OVERVIEW OF COMPETITION LAW IN BRAZIL

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Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional
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Contributors

Ana Paula Martinez
Aurélio Santos
Barbara Rosenberg
Bruno de Luca Drago
Caio Mario da Silva Pereira Neto
Carlos Francisco de Magalhães
Cristiano Rodrigo Del Debbio
Daniel Andreoli
Eduardo Caminati Anders
Eduardo Frade Rodrigues
Erika Vieira Sang
Fabiola Cammarota de Abreu
Fabricio Antonio Cardim de Almeida
Filippo Maria Lancieri
Francisco Niclós Negrão
Gabriel Nogueira Dias
Guilherme Morgulis
João Marcelo Lima
Joyce Midori Honda
Leonardo Maniglia Duarte
Luís Henrique Perroni Fernandes
Marcela Abras Lorenzetti
Marcelo Calliari
Marcio Bueno
Marcio Dias Soares
Marcos Exposto
Marcos Paulo Verissimo
Maria Eugênia Novis
Mariana Tavares de Araujo
Mauro Grinberg
Paulo Eduardo Lilla
Paulo Leonardo Casagrande
Pedro Paulo Salles Cristofaro
Priscila Brolio Gonçalves
Renata Fonseca Zuccolo
Renê Guilherme S. Medrado
Ricardo Botelho
Rodrigo Alves dos Santos
Sandra Terepins
Vinicius Marques de Carvalho

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Chapter XI

CARTEL SETTLEMENTS IN BRAZIL: RECENT DEVELOPMENTS AND UPCOMING CHALLENGES

LEONARDO MANIGLIA DUARTE
RODRIGO ALVES DOS SANTOS

I. Introduction

A strong settlement policy may be an effective tool for efficient competition law enforcement and cartel deterrence. Experience in several jurisdictions has shown that negotiated resolutions in cartel investigations may present benefits for the investigated parties, for the antitrust authorities and for society as a whole.

Under the Brazilian Antitrust Law, parties investigated may benefit from deductions in the amount of the fine and, in addition, may avoid costs related to lengthy investigations. For the antitrust authorities and society as a whole, a settlement may be a cost-efficient resolution to an investigation and, therefore, may enable the antitrust authorities to relocate their scarce resources to other cases. A settlement may also be a way of obtaining evidence to build a stronger case and help secure the conviction and punishment of other investigated parties, making the investigations easier and shorter and even strengthening the deterrent effect of cartel prosecution.

Another important advantage presented by a negotiated solution for the antitrust authorities in Brazil is to avoid having their decisions challenged
in court by the settling parties. Court challenges may absorb significant public resources, as judicial proceedings in Brazil may last for many years and delay enforcement of the decision by the antitrust authorities. Additionally, a settlement may also allow the antitrust authorities to quickly collect monetary contributions that could otherwise take years of litigation to be finally collected through the imposition of fines.

In certain cases, the authorities may also be able to extract certain commitments from the settling defendants that go well beyond what they could obtain through litigation, which may improve competition in the affected markets – i.e. by correcting market or regulatory failures – and benefit society in ways that could not be achieved in a decision of conviction.

Therefore, it is not without reason that several jurisdictions around the world have decided to include cartel settlement policies in their competition enforcement tool kit, and are constantly seeking to improve the applicable rules to build a system with the right incentives to encourage defendants to settle and cooperate with the investigations, while also avoiding fostering sub-optimal punishment and deterrence or discouraging applications for leniency, which still remain the most effective tool to uncover and dismantle cartels. Finding the optimal balance between these goals is essential to implement a successful cartel settlement system.

The Brazilian experience presents a very interesting example of developments seeking this balance and the interaction and conflicts between a settlement policy and a leniency program in an emerging economy with a still-young tradition in competition enforcement.

There is little doubt that the Brazilian antitrust settlement policy has been successfully improved in recent years. Nevertheless, in spite of all the significant progress and success in this area, some controversial issues have not yet been properly addressed by the applicable rules or by case law, which may prevent the antitrust settlement system in Brazil from achieving its full potential and curb its effectiveness.

The purpose of this paper is to present an overview of recent developments in the Brazilian antitrust settlement system with focus on settlements in cartel cases, pointing out the most controversial aspects surrounding this subject under the current legal framework and case law. This paper will also discuss proposals to improve the current system and bring more transparency and predictability to the negotiation process, so as to establish the right incentives to encourage both defendants and authorities to seek a negotiated resolution whenever possible.
This paper will be divided into the following sections: (i) Brief comments on the development of settlements under Brazilian Competition Law; (ii) Negotiating cartel settlements under the current legal framework; (iii) Final remarks.

A. Brief comments on the Development of Settlements under Brazilian Competition Law

So as to better understand the path and the foundations that led to the legal framework currently in place for the negotiation and execution of antitrust settlements, it will be useful to briefly review how this negotiating instrument was introduced and developed in Brazil.

1. The early years of enforcement of the 1994 Antitrust Law

It is fair to state that the first effective competition legislation enacted in Brazil was the 1994 Antitrust Law, following the opening of the Brazilian economy in the late 1980s/early 1990s.\(^1\) As in many jurisdictions with a young tradition in competition law, enforcement in the early years of the 1994 Antitrust Law was mainly focused on merger control.

Investigations of anticompetitive conducts were limited and usually derived from complaints lodged by third parties, with rare efforts from the authorities to detect possible violations and seek evidence. The lack of better investigation tools and scant experience in this area limited the authorities’ ability to effectively detect and prosecute anticompetitive practices, particularly cartels, which, by their very nature, are usually quite difficult to uncover.

In this context, even though the 1994 Antitrust Law provided for the possibility of executing settlements in cartel investigations, inspired by the U.S.’ consent decrees,\(^2\) this instrument was barely used during the first

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\(^1\) Note, however, that Brazil has had other laws dealing with competition matters before, such as: Law 2,919/1914; Decree-Law 22,626/1933; Decree-Law 431/1938; Decree-Law 869/1938; Decree-Law 4,599/1942; Decree-Law 7,666/1945; Brazilian Constitution of 1946; Law 1,521/1951; Law 4,137/1962; Brazilian Constitution of 1967; Brazilian Constitution of 1988; Law 8,137/1990; Law 8,158/1991; Law 8,666/1993.

years of enforcement of the 1994 Act, with just a few agreements executed between the years of 1995 and 2000.³

2. The 2000 Amendments to the 1994 Antitrust Law: the leniency program and the prohibition on settling in cartel cases

In 2000, the 1994 Antitrust Law was amended to introduce the leniency program and the possibility of making dawn raids with court authorization, which equipped the antitrust authorities with more effective tools of investigation.⁴ Nevertheless, the same amendment prohibited the execution of settlements in cartel cases, on the assumption that this restriction would boost the leniency program and encourage violators to apply for leniency rather than trying to settle in ongoing investigations afterwards.

In spite of the amendments to the 1994 Antitrust Law in 2000, it was only in 2003 that the antitrust authorities began to make effective use of the new tools of investigation, with the first dawn raid operations⁵ and the execution of the first leniency agreement,⁶ which took the authorities' capabilities to detect and successfully prosecute cartels to the next level. As from 2003, the fight against cartels became a top priority in Brazil. The antitrust authorities executed 8 leniency agreements and carried out several dawn raids between 2003 and 2007.⁷⁸

³ Only 18 cases were identified during this period. For more information in this regard, please refer to: PEREIRA, Guilherme Teixeira. Política de Combate a Cartel no Brasil: Análise Jurídica do Acordo de Leniência e do Termo de Compromisso de Cessação de Prática, 53, 2011, available at http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/8518/disserta%E7%E3%00%de%20mestrado%20-%20vers%E3%00%final%20banca%20examinadora.pdf?sequence=1.
⁷ For additional information in this regard, see the presentation made by the Superintendent-General of CADE at IBRAÇ’s International Seminar on Competition Policy in 2014. Available at http://www.ibrace.org.br/Uploads/Eventos/20SeminarioConcorrencia/PALESTRAS/%C3%9Altimo20Painel.pdf.
⁸ For additional information, see the competition enforcement annual report issued by the extinct Antitrust Division of the Secretariat of Economic Law – SDE in 2007. Available at http://portal.mj.gov.br/services/DocumentManagement/
Cartel cases have also become more complex – frequently involving leniency agreements, dawn raids and international/multijurisdictional investigations – and based on direct evidence of violation, increasing the chances of conviction and leaving the defendants with less room to question the existence of the conduct. As a result, defendants started to become more inclined to challenge the legality and validity of the evidence, at both the administrative and judicial levels.

In view of the fact that a negotiated resolution was no longer an option for cartel cases since the 2000 amendments, and that only the first-in could benefit from a leniency agreement, defendants had no alternative but to litigate, even if a negotiated resolution presented a more favorable outcome for both defendants and authorities. This situation led to a substantial increase in the number of lawsuits filed by defendants to question the authorities’ decisions, increasing litigation costs for all parties and the duration of the investigations, preventing antitrust authorities from allocating their limited resources to new investigations and, consequently, limiting the effectiveness of competition enforcement and cartel deterrence. The lack of a settlement option also prevented the authorities from benefiting from possible cooperation, which could help to secure the conviction of other defendants.


The need to have negotiated resolutions in cartel cases became clear and, as a result, the 1994 Antitrust Law was amended again in 2007 to reinstate a settlement policy in cartel investigations, with some adjustments to make it compatible with the leniency program. In order to preserve the leniency program and avoid the possibility of placing a settling defendant in a more favorable position than through a leniency applicant, the 2007

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9 Paulo Furquim de Azevedo, and Alexandre Lauri Henriksen. Cartel Deterence and Settlements: The Brazilian Experience, 5-6. Available at http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/6896/TD%2020265%20%20Paulo%20Furquim%20de%20Azevedo.pdf?sequence=1&isAllowed=y

amendment required that settlements in cartel cases should necessarily be conditional upon payment of a monetary contribution, which could not be less than the minimum fine provided by law in case of a conviction.

In addition, the Administrative Council of Economic Defense – CADE amended its Bylaws in 2007 to regulate the new settlement procedure, and included the additional requirement that the defendants should necessarily plead guilty in order to settle in investigations involving leniency agreements.11

Another innovation introduced by CADE in the 2007 amendment to its Bylaws was to allow the submission of a settlement proposal only once (“one-shot only”), in order to encourage defendants to submit their best offer at first, rather than submitting less attractive proposals during the course of the investigation and their best offer only at the end, when a final decision was about to be rendered.

Following the 2007 amendments to the 1994 Antitrust Law and the CADE Bylaws, an impressive number of settlement agreements were negotiated in cartel investigations. Between the years 2007 and 2010, 21 settlements were executed, which was more than the total number of agreements executed before 2007.12 In this initial period, negotiations were carried out separately by each CADE commissioner and his or her respective staff, not always followed the same negotiation standards and criteria. In addition, the fact-finding authority at the time, the Secretariat of Economic Defense of the Ministry of Justice – SDE/MJ, did not participate in the negotiations, which limited the possibilities of extracting more effective cooperation from the defendants settling.

Therefore, it proved necessary to create more effective mechanisms and procedures within CADE for purposes of ensuring consistency in negotiations and improving knowledge management on this matter, in order to capture, develop, share and effectively use the knowledge and experience acquired in the negotiations.13 In 2009, CADE again amended its Bylaws

13 BRENDO ZABAN CARNEIRO. Negociando com a Administração: Experiências Concretas na Superação dos Obstáculos à Negociação de Particulares com o Estado, 18, available
to create the “negotiation commissions”, entrusted with the attribution of carrying out negotiations of settlements under the supervision of the CADE commissioners in charge of reporting the case.\textsuperscript{14}

CADE also created a working group to train negotiators to make up the negotiation commissions, to ensure retaining and sharing knowledge and experiences obtained in previous negotiations, and to study more effective negotiating techniques based on the best international practices, including training negotiators abroad and exchanging experiences with antitrust authorities from other jurisdictions.\textsuperscript{15-16} As a result, CADE started to develop a staff progressively more knowledgeable and experienced in this area.\textsuperscript{17}

4. The 2011 Antitrust Law: restructuring the antitrust settlement policy

In 2011, The Brazilian Congress approved a new Antitrust Law (the “2011 Antitrust Law”), which came into force in 2012. The 2011 Antitrust Law made significant changes in the Brazilian Competition System’s institutional framework\textsuperscript{18} and also a pre-merger review system, but made

\begin{itemize}
  \item at: http://repositorio.fjp.mg.gov.br/consad/bitstream/123456789/607/1/C4_TP_NEGOCIANDO%20COM%20ADMINISTRA%C3%87%C3%83O%20EXPERI%C3%83%C3%82NCIAS.pdf.
  \item CADE Regulation No. 51/2009.
  \item For instance, the participation of Brazilian authorities in the discussions regarding cartel settlements carried out by the ICN cartel working group and by the OEDC Competition Committee in 2008.
  \item Under the 1994 Antitrust Law, the Brazilian Competition System was composed of three competition enforcement agencies: the Secretariat of Economic Law – SDE, the Secretariat of Economic Monitoring – SEAE, and the Administrative Council of Economic Defense – CADE. SDE, through its Antitrust Division, used to be the chief investigative agency for anticompetitive investigations and also issued non-binding opinions in merger cases. SEAE was primarily in charge of reviewing merger cases and issuing non-binding opinions. CADE worked as the decision-making authority in charge of rendering final decisions in both anticompetitive investigations and merger cases. The 2011 Antitrust Law restructured the
\end{itemize}
few changes to the rules for anticompetitive investigations and settlements provided under the 1994 Antitrust Law, as amended in 2007, delegating to CADE powers to establish complementary rules for settlement agreements through regulations.

When the 2011 Antitrust Law came into force in 2012, CADE enacted its new Bylaws under the new law and established rules for the negotiation and execution of antitrust settlements very similar to those provided by its previous Bylaws, as amended in 2009. The new Bylaws provided for adjustments to adapt the procedures to the new institutional framework established by the 2011 Antitrust Law.

In 2013, CADE amended its Bylaws to establish new paradigms, incentives and goals for the negotiation and execution of antitrust settlements. CADE also reorganized its internal procedures for the management of cartel cases seeking more effectiveness and celerity for cartel investigations. Based on the knowledge and experience gathered in settlement negotiations since 2007 and on the best international practices on this matter, CADE identified the need to design a system with the right incentives to pursue the following goals:

(i) Extract more cooperation from the settling defendants to strengthen the evidence against other defendants and increase the chances of conviction, rewarding defendants that cooperate more with larger discounts in the monetary contribution and leaving behind the pay-to-go settlement model that prevailed under the previous rules, in which little or even no cooperation was required from the settling defendants, even in cases that were still at the fact-finding stage;

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(ii) Encourage defendants to settle sooner rather than later, rewarding defendants that settle first and at the early stages of the investigation with larger discounts in the monetary contribution, considering that the sooner a settlement is executed, the more the authority can benefit from cooperation and save its resources for other investigations;

(iii) Preserve and foster the Leniency Program and ensure that a settlement does not present a more favorable outcome for defendants than a leniency agreement, with mandatory acknowledgment of participation in the conduct under investigation in cartel cases and payment of monetary contributions high enough to ensure deterrence;

(iv) Promote public perception of deterrence through the requirement of monetary contributions high enough to ensure dissuasion and disclosing to the public the terms of the agreements and benefits to competition and to society as a result of the settlements;

(v) Create two different procedures and incentive packages for the negotiation of settlements according to the stage of the investigation: (i) negotiation with SG-CADE before the end of the investigatory stage, when cooperation is more useful and a settlement tends to be more desirable for the authorities; and (ii) negotiation with the CADE commissioner selected to report the case, when the fact-finding stage has already ended, and the case is at the CADE Administrative Court for judgment, in which case execution of a settlement usually becomes less attractive for the authorities.

The 2013 amendments to the CADE Bylaws established the legal framework currently in force for the negotiation and execution of antitrust settlements in Brazil, following the guiding principles described above. The applicable rules, requirements and procedures for negotiating an antitrust settlement in Brazil, plus the most controversial issues arising in the negotiations and in the most recent case law on this matter, will be discussed in greater detail in the following section.

B. Negotiating Cartel Settlements within the Current Legal Framework

As mentioned before, the current rules regarding the negotiation and execution of settlement agreements with CADE are established in Law 12,529/11 (the “2011 Antitrust Law”), and in CADE Regulation No. 1/2012, as amended (“CADE Bylaws”).
1. Steps and procedures to propose and negotiate a settlement

According to the 2011 Antitrust Law, any defendant in an antitrust investigation may propose a settlement agreement to CADE before a final decision is rendered. The defendant, however, has only one opportunity to do so in the same investigation, so as to create a strong incentive for defendants to be efficient when proposing and negotiating a settlement. The CADE Bylaws set out detailed rules governing the proposal and negotiation of settlement agreements.

The 2011 Antitrust Law and CADE Bylaws established two different procedures for the negotiation of settlements, according to the stage of the investigation. If the case is still at the fact-finding stage at SG-CADE, the settlement should be proposed to and negotiated with SG-CADE. The applicable rules also allow SG-CADE to take the initiative and propose a settlement to the defendants. If the defendants do not accept SG-CADE’s proposal, they may still propose a settlement before a final decision is rendered.

If the fact-finding period is over and SG-CADE has already concluded its opinion and forwarded the case to the CADE Administrative Court for judgment, the settlement should be proposed and negotiated with the CADE Commissioner randomly selected to report the case. In both situations, a negotiation commission will be appointed to carry out the negotiations, under the supervision of either the Superintendent-General or the Commissioner.

The first step when a defendant decides to propose and initiate a negotiation is to contact the authorities and obtain a marker to ensure its place in line, considering that the current system awards larger discounts in the monetary contributions to settle for the defendants who come in first. It is possible to contact the authorities to confirm if there are other negotiations in progress and what would be the best place in line available at the moment.


21 To the best of the authors’ knowledge, SG-CADE has not made use of this provision up to the date on which this paper was written.
The authorities usually provide a written marker to secure the applicant’s place in line and grant it a 5-day period to formally propose negotiations, which may be very useful when the applicant still needs additional time to make a decision on starting a negotiation, but wishes to secure the best position in line available as soon as possible. Unfortunately, there is as yet no regulation on how to obtain a marker to negotiate a settlement, and the provision of clear guidelines on this matter by CADE would certainly be a welcome improvement.

With the submission of the formal request to negotiate, SG-CADE or the Commissioner will issue a decision to appoint the members of the negotiation commission and determine the start of the negotiation period. At SG-CADE, the negotiation period may be determined by the Superintendent-General, and suspended at its discretion. In practice, SG-CADE has been establishing a 30-day initial period and extending it for additional 30-days periods if necessary, at SG-CADE’s discretion. At the Administrative Court, there is a 30-day initial period for negotiations, which may be extended for additional 30-day periods, or suspended at the Commissioner’s discretion.

When the negotiation period is concluded, the authorities will grant a 10-day period for the settling defendant to submit its settlement proposal. In practice, the settling defendant usually submits a draft settlement proposal to the authorities in advance, allowing them to confirm that all terms are in line with the understandings reached during the negotiation, before a final proposal is formally submitted. It is also common for the Superintendent General or the Reporting Commissioner to discuss the terms of a draft proposal in advance with the other members of the CADE Administrative Court to confirm that the proposed terms are acceptable. This interaction with the CADE Administrative Court has proved to be extremely useful, considering that the Administrative Court can only accept or reject a settlement proposal, and cannot propose any amendments to it.

The CADE Bylaws state that the authorities may allow interested third parties to comment on the settlement proposal submitted by a settling defendant, who will have 10 days to make any amendments if any comment is presented.

Once the settling defendant submits its final proposal, SG-CADE will issue its opinion, recommending approval or rejection of the proposal, and submit it to the CADE Administrative Court for approval. If the
negotiation is conducted by the Reporting Commissioner, he or she will submit the settlement proposal to the Administrative Court with his or her vote to approve or reject it.

After the parties execute a settlement agreement, CADE will declare suspension of the investigation with respect to the settling defendant until the date of the fulfillment of all the conditions and performance of the obligations set out in the agreement. Once the conditions established in the settlement are fulfilled, the administrative proceedings will be ended with respect to the defendant who executed the settlement.

However, if the settling party does not comply with the provisions of the settlement, CADE may impose the applicable penalties and resume the investigations against the settling defendant. In addition, CADE may also adopt other administrative and legal measures to enforce the terms of the agreement.

2. Confidentiality and guarantees if an agreement is not reached

The CADE Bylaws ensure that a proposal to initiate negotiations to settle will not be considered as any form of confession or acknowledgment of any illicit conduct under investigation. At CADE’s discretion, the negotiation process and the proposal to settle may be treated as confidential and disclosed only when submitted to the CADE Administrative Court for approval. Although confidentiality is not a guarantee, as a rule CADE has been granting confidential treatment to negotiations until their submission to the CADE Administrative Court for approval.

The settlement agreement will necessarily become public after its approval by the Administrative Court, and CADE usually releases public statements to disclose the terms of the agreements, the amount of the monetary contributions collected, and the benefits for competition resulting from the settlement, so as to increase the public perception of deterrence. The information and documents submitted as part of the defendant’s cooperation may be treated as confidential and disclosed only to the other defendants for the specific purposes of exercising their right of defense.

According to the rules provided by the CADE Bylaws for the negotiation of leniency agreements, all information and documents presented by the leniency applicant during the negotiation will be either
returned or destroyed and may not be used by the authorities if an agreement is not reached. CADE has been extending the same guarantees to settlement negotiations, although the CADE Bylaws are silent on this matter.

Considering that these guarantees are not expressly provided for under the CADE Bylaws, it is usually advisable to obtain a written statement from the authorities confirming that they will be extended to the settlement negotiation. Although CADE has been accommodating this frequent concern of defendants during the negotiations, it is important that CADE should include this guarantee explicitly in its Bylaws, so that defendants can feel more comfortable to fully cooperate and share information and documents with the authorities without any reservations.

3. **Mandatory requirements in a settlement agreement**

According to the 2011 Antitrust Law, all settlement agreements must state: (i) the commitments to be undertaken by the settling party in order to cease the anticompetitive conduct or its effects, plus other commitments that CADE considers suitable; (ii) the fine to be imposed in case of noncompliance with the agreement; and (iii) the compensation to be paid to the Fund for Defense of Diffuse Rights (Fundó de Defesa de Direitos Difusos – “FDD”),\(^{22}\) when applicable.

In cases involving the investigation of concerted practices between competitors, the Antitrust Law states that payment of a monetary contribution is mandatory, and the amount may not be less than the minimum fine set by law.\(^{23}\) According to the law, payment of a monetary contribution in cases other than cartel investigations is not strictly mandatory, but may be required when applicable, at CADE’s discretion. In practice, CADE has also been imposing this payment as a condition for

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\(^{22}\) The Fund for Defense of Diffuse Rights financially supports projects to repair damages to the environment, free competition, consumer rights and the historical, cultural and artistic heritage.

\(^{23}\) As provided for by Article 37 of the 2011 Antitrust Law, anticompetitive conducts subject offenders to fines of 0.1\% to 20\% of the annual gross revenues registered by the company, economic group or conglomerate in the year before filing the Administrative Proceeding, in the business activity where the conduct occurred.
settling in practically all recent cases involving non-cartel violations (i.e. unilateral conduct and abuse of dominance) for deterrence purposes.24

The CADE Bylaws also require that settling defendants acknowledge their participation in the conduct under investigation and cooperate with the investigations in cases involving cartels.

4. Negotiating a settlement

As mentioned before, antitrust settlements are negotiated with a negotiation commission consisting of at least 3 members of CADE’s staff, under the supervision and instruction of either the Superintendent-General or the Reporting-Commissioner, depending on whether the case is at SGCADE or at the Administrative Court. As a rule, the officials involved in the investigations and who are familiar with the details of the cases are invited to be part of the negotiation commissions. CADE has invested in negotiation skills training to prepare its staff for this task, and developed negotiation procedures to ensure that negotiations move quickly and efficiently.

In this context, CADE has been dividing the negotiation procedures into three steps in order to separately discuss the three main commitments required from defendants in a cartel settlement: (i) cooperation; (ii) acknowledgment of participation in the conduct; and (iii) monetary contributions. The purpose of this division is to avoid discussion of one commitment contaminating discussions of the others, compromising the negotiations.

The order of discussions is also important to allow the authority to assess how effective and useful the cooperation the defendant has to offer is. This aspect may affect negotiation of the requirements that follow, considering that the more a defendant cooperates with investigations, the better its discount in the monetary contribution should be. In principle, strong cooperation may also put a defendant in a better position to negotiate

24 In this regard, see, for example, CADE, Reporting Commissioner Márcio de Oliveira Júnior (Settlement Agreement No. 08700.004410/2014-58) (May 27, 2014). CADE, Reporting Commissioner Olavo Zago Chinaglia (Settlement Agreement No. 08700.004379/2010-21) (Aug. 25, 2010).
the scope of acknowledgment of participation in the conduct. Each of these main topics of the negotiation will be described in greater detail below.

C. Cooperation with the Investigations

The first step of a settlement negotiation is to discuss what the defendant has to offer in terms of cooperation and what the authorities expect in this regard. Within the current legal framework, a cartel settlement will only be attractive for the authorities if the defendant settling is willing and able to cooperate with the investigations. The type and extent of cooperation, however, may vary from one case to another and may not necessarily be limited to the provision of direct evidence to confirm the existence of the cartel and participation of other defendants. Cooperation may also involve technical assistance regarding the markets under investigation, assistance in the analysis of documents and associated evidence, among others. As a rule, CADE requires the settling defendants to provide a summary of the conduct and also documents to support the facts declared by the defendants.

The level of cooperation will be considered by CADE in setting the monetary contribution to settle, which is calculated based on the amount of the expected fine that could be imposed on the defendant in case of conviction, minus a discount for settling. If an agreement is reached and a settlement is executed, CADE usually requires the settling party to agree to provide additional cooperation until the investigation is ended, if necessary.

In certain cases, CADE may waive the defendant settling from the obligation to cooperate, particularly if the defendant has no valuable cooperation to offer or if the case is already at an advanced stage, with sufficient evidence to support a decision. In the absence of valuable cooperation, a settling defendant may receive a smaller deduction from the monetary contribution.

a. Acknowledgement of participation in the conduct

The second step of the negotiation is to discuss the extent and scope of acknowledgment of participation in the conduct under investigation. As discussed before, this requirement has been made mandatory in cartel settlements, to preserve the leniency program and deterrence. This mandatory commitment may play a key role in a defendant’s decision to settle, considering that a settlement agreement does not shield defendants
against possible civil claims for damages\textsuperscript{25} or any individuals involved against criminal prosecution,\textsuperscript{26} taking into account that practicing a cartel is also considered a crime under applicable Brazilian law. Therefore, it is advisable to make a careful risk assessment of possible civil claims for damages and criminal prosecution before entering into a settlement negotiation.

The lack of criminal immunity for individuals who decide to settle has been considered a major barrier that may prevent individuals from engaging in settlement negotiations, particularly at the present time, when there seems to be a trend towards intensifying criminal prosecution for anticompetitive practices.\textsuperscript{27} This factor may also prevent companies from entering into negotiations seeking to preserve their executives and employees, or make it very difficult to convince individuals to cooperate and join the agreements.\textsuperscript{28}

Nevertheless, the antitrust authorities do not seem to be supportive towards an amendment to the 2011 Antitrust Law to create criminal immunity for settlements. A possible concern is that the extension of this benefit to settlements might weaken the leniency program.

\textsuperscript{25} Antitrust lawsuits for damages are not yet very common in Brazil, considering that the Brazilian legal framework does not offer the necessary tools and incentives for private parties to build a successful case and to encourage them to seek compensation before the courts of law. A high level of burden of proof is imposed on the plaintiffs (who need to demonstrate the damages actually suffered as a result of the conduct). In addition, there are no treble damages or punitive damages in Brazil (compensation must be proportional to the actual damages suffered). Only a few lawsuits for antitrust damages have been filed in Brazil and in none of them has a final decision been rendered so far. In this regard, see Leonardo Maniglia Duarte, Lívia Gandara, and George Carroll. \textit{Private Antitrust Enforcement in Brazil}. Robins, Kaplan, Miller & Ciresi L.L.P. Antitrust Bulletin – Fall 2012 | Vol. 4, No. 2. Available at http://www.robinskaplan.com/resources/newsletters/~/media/013947DD3E0A44F396EEFAD7B2438C44.ashx

\textsuperscript{26} Although criminal prosecution for a cartel is still not very common in Brazil, the Public Prosecutors have recently become more active, filing criminal charges against individuals in certain cases.

\textsuperscript{27} Perpaolo Bottini, Ricardo Inglez, and Fernanda Ayres Dellos. \textit{A nova dinâmica dos acordos de cessação de práticas anticoncorrenciais no Brasil}, supra note 20, at 9.

\textsuperscript{28} Brian Byrne, and, Carvalhaes Amadeu Ribeiro. \textit{Three Proposals To Improve Brazil’s Cartel Settlement Process}. 6-7. ABA/IBRAC’s Antitrust in the Americas Conference, São Paulo, Brazil, 2013.
These risks may be mitigated depending on the extent and scope of acknowledgment of participation that the defendant is able to negotiate with CADE. There have been cases in which CADE has accepted generic descriptions for purposes of acknowledgement of participation in the settlement agreement disclosed to the public, leaving the specific details of the conduct to the confidential “summary of conduct” submitted by the settling defendant for cooperation purposes, which is usually treated as confidential and available to CADE and the other defendants only for purposes of exercising their right of defense. Therefore, a successful negotiation of the extent, scope and confidentiality of this requirement is crucial for mitigating possible risks for the settling defendants.

The approach of accepting a generic and less detailed acknowledgement of participation in the conduct as part of the settlement agreement to be made available to the public fully meets the legal requirement on this matter and, at the same time, mitigates the level of exposure of defendants to possible risks arising from this acknowledgment. This approach benefits not only the defendants, but also the authorities with an additional incentive to encourage defendants to settle, and increase the attractiveness of the settlement policy. In this context, it would be a significant improvement if CADE were to amend its Bylaws to expressly provide for this possibility, so as to afford defendants greater predictability and attractiveness when considering the possibility of settling.

It would also bring more comfort to defendants to have clear rules addressing the possibility of acknowledging participation only in part of the conduct, considering that there are cases involving a variety of different conduct, timeframes and geographic regions, not always related to all the defendants. In fact, it is unreasonable and unfair to require a defendant to admit participation in all the conduct under investigation when there is no evidence in the case files that such defendant would have participated in all of them. Therefore, it is advisable for the CADE Bylaws to lay down clear rules allowing a partial admission of participation, which should be limited to the extent of the evidence against the defendant settling in the case files.


30 *Idem.*
b. Monetary contribution

Discussions regarding the monetary contribution are left to the end of the negotiation, not only because it is usually the toughest topic to be negotiated, but also because setting the amount of the contribution will be affected by the extent and value of the cooperation provided. Although the 2011 Antitrust Law states that the monetary contribution may not be less than the minimum fine set by law, \(^\text{31}\) monetary contributions in cartel cases have been set at levels far beyond the minimum amount.

The criteria established by the CADE Bylaws for setting monetary contributions take into consideration the amount of the “expected fine” that could be imposed in case of conviction, minus a discount for settling. According to the CADE Bylaws, for settlements negotiated with SG-CADE, the amount of the contribution must take into account the degree of the defendant’s cooperation with the investigations and the point at which the defendant makes the proposal, observing, whenever possible, the following levels of discounts:

(i) Reduction from 30% to 50% of the expected fine for the first defendant to propose a settlement agreement;

(ii) Reduction from 25% to 40% of the expected fine for the second defendant to propose a settlement agreement;

(iii) Reduction up to 25% of the expected fine for other defendants that propose a settlement agreement.

For settlements negotiated when the case is already at the CADE Administrative Court, however, the amount of the contribution should take into consideration the status of the investigation, and the maximum discount applicable is 15% of the expected fine only.

If the authorities consider that the settling defendant has provided strong cooperation, they usually grant the maximum discount allowed (i.e. 50% for the first to settle, 40% for the second to settle and 25% for the third to settle while the case is still at SG-CADE). Nevertheless, it is not possible to receive a higher percentage discount than the percentage granted to

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\(^{31}\) As stated by Article 37 of the Antitrust Law, anticompetitive conduct offenders to fines of 0.1% to 20% of the annual gross revenues registered by the company, economic group or conglomerate in the year before filing the Administrative Proceeding, in the business activity in which the conduct occurred.
other defendants in previous settlements reached in the same investigation. As discussed above, these provisions seek to encourage defendants to settle sooner rather than latter and when the case is still at the fact-finding stage before SG-CADE, when cooperation is more useful for the authorities.

One of the most challenging topics when negotiating a settlement is to reach a common understanding on what should be the “expected fine” in case of conviction, which results from the lack of clear guidelines for setting fines under the 2011 Antitrust Law. The estimate of the expected fine requires the definition of: (i) the relevant revenues to be considered as the basic amount for calculating the fine, which, according to the Antitrust Law, should be the revenues registered by the company or group in the “business activity in which the violation occurred”; and (ii) the percentage fine to be applied, which, according to the Antitrust Law, may vary from 0.1% to 20% of the relevant revenues.

The definition of “business activity in which the violation occurred” has been the source of debates and disagreements between antitrust authorities, legal practitioners and academics since enactment of the 2011 Antitrust Law. It is undoubtedly one of the most controversial issues regarding setting fines and negotiating settlements in Brazil nowadays. Some hold that this legal concept should be interpreted to encompass only the products and services affected by the conducts under investigation or the relevant markets affected, while others, including the authorities, defend a broader interpretation to include other products and services that may be considered part of the same activity.

In this regard, CADE has enacted CADE Regulation No. 3/2012 to establish a list of “business activities” for purposes of setting of fines, which was based on the National Classification of Economic Activities – CNAE. The CNAE was inspired by the United Nations International Standard Industrial Classification of All Economic Activities – ISIC.32

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32 Some academics sustain that CADE Regulation No. 3/2012 is illegal, based on the argument that it would exceed CADE’s normative powers, considering that the Antitrust Law did not delegate to CADE specific powers to enact rules on setting fines. In this regard, please refer to Sérgio Varella Bruna’s presentation at the IBRAC International Seminar on Competition Policy in 2012. Available at: http://www.ibrac.org.br/Uploads/Eventos/18SeminarioConcorrencia/PALESTRAS/Sergio%20Varella%20Bruna.pdf
The problem is that most of the categories of business activities on this list are overly vague and wide-ranging, and frequently end up capturing revenues derived from the sale of products and services not even slightly affected by the alleged violations, leading to the setting of fines that may be disproportional to the anticompetitive effects potentially produced by the conduct under investigation.  

Although the CADE Administrative Court has in some cases already expressed the understanding that CADE Regulation No. 3/2012 could be applied with shades of proportionality in the light of the specific circumstances of each case, there are still many uncertainties on this matter, limiting predictability and transparency in the negotiation of monetary contributions and making settlements less attractive for defendants.

For instance, in the air freight cartel investigation, the CADE Administrative Court concluded that only billing from air cargo transportation should be considered for calculating all the fines / monetary contributions levied on the defendants, even though CADE Regulation No. 3/2012 defines “Air Transportation – passengers and cargo” as one selfsame “business activity”.

Following the same approach, in the settlement agreements executed in the investigation of a cartel in a tender for procurement of ambulances, the CADE Administrative Court concluded that it would not be reasonable and proportional to set the expected fine on the basis of the total billing of the economic group, based on the classification of business activity as provided by CADE Regulation No. 3/2012, considering as a parameter the amount of the contract related to the tender, taking into account that the scope of the investigation was limited to just one tender. A similar understanding was also applied by the CADE Administrative Court in the settlement agreement executed in the investigation of a cartel in tenders for providing laundry services to public hospitals in the State of Rio de Janeiro, in which the CADE Administrative Court also applied a more flexible approach for reasons of proportionality.

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33 Alberto Afonso Monteiro. *Settlements in Cartel Cases: Recent Developments and Proposals for Improvement*, supra note 33, at 15.

34 Administrative Proceeding No. 08012.011037/2006-02

35 Administrative Proceeding No. 08012.003931/2005-58

Based on these precedents, there is still a significant level of uncertainty on how to define the “business activity in which the violation occurred” for purposes of setting fines, which may have the undesirable effect of leading to fines or monetary contributions that are unreasonable and disproportional to any potential effects caused by the conduct under investigation in the affected relevant markets.

The most suitable solution for this problem would be to interpret the legal concept of “business activity in which the violation occurred” as the product(s) or service(s) potentially affected by the conduct under investigation, following the best international practices on this matter.\textsuperscript{37-38-39} CADE could easily settle this highly controversial issue by regulation to amend or replace CADE Regulation No. 3/2012 or even through case law, with more conclusive and clear rules or guidelines for setting fines.

The list of business activities provided by CADE Regulation No. 3/2012 may even be considered as an initial parameter or starting point for a definition of the business activity in which the violation occurred, but never as a strict listing to be applied mechanically and automatically, without taking into consideration the peculiarities of each case. Otherwise, it will inevitably end up taking in separate business activities that may not be even remotely related to or affected by a given conduct.

In the context of a negotiation of a settlement, in which there is usually no final assessment of the scope of the conduct under investigation and of the level of participation of each defendant, it is essential for the definition of the relevant revenues to serve as the basis for calculating the expected fine to take into consideration the scope of the accusations and evidence against the settling defendant and the business activities that may actually have been affected by the conduct defined in such accusations.

Although it is important to preserve the amount of the expected fine that might be imposed in case of conviction as a parameter to set


\textsuperscript{38} Alberto Afonso Monteiro. \textit{Settlements in Cartel Cases: Recent Developments and Proposals for Improvement}, supra note 33, at 15.

\textsuperscript{39} Brian Byrne, and, Carvalhaes Amadeu Ribeiro. \textit{Three Proposals To Improve Brazil’s Cartel Settlement Process}, supra note 28, at 14.
the amount of the contribution, so as to ensure deterrence, it is equally important to avoid setting contributions that may be disproportional to the potential negative economic effects derived from the conduct and possible advantage gained or pursued by the violator. If CADE does not adopt a proportional approach in setting fines and monetary contributions, there is a risk that defendants may be discouraged to settle, with convicted defendants ending up challenging CADE’s decision before the courts of law, which may ultimately decide what should be the best interpretation for the legal concept of business activity.

Another troublesome aspect in discussing the “expected fine” with the authorities is to determine the percentage of the fine that might be imposed on the settling defendant in the event of conviction. In the most recent decisions in settlement cases, CADE has applied a standard percentage of 15% to estimate the expected fine, considering that fines in recent cases of cartels have been mostly set around this percentage. The automatic application of a percentage of 15% in each and every case involving an accusation of a cartel, on the sole argument of its involving a violation considered to be grave, fails to take into account other criteria for weighting the penalties provided for by the Antitrust Law, and minimizes the importance of the constitutional principle of individualization of the penalty.

In addition to the seriousness of the violation, the 2011 Antitrust Law also determines that weighting the penalty should take into account, among other criteria, the good faith of the offender, possible negative economic effects produced on the market and the advantage gained or pursued by the offender. It is essential for all aggravating and attenuating circumstances covered under the Antitrust Law should be duly considered when setting the expected fine, at the risk of reaching an amount that would be excessive and disproportional.

The peculiarities of each defendant in an investigation may justify the application of different criteria in setting the fine for each defendant, and must be analyzed on a case-by-case basis, out of respect for the constitutional principle of individualization of the penalty and the weighting criteria for penalties provided by law.40

40 Another interesting argument to question the standard 15% fine is the fact that the 2011 Antitrust Law amended the range for the application of fines from 1% to 30%
In spite of all these arguments, CADE has been insisting on adopting the 15% standard percentage to estimate the expected fine in most cartel cases. Like the dispute regarding definition of the legal concept of “business activity in which the violation occurred”, poor predictability and transparency regarding the definition of the percentage of the expected fine also derives from the lack of clear and consistent guidelines for setting fines for anticompetitive violations.

CADE, however, has been more open to adopting a flexible approach for the definition of the relevant revenues in certain cases, which is usually more effective in terms of reducing the amount of monetary contributions. It is important to note that CADE has also required the application of a duration adjustment to increase the amount of monetary contributions in cases of cartels that lasted for longer periods, usually adding 1.5% to the amount of the estimated fine per year of duration of the cartel. The enactment of guidelines to bring more predictability and transparency to the rules for setting fines would be a major improvement.

D. Other Commitments that May be Required in a Settlement

In addition to the mandatory commitments required by the Antitrust Law, settling defendants may also be required to undertake other obligations in order to settle, such as refraining from challenging the use of documents obtained either from the leniency applicant or by dawn raids before the courts of law, and implementing or improving compliance programs. In principle, CADE may impose or the settling party may propose different obligations depending on the specificities of each case.

In certain cases, particularly in cases of unilateral conduct, the authorities may try to obtain certain commitments from the settling defendants to improve competition in situations of market or regulatory failures, reduce barriers to entry for new competitors, and create better

(under the 1994 Antitrust Law) to 0.1% to 20%. Therefore, the level of 15% applied by CADE to cases of cartels, under the guidance of the previous law, would be equivalent to approximately 10% under the new law. To maintain proportionality with the levels of fines that were being applied when the previous law was in effect, considering that CADE applied a rate at a percentage corresponding to 50% of the maximum rate provided for in law (15%, considering the maximum rate of 30%), the proportional rate corresponding to 50% of the maximum stated in the new law would be 10%.
conditions for the development of competition in ways which could not be achieved in a decision of conviction.\textsuperscript{41}

A desirable improvement to be considered in the regulation of settlement negotiation would be to provide incentives to encourage settling defendants to propose these types of commitments to settle, by granting additional discounts in the monetary contributions in exchange for the implementation of measures which could have the effect of correcting market or regulation flaws or in some way improving competition in the affected markets.

\section{II. Final Remarks}

It is undisputable that the antitrust settlement policy in Brazil has undergone considerable progress since enactment of the 1994 Antitrust Law. The current rules provided by the 2011 Antitrust Law and CADE Bylaws, as amended in 2013, made considerable improvements in terms of predictability and transparency, and took the Brazilian antitrust settlement system to the next level, making it better aligned with the best international practices.

The current system seems to have achieved a good balance between creating incentives to encourage defendants to settle – and to do that sooner rather than later –, while, at the same time, also preserving the attractiveness of the leniency program and the deterrent effect of negotiated resolutions. The success of the settlement policy is borne out by the number of agreements executed in cartel cases since the current rules came into force in 2013: 6 in 2013, 22 in 2014, and 6 in just the first two months of 2015.

In spite of all developments so far, there are still many gray areas that need to be clarified by CADE so as to have more transparency and predictability in the negotiation process and provide the settling defendants with a clear picture of the possible outcomes in a settlement negotiation.

\textsuperscript{41} Administrative Proceeding No. 08012.002474/2008-24. Under the agreement, AmBev agreed to stop using 630-ml returnable bottles with beer of any current or future mark, and to discontinue the line of differentiated bottles, considering that this practice was allegedly increasing rivals’ costs as an abrupt departure from the returnable bottle system in place in Brazil for many years, in which all brewers used the same standard 600 ml returnable bottles.
These improvements are key to ensuring the attractiveness of the settlement policy for defendants, and consequently allow the authorities to use settlements as an effective tool for cartel enforcement and deterrence. In this context, the upcoming challenges that CADE still has to face to improve the Brazilian antitrust settlement system may be summarized as follows:

1. **Markers**: establish clear rules and procedures on how defendants can obtain a marker to secure their places in line to negotiate settlements.

2. **Confidentiality**: establish clear rules and guidelines on the situations in which confidentiality may not be granted in a settlement negotiation, and treat these situations as exceptions and confidentiality as the rule. It is also important to ensure the maximum degree of confidentiality possible for the information and documents provided by the settling defendant in cooperation, limiting access to such information and documents to other defendants and for defense purposes only. The greater the level of confidentiality granted by the authority, the better the chances that defendants will fully cooperate.

3. **Guarantees if an agreement is not reached**: establish clear rules to expressly extend the same guarantees provided for the negotiation of leniency agreements to the negotiation of settlements regarding the use of information and documents provided in the negotiation, so as to ensure that all information or documents presented during the negotiation will be either returned or destroyed, and will not be used by the authorities if an agreement is not reached. These guarantees are essential to provide the defendants with the necessary comfort to cooperate and share information and documents without reservations.

4. **Scope of Acknowledgment**: provide clear rules and guidelines for the extent and scope of acknowledgment of participation in the conduct, and allow generic and less-detailed acknowledgement of participation in the settlement agreement to be made available to the public, leaving the details of the facts in the confidential version of the history of conduct to be made available only to the other defendants for defense purposes. This approach is consistent with the legal requirement on this matter and, at the same time, mitigates the level of exposure of defendants to possible risks arising from this acknowledgment, benefiting not only the defendants, but also the authorities with an additional incentive to encourage defendants to settle and fully cooperate. It is also recommendable to have clear rules on the possibility of acknowledging participation in only part of the conduct,
which should be limited to the extent of evidence against the settling defendant in the case files.

5. **Mitigating the risk of criminal prosecution for settling individuals**: a conclusive solution for this concern seems to require amendments to the applicable legislation, to allow the public prosecutors to refrain from criminally prosecuting individuals who decide to settle, or to reinstate the possibility of executing agreements in criminal lawsuits for cartel violations, which was no longer a possibility for cartel violators after the increase in the criminal penalty for cartels introduced by the 2011 Antitrust Law.\(^{42}\) Therefore, although CADE seems to have little room to solve this concern by itself, it may try to join forces with the public prosecutors to find a reasonable solution to mitigate this risk and encourage individuals to settle.

6. **Setting fines**: It is of the utmost importance for CADE to establish clear rules and guidelines for setting fines for anticompetitive practices in order to improve consistency and predictability not only in the settlement negotiations, but also – and perhaps more important – for setting fines in decisions of conviction. The legal concept of “business activity in which the violation occurred” should be interpreted as the product(s) or service(s) potentially affected by the conduct under investigation, following the best international practices on this matter and in accordance to the principles of proportionality and reasonableness established by the Brazilian Constitution and applicable legislation. CADE should also provide clear rules for defining the percentage of the fine and take into consideration all mitigating and aggravating circumstances in this decision, as opposed to applying a standard percentage for certain practices (i.e. 15% in all cartel cases) regardless of the particularities of each defendant’s situation. It is also advisable to establish clear rules for the application of duration adjustments as an aggravating factor.

7. **Extra discounts in the monetary contribution for measures that may improve competition**: provide incentives to encourage settling defendants to propose or accept commitments that may have the effect of correcting market or regulation flaws or in any way improving competition in the affected markets.

\(^{42}\) Brian Byrne, and, Carvalhaes Amadeu Ribeiro. *Three Proposals To Improve Brazil’s Cartel Settlement Process*, supra note 28, at 14.
8. **Tailor-made rules and procedures for settlements in unilateral conduct investigations:** although a detailed analysis of the negotiation of settlements in cases involving unilateral conduct exceeds the scope of this paper, it is worth noting that the 2011 Antitrust Law does not lay down specific rules and requirements for the negotiation of settlements involving unilateral conduct, which presents different challenges and concerns and should therefore be treated differently than cartel cases, with tailor-made incentives to encourage the defendants to settle and cooperate in helping to improve competition in the affected markets. Therefore, it would be an improvement if CADE were to establish specific procedures, incentives and discounts to encourage settlements in these types of investigations.

These proposals would certainly add more predictability and transparency to the negotiation of settlements, and substantially improve the already-successful system implemented by CADE. The recent progress achieved so far in this and other areas of competition enforcement in Brazil is remarkable and demonstrates that CADE has what it takes and is on the right path to facing these challenges and improving even further the legal framework for the negotiation of settlements.

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