

# International Antitrust Bulletin

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International Committee | ABA Section of Antitrust Law

2010 – Volume 1

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We are accepting articles now for our next edition of the International Antitrust Bulletin. Articles can cover any topic in the international antitrust area and should be approximately 800-1,200 words. If you have a topic idea, please contact our Editor-in-Chief, Rob Kwinter at [robert.kwinter@blakes.com](mailto:robert.kwinter@blakes.com).

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The International Antitrust Bulletin is published four times a year by the American Bar Association Section of Antitrust Law (International Committee). The views expressed in the International Antitrust Bulletin are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the International Committee. If you wish to comment on the contents of the International Antitrust Bulletin, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598.

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# Settlement as a Way Out in Hard-Core Cartel Investigations in Brazil: Practice and Problems

By: *André Marques Gilberto and Priscila Brolio Gonçalves\**

Since May 2007, the law has permitted settlements of cartel investigations in Brazil. To date, there have been eight settlements, a figure that, while not trivial, is not very impressive (especially when compared to the increasing number of investigations initiated by the Brazilian authorities). This article explores possible reasons why settlements are not adopted more frequently.

## Legal Background

Settlements in cartel investigations were originally authorized in Brazil in 1994 by Law No. 8884 (the “Competition Law”), which provided that settlements were admissible in any investigation at any point. In the beginning of 2001, Law No. 10149 (the “2000 Competition Law Amendments”) became effective and curtailed the use of settlements while augmenting enforcers’ investigative powers in order to stimulate the development of the recently introduced leniency program.

Over the next six years, Brazilian enforcers fully utilized their enhanced investigative powers but also found that investigations were inordinately drawn out. Interminable court processes and (in particular) a lack of appropriate resources to conduct simultaneous prosecutions against multiple undertakings and individuals were viewed as the principal causes of delay.

Therefore, it was no surprise when, in May 2007, Law No 11482 was approved by the Brazilian Congress (the “2007 Reform”), reviving the policy of settlements in cartel investigations. However, it soon became evident that the 2007 Reform suffered from a lack of clarity regarding the eligibility requirements for individuals and corporations seeking a settlement with CADE.<sup>1</sup> For

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example, the 2007 Reform did not even state whether an admission of guilt was a prerequisite to settlement, nor did it provide criteria for fixing pecuniary fines or “voluntary” contributions.

## Guidelines of Local Administrative Authorities

To reduce uncertainty, a number of measures have since been taken. First, in September 2007 CADE amended its Guidelines to provide that:

- An applicant may only request to enter into settlement negotiations once during a cartel investigation;
- The negotiation period should last 30 days, and be renewable for another 30 days;
- CADE has the discretion to treat settlement negotiations as confidential;
- If the cartel investigation is initiated through a leniency application, the case may be settled only if the interested party admits guilt (in the absence of a leniency agreement, CADE will make settlement determinations on a case-by-case basis);
- The amount to be “voluntarily paid” by the interested party must be at least one per cent of the gross revenues of the company in the year prior to the beginning of the investigation;<sup>2</sup> and
- CADE will take into account for the purposes of calculating this payment the timing of the company coming forward.

<sup>1</sup> The Administrative Council for Economic Defence (CADE) is an administrative tribunal, composed of seven commissioners, which makes final rulings in connection with anti-competitive practices and merger review.

<sup>2</sup> The Law does not state that the contribution should be limited to gross revenues of the company in Brazil; so far, all of the payments for settlements in local cartel investigations were calculated based on Brazilian turnovers.

It should also be stressed that although CADE is the competent authority to settle a cartel investigation in Brazil, it has commonly sought the opinion of Brazil's competition investigative agency, SDE<sup>3</sup>.

### Settlements So Far: Admissions of Guilt and Increasing Pecuniary Contributions

Eight settlements have taken place since the 2007 Reform. Payments have ranged from 2.25 to 25 percent of the applicants' turnover in Brazil. And in the five most recent cases the interested parties agreed to admit guilt.

#### Settlements in Hard-Core Cartel investigations in Brazil (as of March 2010)

Industry/Defendant	Date	Contribution (% revenues)	Admission of Guilt
Meat industry Friboi (JBS)	11.28.07	2.25% R\$ 13.7 million	No
Cement Lafarge	11.28.07	10.4% R\$ 43 million	No
Packaging Alcan	07.23.08	10% R\$24.2 million	No
Marine hoses Bridgestone (1 <sup>st</sup> ) Manuli (2 <sup>nd</sup> ) Trelleborg Industrie (3 <sup>rd</sup> )	08.27.08	13% R\$ 1.6 million	Yes
	01.27.09	14% R\$ 2.1 million	Yes
	09.16.09	20% R\$ 4.4million	Yes
Air compressors Brasmotor, Whirlpool and seven employees	09.30.09	20-25% R\$103.06 million	Yes
Campinas' Driving Schools Association (and manager)	10.07.2009	R\$ 26,000.00 R\$ 6,400.00	Yes

The table shows that contribution percentage rates are increasing for companies, starting at 2.25% of the applicant's annual Brazilian turnover two years ago and reaching 20-25% late last year. In the marine hoses case, the first applicant, Bridgestone, agreed to pay the equivalent to 13% of its annual turnover, while the

<sup>3</sup> The Secretariat of Economic Law of the Ministry of Justice (SDE) is the chief investigative body in matters related to anti-competitive practices.

following applicants agreed to pay as much as 14% and 20% to resolve the investigation. Among the cases cited above, the air compressors and marine hoses investigations are the only ones in which leniency agreements were executed.

The settlements to date indicate the following tendencies:

- In cases with leniency agreements, settlements will not be accepted unless applicants admit guilt. This policy is coherent with CADE's guidelines; and
- Contribution percentages for applicants in connection with the same cartel investigation tend to increase for each new settlement application in order to encourage applicants to not only be the first to settle but to avoid being later than others.
- Settlements sometimes include both the company and the employees under investigation (Whirlpool, JBS and Alcan) but at other times do not (Bridgestone).

### Final remarks

The Brazilian competition authorities have issued useful guidelines, creating incentives for settlement of cartel investigations, and there are signs that private parties are responding positively by settling or at least initiating negotiations.<sup>4</sup> Nevertheless, there are still important, unresolved issues. Settled cases offer clues for parties and practitioners in connection with some, but not all, controversial issues.

The most obvious question is the impact of the settlement option on the agencies' leniency program. Critics of the 2007 Reform claim that incentives for companies and individuals to adhere to the leniency program decrease with the introduction of the settlement alternative. Supporters argue that incentives for leniency continue to exist as long as (i) adherents get criminal immunity and (ii) administrative fines are not imposed (when the leniency agreement provides the authorities with evidence in connection to previously unknown cartel activities) or will be substantially reduced (when the authorities are already aware of the cartel, but do not have sufficient evidence to convict its participants). It is too early to make predictions but, so far, the leniency

<sup>4</sup> In addition to a frustrated negotiation in the cartel investigation in the orange juice industry, a few companies formally initiated conversations with the authorities and attempted to settle in the packaging case, without success.

program does not seem to have been negatively impacted by the coexistence of the settlement program.

In addition, doubts still remain in connection with the effectiveness of the settlement provisions themselves and it is too soon to conclude that the reform is a success or a failure. There are only eight agreements and several outstanding uncertainties. In five cases, the agreements involved admission of guilt. While there is no legal guarantee that defendants will not be criminally prosecuted (or that an admission of guilt will not be used to obtain a conviction), authorities claim that the Public Prosecution Office will refrain from prosecuting settling parties. It is worth mentioning that jurisdiction in connection to criminal investigations is still undefined in Brazil, so even if federal public prosecutors officially commit not to pursue a conviction when a settlement involving an admission of guilt is reached with CADE, state prosecutors may not agree. The safest avenue for defendants in this event is to settle with both CADE and with other prosecutors with criminal jurisdiction, but this is possible only if there is a criminal case pending and if the plaintiff does not have cumulative infractions (settlements are not allowed if the defendants are charged with collusion *and* conspiracy, for example). And what would be the outcome for employees or ex-employees that were not covered by the settlement reached by the company, as in the example of the Bridgestone case?

Finally, the criteria to be adopted by CADE to calculate the contribution percentage when there are multiple settlements in the same case remains unclear. Fines deriving from convictions are supposed to be calculated individually, taking into account particular circumstances related to each defendant and their respective participation in the infraction. Settlements, however, may be reached in early stages of the case at which time individualization may not be possible. If different companies or individuals decide to initiate negotiations in order to settle, how should CADE calculate the contributions for each one of them? Should such contributions be equal or should the first settlement applicant receive a discount? In the marine hoses investigation, all three settlers admitted guilt, but the second one to settle contributed 1% more than the first and the third contributed 6% more than the second. It is reasonable to expect that CADE will increase the burden for the second comer and so on, but it is difficult to predict by just how much.

These questions do not preclude others that may arise from the 2007 Reform. What is certain is that defendants in cartel investigations that are interested in settlements with the Brazilian authorities have many relevant factors to take into account before formally requesting the initiation of negotiations.

## International Committee Calendar

- Antitrust Law 2010 Spring Meeting  
April 21-23, 2010  
Format: Live/In-Person  
Washington, DC
- EU Cartel Enforcement Policy: Is the Noose Tightening or the Hangman Slipping?  
May 10, 2010  
Format: Webcast/Teleconference