

# Guidelines

Cease and Desist  
Agreement for cartel  
cases ("TCC")

**Draft**

February/2016



Ministry of Justice  
Administrative Council of Economic Defense

DRAFT

---

**Guidelines: Cease and Desist Agreement for cartel cases (“TCC”)**

General Superintendence of CADE  
SEPN 515 Conjunto D, Lote 4, Ed. Carlos Taurisano  
Cep: 70770-504 – Brasília/DF  
[www.cade.gov.br](http://www.cade.gov.br)

---

## **Coordination:**

Eduardo Frade Rodrigues

Diogo Thomson de Andrade

Marcela Campos Gomes Fernandes

Fernanda Garcia Machado

Ravvi Augusto de Abreu C. Madruga

## **Editing and Graphic Planning:**

Public Relations Unit

## **Review:**

Vinicius Marques de Carvalho

Victor Santos Rufino

Alexandre Cordeiro Macedo

João Paulo Resende

Cristiane Alkmin Junqueira Schmidt

Márcio de Oliveira Júnior

Paulo Burnier da Silveira

Gilvandro Vasconcelos Coelho de Araujo

## **In-house collaborators:**

Amanda Athayde Linhares Martins

Ademir Picano de Figueiredo

## SUMMARY

<b>PRESENTATION</b> .....	<b>6</b>
<b>INTRODUCTION</b> .....	<b>7</b>
<b>I. COOPERATION</b> .....	<b>10</b>
I.1 Scope and usefulness of the cooperation .....	11
I.1.1 Identification of the participants in the violation .....	12
I.1.2 Presentation of information and documents that prove the violation .....	13
<i>I.1.2.1 Information that proves the violation</i> .....	13
<i>I.1.2.2 Documents that prove the violation</i> .....	14
I.2 The procedural timing of the cooperation .....	16
I.3 The method to quantify the cooperation for the purpose of defining the applicable discount .....	17
<b>II. PECUNIARY CONTRIBUTION</b> .....	<b>22</b>
II.1 Definition of the applicable law .....	25
II.2 Calculation of the pecuniary contribution .....	26
II.2.1 Calculation of the pecuniary contribution for companies .....	26
<i>II.2.1.1 Calculation basis</i> .....	27
<i>II.2.1.1.1 General rule</i> .....	27
<i>II.2.1.1.2 Parameterization for the purpose of proportionality</i> .....	27
II.2.1.1.2.1 Parameterization with respect to the field of business activity described in CADE Resolution nº 3/2012.....	27
II.2.1.1.2.2 Parameterization in relation to the base year of the turnover .....	28
II.2.1.1.2.3 Parameterization with respect to the turnover in national territory .....	29
<i>II.2.1.2 Update of the calculation base</i> .....	30
<i>II.2.1.3 Percentage of the expected fine</i> .....	31
<i>II.2.1.4 Discount</i> .....	33
<i>II.2.1.4.1 Combination of TCC and Leniency Plus discounts</i> .....	34
II.2.2 Calculation of the pecuniary contribution for individuals .....	36
<i>II.2.2.1 Company administrators</i> .....	36
<i>II.2.2.2 Other individuals (non-administrators)</i> .....	37
<i>II.2.2.3 Individuals in "accession clause"</i> .....	37

<i>II.2.2.4 Individuals under "umbrella clause"</i> .....	38
II.3 Manner of payment of the pecuniary contribution .....	39
<b>III. ACKNOWLEDGEMENT OF PARTICIPATION IN INVESTIGATED CONDUCT, OBLIGATION NOT TO PRACTICE CONDUCT AGAIN AND OTHER MEASURES</b> .....	<b>41</b>
<b>IV. MODELS</b> .....	<b>42</b>

DRAFT

## PRESENTATION

These Guidelines for the negotiation of Cease and Desist Agreements (locally, "TCC") consolidates the best practices and procedures usually adopted during the negotiations of TCCs with the Administrative Council of Economic Defense ("CADE") in cartel cases. Their objective is to provide institutional framework for future negotiations, to keep record of the institutional memory acquired by CADE in these negotiations and to be used as reference for public-sector employees, attorneys, counsels and the society as a whole about the procedures of this relevant activity of competition policy and for detection and deterrence of cartels and any kind of antitrust conspiracy.

Although these Guidelines addresses only procedures in TCC negotiations in cartel cases, a TCC is an instrument that can also be used in investigations for other violations of the economic order under Law nº 12.529/2011. However, the parameters of such negotiations are not necessarily bound by the same procedures and criteria described herein.

**This document is not binding and does not have the nature of a rule, statute or bylaw (i.e., it does not alter provisions of CADE's Internal Regulations - locally, RICADE). The conducts and procedures described herein can be altered at CADE's discretion, depending on the circumstances of the cases at hand.**

The structure of these Guidelines follows the main requirements for execution of TCCs, pursuant to Articles 85 of Law nº 12.529/2011 and Articles 184 to 189 of RICADE:

- (I) Cooperation;
- (II) Financial penalty;
- (III) Acknowledgement of participation in the investigated conduct, obligation not to practice it again and other measures; and
- (IV) Main models of agreements used by CADE in TCC negotiations.

Finally, TCCs executed in accordance with the parameters herein do not bind CADE to the same parameters for the decision criteria and calculation of penalty of other Defendants within the same administrative proceeding.

## INTRODUCTION

Provided for in Article 85 of Law n° 12.529/2011, a Cease and Desist Agreement is an agreement executed between CADE and the companies and/or individuals investigated for violation of the economic order, under which the antitrust authority agrees to halt investigations of the Parties to a TCC as long as the terms of the agreement are complied with, and the Parties agree to the obligations expressly provided thereunder.

The regulation of TCC negotiation procedures are provided for in RICADE Article 184 et seq. Under the rule, until the case is submitted to the Administrative Tribunal for ruling, the TCC shall be negotiated with the General Superintendence of CADE ("SG/CADE"). If the case is already at the Tribunal for ruling, the proposal shall be negotiated with the Rapporteur Commissioner of the case.

The proposals are received in an order that is the same in the SG/CADE and the Tribunal, through a system of markers that takes into account the order of presentation of the interested parties before the authority in charge of the discovery of the case. After the certificate containing the marker is received, the interested party shall file the TCC Request within 5 (five) days, formally declaring its interest in starting negotiations. Failure to comply with the deadline results in loss of validity of the certificate containing the marker of the interested party.

Upon filing the intention to execute a TCC with SG/CADE, the General Superintendent shall determine a period for negotiations, which, as a rule, is of 60 (sixty) days, and can be renewed for other periods depending on the circumstances of the individual case. In the case of a TCC filed at the Tribunal, the negotiation period is of 30 (thirty) days, which can be renewed by the Rapporteur Commissioner for other equivalent periods.

A "Negotiation Commission" is constituted for the negotiations, and it shall be composed of at least 3 (three) members, who shall conduct the negotiations and forward the request to the Tribunal with a suggestion of homologation or rejection of the proposal. Under Article 179, §3 of RICADE, the terms of the proposal, the procedure and the negotiation process may receive restricted access classification.

Specifically for the cases of agreement, combination, manipulation or arrangement among competitors (as is the case of cartels, object of these Guidelines), a TCC shall fulfill the following requirements:

- (i) if the TCC is filed before the SG/CADE, cooperation of the party within the investigation and the administrative proceedings, under Article 186 of RICade. This cooperation shall be:
  - a. At the time of the TCC's negotiation and execution, by means of the presentation of reports containing information and documents that help the SG/CADE identify other participants in the conduct and that prove the violation. The reports of the Proponent are drafted in a document called History of Conduct ("HC"). The HC shall contain the description of the anticompetitive conduct, as considered by the SG/CADE, based on the information and documents presented by the TCC Proponent. The HC is a document prepared and signed by the SG/CADE when the TCC is approved. The HC is not signed by the Proponent or his/her counsel. The attachments to the HC are the documents that substantiate the reports of the Proponent. Depending on the circumstances of individual cases, even after a TCC is approved, the HC and its attachments may be treated as documents of restricted access by CADE, in which case they shall compose a separate brief that can only be accessed by the other investigated parties;
  - b. After the signing of a TCC, during the course of the administrative proceeding, the Party cooperates through clarifications that may be requested by the authority and procedural aid that the authority may need and which can be offered by the Party.
- (ii) payment of pecuniary contribution to the Fund for the Defense of Diffuse Rights ("FDD"), as provided under Articles 85, §1, III of Law nº 12.529/2011 and Article 184, *caput*, of RICADE. The contribution is determined based on the value of the expected fine, on which a percentage reduction is applied, vaying according to the scope and usefulness of the cooperation of the Party and the time the TCC is filed, in accordance with the provision of the Article 187, subparagraphs I, II, III and Article 188 of RICADE:
  - a. if the TCC is filed soon after initiation of an administrative proceeding and before the brief is sent to the Tribunal for judgment.



(i.e., during the phase procedural instruction at SG/CADE), the pecuniary contribution is calculated based on the expected fine, upon which are applied:

- i. a 30% to 50% reduction for the first TCC proponent;
  - ii. a 25% to 40% reduction for the second TCC proponent;
  - iii. a reduction of up to 25% for the other TCC proponents;  
and
- b. if the TCC is proposed after the brief is sent to the Tribunal for judgment, the pecuniary contribution is calculated based on the expected fine, upon which a reduction of up to 15% is applied.
- (iii) establishment of the value of the fine in the event of total or partial non-compliance with the obligations undertaken;
  - (iv) acknowledgement of participation in the investigated conduct by the party, according to Article 185 of RICADE;
  - (v) specification of the obligations of the TCC Proponent to not practice the investigated conduct or its harmful effects, according to §1 of Article 85 of Law nº 12.529/2011;

Finally, it is important to note that, unlike Leniency Agreements<sup>1</sup>, a TCC does not result in benefits for criminal liability. However, if the party interested in signing a TCC with CADE also wishes to simultaneously negotiate a plea bargain agreement with the Public Prosecutor and/or the Federal Police (pursuant to Law 12.850/2013), the SG/CADE may help the TCC proponents with such communication.

---

<sup>1</sup> A Leniency Agreement is available only to the first agent to report the collective anticompetitive conduct (Article 86, §1, sub-paragraph I of Law nº 12.529/2011), whose benefits, that can culminate in total immunity, are both administrative and criminal (Article 86, §4 combined with article 87 of Law nº 12.529/2011).

## I. COOPERATION

Cooperation is a requirement for the signing of TCCs when the case is still in progress at the SG/CADE, as put forward in Articles 186 and 187 of RICADE, *in verbis*:

Art. 186. In investigations of agreement, combination, manipulation or arrangement among competitors, the final proposal forwarded by the General Superintendence to the President of the Tribunal, pursuant to Article 181, §4 of these Internal Rules, shall necessarily count on the cooperation of the party with procedural instruction.

Art. 187. The analysis of pecuniary contribution in TCC proposals under Article 186 of these Internal Rules shall take into account the **scope and usefulness** of the cooperation of the party with procedural instruction **and the time the proposal is presented**, subject, when they can be estimated and if the TCC is signed, to the following parameters:

I - percentage reduction between 30% and 50% of the expected fine for the first Proponent who proposes a TCC within an investigation of a given conduct;

II - percentage reduction between 25% and 40% of the expected fine for the second Proponent who proposes a TCC within an investigation of a given conduct;

III - percentage reduction of up to 25% of the expected fine for the subsequent Proponents who propose a TCC within an investigation of a given conduct.

Although not a requirement for the signing of a proposed TCC when the brief is already at the Tribunal for ruling, depending on the circumstances of individual cases and according to CADE's judgment of convenience and opportunity, cooperation may also be requested in this phase.

The rule transcribed above determines that the analysis of cooperation shall take into consideration the scope and usefulness, as well as the time the proposal is presented, for which reason these topics shall be detailed in Section I.1 (scope and usefulness of the cooperation) and in Section I.2 (about the procedural timing of the cooperation).

To allow for more predictability on the quantification of the cooperation for the definition of the applicable discount, Section I.3 presents a non-exhaustive and non-binding method of parameters considered by Cade in such analysis.

It is important to state that the analysis of cooperation shall be taken into consideration for the calculation of the discount percentages for the pecuniary contribution, and not for the definition of the expected fine, which is the initial basis for the calculation of contribution.

CADE states that all the information and documents presented by the Proponent in the course of TCC negotiations shall be treated as confidential and shall have its access restricted to the Proponent, attorneys, counsel and CADE officers that participate in the negotiation process. Upon signing of the TCC, the information and documents presented by the Proponents may be accessed by the other Defendants in the Administrative Proceeding and by persons authorized by CADE, under the rules of access to information contained in RICADE.

If the TCC is not signed, the information and documents presented in the context of the negotiation shall be returned to the Proponents or destroyed (including information recorded in electronic media) and shall not be used for any purposes by the authorities that have had access to them. This does not prevent the authorities from using information and documents that come to their knowledge by any other means in the course of the investigation in progress at CADE.

Finally, upon signing of the TCC, the Proponent shall continue to cooperate with the procedural instruction, reporting subsequent new documents and information to CADE, under penalty of breach of the agreement.

#### I.1 Scope and usefulness of the cooperation

In analyzing the scope and usefulness of the cooperation presented by the Party(ies) CADE applies, by analogy, the criteria for analysis of cooperation in Leniency Agreements, provided for in Law n.º 12.529/2011, namely:

Art. 86. CADE, by means of the General Superintendence, may enter into leniency agreements, and may terminate any punitive action of the public administration or reduce one (1) to two thirds (2/3) of the applicable penalty, under the terms of this article, with individuals or legal entities that violate the economic order, provided that **they effectively cooperate with the investigations and administrative proceedings, and that from such cooperation results:**

I – **the identification of other persons involved in the violation**; and

II – the obtaining of **information and documents proving the** reported or investigated **violation**.

Thus, two are the main criteria valued by CADE in terms of the scope and usefulness of the cooperation in a TCC negotiation: identification of other participants in the violation (Sub-section I.1.1); and presentation of information and/or documents that prove the violation (Sub-section I.1.2).

CADE considers these two criteria as conditions for the signing of a TCC with the SG/CADE. Therefore, the party interested in signing a TCC with the SG/CADE must be able to submit to the authority all the documents in its possession and all the information of which it might be aware that can lead to the identification of those involved and prove the violation. The absence of these requirements may lead to the rejection of a TCC proposal. The depth of the cooperation under these two criteria and other forms of cooperation shall be valued in the discount of the financial penalty, as detailed later.

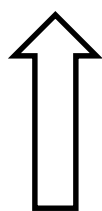
It is important to once more emphasize the fact that the practices and procedures herein described may be altered at CADE's discretion, depending on the circumstances of individual cases.

#### I.1.1 Identification of the participants in the violation

The scope and usefulness of the cooperation in a TCC negotiation shall be valued by CADE to the extent that the Party identifies the participants in the violation. Therefore, CADE considers that such cooperation shall be broader and more useful when it brings information that adds to information already available in the investigation. Such can be done both through indication of other companies and/or individuals not yet identified by CADE, or through provision of information about the companies and/or individuals already identified (e.g.: current address, professional history, market share, participation in the conduct, etc.).

It is important to state that the degree of participation in the conduct shall not be considered a criterion for the application of the discount, but shall be taken into account in calculating the aliquot of the applicable expected fine.

In this respect, the following increasing bands of cooperation in the TCC can be established, concerning the identification of participants in the violation:



If it indicates participants already identified by Cade and presents new information about the unidentified participants; or
If it only indicates the participants already identified by Cade.

## I.1.2 Presentation of information and documents that prove the violation

### *I.1.2.1 Information that proves the violation*

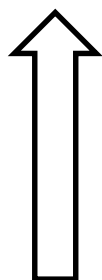
The scope and usefulness of the cooperation in TCC negotiations shall be valued by CADE to the extent that the Party presents information about the investigation, generally consolidated by the SG/CADE in the document called HC, already described in the introduction to these guidelines.

In evaluating the scope and usefulness of the cooperation, CADE considers that such History of Conduct should ideally contain, at the end of the negotiations, the following information, listed as illustration:

- (i) Participation of the TCC proponent and other participants in the investigated violation, specifying the level of participation of each party involved in the conduct (see I.1.1);
- (ii) Functioning/dynamics of the anticompetitive conduct;
- (iii) Duration of the anticompetitive conduct;
- (iv) Means by which competitors exchanged information (meeting, phone calls, chance meetings, etc.), place and date of such contacts;
- (v) Subjects addressed in the contacts among competitors;
- (vi) Clients affected by the conduct;
- (vii) Direct or potential effects in Brazil, when applicable;
- (viii) Products/services object of the violation and the functioning of the affected market.

In case of information that contradicts what is already contained in the file, such information shall be thoroughly explained and supported by documents. It is important to state that mere presentation of information that is not new and/or does not contribute to the investigation may result in rejection of the TCC proposal.

In this respect, the following increasing bands of cooperation in the TCC can be established, concerning presentation of information:



More comprehensive report than the report of the Leniency and/or of facts known by Cade; or
Similar report to the report of the Leniency and/or of the facts known by Cade; or
Less comprehensive report than the report of the Leniency and/or of the facts known by Cade.

### *1.1.2.2 Documents that prove the violation*

The scope and usefulness of the cooperation in TCC negotiation shall be valued by CADE to the extent that the Party additionally presents documents that prove the anticompetitive conduct subject to the investigation, which can be also mentioned in the History of Conduct (I.1.2.1). The scope and usefulness of such documents will depend on their correlation with the information provided and, especially, on their capability to demonstrate the investigated violation. In this respect, CADE considers that the presentation of documents is crucial cooperation. Except for specific situations, cooperation that contains only reports will not be appropriate, nor will it avail reasonable discount, and can even lead to the rejection of the TCC.

The TCC proponent shall present all the documents in his/her possession deemed apt to prove the reported violation. Some examples of documents most commonly received by CADE as proof of the reported or under investigation violation are the following:

- (i) bilateral e-mails between competitors;
- (ii) unilateral e-mails between persons from the same company reporting the arrangements among competitors;
- (iii) correspondence among competitors;
- (iv) unilateral correspondence among persons of the same company reporting arrangements among competitors;
- (v) exchange of electronic messages (SMS, *whatsapp*, etc.) among competitors and/or containing information about arrangements among them;
- (vi) handwritten notes containing information about arrangements among competitors;
- (vii) recordings of conversations among competitors and/or containing information about the arrangements in which the Party is an interlocutor;

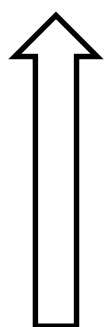
- (viii) tables containing information on market division, division of clients and/or division of production among competitors, or even indication of prices and/or bids to be presented by each competitor in public or private tenders;
- (ix) diaries containing record of meetings among competitors and/or information about arrangements among them;
- (x) general evidence of meetings (minutes of meetings, *outlook* or other electronic agenda commitments, booking of room, hotel reservations, expense and travel reports, etc.);
- (xi) phone records demonstrating calls between competitors;
- (xii) business cards;
- (xiii) record of entry into buildings;
- (xiv) notices and minutes of decision of bids; etc.

It is important to note that to ensure that the electronic and physical documents presented by a TCC proponent have higher probative value, technical care must be taken in collecting the evidence. As a rule, the proponent must keep record of the chain of custody of the electronic and physical documents that shall be submitted to CADE, i.e., the chronological history of the evidence, presenting specific information of the person responsible for the collection.

Additionally, in the case of electronic documents, the TCC proponent must be able to describe the method of extraction of evidence in detail, which shall be done, whenever possible, in a way that best ensures the integrity and the chain of custody of the material. Whenever possible, the TCC proponent must preserve the hard disks or original equipment (from which the information was extracted) and/or their authenticated forensic image preserved, without alterations. CADE shall evaluate, in each case, the care taken to ensure the fidelity of the documents to the original. If necessary, the proponent may request more detailed information on methods of evidence extraction and description of procedures to CADE's technical team.

Under the criteria of convenience and opportunity, CADE may also request the conduction of interviews with the individuals proposing the TCC to obtain further information and details about the documents presented.

In this respect, the following increasing bands of cooperation in the TCC can be established, concerning the presentation of documents:



Documents prove the violation and are broader and more useful than the ones presented in the Leniency / facts known by Cade; or
Documents prove the violation; or
Documents partially prove the violation; or
Documents presented do not prove the violation, but help with the procedural instruction

## I.2 The procedural timing of the cooperation

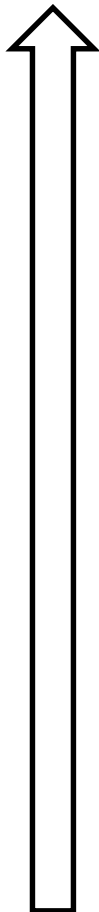
When analyzing the procedural timing of presenting a TCC proposal as a criterion valued in the cooperation presented by the Party(ies), CADE considers that the sooner the TCC proposal is presented, the greater shall be the discount to the proponent. This is because a TCC can considerably reduce procedural costs both for the Public Administration and for the proponent, even more so the earlier it occurs in the investigations. Additionally, a TCC executed in the early stages of the proceeding will possibly be more useful to the investigation, adding information still unknown or little understood by the authority and, therefore, indicating the best paths and ways for the continuing investigation. Consequently, the very duration of the investigation can be shortened.<sup>2</sup>

In this respect, in view of the procedural phases of discovery at the SG/CADE, the following increasing bands of cooperation in the TCC can be established concerning the timing of the presentation:

---

<sup>2</sup> On the contrary, a TCC executed at a more advanced phase of the proceeding - for example, at the Tribunal and with little advance in regards to the ruling of the case - has little or no possibility of adding information that is relevant for the comprehension of the conduct or of the participation of the Defendants. Its main usefulness in terms of reduction of costs would be achieved in an earlier solution of the proceeding, avoiding future legal disputes.





TCC presented before initiation of Administrative Proceeding ("AP"):

- TCC presented up to 3 months from administrative and/or legal actions of investigative nature, the initiation of administrative inquiry (AI), or from other form of knowledge about the existence of the investigation by the Defendant;
- TCC presented between the end of the aforementioned period and the initiation of the AP.

TCC presented between the initiation of the AP and the end of the defense period:

- TCC presented before the proof that the Party is served to the proceeding is attached to the file;
- TCC presented between the end of the aforementioned period and the end of the defense period.

TCC presented between the end of the defense period and the order to present new arguments

- TCC presented up to 6 months from the end of the defense period;
- TCC presented between the 6th month subsequent to the end of the defense period and the order to present new arguments.

It is important to note that, pursuant to Article 179 of RICADE, a TCC proposal can only be presented to the SG/CADE until such time as the proceeding is sent to the Tribunal for ruling. Combining this regulatory provision with the idea that a TCC only cooperates with the investigations while the case is still at the SG/CADE, CADE clarifies that it shall not accept a TCC proposal at the SG/CADE after the procedural instruction ends and the period for presentation of new arguments by the Defendants begins, as provided for in Article 73 of Law nº 12.529/11. However, this does not prevent the presentation of a TCC at the Tribunal, under the terms and conditions provided for in Articles 182 and 188 of RICADE.

### I.3 The method to quantify the cooperation for the purpose of defining the applicable discount

Considering Sections I.1 and I.2 above, CADE clarifies the main method used and the parameters deemed most important by the authority to quantify the cooperation for the purpose of defining the applicable discount, which are non-exhaustive and non-binding. Other factors not provided for in the method and parameters presented herein may be used by CADE to increase or reduce the discount, accordingly to the circumstances of the case at hand.

When quantifying the cooperation, CADE goes from the minimum level of the discount band in which the Party is positioned, moving to a sum of points as certain parameters of cooperation are fulfilled or not fulfilled. The minimum and maximum discounts are provided for in Articles 186 and 187 of RICade, already mentioned in these Guidelines.

However, if the set of elements brought as cooperation by the Party is deemed insufficient, CADE may reject the TCC proposal.

Moreover, RICADE prevents the discount granted under a TCC from exceeding the discount already granted in a previous TCC already executed in the same proceeding (Article 189 of RICade), especially when there is an intersection between the discount bands.

In this respect, CADE presents in the table below the method used to quantify the cooperation for the purpose of defining the applicable discount under the TCC. The table indicates the amount of points to which the Proponent is entitled, taking into consideration each parameter of cooperation evaluated by CADE, and also the place in line of the TCC Request. Each point attributed to the Proponent's cooperation corresponds to one percentage point within the discount band in which it is positioned.

It is important to note that the points indicated in the table are the maximum points a Proponent may be entitled to in each criterion, and that depending on the quality of the cooperation under analysis, it may receive a lower score.

Furthermore, the table is merely indicative and, given the subjective nature of evaluations, CADE shall take into consideration the characteristics of each individual case for its analyses. Additionally, in each case, specific criteria not identified in the table may be used to increase or reduce the final discount.

The table below contains four calculation parameters: (i) Identification of the participants in the violation; (ii) Presentation of information about the violation; (iii) Presentation of documents that prove the violation; and (iv) Procedural timing. Each parameter shall receive a score from zero to the maximum contemplated within the specific parameter, depending on whether the proponent is the first, second or third

(and subsequent).<sup>3</sup> The sum of the maximum values in each parameter corresponds to the maximum score estimated for each proponent.<sup>4</sup> A minimum score corresponds to the minimum percentage discount provided for at RICADE to position each participant according to the order in which the proposals are made; a maximum score corresponds to the maximum percentage discount for each proponent.<sup>5</sup>

PARAMETERS	POSITION IN TCC REQUEST		
	<u>First</u>	<u>Second</u>	<u>Third and subsequent</u>
<b><u>Identification of participants in the violation</u></b>			
If it indicates the same participants already identified by Cade and presents other information about other participants still not identified;	3	2	1
If it only indicates the participants already identified by Cade.	0	0	0
<b><u>Presentation of information about the violation</u></b>			<b><u>Third and subsequent</u></b>
Report that is more comprehensive than that of the Leniency <sup>6</sup> or of the facts known by Cade; or	4	3	2
Report that is similar to that of the Leniency or to the facts known by Cade; or	2	1,5	1
Report that is less comprehensive than that of the Leniency or of the facts known by Cade.	0	0	0
<b><u>Presentation of documents that prove the violation</u></b>			<b><u>Third and subsequent</u></b>
	<b><u>First</u></b>	<b><u>Second</u></b>	

<sup>3</sup> For example, within the parameter “identification of the participants in the violation”, the first proponent shall receive a score from 0 to 3; the second from 0 to 2; the third from 0 to 1. The scores provided for in each parameter are not added. They go from zero to the maximum number provided for in the parameter.

<sup>4</sup> For example, if the first proponent gets maximum score in all the parameters, at the end it will have added 20 points.

<sup>5</sup> For example, if the first proponent scores 0, it shall receive the minimum percentage discount provided for in RICADE, which is 30%; if it scores 20 points, the percentage discount received shall be the maximum, i.e., 50%. If the second proponent scores 0, it shall receive the minimum percentage discount provided for in RICADE, which is 25%; if the score is 15, the maximum percentage discount shall be granted, i.e., 40%.

<sup>6</sup> A more comprehensive report than that of a beneficiary of leniency agreement does not necessarily imply breach of the leniency agreement by the beneficiary due to lack of information. The leniency obligation is to present to the authority all the facts known by the company or individual. It is natural that in some cases the beneficiary is not able to report or demonstrate certain facts. However, the verification that the beneficiary withheld or was untruthful about certain facts may result in breach of the leniency agreement.

Documents prove the violation and are broader and more useful than those presented in the Leniency / facts known by Cade;	8	6	4
Documents prove the violation; or	6	4,5	3
Documents partially prove the violation; or	4	3	2
Documents presented do not prove the violation but help clarify the facts or the circumstances of the violation; or	2	1,5	1
Does not present documents.	0	0	0
<b><u>Procedural timing</u></b>	<b><u>First</u></b>	<b><u>Second</u></b>	<b><u>Third and subsequent</u></b>
<b>TCC presented before initiation of AP</b>			
TCC presented up to 3 months from administrative and/or legal actions of investigative nature, from the initiation of AI, or other form of knowledge about the investigation by the Defendant;	5	4	3
TCC presented between the end of the aforementioned period and before initiation of the AP.	4	3	2,5
<b>TCC presented between initiation of the AP and the end of the defense period</b>			
TCC presented before the proof that the Party is served to the proceeding is attached to the file;	3	2	1,5
TCC presented between the end of the aforementioned period and the end of the defense period.	2	1	1
<b>TCC presented between the end of the defense period and the order for presentation of new arguments</b>			

TCC presented up to 6 months from the end of the defense period;	1	0,5	0,5
TCC presented between the end of the aforementioned period and the order for presentation of new arguments.	0	0	0
<b>Possible Score</b>	<b>0 - 20</b>	<b>0 - 15</b>	<b>0 - 10</b>

DRAFT

## II. PECUNIARY CONTRIBUTION

The payment of pecuniary contribution to the FDD as a requirement for execution of TCC is provided for in Article 85 of Law 12.529/11 for cases of cartel and of influence in uniform commercial practice (Article 36, §3, sub-paragraphs I and II of Law 12.529/11), *in verbis*:

Art. 85. In the administrative proceedings referred to in items I, II and III of Art. 48 of this Law, Cade may obtain from the defendant a cease-and-desist agreement related to the practice under investigation or its harmful effects, if duly grounded, for convenience and at the proper time, and if it understands that such agreement complies with the interests protected by law.

### **§ 1 The agreement shall contain the following elements:**

I - specification of the defendant's obligations not to practice the investigated activity or its harmful effects, as well as obligations deemed applicable;

II – the setting of fines to be paid in case of failure to comply, in full or in part, with the obligations undertaken;

**III - the setting of pecuniary contributions to be paid to the Fund for the Defense of Diffuse Rights, when applicable.**

**§ 2 In regard to the investigation of a violation related to or resulting from the conduct set forth in items I and II of § 3 of Article 36 of this Law, among the obligations referred to in Item I of § 1 of this Article it shall be an obligation to pay to the Fund for the Defense of Diffuse Rights a monetary value that cannot be less than the minimum required under Article 37 of this Law.**

§ 3 (VETOED).

§ 4 The proposed cease-and-desist agreement may only be submitted once.

§ 5 The proposed cease-and-desist agreement may be confidential.

§ 6 The presentation of the cease-and-desist agreement does not suspend the progress of the administrative proceeding.

**§ 7 The cease-and-desist agreement shall be public, and it shall be published at CADE's website within five (5) days of its signature.**

§ 8 The cease-and-desist agreement constitutes an instrument enforceable in Court.

§ 9 The administrative proceeding shall be suspended while the cease-and-desist agreement is being complied with and it shall be filed at the end of the established deadline, if all the conditions set forth therein are satisfied.

§ 10. The suspension of administrative proceedings referred to in § 9 of this Article shall relate only to the defendant who has signed the commitment, and proceedings will follow their regular course in relation to the other Defendants.

§ 11. If the cease-and-desist agreement is not complied with, CADE shall apply the sanctions provided for therein and determine the continuation of the administrative proceeding and other administrative and legal measures for its enforcement.

§ 12. The conditions of the cease-and-desist agreement may be changed by CADE if it is proved to be excessively burdensome for the defendant, provided that the change does not cause damages to third parties or to the public.

§ 13. The proposal for the signing of a cease-and-desist agreement shall be rejected when the authority does not reach an understanding with defendants regarding its terms.

§ 14. CADE shall define, by resolution, the additional rules applicable to the cease-and desist agreement.

§ 15. The provisions contained in Article 50 of this Law shall apply to the cease-and desist agreement. (our highlights)

As can be observed, the pecuniary contribution shall necessarily be included in the TCC, which shall have a public character (Article 85, §§ 1 and 7 of Law 12.529/11)<sup>7</sup>. In turn, for the purpose of calculating the pecuniary contribution in cartel cases and in cases of influence of uniform commercial practice, the Law determines that the value shall not be lower than the minimum value of the fines, indicated in Article 37<sup>8</sup>, which determines, *in verbis*:

Art. 37. A violation of the economic order subjects the ones responsible to the following penalties:

I - in the case of a company, a fine of one tenth percent (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 the estimation thereof is possible;**

II - in the case of other individuals or legal entities governed by public or private law, as well as any association of persons or legal entities established de facto or de jure, even if temporarily, incorporated or not, which do not perform business activity, therefore not being possible to use the gross sales criteria, the fine will be set between fifty thousand reais (R\$ 50,000.00) to two billion reais (R\$ 2,000,000,000.00);

III - if the administrator is directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, a fine of one percent (1%) to twenty percent (20%) of the one applied to the company, in the case set forth in Item I of the caput of this Article, or to legal entities, in the cases set forth in item II of the caput of this article.

§ 1 In case of recurrence, the fines shall be doubled.

---

<sup>7</sup>The information and documents attached to the Term presented by the Proponent due to the signing of the TCC, as well as the opinions of the SG/CADE and of the Tribunal with regard to the request shall follow the rules of confidentiality provided for in Articles 50 et seq. of the RICADE. Information over 5 (five) years old and inherently public information related to listed companies.

<sup>8</sup>I.e., 0,1% in the case of legal entities, pursuant to sub-paragraph I, for example.

§ 2 In the calculation of the value of the fine referred to in item I of the caput of this article, CADE may consider the total turnover of the company or group of companies, when the value of sales in the field of business activity in which the violation occurred is not available, as defined by CADE, or when it is incompletely presented and/or not clearly and credibly demonstrated. (our highlights)

Thus, when negotiating the pecuniary contribution for the purposes of the TCC, the SG/CADE follows the legal requirement that such contribution shall not be lower than the minimum fine applicable to the TCC Proponent and also, in the case of a company, never below the advantage obtained, when this advantage can be estimated.

Generally speaking, CADE also takes into consideration the scenario of the expected fine based on the principles of reasonableness, proportionality and equality, additionally to the following criteria provided for in Article 45 of Law nº 12.529/11, *in verbis*:

Art. 45. In the application of the penalties set forth in this Law, the following shall be taken into consideration:

I - the severity of the violation;

II - the good faith of the transgressor;

III - the advantage obtained or envisaged by the violator;

IV – whether the violation was consummated or not;

V - the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties;

VI - the negative economic effects produced in the market;

VII - the financial standing of the transgressor; and

VIII – any recurrence.

In view of this legislation that establishes the guidelines for the establishment of the pecuniary contribution under the TCC, to the next sections detail how CADE has been acting to date, always admitting future improvements. The three steps adopted by the SG have been the following: definition of the applicable law (Section II.1), calculation of the pecuniary contribution (Section II.2) and manner of payment of the pecuniary contribution (Sub-section II.3).



## II.1 Definition of the applicable law

In negotiations of TCCs in cases that investigate conducts initiated and terminated before 2012, the law applicable to the case must be analyzed to determine not only the legal minimum, but also the convenience of the proposal of a TCC, since Law nº 12.529/2011 has altered the sanctions applicable to antitrust violations provided for in Law nº 8.884/94.

The matter of intertemporal conflict of laws was addressed by the Tribunal in the ruling of Administrative Proceeding nº 08012.009834/2006-57. According to opinion dedicated to the theme, the most favorable law must be applied, *in verbis*:

This proposition - to admit the application of Law 12.529/11 when, and only when, it is more favorable to the Defendants in cases pending ruling - seems to be correct, as it recognizes a change in society's parameters of value in antitrust administrative law, without affecting the legal certainty of administrative *res judicata*. [...]

Finally, it is important to register that the application of the subsequent more beneficial law in antitrust cases pending ruling by CADE, is consistent with the principles of the 1988 Constitution, which determine that the alteration of the value standards of society with respect to a violating conduct should, when more beneficial to the citizen and when the corresponding case has not yet been ruled by the authority of competent jurisdiction, be reflected in the determination of the sanction. Additionally, such application is also connected, from an axiological point of view, to other fundamental principles for exercise of the punitive right of the State, such as proportionality, individualization of the sanction and the extent to which the practice is reproachable.

Based on this assumption, the Tribunal verified that the most favorable law depends on the quality of the Defendant, since the changes of Law nº 12.529/2011 were not more beneficial to all categories of antitrust violators. Based on these considerations, it is possible to extract the following rule:

- (i) Company: application of Law nº 12.529/2011, since it is more beneficial than the previous law;
- (ii) Administrator: application of Law nº 12.529/2011, since it is more beneficial than the previous law;
- (iii) Other individuals (non-administrator) or legal entities, associations of entities or non-business de facto or de jure entities: application of Law nº 8.884/1994, since it is more beneficial than the subsequent law.

However, it is important to mention that this standard for defining which law would be more beneficial is understood as mere *assumption*, susceptible to proof that this interpretation is not true in any individual case. And also, it is important to clarify that it is applied only for cases in which the violation had begun and had ended before Law 12.529/11 came into force, but the administrative proceeding is still on-going.

## II.2 Calculation of the pecuniary contribution

The pecuniary contribution shall be based on the following requirements: the need for a sanction that is proportional to the conduct; the need for a fine that can dissuade administrators and third parties; and the need to provide legal certainty and equality among Defendants.

In order to quantify the pecuniary contribution, first the expected fine for the company must be calculated (Article 187 of the RICADE), which shall not be lower than the advantage obtained from participating in a cartel, when such advantage can be estimated (Article 37, sub-paragraph I, of Law nº 12.529/2011). Whenever possible, the advantage obtained shall be calculated.

It is important to note that, in order to attract companies to execute this kind of agreements, the amount of the contribution should be lower than the fine, but not necessarily lower than the advantage obtained.

With respect to the expected fine, there are some differences in the case of companies (Sub-section II.2.1) and individuals (Sub-section II.2.2) – including administrators and non-administrators.

### II.2.1 Calculation of the pecuniary contribution for companies

The calculation of the expected fine for companies corresponds to the financial amount derived from the hypothetical application, to the case under analysis, of the provision of Article 37 of Law 12.529/2011, *in verbis*:

Art. 37. A violation of the economic order subjects the ones responsible to the following penalties:

(...)

I - in the case of a company, a fine of one tenth percent (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 lower than the advantage obtained, when the estimation thereof is possible;

Thus, CADE clarifies that, as a rule, the step by step calculation of the expected fine is the following: definition of the calculation basis/turnover (*II.2.1.1*), update of the calculation basis/turnover (*II.2.1.2*), application of the percentage of the calculation basis for the expected fine (*II.2.1.3*). Lastly, for the calculation of pecuniary contribution of TCCs, the discount is applied (*II.2.1.4*).

### *II.2.1.1 Calculation basis*

#### *II.2.1.1.1 General rule*

States that, further to the provisions of Article 37, sub-paragraph I, of Law 12.529/2011, transcribed above, it must use the gross turnover (including taxes) of the Proponent's *economic group* obtained in the *field of the business activity* in which the practice occurred in *the year prior to the initiation of the administrative proceeding*. For the application of this rule, the list "field of business activities" discriminated in CADE Resolution nº 3, of May 29th 2012 should be consulted ("Resolution nº 3/2012").

Taking into consideration the rule of joint liability provided for in Article 33 of Law nº 12.529/2011, and in order for the protection granted by the TCC to be extended to all the economic group of the Proponent, it is necessary that the calculation basis takes into account the turnover of the group as a whole in the field in question.

#### *II.2.1.1.2 Parameterization for the purpose of proportionality*

##### *II.2.1.1.2.1 Parameterization with respect to the field of business activity described in CADE Resolution nº 3/2012*

As expressly provided for in Article 37, §2 of Law 12.529/2011, when the value of the turnover in the field of business activity in which the violation occurred is not available, as determined by CADE, or when it is incompletely presented or not clearly and credibly demonstrated, CADE may take into consideration the total turnover of the company or group of companies. Additionally, if the criterion of gross turnover cannot be used, the fine shall be set between R\$ 50.000,00 (fifty thousand reais) and R\$ 2.000.000.000,00 (two billion reais).

In this sense, to deal with and solve issues of proportionality and reasonableness presented in the case at hand, CADE's experience has been taking into consideration some aspects to better aim at a value of calculation basis more related to the violation itself, such as:

- (i) turnover of the product or service affected by the cartel, which shall not be confused with the definition of relevant market<sup>9</sup> (e.g. cartel involving a very specific product or service in a very broad field of business activities);

---

<sup>9</sup> Cases of Air Cargo (Req. nº 08700.010220/2012-16), Meters (Req. nº 08700.009323/2014-97), Cables (Req. nº 08700.002074/2013-28), and Clutches (Req. nº 08700.001445/2015-16), for example.

- (ii) turnover related to the geographic scope of the conduct, which shall not be confused with the definition of the relevant market (e.g.: state, municipal or local cartel practiced by a company with national operations and turnover in the field of business activity);
- (iii) turnover obtained with the revenue effectively gained by the company with the business in question <sup>10</sup> (e.g.: cases in which the company's turnover includes the totality of a good/service, but only part of this value is effectively retained by it as, for example, commission, with the rest being passed on to another agent).

#### II.2.1.1.2.2 Parameterization in relation to the base year of the turnover

Depending on the procedural timing in which the negotiation occurs and also on the determination of absence of proportionality between the Proponent's turnover in the year prior to the initiation of the AP and its turnover in the years in which the conduct took place, CADE may take into consideration some aspects to adjust the agreement.

CADE lists below some aspects that can be taken into consideration to determine proportionality and reasonableness:

- for cases in which the negotiation occurs in AP not initiated (e.g., Administrative Investigation or Preliminary Proceedings), it may take into consideration the fiscal year prior to the initiation of the AI or PP, or even, in the case of AI or PP that are confidential, it may take into consideration the turnover of the year prior to the year of presentation of the TCC;

---

<sup>10</sup> Case of Air Freight (Reqs. n° 08700.010662 2012-54, 08700.010314.2013-68, 08700.011226.2013-83 and 08700.001455/2015-51), for example.

- for cases in which there is clear lack of proportionality between the turnover in the year prior to the initiation of AP/AI and the turnover obtained in the period of the conduct (for example, the termination of the activities of the company in the cartelized market or considerable growth/reduction of the market), it is possible to take into consideration:
  - (i) application of the turnover for the last 12 months of the conduct<sup>11</sup>;
  - (ii) application of the highest annual turnover obtained during the conduct<sup>12</sup>;
  - (iii) average of the turnovers during the period of the conduct.

#### II.2.1.1.2.3 Parameterization with respect to the turnover in national territory

For the cases in which the TCC Proponent does not have a turnover in Brazil (e.g., cases of international cartel in which the proponent did not obtain revenue in the Brazilian market under investigation), subject to the legal requirements, it is possible to take into consideration the following aspects for the purpose of proportionality and reasonableness:

---

<sup>11</sup> Cases of TFT-LCD (Req n°. 08700.003192/2013-53, n° 08700.007696/2013-42) and of CPT/CDT (Req n° 08700.011328/2013-07 e 08700.011327/2013-54), for example.

<sup>12</sup> Case of DRAM (Req. n° 08700.003191/2013-09 e n° 08700.001718/2011-07), for example.

- (i) “virtual turnover” in the Brazilian market, i.e., application of the Proponent’s worldwide market share on the total volume of the national market<sup>13</sup>;
- (ii) other factors, such as, for example, in cases of international cartel and company without turnover in Brazil, estimates of indirect sales of the Proponent in the national market, i.e., estimate of Brazilian sales of byproducts that used the cartelized product as input.

### *II.2.1.2 Update of the calculation base*

Upon completion of the first step related to the calculation of the expected fine - definition of the calculation base/turnover (*II.2.1.1*) –, we proceed to the monetary update of such value, which is done by applying the SELIC<sup>14</sup>, since, additionally to inflation, the opportunity cost of the non-profitable money must be taken into consideration (which is, at least, the return on investment in public bonds, expressed by the nominal interest, which includes the actual interest).

In turn, the period of update corresponds to the range of months between the turnover used (year prior to the initiation of the administrative proceeding or, for example, the last 12 months in the conduct, see *II.2.1.1*) and the month prior to the filing of a TCC request.

<sup>13</sup> Case of Maritime Hoses (Requests n° 08700.005321/2008-81, n° 08700.002312/2009-19, n° 08700.004174/2011-27, n° 08700.006544/2012-41 and n° 08700.001882/2008-19) and Cable Case (Request n° 08700.002074/2013-28), for example.

<sup>14</sup> The Selic is calculated by the Central Bank of Brazil and, therefore, its primary source. Nowadays, there are two “SELIC calculators: the Central Bank of Brazil and the Brazilian Revenue Office. The calculation of the Central Bank of Brazil takes into consideration compound interests and the calculation of the Brazilian Revenue Office simple interest. According to Law 9021/95, the turnover update for the purpose of CADE fines is calculated in the same way as the calculation of federal taxes which, nowadays, is the SELIC. However, according to the jurisprudence of the courts related to taxes, such federal tax updates must not result in anatocism (interest on interest). Therefore, to make it easier, the Federal Revenue Office has a calculator: <http://idg.receita.fazenda.gov.br/orientacao/tributaria/pagamentos-e-parcelamentos/taxa-de-juros-selic>. As the law determines that we must use the same calculation used to update federal taxes, we normally use the calculator of the Brazilian Federal Revenue Office for TCCs.

Therefore, the SELIC is used to update the company's turnover to current values. CADE clarifies that there are two manners to calculate the update of the calculation base/turnover, which achieve the same result: the first, adding the monthly rates of the update period; the second, subtracting the accumulated rates of the first and of the last month of the updated period. In the addition method, the initial date for the update shall be the *first month of the fiscal year subsequent to the one of the turnover used* and the last date shall be the month prior to the filing of TCC request. In the subtraction method, the initial date shall be the *last month of the turnover year used* and the last date shall be the month prior to the month of filing of TCC request.

### *II.2.1.3 Percentage of the expected fine*

Upon completion of the first two steps of calculation of the expected fine - definition of calculation base (*II.2.1.1*) and update of the calculation base (*II.2.1.2*) –, the following sections present the criteria used by CADE for the definition of the expected fine percentage, i.e., the percentage of the calculation base which results in the expected fine. Please note that the criteria below are mere parameters which can be altered at CADE's discretion in exceptional circumstances.

As a rule, in classic cartel cases (or "*hard core*" cartels), the initial reference adopted by CADE in a TCC negotiation is the application of a 15% amount on the calculation base considered, in line with the latest convictions of the Tribunal for this type of conduct.

However, depending on mitigating or aggravating circumstances, additionally to other factors that take into account the principles of reasonableness, proportionality and equality, and the criteria provided for in Article 45 of Law n<sup>o</sup> 12.529/2011, this percentage may be reduced to the minimum considered by CADE as adequate to discourage this kind of conduct, usually 12%, or increased to the maximum permitted by law, 20% <sup>15</sup>.

Below, CADE lists some illustrative hypotheses of **mitigating** circumstances in cases of classic cartels that can reduce the percentage to the minimum level considered by CADE for such cases (in general, 12%):

---

<sup>15</sup> Case of onshore industrial assembly of Petrobras (Req n<sup>o</sup>. 08700.007402/2015-44).

<b>MITIGATING CIRCUMSTANCES</b>
<b><u>Severity of the violation</u></b>
Having been coerced to participate in the conduct
Peripheral/occasional participation in the conduct
Extremely short duration (up to six months), as long as this circumstance does not result from the actions of public authorities to interrupt the conduct
<b><u>Good faith of violator</u></b>
Previous suggestion of adoption of the conduct by a public entity (e.g., terms of commitment with Public Prosecutors or other bodies, court decisions, decisions of regulatory agencies, bylaws etc.)
Existence of compliance programs that relate directly to the decision to file for TCC and/or resulting from cooperation presented within the TCC
<b><u>Financial standing of the violator</u></b>
Proven low financial capability or inability to pay

Below, the SG/CADE lists some illustrative hypotheses of **aggravating** circumstances in classic cartel cases, which can increase the percentage rate up to the legal maximum (20%):

<b>AGGRAVATING CIRCUMSTANCES</b>
<b><u>Severity of the violation</u></b>
Leadership without coercion of other defendants
Leadership with coercion of other defendants
Duration of the conduct and of the participation (1 to 5 years)
High duration of the conduct and of the participation (5 to 10 years)
Very high duration of the conduct and of the participation (over 10 years)
<b><u>Absence of good faith of the violator</u></b>



Previous suggestion of interruption of the conduct on the part of a public entity (eg., terms of commitment with Public Prosecutor's Offices or other bodies, court decisions, decisions of regulatory agencies, etc.) and continuity of the conduct.
<b><u>Degree of harm, or danger of harm to competition, to the national economy, to consumers or to third parties</u></b>
Essentiality of the product object of the cartel
Direct negative impact in strategic public policies for the country
<b><u>Negative economic effects produced in the market</u></b>
High negative economic impacts

Other mitigating and aggravating circumstances verified in individual cases may, at CADE's discretion, also result in variation of the percentage.

Moreover, as a rule, in the case of one-off or diffuse cartels (e.g., occasional or not systematic exchange of information, unilateral disclosure of information, etc.), CADE usually applies a rate of 5% to 12%, depending, however, on certain mitigating or aggravating circumstances and additionally to other factors that take into consideration the principles of reasonableness, proportionality and equality and on the criteria provided for in Article 45 of Law nº 12.529/11. Specific circumstances of individual cases, however, may require the application of the percentage rate on a differentiated basis.

Lastly, taking into consideration Article 37, § 1, of Law nº 12.529/11, in the event of **recidivism** the percentage applied to the calculation base shall be doubled when the Party has already been convicted.

#### *II.2.1.4 Discount*

Upon completion of the first three steps for the calculation of the expected fine - definition of the calculation base/turnover (*II.2.1.1*), update of the calculation base/turnover (*II.2.1.2*) and application of the percentage rate (*II.2.1.3*) -, the next and last step for the calculation of the pecuniary contribution of TCC is the application of the discount.

With respect to the calculation of the discount in cases of TCC filed at the SG/CADE, since the TCC is directly related to the Proponent's cooperation, reference is made to Part I (specifically, Section I.3) of these Guidelines.

At this point, it must be reiterated that the minimum and maximum discount percentages in TCCs are provided for in Article 187 of RICADE, which takes into consideration the following bands, graded according to the time of the filing of the agreement:

- (i) first proponent before the SG/CADE: 30% to 50% discount on the expected fine;
- (ii) second proponent before the SG/CADE: 25% to 40% of the expected fine;
- (iii) third and other proponents before the SG/CADE: up to 25% of the expected fine

In the case of TCCs filed before the Tribunal, according to Article 188 of RICade, the maximum discount possible is 15%. It must be noted that filing a TCC after the opinions of the CADE's Attorney General's Office and of the Federal Public Prosecutors Office have been presented significantly reduces the convenience and opportunity to execute the agreement filed at the Tribunal, all of which shall be assessed according to the circumstances of the case at hand.

It is also important to note that, under Article 189 of the same law, no TCC proposal shall provide for a percentage reduction above the one determined in TCCs already signed in the same case. This rule also applies to TCCs filed before the SG/CADE and the Tribunal, so that, if a TCC negotiated before the SG/CADE determined a discount below 15%, the discount applied by the SG/CADE shall be the maximum possible discount for TCCs at the Tribunal.

#### *II.2.1.4.1 Combination of TCC and Leniency Plus discounts*

There is also the possibility of combining a **TCC with Leniency Plus**<sup>16</sup>. If the signatory of a new Leniency Agreement in another cartel decides to sign a TCC related to the conduct already under investigation, which was not available for negotiation of the Leniency Agreement, the benefits of the Leniency Plus and of the TCC may be combined, at CADE's discretion.

---

<sup>16</sup> Leniency plus consists of the reduction of one third of the sanction applicable to the company and/or individual that does not qualify for a Leniency Agreement for a cartel, but that supplies information about another cartel not previously known by the SG/CADE (pursuant to Article 209 of RICADE combined with Article 86, §7, of Law n° 12.529/2011).

Both discounts are applied subsequently (i.e., first the Leniency Plus and then the TCC discount) and non-cumulatively (i.e., the sum of both discounts). Cumulative application could result in excessive benefit for the company and/or individual that practiced cartel in several markets, with possible reduction of the dissuasive effect of the conduct, which could also discourage the presentation of new Leniency proposals, because the benefits under TCCs would be greater.

Subsequent application of discounts (i.e., first the Leniency Plus and then the TCC discount) is based on interpretation of the laws, because the Leniency Plus discount falls upon the applicable penalty in general terms, whereas the TCC discount falls upon the expected fine, in the concrete case. Moreover, it maintains the consistency between the maximum discounts in Leniency Plus and TCC, *vis a vis* the hypothesis of partial leniency<sup>17</sup>. Additionally, the subsequent application of the additional pursuant to the Leniency Plus is not significantly different from CADE's experience in TCC negotiations, but adequately benefits Proponents that cooperate in both investigations.

Given that a TCC negotiation considers discount bands, the subsequent application of Leniency Plus with TCC at SG/CADE, can result in the following total discount bands on the expected fine:

- (i) in the case of first TCC proponent: from 53,33% to 66,67%;
- (ii) in the case of second TCC proponent: from 50% to 60%;
- (iii) for the other TCC proponents: up to 50%.

For further information about execution of Leniency Agreements, see Articles 86 et seq. of Law n° 12.529/2011, Articles 96 et seq. of RICADE, as well as the Leniency Guidelines and FAQs.

---

<sup>17</sup> Partial leniency, pursuant to Article 86, § 4, sub-paragraph II, of Law n° 12.529/2011, is the one executed when the SG/CADE has prior knowledge of the notified violation.

## II.2.2 Calculation of the pecuniary contribution for individuals

The individuals participating in the anticompetitive conduct shall have different assessment in TCC negotiations, depending on whether they are administrators (*II.2.2.1*), non-administrators (*II.2.2.2*), or depending on coverage of the so-called "accession clause" (*II.2.2.3*) and "umbrella clause" (*II.2.2.4*).

### *II.2.2.1 Company administrators*

Under Article 37, sub-paragraph III of Law nº 12.529/11, in the case of an administrator directly or indirectly responsible for the violation, upon evidence of intention (e.g. malice) or fault (e.g., negligence, imprudence or malpractice), the expected fine goes from 1% (one per cent) to 20% (twenty per cent) of the fine imposed on the company, legal entity or related entity (unions and associations, for example).

In order to encourage individuals involved in cartel investigations to apply for execution of a TCC at the beginning of the procedural instruction, especially in cases where there is difficulty in locating and in serving the individuals involved in the conduct, CADE considers reasonable that the pecuniary contributions should be closer to the legal minimum, i.e., around 1% of the contributions imposed on the company. However, this does not mean that higher penalties will not be applied depending on aggravating circumstances, or when the 1% criterion is below R\$ 50.000,00 (fifty thousand reais).

Important to note that, as a rule, administrators are the persons with the positions described in the bylaws or articles of association of the company. However, when the individual is not an administrator thereunder but has equivalent management powers or relevant participation in the cartel, his/her contribution shall be calculated in values that are similar to the administrator's, subject to the maximum and minimum limits of contribution of non-administrators, addressed below. Examples of individuals that could have their contribution calculated in this manner are the directors, managers, superintendents, commercial supervisors, and others, with relevant participation in the cartel.

### *II.2.2.2 Other individuals (non-administrators)*

Under Article 37, sub-paragraph II of Law 12.529/11, in the case of other individuals (i.e., non-administrators), the expected fine under the new law goes from R\$ 50.000,00 (fifty thousand reais) to R\$ 2.000.000.000,00 (two billion reais).

In order to encourage individuals involved in cartel investigations to come forward for signing of a TCC at the beginning of the proceedings, especially in cases where there is difficulty in locating and in serving the individuals involved in the conduct, CADE considers reasonable that the pecuniary contributions should be closer to the legal minimum. However, it is important to analyze the degree of participation of the individual in the investigated conduct, especially when it is someone who is not an administrator under the terms mentioned above, but who had equivalent management powers or relevant participation in the cartel, in which case the contribution shall be calculated in values that are similar to the administrator's.

Lastly, even for cases of violation occurred when Law nº 8.884/1994 was in force, CADE does not consider reasonable to negotiate a TCC for a value that is below R\$ 50.000,00 (fifty thousand reais).

### *II.2.2.3 Individuals in "accession clause"*

Although, as a rule, individuals interested in signing a TCC should negotiate and sign the agreement directly as Proponent-Signatories, in some circumstances it is possible that they be subsequently included in a TCC negotiated and signed by the company where they worked at the time of the events. This usually happens when the company appears before the authority to negotiate the agreement without having, until that date, located and/or gathered all the employees involved in the conduct, especially those that no longer are employees, i.e., who are working for other companies or who have retired.

In these cases, in order to speed up the negotiation process, the company can negotiate and sign its TCC individually, but already providing for in the agreement the conditions for subsequent inclusion of employees or former employees involved in the conduct. These conditions shall be provided for in the agreement under the so-called "accession clause".

CADE's main objective in executing agreements containing accession clauses is to reduce procedural costs of future individual negotiations. Additionally, in case of difficulty to serve defendants to the process, like in international cartels, for example, the accession clause has proved advantageous as it also reduces procedural costs of

locating and notifying Defendants.

It is important to note that the accession clause does not prevent negotiation with individuals that are candidates to accession, if they disagree with the terms of the negotiation. However, in this case, individuals will be entitled to the discount band in which they fit when their individual request is filed, and no longer the discount band where the company was.

As a rule, in calculating the value of accession of individuals, CADE has adopted the following provisions related to timing:

- up to six months after approval of the Term, a determined value;
- thereafter, addition of 50% on the aforementioned value.

Finally, it is important to state that the accession clause is agreed for to a maximum period of validity, which shall be the first of (i) 06 (six) months from the date of publication of the approval of the TCC in the Official Federal Gazette; or (ii) up to 60 (sixty) days from the date of publication in the Official Federal Gazette of the order of initiation of an administrative proceeding against the Employee.

#### *II.2.2.4 Individuals under "umbrella clause"*

Additionally to the possibility of including individuals in TCCs negotiated and executed by a company under "accession clause", in some circumstances employees involved in the conduct can be included in a TCC under the so-called "umbrella clause".

This clause can be used when the company wishes to terminate all its relation to the case, including the possibility of finding an employee involved in the conduct, *but not yet identified* (by the company or by the Public Administration) until the time of signing of the TCC. It is therefore used when the probability of identifying new participants in the conduct is low.<sup>18</sup>

CADE's main objective with the umbrella clause is also to reduce procedural costs. The aim is to address the liability of all the individuals related to that company that is negotiating a TCC that may come to be identified as involved in the conduct, avoiding the need to include new Defendants or initiate new cases whenever the participation of an additional employee in the conduct is identified.

---

<sup>18</sup> The umbrella clause is not applicable when the individuals are already Defendants, or have already been clearly identified in the History of Conduct of the Beneficiary of Leniency and/or of the Party(ies) of previous TCCs.

As a rule, for the calculation of pecuniary contributions of employees' under "umbrella", CADE considers the following parameter: an additional value corresponding to 10%<sup>19</sup> of the

pecuniary contribution owed by the company, and such percentage may be increased or reduced <sup>20</sup> depending on the circumstances of the individual case.

Therefore, the main differences between the "umbrella clause" and the "accession clause" are the following:

- (i) the "umbrella clause" extends to persons *not yet identified*, whereas the "accession clause" extends to those that *have already been clearly identified* in the investigation;
- (ii) in the "umbrella clause", the company has already paid a flat amount, irrespective of how many more employees have been involved in the conduct and are subsequently identified, whereas in the accession clause the value is paid per individual only after the inclusion.
- (iii) the "umbrella clause" makes the initiation of an administrative proceeding against new persons related to the Party senseless<sup>21</sup>, whereas the "accession clause" requires the initiation of an administrative proceeding against the identified individual and only after the inclusion is the accession possible.
- (iv) the "umbrella clause" does not have a term and remains in force indefinitely as long as the TCC is not declared breached, while the "accession clause" is executed for a maximum term, which is mentioned above.

### II.3 Manner of payment of the pecuniary contribution

Upon determination of the final value of the pecuniary contribution, the method of payment is discussed, and CADE considers the possibility of deferring payment or payment in installments.

---

<sup>19</sup> For individuals, this percentage corresponds to a minimum contribution of 10 additional administrators still not identified. It is a reasonable amount for the Public Administration, given that it extends to a considerable number of new categories of individuals. It is not unreasonable to assume that, after the effort to compose the Defendants and/or analysis of Histories of Conduct and other TCCs, there would still be a much higher number of unidentified individuals.

<sup>20</sup> E.g.: Roller bearing case (Req. n° 08700.001413/2015-11), in which the umbrella clause was established at 2%, since, given the high value of the final contribution of the Legal Entity and the vast number of individuals involved, it did not seem reasonable to charge the value resulting from the application of 10%.

<sup>21</sup> The SG/CADE explains that if the proceeding is initiated, it shall be immediately halted in relation to the individual or Legal Entity of the group of the Party that has executed a TCC with the accession clause.

In the case of a single installment, the deadline is usually up to 90 (ninety) days, without monetary correction based on the SELIC. In exceptional cases, the payment in a single installment may be carried out in up to 180 (one hundred and eighty) days, without monetary correction based on the SELIC, depending on the value of the contribution and the circumstances of the individual case.

In the event of payment in installments, pursuant to Article 196 of RICade, the installments shall be necessarily adjusted based on the SELIC, *in verbis*:

Art. 196. Under the terms of a Cease and Desist Agreement (TCC) that contains a pecuniary contribution, CADE can accept payment thereof in installments.

Sole paragraph. The installments of the pecuniary contribution shall necessarily be corrected by the rate of the Special System of Settlement and Custody - SELIC, announced by the Central Bank of Brazil (BACEN).

As a rule, the installments may extend to up to 2 (two) years, and the SELIC rate is applied on the second installment and on all the others thereafter. In exceptional cases, installments extending to up to 4 (four) years may be authorized, depending on the circumstances of individual cases, with application of the SELIC rate on the second installment and on all the others thereafter. Longer periods shall only be admitted in absolutely exceptional and specific circumstances, and in no event shall extend for an excessive period.

CADE adopts the following parameters to define the installment period:

- amount of the pecuniary contribution;
- absolute amount of each installment;
- financial standing of the company - duly demonstrated;
- reasonableness of payment in installments, so as not to mitigate the dissuasive character of the pecuniary contribution;
- scaling of the payment value and possibility of advanced payment of installments.

Finally, CADE does not deem appropriate to have very close due dates (e.g., monthly installments), since the cost of monitoring the payment of each installment is high.



### III. ACKNOWLEDGEMENT OF PARTICIPATION IN THE INVESTIGATED CONDUCT, OBLIGATION TO NOT PRACTICE IT AGAIN AND OTHER MEASURES

Acknowledgement of participation in the investigated conduct is a requirement of RICADE to sign TCCs in cartel cases, pursuant to Article 185, *in verbis*:

Art. 185. In investigations of agreement, combination, manipulation or arrangement among competitors, the cease and desist agreement shall necessarily contain the acknowledgement of participation in the investigated conduct by the party thereto.

CADE points out that this requirement has already been confirmed by Brazilian courts<sup>22</sup>, so that there is no possibility of signing of a TCC in cartel cases without acknowledgement of participation in the investigated conduct, which shall be included in the term.

With respect to the obligation to not practice the investigated conduct again, it is based on Article 85, § 1, sub-paragraph I, of Law 12.529/2011, which determines that the term shall additionally include:

Art. 85. In the administrative proceedings referenced to in sub-paragraphs I, II and III of Art. 48 of this Law, CADE may obtain from the defendant a cease-and-desist agreement related to the practice under investigation or its harmful effects, if duly grounded, for convenience and at the proper time, and if it understands that it complies with the interests protected by law.

§ 1 The agreement shall contain the following elements:

I - specification of the defendant's obligations not to practice the investigated activity or its harmful effects, as well as obligations deemed applicable;

II – the setting of fines to be paid in case of failure to comply, in full or in part, with the undertaken obligations;

III - the setting of pecuniary contributions to be paid to the Fund for the Defense of Diffuse Rights, when applicable.

To make sure that the Proponent will not practice the investigated conduct again, CADE can demand commitment to adopt preventive measures. These measures can be included in the term generically or in a detailed manner, depending on the circumstances of individual cases.

Lastly, the Proponent may be requested to commit to adopt structural and/or behavioral measures to stimulate and/or re-establish competition in the market, or even to repair the negative effects of the conduct.

---

<sup>22</sup> About the requirement to acknowledge participation in the conduct, the Federal Regional Tribunal of the 1st Region has already ruled that "*the rule contained in CADE's Internal Regulations did not exceed the limits provided for in the applicable laws, but merely regulated, based on objective criteria, in which situations it would be possible to execute Cease and Desist Commitments, and in this case is an essential condition that the party thereto acknowledge participation in the conduct.*". Interlocutory Appeal 0070598-57.2013.4.01.0000/DF (30.01.2014) and Interlocutory Appeal 0004708-40.2014.4.01.0000 (03.02.2014), Federal Justice Rapporteur Jirair Aram Meguerian.

#### **IV. MODELS**

CADE provides TCC models (with or without, for example, “accession clause” or “umbrella clause”).

As a rule, the text and format of the term are standard and must be preserved in accordance with the models made available by CADE, or altered as little as possible, so as to speed up the negotiations and maintain the equality of all agreements. Alteration requests made by a Proponent should be exceptional and duly grounded in view of specific concrete circumstances. CADE also reserves the right to make alterations when specific circumstances so require.

DRAFT