Brazil's CADE and TCU have entered into a cooperation agreement to fight bid-rigging in public procurement

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The Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica – CADE) and the Federal Court of Accounts of Brazil (Tribunal de Contas da União – TCU), entered into a cooperation agreement on 27 December 2018 as part of a joint effort to fight violations of the country's public procurement process and antitrust regulations. The two regulators will share information, documents, and assets, including technology tools, databases, reports, intelligence, and launch joint initiatives to detect anticompetitive conduct in public tenders. The two agencies will also conduct joint investigations, studies, and training.

The effects of this agreement are wide-reaching given that the Brazilian government is a leading purchaser of goods and services and all major sectors of the economy are regulated in this country. Also, this agreement will be an additional tool to assist Mr. Jair Bolsonaro, Brazil's president-elect who took office on 1 January 2019, to move forward with its promise to clean up Brazil from corruption.

This new cooperation agreement is part of CADE's broader policy to collaborate with other authorities, in particular entities that oversee the federal government. Also in 2018, CADE signed a cooperation agreement with the then Ministry of Transparency, Supervision and Comptroller-General (CGU), to increase the prosecution of Brazilian and foreign companies involved in corruption and/or cartel activity.[1] While the CGU is part of the intern/direct public administration and the authority in charge of negotiating leniency agreements at the federal level with respect to corruption cases in Brazil, the TCU is the external control institution of Brazil's federal government that supports the National Congress with the mission of overseeing the budget and the financial performance of the country and contributing to the improvement of public administration. Both authorities are key players in Brazil's fight against corruption and can apply administrative sanctions to entities and individuals.

This cooperation should increase enforcement of Brazil's anti-corruption and antitrust laws given that bid-rigging and corruption are hot topics and a clear priority for CADE, which has entered

[1] This cooperation was materialized by Joint Ordinance No. 4, published in the *Official Gazette of Brazil* on 1 June 2018. Please see our specific alert on this development here.

into more than 10 leniency agreements in cases linked to Operation Car Wash[2], and of Bolsonaro's government.

Key highlights

- The TCU is the Brazilian federal accountability office responsible for assessing the accounting, financial, and budgetary performance of government bodies and entities and maintaining oversight of public property. The TCU is responsible for auditing and evaluating the use of public funds by public administrators and of other individuals responsible for federal public funds and assets. The TCU also evaluates and then approves or rejects the accounts of those whom they deemed to have caused loss, misappropriation, or other irregularity resulting in losses to the public treasury. Potential sanctions that can be applied by the TCU include fines, unavailability of assets, obligation to correct the irregularities identified, and prohibition to work for the federal government or to participate in public procurement processes.

- Under the Brazilian Anti-corruption Law, legal entities are strictly liable for corrupt practices. Sanctions may include: (i) fines of up to 20 percent of a company's gross revenue in the year prior to the initiation of the investigation (or R$6,000 to R$60 million if it is not possible to determine the company's revenues); and (ii) an obligation to publish the decision that resulted in the fine in a newspaper. If the conduct also included a violation of the Public Procurement Law in Brazil, an entity can also be barred from participating in future bids or from executing agreements with public bodies, which may significantly impact companies with an interest in this sector due to the importance of public procurement contracts in Brazil. Other potential sanctions include: (i) confiscation of the subject company's assets; (ii) suspension of the subject company's activities or the mandatory dissolution of the entity itself; and (iii) prohibition from receiving incentives, subsidies, grants, donations, or loans from public bodies, public financial institutions, or companies controlled by public authorities for a prescribed period of time.

- Under the Brazilian Antitrust Law, CADE can impose fines from 0.1 percent to 20 percent of the gross revenues of a company, group, or conglomerate, earned in the year before the initiation of the proceeding before CADE and resulting from the line of business related to the violation. The fine will never be lower than the advantage obtained from the improper conduct in cases where it is possible to calculate such amount. Additional sanctions can also be applied to the legal entity, including (i) the obligation to publish CADE's decision in a newspaper of wide circulation; (ii) a prohibition on contracting with financial institutions and participating in biddings held by public bodies; (iii) a split-up of the company or a divestiture of certain assets; and (iv) a prohibition on the ability to make arrangements for the payment of taxes in installments, among others. Individuals involved in the conduct may also be personally fined 1 percent to 20 percent of the fine imposed on the legal entity.

Should you require more information, please contact us.

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[2] Operation Car Wash, the largest corruption investigation in the history of Brazil, started in March 2014 with an inquiry into Petróleo Brasileiro S.A. (Petrobras), Brazil's state-run oil company and the biggest company in the country. The corruption investigation is ongoing and continues to date. It has been linked to some of the country's most powerful and wealthy businessmen and politicians, and its findings have greatly impacted entities in the public and private sectors.

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