Settle for less…? Or more! Tips on timing, confidentiality and strategy (multijurisdictional) settlement arrangements

Organising Commissions: Antitrust, Commercial Fraud and Litigation

Prague, 2014 - working session 5

National Report of Brazil/ Antitrust Commisson

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10 March 2014

2. QUESTIONNAIRE FOR ANTITRUST PROCEDURES (MAÏTE OTTES)

2.1. General issues

2.1.1. Does your jurisdiction provide for settlement procedures with the competent competition authority?

Yes. They are thoroughly regulated in article 85 of the Antitrust Law and from 179 to 196 of CADE's Administrative Rule # 1 (*Regimento Interno do CADE*).

2.1.2. If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions?

Not applicable, since it provides for settlement procedures. However, the legislation also provides for commitment decisions, mostly for dominance cases.

O If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure.

2.1.3. What is the general stance towards settlement procedures in cartel matters? Are these generally considered to be a preferred route?

In the speech, the antitrust authorities claim that settling is the preferred route. However, there are many practical issues that make the settlement a more expensive route and possibly riskier, if compared to the litigation in the administrative sphere.

Settlement agreements are usually deemed a good form of avoiding litigation. In fact, negotiation techniques are one of the themes addressed in courses on methods of alternative conflict resolution.

Regardless of the difficulties inherent in the peculiarities of rigid administrative law systems, this assertion is perfectly applicable to cases involving antitrust authorities.

From the standpoint of public administration, the antitrust authorities claim there are no doubts about the positive effects of the execution of leniency agreements as regards the possibility of continuing the discovery phase of the proceedings until a final adverse decision, because: a) there will be an economy of public resources, b) it will be easier to obtain evidence with the assistance of the party to the leniency agreement during investigations, c) the proceedings will end more rapidly and d) the possibility of a court review changing the final decision will be partially reduced.

Some critics do not share such an enthusiasm for settlement agreements. The institutional structure of settlement agreements with cartels must present some characteristics to induce cartel members under investigation to execute them,

but not to the point of discouraging leniency. In addition, these characteristics cannot undermine the dissuasive character of antitrust repression – this is the difficulty faced by the antitrust authorities when deciding whether to accept a consent decree proposal or not.

2.2. Procedural issues

2.2.1. At what stage can a settlement be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

At any time. The rule of thumb is the sooner a settlement proposal is filed with the antitrust authorities, the greater the discount in the settlement will be the discount range in the potential fine to be imposed.

2.2.2. Is it possible to settle with only one, or several parties involved in the alleged cartel, or do all accused parties need to be involved? Are there any constraints with whom a settlement can be reached (cartel leaders, recidivists, etc.)?

It is possible to settle with only one party.

Until 29 May 2019, the cartel leaders could not enter into a leniency agre-ement with the antitrust authorities, but there was no restriction on the settling the antitrust case. From the same date onwards, such a restriction was ruled out.

2.2.3. Could you elaborate on the possible settlement arrangements. Are these only pecuniary measures or could these involve behavioral measures as well? How are the terms of a settlement being determined?

The Brazilian Antitrust Law rules that the authorities are empowered to take any measure required to bring the market back to its original condition (i.e. no collusion or dominance). This means that the pecuniary measures are not the only possible arrangements.

In practice, there have been few behavioural measures agreed in settlements and all of them referred to dominance case.

In reality, the introduction of the possibility of settlement in the regulatory toolkit did not produce the expected effect. In a certain scenario, it is possible to observe the collateral effects of a certain regulation in a given balance, and any change can affect the existing balance. A correct understanding of the effects of a rule is indispensable for successful anti-cartel policies, because “Wishful thinking is no substitute for theoretical understanding. Underlying most regulatory failure, ironic or otherwise, is bad science”.(Grabosky, 1995: 356).

Take the example of environmental regulation about pollution. In the absence of such regulation, companies tend to ignore any risk to the environment and to release untreated pollutants and waste. The introduction of environmental rules aims at reducing pollution in the environment, but occasionally some or even

all companies could simply move from that region to another – pollution would be reduced, but at the expense of the reduction in the social welfare of the local community, which would lose employment and income. A similar move can be observed when there is a strengthening of the regulatory requirements for pollution control.

In the specific case of settlement with cartels, it is possible to distinguish four different institutional structures based on which the legislator may work.

In the first structure, the anti-cartel policy does neither include leniency agreements nor agreements such as the consent decree – this was the case in Brazil until 2000. Under these circumstances, the antitrust authority should concentrate great efforts in the investigations and, in case of administrative repressive systems in the enforcement following the decision made. There is not much room for variations during the process, which renders the establishment of responsiveness more difficult.

Between 1994 and 2000, the Brazilian Antitrust Law allowed the execution of these agreements with cartel members during administrative proceedings, and it was neither necessary for the defendant to be subject to a judgment by default nor to acknowledge the "unlawfulness of the practice under analysis". The rare cases of collusive practices investigated came to an end with the execution of these agreements. In fact, until 2000 only one cartel case obtained an adverse judgment, possibly because the strategy of the defense did not consist in the proposal of an agreement – it took more than 10 years of court litigation for the defendants to pay the fines.

Settlement agreements executed with the antitrust authority (1995-2000)

Year	Executed CCP	Cartel*?
1995	**01** – Administrative Proceedings 08000.012720/94	Yes
1996	**01** – Administrative Proceedings 08000.016384/94-11	Yes
1997	**01** – Administrative Proceedings 49/92	No
1998	**None**	--
1999	**None**	--
2000	**02** – Administrative Proceedings 08000.020849/96-18 and Administrative Proceedings 08012.003303/98-25	One of them is a cartel

* The practices punished under items I, II, III and VIII of Atrticle 21 the Brazilian Antitrust Law are considered collusive practices.

Source: Annual Reports of the CADE.

In the second structure, the possibility of executing agreements such as the settlement to resolve cartel investigations is introduced – this scenario never happened in Brazil. This institutional arrangement has the disadvantage of not perceptibly increasing the degree of cartel detection, in spite of leading to a possible decrease in the costs for enforcement of the decisions. There is no substantial benefit for actual cartel repression – the authority will continue facing the same difficulties for detection of existing cartels in the first

institutional structure, but they will have more resources to conduct investigations.

In the third structure, antitrust policy only institutes leniency agreements without the possibility of settlement – this happened in Brazil between 2000 and 2007. The direct effect of leniency is to increase the changes of dismantling cartels through qualified cheating on the part of the signatory to the leniency agreement – aware of the natural instability of cartels, the antitrust authorities would make use of this weakness to encourage cheating. Thus, implementation of leniency enables the strengthening of cartel repression through the increase in the chances of punishment resulting from the stronger possibility of detecting cartels. There is an indirect increase in the cartel costs, since there is a substantial increase in the probability of its detection, leading to a substantial discouragement of cartel practice.

In 2000, the Antitrust Law was amended and the execution of settlement agreements for violations related to collusive practices became the rule. This amendment shall be read in the context of the introduction of the institution of leniency, occurred at the same time. As a result, there was a clear contrast in the number of adverse judgments in comparison with the preceding period, as shown in schedule below. Part of this contrast may be attributed to the improvement of investigation tools at the disposal of the authority, but it is probable that the new institutional scenario has favored a stronger action.

Schedule 4 – Adverse Judgments in cartel cases in Brazil	
Year	**Adverse Judgments in cases involving collusive practices**
2000	Nine
2001	Two
2002	Six
2003	Five
2004	Eleven
2005	Eleven
2006	Six
* The practices punished under items I, II, III and VIII of Article 21 of the Brazilian Antitrust Law are considered collusive practices.	
Source: Annual Reports of the CADE.	

Hence, there is a possible relationship between the mere existence of agreements and the number of adverse judgments. In 2005, the OECD acknowledged in the Peer Review that "this approach, as well as the statutory denial of settlement in cartel cases, reflects sound policy where settlement entails no admission of liability and no penalty" (OECD and IDB: 2006, 168).

In the fourth structure, both leniency agreements and consent decrees are introduced simultaneously, which enables complete existence of the regulatory toolkit for the responsive regulation – this has been the case in Brazil since 2007. There is no doubt that this would be the optimum regulatory model for an efficient antitrust policy. In fact, the combination of both agreements is

recommended and deemed necessary by several specialists and institutions such as the World Bank and the OECD.

In May 2007, an amendment to the Antitrust Law reintroduced a provision incorporating the possibility of settlement agreement with cartel members.

According to that legislation, slightly different from the currently in force, the initial submission of the terms of the agreement shall be incumbent upon the investigated cartel member at any time, but the wording of the settlement agreement is in principle incumbent upon the commissioner appointed to analyze the case. The proposal shall contain the commitment to cease the collusive practice and to make a payment to a public fund. The authority may analyze the proposal only once, but the practice reveals that the initial proposal may be changed to meet the requirements made by the commissioners. Although the Antitrust Law did not contain any provision on the matter, CADE's rules establish that in case the antitrust investigation has been initiated by means of a leniency agreement, the execution of a settlement agreement would only occur if the defendant pleads guilty. This provision was widely criticized because it changed the provisions of the Brazilian Antitrust Law: there is no such differentiation in the law.

The new regime in force since 29 May 2012 continued with similar provisions. However, CADE's Administrative Rule # 1 became the confession requirement even stricter: every proposal must have a confession of involvement in the collusion.

Even with this near unanimity on the side of this fourth structure, there are certain difficulties to be overcome. The rationale of leniency agreements adopts relatively simple criteria, but this is not the case of consent decrees. While the antitrust authority takes advantage of the instability inherent in cartels to execute leniency agreements, the manipulation of settlement is more complex.

Win-win games, which are so clearly seen in the case of leniency agreements, become more obscure in the negotiation of settlement agreements with cartel members. What would a cartel member win by accepting a deal by means of which it agrees to pay a fine? In the US, the clarity of the punishment system, expressed in the U.S. Sentencing Guidelines, shows that the likely advantage of the settlement consists of a smaller fine. However, the same cannot be said about systems that do not dispose of this predictability like Brazil: it is hard to implement antitrust policies that break with the tradition of their legal system and allow the execution of agreements with violators. Moreover, what should we say about systems in which actual punishment may remain uncertain even after detection and conviction of the cartel by the antitrust authorities?

In fact, even after cartel detection, cartelists desire and are able to maintain the benefits obtained by means of the use of their market power, thus interfering with the objectives of public policies – occasionally, even a super-punishment would serve as an incentive for maintenance of the practice, provided it was not carried out immediately. By using institutional deficiencies characteristic of a certain country, cartel members are able to indirectly "change" the quantum

of punishment imposed by the antitrust authorities. From another point of view, the quantum imposed by the authorities may be actually inferior to the amount necessary to dissuade the cartel in case no deficiencies of the system are taken into consideration.

Simultaneous manipulation of leniency agreements and settlement requires a precise determination of the monopolistic gains made on the part of the antitrust authorities, so as to establish the optimum level of punishment. A light punishment in a settlement discourage leniency to the extent that all cartel members would continue betting on non-detection and, should they be detected, they would be able to settle the case upon payment of a low fine. This is certainly the worst-case scenario of undesired effects of simultaneous use of leniency agreements and consent decrees. Even in the US, referred to as the jurisdiction with the strictest antitrust enforcement, Connor (2007: 437) notices that punishment imposed on cartels was not sufficient to dissuade the formation of global cartels, and he identifies the cause as follows: "Large discounts on maximum fines are often granted for both legitimate reasons leniency programs) and for minimal cooperation. Payments of fines and settlements are often made many years after the cartel's monopoly profits were earned, which robs recipients of prejudgment interest. Moreover, by charging smaller subsidiaries of parent multinationals and by offering multi-year installment payments, antitrust authorities are reluctant to impose fines that might require a defendant to sell some of its assets".

Within this context, a failure in the manipulation of a model that theoretically produces the best outcome actually produces worst results. For this reason, the third institutional structure, as described above, could lead to better global results for the enforcement of antitrust authority in Brazil as the fourth.

2.2.4. Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?

The proposal can be made by the defendants and the administrative authority (namely the *Superintendência-Geral*, or the Directorate General in English).

2.2.5. Are there any other institutions involved other than the competition authority? Does a settlement, e.g., require any court approval? Please elaborate on the relevant procedure.

Most of the negotiations are carried out by one of the commissioner of the antitrust authority, assisted by a special negotiation team.

The Federal Public Prosecutor's Office (*Ministério Público Federal* in Portuguese) is an independent body which takes part in every decision-making hearing of the antitrust authority. Its role is far greater than *custus legis*: it includes the protection of society and consumers against the economic violations. For this reason, quite often, it voices its opinion on settlements. In the first settlement proposal, the Federal Public Prosecutor's Office had a leading role in persuading the antitrust authority not to enter into the proposed agreement.

No court approval is required.

2.2.6. Is it necessary for reaching a settlement to admit being guilty?

Yes, it is. Even though the Antitrust Law does not require it, article 185 of CADE's Administrative Rule #1 (*Regimento Interno do CADE*) rules that a confession is a mandatory requisite for a settlement whenever there is collusion.

2.3. Enforcement of settlement

2.3.1. Are there any rules as to the enforcement of a settlement? E.g. in monitoring any possible behavioral measures? What are the consequences if a settlement agreement is breached?

Yes, there are rules regarding the monitoring of the conditions as well as breach of the settlement.

In relation to the monitoring of the possible behavioural measures, there is a branch of the antitrust authority specialized in checking whether the commitments have been implemented. Even though there is still a long way to have a very efficient enforcement, one must admit that there have been remarkable improvements since its early days.

Normally, the settlement itself lists the sanctions. Moreover, the breach of the settlement agreement causes the antitrust authority to recommence the administrative proceedings.

2.3.2. Is a settlement subject to appeal? Can the parties agree to waive the right of appeal?

As a rule, no legitimate agreement is subject to appeal by its signatories: after all, they voluntarily agreed on those conditions. Every agreement has an implicit clause waiving the right of appeal. Of course, this does not happen if there was a defect in the free will of one of the parties. See item 1.3.1 above.

2.3.3. Would it e.g. be possible for a party reaching a settlement with a public authority to be prosecuted for the same behavior by a criminal prosecutor?

Yes, it is possible. This is really a catch 22 for the widespread use of settlement in the administrative sphere in cartel cases. As there is a confession requirement and no restriction to its use by the public prosecutors, it is very risky for natural people to enter into a settlement in a collusion case. The administrative settlements reached so far mostly referred to legal entities with limited participation in Brazil, so that none of its directly involved officers were living in Brazil.

2.4. Confidentiality and privilege

2.4.1. Is a settlement arrangement made public? What information is made public? Does this, e.g. include the settlement agreement itself, any documents and/or statements leading to such settlement?

The settlement must be made public pursuant paragraph 7 of article 85 of the Antitrust Law. There is no fixed rule and practice has shown varying degrees of confidentiality, most of them related to the requests made by those proposing the settlement. In other words, the public interest clause may be used to restrict the access of the public to some part of the agreement.

In other words, the agreement must be made public, but some other documents may also be disclosed. Moreover, the votes of the commissioners in the decision-making hearing are also public.

2.4.2. If the parties do not reach a settlement, can statements and/or documents used in trying to reach a settlement, be used against the accused (or other) parties?

In theory, the statement and/or documents cannot be used against the accused (or other) parties.

2.4.3. Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?

No, the parties who settled their case do not get any protection from follow-on claims.