

CADE Revises Regulation on Cartel Settlements

On March 7, 2013, Brazil's antitrust agency CADE revised its regulation on settlement proceedings regarding pending investigations for alleged anticompetitive behavior. The revised rules are primarily related to settlements in cartel cases and directly affect pending international cartel investigations.

Under the new policy, to settle an ongoing cartel case, defendants (both individuals and companies) must admit their participation in the illegal behavior, cooperate with the investigation and pay a settlement sum. Differently from the previous system, the new regulation establishes predetermined level of discounts depending on the moment in time the defendant comes forward and the degree of expected cooperation. In case the investigation is still pending before CADE's Superintendency, the first defendant to settle can be granted a reduction of between 30 and 50 per cent of the expected fine, the second 25 to 40 per cent and the third onwards up to 25 per cent. If the case is already pending at CADE's Tribunal for final adjudication, a defendant is entitled to a fine reduction of up to 15 per cent. In any event, the settlement sum can never be less than the minimum fine for anticompetitive conduct provided for in Brazil's competition law, which is equivalent to 0.1 per cent of a company's (group of companies' or conglomerate's) gross revenues generated in the sector of activity affected by the infringement in the year prior to the initiation of the investigation.

The general procedure rules provides that (i) a defendant can only try to settle once ("one-shot game"), and that (ii) the negotiation period is for 30 days, renewable for another 30 days, if the case is at CADE's Tribunal awaiting adjudication. For investigations pending at the Superintendency, the negotiation deadline is established at the discretion of the agency. The negotiation process may also be confidential at the discretion of CADE.

Pursuant to the previous rules, the investigation was suspended for the settling parties during a specified period of time for the conditions set forth to be fulfilled, after which, they would be excluded from the proceedings. Under the new policy, the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE adjudicates the cartel investigation. CADE is allowed to settle with only one defendant, i.e., it is not necessary that all defendants settle or settle at the same time. In this case, the investigation will be suspended with respect to the settling party and proceed with respect to the other defendants.

Cartels are both an administrative infringement and a crime in Brazil, with parallel and independent enforcement systems. A settlement with CADE does not shield individuals from criminal liability and the fact that an admission of guilt is now mandatory requires interested parties to carefully consider the expected effects a settlement at the administrative level might have at the criminal front. Also, the level of private antitrust enforcement is increasing in Brazil and settlements with CADE may also prompt civil courts to determine that award for damages be paid by settling parties to third-parties affected by the conduct.

Finally, pursuant to the previous rules, the investigation was suspended for the parties that settle, during a specified period of time for the conditions set forth to be fulfilled, after which, they would be excluded from the proceedings. Under the new policy, the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE adjudicates the case.

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