

Client Alert

Latham & Watkins
Litigation Department

Brazil Proposes New Regulation to Boost Cartel Enforcement

On December 14, 2012, the Administrative Council for Economic Defense (CADE), Brazil's competition authority, proposed a regulation that improves the settlement procedure for companies involved in cartel activity that fail to qualify for amnesty.¹ The public comment period closed on January 14, 2013, and CADE is expected to enact the regulation in its final form by the end of February.

The proposed regulation is the latest CADE initiative to make self-reporting and collaboration with the government more attractive to companies and individuals who are involved in cartel activity. It improves transparency and predictability — two features that are critical to a successful leniency program — and should reduce the length of time that it takes CADE to investigate cartel activity. The regulation confirms CADE's commitment to enforcing Brazil's prohibition against global cartel conduct.

Brazil's Leniency Program

Until the early 2000's, Brazilian antitrust enforcement centered around merger control.² In 2003, however, Brazil joined the international trend towards making cartel prosecution a priority.³ Since that time, CADE has put Brazil on the map of aggressive cartel enforcers, punishing offending businesses administratively and individuals both administratively and criminally. In addition to working with local criminal enforcement authorities, CADE coordinates closely with its international counterparts pursuant to "cooperation agreements" executed with antitrust enforcers in countries such as the US, Canada, Chile Portugal, Russia and the European Union.⁴ These cooperation agreements obligate signatories to notify each other (within the bounds of local law) regarding enforcement activity that pertains to the country being notified and they enable Brazilian officials to conduct dawn raids in tandem with officials in other countries and to serve targets that reside outside Brazil.⁵

As in other jurisdictions, much of Brazil's success in the cartel arena is attributable to the use of a leniency program, which allows corporations and individuals, in return for their cooperation in prosecuting a case, to be excused from some or all of the penalties for cartel conduct.⁶ The secrecy surrounding cartel activity makes most cartels difficult to detect and investigate without the cooperation of one or more of the its participants.⁷ Once CADE has secured the cooperation of one cartel

"While CADE continues to take steps to improve its investigative process, its proposed regulation should come as good news to businesses seeking greater certainty from Brazil's leniency program."

participant, CADE uses the information that it obtains through that cooperation to identify and investigate other cartel participants — who may choose to defend against the allegations in administrative and criminal proceedings or settle with the government.⁸

CADE's current system guarantees immunity to leniency applicants.⁹ But the system is anything but predictable for the other cartel participants once they become targets of an investigation and must decide whether to challenge CADE's allegations or settle. Settlements in Brazil involve the payment of a fine or "pecuniary contribution," the starting point of which could fall anywhere on a broad spectrum of potential fines established by the New Competition Act of 2011.¹⁰ Though CADE considers mitigating factors for fine reduction — *i.e.*, the timing of the settlement, the cooperation of the applicant with the investigation and (in the case of individuals) an individual's position within the company¹¹ — those factors are themselves subject to interpretation. It is thus difficult to derive a consistent methodology from CADE's "case-by-case" approach, and nearly impossible to predict a potential fine or assess the mitigating factors that CADE may decide to use in its calculation. Consequently, many have criticized Brazil's settlement process as opaque and confusing.

Cade's Proposed Regulation

On December 14, 2012, CADE issued a proposed regulation to promote transparency and create incentives for settlement for those applicants who fail to qualify for amnesty.¹² Once enacted, the regulation will amend CADE's settlement rules in several important ways:

- First, the proposed regulation requires settling parties to acknowledge their involvement in the cartel. Under the prior scheme, only the leniency recipient had the obligation to admit liability.
- Second, CADE proposed a scheme to discount fines that would apply to second (and subsequent) cooperating parties in the event of settlement.¹³ As proposed, the regulation provides that:¹⁴
 - The second applicant's fine will be reduced between 30 percent and 50 percent;
 - The third applicant's fine will be reduced between 25 percent and 40 percent;
 - Any subsequent applicant's fine (prior to the close of the investigation) will be reduced up to 25 percent; and
 - An applicant that comes forward after CADE has closed an investigation and forwarded its recommendation to CADE's Tribunal will be entitled to a reduction of up to 15 percent off the potential fine.
 - CADE will determine specific reductions within the allotted ranges based upon the extent of cooperation as well as the extent to which that cooperation advanced CADE's case.
- Finally, the proposed regulation introduces a procedure for settlements between an individual or company and CADE's Superintendent General (SG). Under the proposed regulation, either side may initiate the settlement process. A commission of CADE officials will negotiate the terms of any resulting settlement, and CADE's tribunal will review and approve it. CADE may agree to keep the negotiation of a settlement confidential at the request of the parties.

CADE solicited comments from the public until January 14, 2013 and received a dozen comments, which officials of CADE have characterized as "a strong positive reaction." The agency also received constructive criticism from the Brazilian

Institute for the Study of Competition, Consumption and International Trade (IBRAC).¹⁵ IBRAC suggested the following revisions to the proposed regulation: (1) stricter confidentiality requirements — even for those settlements that CADE does not approve; (2) an increase in the fine reduction for applicants that come forward after CADE has closed an investigation (IBRAC proposed an increase from 15 percent to 20 percent); (3) an accommodation for minor cartel players who desire to pay a fine and settle but have little information with which to cooperate; (4) an accommodation for cartel players in certain instances to decline to admit involvement, when such admissions might have criminal or international implications; (5) a clarification of the event that triggers a settling party's place in line; (6) setting of a fine at the outset of negotiating the settlement, for greater predictability and (7) an accommodation for settlement agreements that might be negotiated jointly (for example, with two individuals from the same company). Finally, IBRAC criticized CADE's proposal to link fine reductions to the usefulness of information that the target provides on the ground that it would reward cartel members with bigger roles in the conspiracy because those members will always have more useful information.

Officials from CADE are considering IBRAC's comments and likely will issue the final regulation by the end of February.

Cade's Remaining Challenges

CADE's new regulation endeavors to encourage cooperation and settlement with the government. If it accomplishes those goals, it should reduce the time that CADE takes to complete cartel investigations. CADE has made significant strides over the past year to reduce the long delays that have plagued the program since its inception, noting: "these cases don't get better with age."¹⁶ In late 2011 and early 2012, CADE reduced its cartel caseload by nearly 30 percent by closing long-standing cases that were draining resources.¹⁷ CADE has also moved forward with proceedings against targets that are easy to serve, even when it cannot serve all members of a cartel, and prioritized more promising cartel investigations that involve leniency applicants and direct evidence of infringement.

However, long delays continue to be a challenge for the authority. Cartel cases in Brazil often remain open for several years due to a lack of human resources, bureaucratic formalities (such as notarization and legalization of documents), difficulties in serving defendants domiciled abroad, and the volume of investigations that do not involve leniency applicants and thus are less likely to contain evidence of wrongdoing. With increased incentives for cartel targets to cooperate, settle, and provide direct evidence against other members of a cartel, CADE's revised leniency program should reduce the agency's backlog and improve efficiency in the future.

Conclusion

While CADE continues to take steps to improve its investigative process, CADE's proposed regulation should come as good news to businesses seeking greater certainty from Brazil's leniency program.¹⁸ The fine reduction scheme will make it easier for companies that are the targets of an investigation to assess their incentives to settle. It should also improve the predictability and transparency of CADE's settlement process, bringing it more in line with successful settlement programs in other jurisdictions.

Endnotes

- ¹ The proposed regulation is available only in Portuguese at http://www.cade.gov.br/upload/Regulamentacao_TCC_ConsultaPublica.pdf.
- ² The Competition Act of 1994 was Brazil's first step towards antitrust modernization, and it remained in place until the New Competition Act of 2011. Law No. 8,884, of 11 June 1994; Law No 12,529, of 30 November 2011. Among other things, the 1994 Act created a merger notification system and designated the three Brazilian entities that would serve as merger enforcers. *Defesa da Concorrência*, Ministério da Justiça, <http://tinyurl.com/avabmm9> (last visited Jan. 15, 2013).
- ³ *Competition Law and Policy in Brazil: A Peer Review* at 14, OECD.ORG (2010), <http://www.cade.gov.br/upload/Peer%20Review%20OECD.%20Brazil%202010.pdf> (last visited Jan. 8, 2013).
- ⁴ *Acordos Internacionais Em Vigor*, CADE.GOV.BR, <http://www.cade.gov.br/Default.aspx?e243c54ad635f752e26c> (last visited Jan. 7, 2013).
- ⁵ *Id.*
- ⁶ Article 86 of the New Competition Act (Article 35 B of the Competition Act of 1994). Since 2003, there have been 25 leniency agreements in Brazil. *Programa de Leniência*, CADE.GOV.BR, <http://www.cade.gov.br/Default.aspx?75b576ba41df203a0e4fe4> (last visited Jan. 8, 2013).

For applicants who fail to win the race for amnesty with respect to one cartel, but are able to report a second collusive scheme, Brazil also has put in place a "Leniency Plus" program. If the requirements of the program are met, Leniency Plus affords the whistleblower in the second conspiracy full administrative and criminal immunity for the second infringement, plus a discounted fine. Bruno Peixoto, *Brazil: Cartels & Leniency*, GLOBAL COMPETITION REV., <http://www.globalcompetitionreview.com/reviews/46/sections/158/chapters/1809/brazil-cartels-leniency/> (last visited Jan. 15, 2013).
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ A leniency applicant's immunity may be full or partial, depending on whether the authority was already aware of the infringement reported by the company. Article 86 of the New Competition Act (Article 35 B of the Competition Act of 1994).
- ¹⁰ The New Competition Act sets forth very general fine calculation parameters for cartel offenses: (i) legal entities are subject to fines that may vary between 0.1 percent and 20 percent of their turnover in the "business segment" concerned by the infringement, in the year before the opening of the relevant administrative proceeding; (ii) company managers are subject to fines ranging from 1 percent to 20 percent of the fine due by the corresponding legal entity; (iii) other employees are subject to fines that may range from approximately US\$25,000 to US\$1 billion. Law No 12,529/2011, Article 37; the terms of the previous Competition Act were equally generic.
- ¹¹ According to Article 85, paragraph 2 of the New Competition Act, in the case of cartel offenses, the amount to be paid by the settling party must be at least equal to the minimum fine foreseen in Article 37 of the New Competition Act, described below.
- ¹² *Ragazzo: Brazil to issue guidance on fines and settlements*, Global Competition Review, GLOBALCOMPETITIONREVIEW.COM, <http://www.globalcompetitionreview.com/news/article/32119/ragazzo-brazil-issue-guidance-fines-settlements/> (last visited Jan. 8, 2013).
- ¹³ *Cade Proposes New Settlement Policy to Strengthen Cartel Fighting*, CADE.GOV.BR (Dec. 17, 2012), <http://www.cade.gov.br/Default.aspx?1225f50312071de6330050e578dd> (last visited Jan. 7, 2013). Note that settlement agreements celebrated with CADE do not extinguish the party's criminal liability; criminal sections may still be imposed on the settling party by the Brazilian criminal authorities.
- ¹⁴ *Id.*
- ¹⁵ *Public Consultation Cade 02, 2012*, IBRAC.ORG.BR (Dec. 28, 2012), <http://www.ibrac.org.br/NovosEventos.aspx?Id=113> (last visited Jan. 15, 2013).
- ¹⁶ See *supra*, n. 12.
- ¹⁷ *Id.*
- ¹⁸ Of course, there are additional factors that a company and/or an individual should weigh when deciding whether to seek amnesty, including: the risk of information disclosure; exposure to civil litigation; and whether any sanctions imposed by CADE could be enforceable, given the residence of the relevant party. Decisions regarding whether or not to seek leniency must be made on a case-by-case basis.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Marguerite M. Sullivan
+1.202.637.2200
marguerite.sullivan@lw.com
Washington, D.C.

Rebecca Valentine
+1.202.637.2386
rebecca.valentine@lw.com
Washington, D.C.

Rita Motta
+32.2.788.6315
rita.motta@lw.com
Brussels

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our website at www.lw.com.

If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to our global client mailings program.

Abu Dhabi	Houston	Paris
Barcelona	London	Riyadh*
Beijing	Los Angeles	Rome
Boston	Madrid	San Diego
Brussels	Milan	San Francisco
Chicago	Moscow	Shanghai
Doha	Munich	Silicon Valley
Dubai	New Jersey	Singapore
Frankfurt	New York	Tokyo
Hamburg	Orange County	Washington, D.C.
Hong Kong		

* In association with the Law Office of Salman M. Al-Sudairi