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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE EXPERIENCE WITH DIRECT SETTLEMENTS IN CARTEL CASES

-- Brazil --

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1. Introduction

1. This paper aims at briefly explaining the legal framework applicable for direct settlement of cartel cases in Brazil, as well as presenting the recent experience of the Brazilian Competition Policy System (BCPS)¹ in this area.

2. Law No. 11.482, dated May 31, 2007, amended the Brazilian Competition Law and introduced the possibility of direct settlements in cartel cases. Before this amendment, the CADE or the SDE (*ad referendum* of CADE) could settle with the defendants in administrative proceedings except those related to cartels. The CADE is the antitrust agency with power to enter into settlements, and the SDE and CADE's Attorney General Office may issue nonbinding opinions directed to the CADE on whether to settle or not.

3. The introduction of settling cartel cases represents a remarkable improvement: early cooperation on the part of the defendants saves public resources, cut down litigation, enable early payment of a significant sum of money and provide expedited treatment and more certainty and transparency to the business community. Settling also proves beneficial for the defendant, as it often means a more efficient use of resources on the part of the company. The first four settlements have already been executed, and others are currently being negotiated.

2. Requirements for direct settlements in cartel cases

4. Article 53 of Law No. 8.884/94 provides that the amount to be paid to settle a cartel case must be at least one per cent of the entire gross revenues of the company in the year before the initiation of the investigation (this requirement is not applicable to cases involving other types of anticompetitive practices).

5. Additionally, under the terms of the law, CADE is allowed to settle with only one defendant (i.e., it is not necessary that all the defendants settle or settle at the same time). If that happens, the investigation will stop with respect to the defendant that settled and proceed with respect to the other defendants.

6. In September 2007, the CADE issued Resolution No. 46/2007, establishing the negotiation rules². According to such regulation, a settlement procedure in cartel cases has to follow the requirements below:

- The applicant can only try to settle once (“one-shot game”);
- The negotiation period is for 30 days, renewable for another 30 days;

¹ The Antitrust law and practice in Brazil is governed primarily by Law n. 8.884, of 1994, as amended in 2000 and 2007 (the Competition Law). The so called “Brazilian Competition Policy System” (BCPS) is composed of three agencies -- namely, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Council for Economic Defense (CADE). SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal, composed of seven Commissioners, which takes the final decisions regarding anticompetitive practices and merger reviews.

² After one year of experience of the Resolution No. 46/2007, the CADE is currently revising the settlement procedures in order to decrease negotiation costs and increase predictability and hence the demand for settlements.

- The negotiation process may be confidential at the discretion of the CADE;
- If the case was initiated using evidence obtained under a leniency agreement, it can only be settled with admission of guilt. In all other cases, the CADE will decide on a case-by-case basis whether to settle where the defendant is not prepared to admit guilt;
- Apart from the minimum sum to be paid provided by the law, the CADE will also take into account the moment in time the company comes forward (the earlier in time, the greater chances to pay a reduced sum);
- A settlement with the CADE does not mean that the case will be criminally settled. A criminal settlement has to be negotiated on a case-by-case basis with the state and federal criminal prosecutors.³

7. The interested party has to consider these rules in preparing a proposal for a settlement to the CADE. The settlement may be proposed until the beginning of the judgment session of the respective administrative proceeding at the CADE. Such proposal has to specify, at least:

- The obligations of the defendant in order to stop the investigated conduct and its harmful effects;
- The amount of the sum to be paid;
- The details of a compliance program; and
- Turnover information of the company referring to the year prior to the initiation of the investigation in order to confirm that the sum paid is one percent of such turnover.

8. Once it is executed between CADE and the interested party, the settlement agreement (*Termo de Compromisso de Cessação – TCC*) can be judicially enforced, and it suspends the investigation against that party. If by the end of its term the CADE acknowledges that all the obligations set forth in the Agreement have been fulfilled, the investigation is filled.

9. Additionally, according to Article 14 of Law No. 8.884/94, in February 2008 the SDE, as the chief antitrust investigative authority, issued guidelines on the principles that guide its analysis of settlement proposals in cartel cases (the *Guidelines* are available at www.mj.gov.br/sde, both English and Portuguese versions). The most important concern of the SDE while analyzing such proposals, concerns shared by CADE, are (a) the preservation of the Brazilian Leniency Program (negotiated and executed by

³ Apart from being an administrative infringement, cartel is also a crime in Brazil, punishable by a criminal fine or imprisonment from two to five years. Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Since 2003, the SDE, as the chief investigative antitrust authority, with the support of the SEAE, is increasing cooperation with the Federal Police and Public Prosecutors to ensure that managers and directors of companies face full criminal liability.

the SDE), which is the main tool of the anti-cartel policy in Brazil⁴; (b) the effective deterrence of future anticompetitive practices; and (c) the avoidance of obstacles to the administrative and criminal persecution of cartels, as well as to private actions for damages caused by such anticompetitive practice. For recommending a cartel settlement to the CADE, the SDE takes into consideration the following requirements:

- Admission of guilt in all hardcore cartel cases where the SDE has a significant amount of direct evidence (usually collected in dawn raids): the SDE takes the view that it is extremely important not to execute agreements that may result in a *sub-optimal punishment* of the investigated party; otherwise, negotiated settlements could become a more appealing option than the Leniency Agreement. In this scenario, a company that participates in a cartel would have strong incentives to continue to practice the illegal conduct and, should the Government detect the conduct through its own investigation and obtain sufficient proof to ensure a conviction, then negotiate a settlement in an early stage of the administrative proceeding without the admission of its participation in the practice and without the obligation of actively cooperating with the investigation. Therefore, the investigated party would evade from his responsibilities for the practice of cartel, among them the reparation of the damages caused to third parties by the cartel. For these reasons, the SDE understands that, in the cases of hardcore cartels with direct evidence, an integrated approach as to the incentives provided by the Leniency Program and the negotiated settlement only fulfills the public interest if there is the requirement to admit the participation on the conduct by the interested party).
- In the case of investigations initiated by means of a Leniency Agreement, the admission of guilt by the applicant has to be similar to that of the beneficiary of the Leniency Agreement and never lesser, in order to keep the incentives for leniency;
- Active and full cooperation of the companies with SDE's investigations;
- Payment of a settlement sum that guarantees deterrence.

⁴ The Brazilian leniency program was launched in 2000, and the SDE is the antitrust agency with power to negotiate the leniency agreement. The requirements are as follows: (i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully cooperate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant. The benefits are full or partial immunity depending on whether the SDE was previously aware of the illegal conduct at issue. If the SDE was unaware, the party may be entitled to a waiver from any penalties. If the SDE was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement. A leniency agreement shelters administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requirements provided in the law. There is a growing number of candidates to the program, including members to international cartels. This reflects in the number of search warrants served: (i) in 2003, 2004 and 2005, 11 warrants were served and 2 people were detained without charges; (ii) in 2006, 19 warrants were served; and (iii) in 2007, 84 warrants were served and 30 people were detained without charges for a 10-day period. More information can be obtained in the "Leniency Policy Interpretation Guidelines" available at SDE's website: <http://www.mj.gov.br/dpde>.

3. The settlement experience

3.1 *Cartel cases settled by the CADE*

10. Cade has approved four out of fifteen settlements proposals⁵ presented by companies in cartel cases so far: JBS/SA (slaughter-house cartel), Lafarge Brasil SA (alleged cement cartel), Alcan Embalagens do Brasil (alleged plastic bags cartel) and Bridgestone Corporation (alleged marine hose cartel).

11. The chart below shows the timing, requirements, amounts paid⁶, existence of leniency agreement and SDE's opinion on whether CADE should have settled or not the cartel cases.

⁵ Each proposal shall contain more than one proponent. Taking this into account, it can be said that thirty three entities have subscribed the mentioned proposals (fourteen companies, three trade associations and fifteen individuals).

⁶ The amounts are collected to the Federal Fund of Diffuse Rights, which is managed by a interministerial commission presided by the Chief of Staff of the SDE. The resources of the Fund are applied in projects in the areas of environmental protection, consumer protection, competition policy and national cultural heritage.

Table 1.

Company	Alleged Conduct	Affected market	Timing	Requirements	Contribution	Leniency Agreement	SDE's opinion
Bridgestone Corporation	Hard core cartel	Marine hose	After dawn raid, during investigation (08/2008)	Admission of guilt; effective and full cooperation	R\$1.594.000,00 (appr. 13% equivalent to the present value of a fine of roughly 20%)	yes	Favorable to the agreement as CADE required admission of guilt, effective cooperation and the payment of an appropriate settlement sum
Lafarge Brasil S/A	Hard core cartel	Cement	After dawn-raids, during investigation (11/2007)	No admission of guilt; compliance program	R\$43.000.000,00 (appr. 10% of the annual gross turnover; equivalent to the present value of a fine of roughly 15%)	no	Contrary to the agreement as it encompassed an alleged hard core cartel with direct evidence and the CADE did not require admission of guilt. The SDE considered that the deterrence effect was not achieved with the agreement
JBS/SA	Soft cartel	Slaughter-house	By the time of the judgment (11/2008)	No admission of guilt; compliance program	R\$13.761.944,40 (appr. 2,5% of total gross turnover in the relevant market)	no	The SDE did not issue an opinion in connection with this case
2 individuals (manager and employee)					10% of the company's contribution (manager) and approx. USD3,600.00 for the other one (employee).		
Alcan Embalagens do Brasil	Hard core cartel	Plastic bags	During investigation	No admission of guilt; compliance program	R\$24.218.550,57 (appr. 10% equivalent to the present value of a fine of roughly 15%)	no	Contrary to the agreement as it encompassed an alleged hard core cartel with direct evidence and the CADE did not require admission of guilt. The SDE considered that the deterrence effect was not achieved with the agreement
1 individual (manager)					10% of the company's contribution (manager)		

12. It is to be mentioned that the settlement in the marine hose cartel was the sole comprising admission of guilt. As noticed above, according to CADE's Resolution, admission of guilt was mandatory in this case since the administrative proceedings were initiated by means of a leniency program.

13. Besides, it should be stressed that Bridgestone Corporation gross revenue in Brazil in 2007 was excessively low to be considered the basis for the contribution, not properly reflecting the weight of the company's alleged participation in the infringement. Thus, the CADE has adopted the "European Commission Guidelines on the Method of Setting Fines"⁷ and took Bridgestone's percentage share of the total worldwide sales of marines hose and applied this share to the aggregate sales within the Brazilian market for the product. The result was taken as the value of sales for the purpose of setting the basic amount of the settlement sum.

14. Finally, it is emphasized that the marine hose settlement was also the only one in which the company agreed to collaborate effectively and actively with the investigations, presenting a number of cartel communications to the authorities.

15. Regarding the timing of the proposal, as mentioned before, the settlement may be proposed until the beginning of the judgment session of the administrative proceeding related to the investigated conduct. The Brazilian experience, although incipient, shows that the Tribunal is willing to negotiate a proposal any time within the legal provision, unless it lacks the legal requirements.

16. The Tribunal takes the view that settlement is an alternative to the fully adversarial proceedings of pursuing a trial. A case is settled only if the CADE concludes that this procedure maximizes cartel deterrence in comparison to the trial outcome. A settlement may increase deterrence if it provides new evidence and collaboration with investigations, increasing the likelihood of detection and decreasing the costs of prosecution, and/or if it saves resources and time of antitrust enforcement. Therefore, a commitment to stop a cartel or its harmful effects may be more valuable than pursuing the trial. Not only granting finality and saving administrative resources, but also the judicial review proceedings and shortcomings related to enforcement of the decision must be considered as incentives for the CADE to settle in a cartel case.

17. While issuing its non-binding opinion to the CADE with respect to all cases presented, the SDE strictly followed its Guidelines, as it recognizes the importance to reach predictability and transparency in the treatment of such settlement proposals. Up to date, the SDE issued 7 non-binding opinions to the CADE on whether to settle or not a case. Except for the Bridgestone settlement proposal (alleged marine hose cartel), the SDE took the view that the settlement proposal was not sufficient to deter collusion and keep the appropriate incentives for the Leniency Program. This is so because in all the cases the SDE issued an opinion the investigation was related to an alleged hard-cartel with direct evidence collected in dawn raids (plastic bags and cement cases).

3.2 *Settlements rejected by the CADE*

18. In the first year of Resolution No 46/2007, only four out of fifteen companies that applied for settlements had their proposals accepted. It is worth mentioning that the number of companies that are potential applicants for settlements, taking into account just cases with direct evidence of hard core cartels, exceeds 200. The incipient use of this alternative to fully adversarial proceedings may be due to the lack of predictability and uncertainties regarding its effects on criminal and private suits that are settled in the administrative area.

⁷ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:HTML) ; see particularly paragraph 18.

19. As to the settlements rejected by the CADE, it is worth mentioning those presented in connection with the security guard services cartel investigation. At the day of CADE's final decision, the Reporting Commissioner was filled up with several last minute applications, made by seven companies, three trade associations and seven individuals. It was considered that the proposals had not met the requirements of Internal Regulations and had also been presented at a rather inadequate moment.

20. In addition, in a different cartel case, there were three other settlement proposals brought to judgment during the investigations. However, they were unanimously rejected since they offered a settlement sum considered insufficient to deter collusion and did not offer any effective collaboration with the investigations. In all the settlements proposals rejected by the CADE, the SDE also issued contrary opinions as it considered that the proposals were not sufficient to deter collusion and keep the appropriate incentives for the Leniency Program.