

## **CONSENT DECREES IN CARTEL INVESTIGATIONS IN BRAZIL**

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### ABSTRACT

The purpose of this paper is to analyze certain aspects in the fight against cartels based on agreements between the government and a cartel member, who will provide assistance during the investigation. This paper also provides some notes on the likely effects of this kind of strategy on the antitrust policy.

It has become more often the practice of agreements among agents accused of cartel and the antitrust authorities, which agreements are referred to as consent decrees<sup>1</sup>. These agreements are believed to be highly advantageous to the Public Administration and not to jeopardize the efficiency of the policy to fight cartels through leniency.

The main benefit of these agreements, especially in view of the tardiness of the Judiciary Branch, would be the opportunity for the antitrust authorities to rapidly resolve a case, thus avoiding the expenditure of public resources that could be used in other

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investigations. Both leniency agreements and consent decrees are designed as an optimum regulatory strategy for antitrust agencies. Should one consider this strategy as the closest to an “ideal” strategy to fight cartels?

To try to answer to this question, the paper shall be divided into the following sections:

- Operation of agreements with cartels in the United States;
- Operation of agreements with cartels in Brazil;
- Rationale of agreements with cartels; and
- Possible noises of the institutional endowment of Brazil as regards the use of consent decrees.

**Key words:** antitrust, cartels, leniency program, consent decrees.

## ***ACUERDOS DE CONSENTIMIENTO EN LAS INVESTIGACIONES SOBRE CARTELES EN BRAZIL***

### *RESUMEN*

*El propósito de este artículo es analizar ciertos aspectos de la lucha contra los carteles, basada en los acuerdos entre el gobierno y un miembro del cartel, quien colabora durante la investigación. Así mismo este artículo provee algunas anotaciones acerca de los efectos de este tipo de estrategia en la política de competencia. Cada vez es mas común la realización de acuerdos entre los agentes acusados de pertenecer a un cartel y las autoridades de competencia,*

*acuerdos referidos como decreto de consentimiento. Este tipo de acuerdos pueden resultar ventajosos para la Administración Pública y no comprometer la eficiencia de la política de combatir los carteles a través de la clemencia. El principal beneficio de este tipo de acuerdos, en vista de la lentitud de la rama judicial, es la oportunidad para las autoridades de la competencia de resolver los casos de forma expedita, evitando el uso de recursos públicos que pueden ser utilizados en otras investigaciones. Tanto los acuerdos de clemencia como los decretos de consentimiento, están diseñados como estrategia óptima de regulación para las autoridades de la competencia. ¿Debería considerarse esta como la estrategia mas cercana a lo “ideal” para combatir los carteles? Para responder a esta pregunta este artículo se dividirá en las siguientes secciones:*

- *Funcionamiento de los acuerdos con carteles de los Estados Unidos;*
- *Funcionamiento de los acuerdos con carteles en Brazil;*
- *Fundamentos de los acuerdos con los carteles; y*
- *Posibles problemas respecto de la potestad institucional en Brazil respecto de los decretos de consentimiento.*

***Palabras clave:*** *derecho antimonopolios, carteles, programas de clemencia, acuerdos de consentimiento.*

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1 There are essential procedural differences between consent decrees and plea agreements in the US antitrust system. However, the designation of consent decree in this paper will refer to agreements executed with cartel member before the administrative authorities, but without criminal implications. This is the design used by the Brazilian Antitrust Law.

## 1. OPERATION OF AGREEMENTS WITH CARTELS IN THE UNITED STATES

This item details how agreements with cartel members operate within the context of the U.S. antitrust policy. The following explanation shall evidence that the conditions for the development of an optimal strategy based on agreements with cartel members are present in the United States, which fact shall provide a background for comparison with Brazil.

In general, consent decrees are litigation settlements expressing a voluntary understanding between the parties as regards legal proceedings. In the United States, these agreements are allowed and widely used in antitrust cases in two situations: (i) as merger remedies and (ii) to cease activities alleged by the government to be anticompetitive in return for an end to the charges<sup>2</sup>.

In both cases, consent decrees are usually proposed and negotiated by the Federal Trade Commission (FTC) or by the Antitrust Division of the U.S. Department of Justice (DOJ), which are the primary federal agencies with jurisdiction to enforce U.S. Antitrust laws. The DOJ is responsible for enforcement of the Sherman Act<sup>3</sup>, while the FTC is responsible for enforcement of the FTC Act<sup>4</sup>. Both jointly enforce the Clayton Act<sup>5</sup>.

Consent decrees are the most used tool from among those available to avoid potential harm to competition caused by a merger. According to Byowitz and Sherman (2006:1), “*most mergers believed by the agencies to result in anticompetitive harm are not litigated, but rather are resolved by remedies included in a consent decree negotiated with the parties*”. In these cases, instead of imposing a restriction (injunction) on the transaction, the authorities negotiate an

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2 See US DOJ, Antitrust Division Manual Ch. IV.E.

3 Sherman Act - 15 U.S.C. §§ 1-7.

4 FTC Act - 15 U.S.C. §§ 41-58.

5 Clayton Act - 15 U.S.C. §§ 12-27, 29.

agreement to arrive at a satisfactory solution. The FTC has even a compliance shop that deals exclusively with negotiations without the involvement of the members of the staff who analyze the merger<sup>6</sup>. The DOJ has a similar structure, which was extinguished in 1981 – now those responsible for the investigation negotiate the agreements (Byowitz and Sherman, 2006:32).

As regards unlawful conducts, the American antitrust authorities have two main enforcement actions against anticompetitive conducts: (i) prohibition of the conduct (injunctive relief) and (ii) significant civil penalties. Hence, consent decrees are agreements executed for the purpose of (i) ceasing the illegal practice and (ii) establishing a fine. The FTC submits the complaints of those practices listed in the FTC Act and the DOJ, on its turn, submits the complaints of the practices referred to in the Sherman Act.

Consent decrees are civil agreements and therefore, they do not eliminate the existence of criminal investigations. In addition, only the Sherman Act refers to practices that are also felonies, i.e., practices that could characterize cartels<sup>7</sup>. Hence, only the DOJ may enter into agreements with cartel members. However, in criminal law these agreements are referred to as plea agreements and are governed by Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.

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6 16 C.R.P. § 2.34 establishes rules about the execution of the agreements. The acceptance of the proposal by the FTC does not mean its automatic approval, but it enables the adoption of measures that lead to the execution of a final agreement. FTC's acceptance represents only the beginning of the process: the consent decree proposal, the denunciation and the recommended agreement are the subject of a public consultation for a period of 30 days, within which any interested person may make comments and suggestions. It is important to point out that these documents are the subject of consultation jointly with an analysis, which "discusses the proceeding, the complaint, and how the proposed consent order remedies the FTC's antitrust concerns". After the end of the consultation term, FTC may withdraw its agreement to the proposal or change its terms. In the event of noncompliance with the agreement, FTC has an action to compel compliance with the provisions of the agreement that was executed.

7 Sherman Act, Section 1.

### 1.1. OPERATION OF THE AGREEMENTS IN THE DOJ

The DOJ agreements were informally discussed and executed until the 1970s. At that time, criticism of agreements with persons accused of anticompetitive practices reached its peak with the Watergate scandal: there was strong suspicion that the DOJ, “as a result of political pressure on the part of the White House, has settled lawsuits during the Nixon Administration (in the early 1970s) to the benefit of the defendant” (Sullivan and Grimes, 2001: 889). To tackle these suspicions, the U.S. Congress passed the Tunney Act, which requires “the proposal of consensual decision to be filed before the courts and open to comments from the public jointly with a “statement on its competitive impact”, which granted more transparency to the process of execution of the agreement. Approved in 1974 as an amendment to the Antitrust Procedures and Penalties Act, the Tunney Act allows the court to reach a decision about the consent decree on the basis of the comments received from the public, and the agreement may be accepted or rejected in accordance with the public interest. The DOJ shall present to the court an analysis of the competitive impact of the practice, which analysis shall include (i) a description of the case and the relief sought in the consent decree, as well as (ii) an analysis of the alternative remedies taken into consideration, (iii) a discussion about these remedies available to aggrieved third parties and (iv) existing procedures to change the proposal. These statements shall be submitted jointly with the consent decree proposal and published in the Federal Register at least 60 days before becoming a final proposal. In case of any written comments from the public, the DOJ shall present an answer in the Federal Register within up to 60 days. At the end of this process, the court shall decide whether the consent decree is in accordance with the public interest or not.

Another essential aspect that reinforces the participation of the civil society in the process is the need to publish the terms of the agreement in the main newspapers issued in the affected area, allowing people and public interest groups to participate in the process. Only to illustrate

this assertion, in the Microsoft case<sup>8</sup> the DOJ had to effect explanatory and clarifying changes in the agreement after having received over 30,000 public comments.

## 1.2. PLEA AGREEMENTS IN THE DOJ

Plea agreements are agreements entered into in criminal procedures, by means of which the defendant voluntarily decides to plead guilty and waive certain rights. This kind of agreement<sup>9</sup> applies only to anticompetitive conducts as regards which the Sherman Act determines that there is criminal liability. Hence, these agreements are entered into with the Antitrust Division of the DOJ, especially in cartel cases, and resolve 90% of the investigations.

One of the characteristics of Plea Agreements is the fact that they are an initiative of the investigated agent, which proposes to cooperate with the DOJ in the case.<sup>10</sup> The admission of wrongdoing is indispensable for the execution of an agreement with cartels, but there are instruments to restrict the cases in which the defendant may plead guilty in private antitrust actions. After receiving an explanation about the meaning of the waiver of certain procedural rights, the defendant must waive certain of these rights, such as “the right to be charged by indictment; the right to plead not guilty; the right to a trial by jury (where the defendant can cross-examine witnesses); the right against self-incrimination; and the right to appeal a conviction and sentence”. (Hammond, 2006). Thus, during a hearing before the Judiciary Branch, the highest of the following penalties is established: (i) US\$500,000.00, (ii) two times the monetary

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8 US DOJ Press Release # 10148. February 28, 2002. Available at: [http://www.usdoj.gov/atr/public/press\\_releases/2002/10148.pdf](http://www.usdoj.gov/atr/public/press_releases/2002/10148.pdf)

9 These agreements are governed by Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.).

10 See US DOJ Model Plea agreement. Available at: <http://www.usdoj.gov/atr/public/guidelines/220671.pdf>

gains obtained by the cartel or (iii) two times the losses imposed to third parties. In addition, the penalty may include even imprisonment of up to 5 years and damages to the aggrieved parties.

The announcement of the agreement must be made in a court open to the public, even though it may be secretly made in order to preserve ongoing investigations<sup>11</sup>. The great advantage of this publicity is to provide for transparency to transmit dissuasive information to the business world, either directly or indirectly, by means of the agents' attorneys.

The announcement of the agreement shall not be taken for its negotiations. These are confidential and possible statements made by defendants or by their attorneys may not be used as evidence in court if the negotiations do not succeed<sup>12</sup>. However, if the defendant fails to meet the conditions established in the deal (e.g. fails to help with the investigations), the DOJ may use the information obtained from the defendant to incriminate it in view of a contractual provision included in the agreement.

Even with all these procedural guarantees, the Judiciary Branch can refuse the deal based on public interest issues. This circumstance would allow the defendant to withdraw its proposal for a deal<sup>13</sup>.

Defendants can reasonably anticipate the fines that would be imposed on them due to the U.S. Sentencing Guidelines<sup>14</sup>. The clarity and predictability of the penalties that could be imposed at the end of the investigation vis-à-vis those that would be imposed in an agreement work as a discouraging element for cartel members engaging in long lawsuits. In fact, "since the Division negotiates, signs, and publicly files plea agreements throughout the course of its investigations, most corporate defendants do not have to wait until their cooperation is complete, or until the investigation is over, before they learn the value that the government places on their cooperation" (Hammond, 2006:3).

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11 Fed. R. Crim. P. 11(c)(2).

12 Fed. R. Crim. P. 11(f) and Federal Rule of Evidence (F.R.E.) 410.

13 Fed. R. Crim. P. 11(c)(5) and (d).

14 18 U.S.C. § 3553(a).



### 1.3. CONCLUSION ABOUT NEGOTIATIONS WITH CARTELS IN THE U.S.

Plea agreement negotiations are not pleasant to cartel members. These are in a position of defendants in a serious felony and subject to severe penalties contemplated in the U.S. Sentencing Guidelines. Thus, the vulnerability of cartel members that negotiate agreements with the DOJ is evident.

Also, it seems the intensive use of agreements with cartel members has not undermined the appeal of leniency agreements, which suggests that the adopted policy has been successful. Incentive to leniency probably persists because the incentives are very clear and defined vis-à-vis the incentives to plea agreements with cartel members. In fact, the U.S. Sentencing Guidelines, jointly with the practices already consolidated for several years, grant predictability to the quantum of the penalty to be imposed on the parties to the leniency agreement and on the signatories to plea agreements.

It is also not possible to disregard the perception, present in countries with a rigid administrative system, according to which “the term ‘plea bargaining’ sometimes carries a negative connotation, because it implies that prosecutors are bargaining away justice by securing guilty pleas that allow defendants to plead guilty to lesser offenses”. (HAMMOND, 2006). Even with severe criticism directed to the mechanism in view of the distortions occurred until the 1970s, there was a consensus about the utility of the mechanism of negotiation. Better than simply eliminating the possibility of an agreement, there was an option to improve it.

The improvement was made exactly to conferring publicity and transparency to the agreements, but even so the authorities were hesitating as regards publicity requirements, which were deemed to be excessive. Although the procedures are carried out before the Judiciary Branch and there is a requirement of conformity to the public interest, the courts have the power to reject agreements that are supposedly in noncompliance with the public interest (SULLIVAN & GRIMES, 2000: 900).

Therefore, transparency is a legitimacy factor of agreements with cartel members.

## 2. OPERATION OF AGREEMENTS WITH CARTELS IN THE BRAZIL

From 1994 to 2000, the Brazilian Antitrust Authority (CADE) was allowed to sign these agreements with cartels members during administrative proceedings - 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<sup>15</sup>.

However, in 2000, Law # 10.149 changed the antitrust policy radically. At the same time leniency agreements were allowed, consent decrees with cartel members were banned. When the new policy was starting to take off, Law # 11.482 was passed in 2007 in order to allow the execution of consent decrees with cartel members, as long as these pay a “financial contribution” to a public fund.

An interesting aspect to be pointed out is the kind of incentives that makes a cartel member to decide for the execution of a leniency agreement instead of waiting for the cartel’s detection and then to execute a consent decree. There are different conditions for the execution of agreements in cases in which there was leniency vis-à-vis cases in which there was not leniency. This situation is extremely delicate in Brazil, because it can directly interfere in the success of anti-cartel policies.

Actually, the institutional endowment of Brazil could contribute to change or distort this delicate relation of incentives, which induce cartel members to enter into leniency agreements and not to wait for the execution of a consent decree.

Consider another example, now related to the question of guilty pleas for the execution of consent decrees. As seen in item 2 above, guilty pleas in cartel cases are a usual requirement in plea agreements executed

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15 Until now (October 2009), the three defendants have neither paid the fine imposed nor complied with the ancillary determinations imposed by the CADE.

by the DOJ in the United States. So far, just one out of the four consent decrees executed in Brazil had a guilty plea.

**SCHEDULE 2 - Consent Decrees (2007-2008)**

<b>Date</b>	<b>Case</b>	<b>Defendant</b>	<b>Financial contribution</b>	<b>Did the defendant plead guilty?</b>
27/08/2008	Bridgestone Corporation	Seaway Hose market	R \$ 1 . 5 9 4 . 0 0 0	Yes, a disclosure letter to the clients was sent 60 days after the agreement
23/07/2008	Alcan Embalagens do Brasil Ltda, Marco Antonio Ferraroli dos Santos (Executive)	Flexible Packs market	R\$ 24.218.550,57 by Alcan Embalagens and R\$ 2.421.855,06 by the executive	No
28/11/2007	Lafarge Brasil S/A	Cement and concrete market	R\$ 43.000.000 in two annual installments	No
28/11/2007	JBSS/A	Cattle slaughtering market	R\$ 13.761.944,44	No

Source: CADE

This plea would facilitate the evidentiary phase throughout the suits for damages, which suits may be deemed one of the pillars of antitrust policy in that country<sup>16</sup>. Even if the fine imposed by the antitrust authorities were lower than the gains made by the cartel, the granting of indemnification to third parties three times bigger than the losses suffered might be a string dissuasive element<sup>17</sup>. It is also worth noticing this omission in the Brazilian Antitrust Law.

16 There is a trend to render the use of this document as evidence in suits for damages more difficult, be it in the United States or in other jurisdictions.

17 “Such private actions have at least two benefits: they supplement and reinforce the public enforcement of the competition law, and they free the competition authority

The 2006 OECD Peer Review acknowledged the need to allow the execution of agreements with cartel members so as to render these agreements possible, even when there is sufficient evidence for an adverse judgment. Nevertheless, the recommendation was made to create a mechanism for those cases in which “a defendant in any type of conduct case does not wish to contest CADE’s charges and is willing to plead guilty, pay a fine, and accept an order terminating the offending conduct”. (OECD and IDB, 2006: 168). Even so, the amendment to the Brazilian Antitrust Law went farther and ignored the recommendation to conduct a public consultation before executing the agreements<sup>18</sup>.

Finally, there are no requirements for public consultation as regards the agreement to be executed. CADE’s internal rules provide that the agreement shall be made available on the website within up to 5 days of its execution.

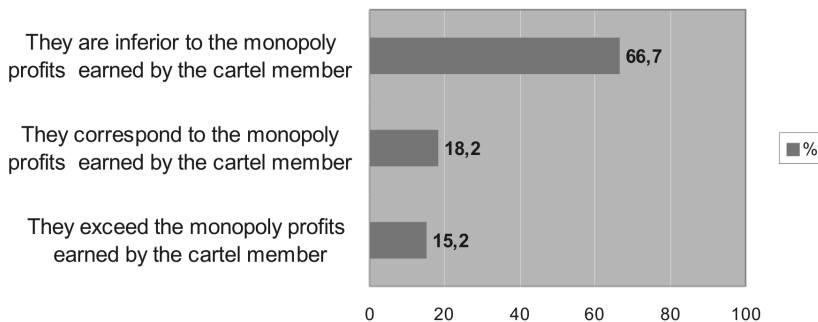
In spite of the small number of consent decrees executed by CADE, there are indications that the dissuasive effect of antitrust enforcement and the incentive to leniency may have been changed. In an 2007 online survey about the perception of 37 attorneys specialized in antitrust law, 67.2% already considered that the fines at the end of investigation procedures tended to be lower than the monopolistic profits, which reveals a trend for under-punishment. As regards consent decrees, 74.3% of the attorneys consider that the amount of the fines tend to be lower than the monopoly profits earned by the cartel member.

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from having to obtain such redress on behalf of private parties.” (OECD and The World Bank, 1998: Annex 3, p. 7).

- 18 OECD and IDB, 2006: 168: “CADE could issue an appropriate remedial order (after a public comment period) and impose a small fine, thus effectively restoring competition without the delay and expense associated with litigation.”

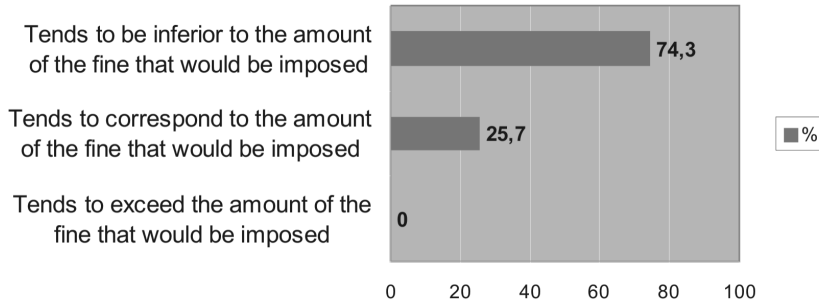
## SCHEDULE 2 - Specifically as regards the fight against cartels, how do you judge the fines imposed by the CADE?



The content of the Consent Decrees are normally the following

- If the company confess or not guilty, as seen only one of the four confessed
- A administrative proceeding is suspended, in order to the company do some obligations, and reestablish the concurrency
- The Obligations – pay a financial contribution and in some of the cases, execute a compliance program
- A fine to the company if the agreement is disobeyed.
- The kind of information the company will give to CADE
- The solidary liability
- A term if everything is correct within this time the proceeding is shelved

**SCHEDULE 3 - According to your opinion, the decisions issued by the CADE in the Consent Decrees signal that the amount of the monetary contribution:**



### 3. RATIONALE OF AGREEMENTS WITH CARTELS

Agreements are usually deemed a good form of avoiding litigation. Negotiation techniques are one of the themes addressed in courses on methods of alternative conflict resolution. Regardless of the difficulties inherent to the rigid administrative law systems, this assertion is perfectly applicable to cases involving Public Authorities.

From the standpoint of Public Administration, 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: (i) there will be an economy of public resources, (ii) it will be easier to obtain evidence with the assistance of the party to the leniency agreement during investigations, (iii) the proceedings will end more rapidly and (iv) the possibility of a court review changing the final decision will be partially reduced. In this respect, the Brazilian Antitrust Authorities have a clear target of “smaller companies which were forced or pressed to take part in a cartel” (SDE, 2005:17). For such companies, leniency offers the opportunity for a win- win situation (Cunningham and Sinclair, 1998:413-422). The aim is to identify a violator who is facing severe losses, is not receiving any substantial benefits and thus would be better-off if its competitors were severely punished.

Nevertheless, the same consensus and the possibility of win-win games are not found in the analysis of the execution of an agreement with cartel members after initiation of formal investigations<sup>19</sup>. Although some of these positive aspects are also present in the execution of agreements after cartel detection, it is certain that such agreements are more complex. The variables that motivate a cartel member to sign a leniency agreement are more strongly connected to the unscheduled economic structure of the cartel and its inclination to cheating, while the motivating factors for the execution of consent decrees are more connected to what exceeds the variables under control of the antitrust authorities in most of the cases. Consent decrees require great institutional abilities on the part of the antitrust authorities – even with the results of investigations there is a great degree of information asymmetry about the data to establish a dissuasive fine to the detriment of the antitrust authorities. In other words, the execution of agreements with cartel members after cartel detection is far more complex than the execution of agreements with a traitor as it happens in the Leniency Agreements.

The institutional structure of 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 can not 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.

Among the factors that induce the agents to execute consent decrees, it is possible to point out the term for submission of the proposal, the amount of the fine to be imposed, the risk of indemnification by third

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19 As Hammond (2006) points out, “the global convergence in leniency programs dissipates, however, when the topic turns to how to treat companies and their executives who lose the race for full immunity but are still in a position to offer timely and valuable cooperation. Every jurisdiction reserves full immunity benefits to only the first company to come forward and cooperate, and virtually every jurisdiction offers reduced sanctions for those who come forward afterwards and advance the investigation with their cooperation. However, there is wide divergence in terms of how this is done and the degree of transparency in the process that is provided by the enforcement authority”.

parties, the damage to the image resulting from the investigation and the involved costs.

The longer the term for proposing a Consent Decree on the part of a cartel member, the more proposals would probably be made. Considering that this longer term would be more burdensome to the antitrust authorities conducting part or almost the entire investigation until receipt of a proposal, the requirements for acceptance of such a last-minute deal shall necessarily be more severe. CADE's recent practice has been recognizing this fact.

The amount of the fine is maybe the biggest problem to be faced. The fine shall both produce a dissuasive effect and be attractive to cartel members. The antitrust specialists will rapidly notice this paradox may hardly be resolved. One should not forget that the punishment for engaging in a cartel shall be considered in aggregate, that is, it shall include the fines possibly paid, civil indemnifications, expenses with the defense, criminal consequences, damages to the image of the cartel members, as well as any and all liens incurred by the cartel member as a result of the collusion. As a result, the punishment imposed by the antitrust authorities shall be taken into consideration within the context of antitrust policy as a whole.

There is a great information asymmetry between cartel members and antitrust authorities. Cartel members are unaware of what the authorities know and think as regards the cartel. However, it is very difficult for the antitrust authorities to exactly determine the gains made by the cartel, and they know that cartel members are aware of this difficulty. The few existing studies present a quantification of price fixing overcharges that vary a lot, which reflects the absence of consensus about the methods and, possibly, insufficiently clear data<sup>20</sup>. The highest

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20 SEE WERDEN, G.J. (2003). The effect of antitrust policy on consumer welfare: What Crandall and Winston overlook, EAG 03-2. Washington, DC: Economic Analysis Group, Antitrust Division, U.S. Department of Justice, January. LEVENSTEIN, M.C. & SUSLOW, V.Y. (2006). What determines cartel success? *Journal of Economic Literature*, 44, 43-95. COHEN, M.A. & SCHEFFMAN, D.T. (1989). The Antitrust Sentencing Guideline: Is the punishment worth the costs? *Journal of Criminal Law*, 27, 331-366. CONNOR, JOHN M., Price-fixing overcharges: legal and economic evidence, *Research in Law and Economics*, vol. 22, 59-153.



of these estimates, made by Posner in 1975, was deemed exaggerated by the author himself 25 years later<sup>21</sup>. If determination of the gains earned with the cartel is complex and uncertain, how is it possible to establish punishment for a cartel at a sufficiently dissuasive level? The answer is unclear and is still a cause for concern on the part of antitrust authorities, there being no appropriate or satisfactory resolution. At most, antitrust authorities establish proxies on which they could base, such as profits earned, advantages gained or losses imposed, and estimate these values.

The risk of indemnifications to be paid to aggrieved third parties is a factor that continuously worries cartel members. On the one hand, strong exposure of cartel members to suits for damages brought by aggrieved third parties might discourage the execution of agreements with the authorities. On the other hand, it is acknowledged that lawsuits brought by third parties shall be used as a form of encouraging the development of antitrust policy. Both these objectives are apparently inconsistent<sup>22</sup>.

As regards the damage to the image of cartel members, it shall be subdivided into the damage to the company and to the individuals involved in the cartel. The agreement is advantageous to the companies because their name would not be involved in the headlines as a company involved in a cartel. As regards individuals, their gain, especially in those systems in which is possible to negotiate time of imprisonment, is exactly to obtain a reduction in the time of imprisonment.

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21 COMPARE R. A. POSNER (1975). The social costs of monopoly and regulation. *Journal of Political Economy*, 83, 807-828 to R. A. POSNER (2001). *Antitrust law* (2nd ed.). Chicago: University of Chicago Press.

22 Without regard to possible limitations of the institutional endowment, the OECD and IDB made the following recommendations to Brazil (2006: 68): “Consider limiting civil suits for antitrust damages to parties and conduct that have been subject to a specific finding of illegality by CADE. Permit settlement of conduct cases by consent even where the defendant admits unlawful behaviour. Treat private suits seeking antitrust damages as opportunities for competition advocacy and develop more information about the competitive impact of such litigation”. As discussed below, questions inherent in the institutional endowment might impair the dissuasive effect of the punishment imposed by the administrative authorities, hence, it would be more appropriate to expand the opportunities for Public Interest Groups to compensate these problems.

Finally, as regards the involved costs, the agreement involves gains for both the antitrust authorities and cartel members. The first can avoid the expenditure of resources that would be spent in a case and use them to conduct other investigations. As regards the cartel members, the execution of agreements could prevent them from paying attorneys' fees, costs with economic consultation and court costs, among others.

This explanation reveals that there is a series of variables that should be taken into consideration for the execution of consent decrees, both on the part of cartel members and on the part of antitrust authorities – it is even possible to design a game with approximate tradeoffs for each of these factors. However, it is also clear that the antitrust authorities' ability to control these variables is limited. These variables are subject to the cartel member or to third parties.

The explanation also shows that manipulation of consent decrees requires a more sophisticated understanding of the rationale of cartel operation, especially if this possibility exists simultaneously to the leniency agreement. A wrong analysis of the rationale of cartel agreements could undermine leniency and indirectly reduce the enforcement of antitrust policy. In this regard, reference is made to the data on the perception of the amount of the fines to be established in consent decrees.

#### 4. POSSIBLE NOISES OF THE INSTITUTIONAL ENDOWMENT OF BRASIL AS REGARDS THE USE OF CONSENT DECREES

It is hard to ignore the fact that the Brazilian and the Latin-American institutional endowment contain some characteristics that might interfere in the optimum performance of the responsive model.

One of the great concerns of public policy specialists is to know why certain policies or institutions produce unsatisfactory results when they are transposed from one jurisdiction to another (North, 1990: 102). After all, "compliance policies which succeed in Japan, a society where deference to authority is widespread and deeply ingrained, may not be readily transplanted to Italy." (GRABOSKY, 1995: 256). This sentence could even be adapted to the current problem as "what

succeeded in the United States may not be readily transplanted to Brazil or Latin America”. As seen above, the undesired consequences of regulation may vary from country to country. More than that, these consequences are determined by the specific institutional endowment of each country.

In analyzing counterproductive effects of regulation, Grabosky (1995: 356-362) lists a series of actors that may result in undesired effects. Bad science, bad planning, bad politics and implementation failure due to resource inadequacy, lack of coordination and oversight failure are some of the most common causes for regulatory failure. These factors are strongly influenced by the local conditions of a country, and they may also vary from region to region within a same country.

Even in Brazil where accusations of improper application of the Antitrust Law related to, v.g. corruption have been rare, one can not ignore the fact that the institutional environment as a whole is uncertain.

Below are identified some of the factors present in the Brazilian and Latin-American institutional endowment, which limit the ability to control the optimum institutional arrangement of responsive regulation. Special emphasis shall be placed on factors that could derange the incentive relation that favors the execution of leniency agreements in a scenario in which it is possible to execute consent decrees.

- **Lack of institutional ability** - the ability to perform functions, to solve problems and to set and to achieve objectives is problematic due to principally limited financial and human resources;
- **Damaged image of invincibility** - Brazil has historically had problems with law enforcement. It is said that “there are laws that are enforced and other that are not enforced”. This makes enforcement is an even more serious issue for any Brazilian regulator<sup>23</sup>. More than anywhere else, enforcement in Brazil truly

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23 For instance, the Brazilian environmental legislation can be compared to those in the United States although the former clearly fails to be enforced adequately (FINDLEY, 1988:30).

determines the success of any public policy. In the context of the competition system, the image of invincibility is not such a good one to possess, since the impact of litigation has been adverse for the authorities<sup>24</sup> in spite of improvements since 2007 .

- **Limitations to the autonomy and independence of the antitrust authorities** The question is if the autonomy acquired by CADE is sufficient to ensure the use of agreements with cartels in accordance with the objectives of antitrust policy. In addition to the political issues that may result from the manipulation of Consent Decrees and that may indirectly affect the system of leniency agreements, the importance of stability in the formation of CADE's decisions shall be taken into consideration. In Brazil, the inexistence of a mechanism similar to the U.S. Sentencing Guidelines renders the formation of a set of decisions able to indicate incentives even more necessary. CADE responded to this criticism trying to give an extensive justification for the value of the fines imposed.
- **Absence of Public Interest Groups (PIGs) - Responsive regulation may develop without the presence of PIGs, but their presence may increase its efficiency.** In fact, frequent contact between cartel members and antitrust authorities may lead to regulatory capture

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24 The Mexican antitrust authorities also report that they face a large number of proceedings (OECD, 2006: 233). "The volume of amparo actions has increased significantly over the years. In 1997, 15 cases were filed. The annual numbers since then are 33 in 1998, 63 in 1999, 83 in 2000, 124 in 2001, and 117 in 2002. This yields a total of 420 cases from 1998 to 2002 (compared to 122 through the end of 1997). Of the 420 cases, 239 (57 per cent) were filed during the pendency of Commission proceedings, while the other 181 (43 per cent) were filed as challenges to final Commission determinations. The procedural interface between amparo cases and the underlying Commission proceeding can become exceedingly complex. Respondents may file a sequence of amparos as the CFC case progresses, and Commission cases involving several respondents can result in multiple amparos filed in different district courts."

- **Lack of transparency** - Directly related to the absence of participation of PIGs in the process of execution of agreements with cartel members there is a normative aspect that increases the risks of its distortion: the lack of transparency. OECD had recommended to Brazil that the execution of the agreements should be preceded by a public consultation: “The ability to negotiate for a minimal fine should provide an incentive for firms to settle rather than engage CADE in protracted administrative litigation and judicial review proceedings. CADE could issue an appropriate remedial order (after a public comment period) and impose a small fine, thus effectively restoring competition without the delay and expense associated with litigation”. (OECD and IDB, 2006, 168).
- **Corruption** - In different degrees, in accordance with the country at issue, corruption is a great hindrance to economic development. Corruptions cause losses for the whole society, to the extent that it “allows inefficient producers to remain in business, encourages governments to pursue perverse economic policies, and provides opportunities to bureaucrats and politicians to enrich themselves through extorting bribes from those seeking government favors. Thus, corruption distorts economic incentives, discourages entrepreneurship, and slows economic growth”. (MBAKU, 1996:1, GOULD,1980). These distortions resulting from or related to corruption might change the payoff of the game between the antitrust authorities and the cartel members, thus jeopardizing leniency. Corruption may reduce the deterrent effect of Consent Decrees and undermine the feasibility of leniency agreements.

#### 4.1. COMPARISON BETWEEN THE INSTITUTIONAL ENDOWMENT IN BRAZIL AND IN THE UNITED STATES

The comparison of the regulation applicable to the matter in the United States and in Brazil may serve as a basis for identifying the risks resulting from the possibility of negotiating agreements with cartels for the feasibility of leniency. This is not about presenting the institutional endowment of the United States as the most perfect or impossible of being distorted. On the contrary, the United States faced many of the problems as Brazil. Even so, the level of the Brazilian and Latin-American deficiencies allows a contrastive comparison between two kinds of institutional endowment. Schedule 4 synthesizes these differences between the institutional endowment in Brazil and in the United States.

#### **SCHEDULE 4 - Characteristics of the institutional endowment that might influence the conditions of agreements with cartel members**

	<b>Brazil</b>	<b>United States</b>
Institutional Ability	Limited human and financial resources	Appropriate human and financial resources
Image of Invincibility	Recent past harms the image of invincibility	Successful history of fight against cartels
Independence and autonomy	In consolidation	Consolidated for decades
Public Interest Groups	Practically inexistent	Active participation
Transparency	Below average	Existing
Corruption deterrence	Impunity	Effective

In view of these differences, there are potential changes in the list of incentives to the economic agents that wish to execute consent decrees and leniency agreements. Nevertheless, it remains unclear to what extent could the Brazilian institutional environment lead to a different result from what is expected or from the North-American model.

Unfortunately, no consequence could be automatically anticipated, and it is still soon to draw conclusions about the future, especially because of the short time since the implementation of the new policy and of the few cases so far decided.

## 6. CONCLUSION

Between detection and punishment there is a lapse of time in which several conditions produce their effects - after all, the “game” with the antitrust authorities continues and this period should not be ignored, since it is in enforcement that success and failure of an antitrust policy lays. However, during this period, the objectives and variables faced by cartel members are different: basically, cartel members intend to minimize their immediate losses, but one should not ignore that amoral players might still wish to maintain anticompetitive practices.

This conjecture is not a mere speculation. Differently from what happens in Brazil, in the United States the real possibility of criminal conviction plays an essential role in the dissuasion. As a consequence, some cartel members may perfectly wish to continue the anticompetitive practice in Brazil, even after punishment - there is a risk that agreements with cartels become only an additional variable in the cartel costs, without producing the expected dissuasive effect.

There are institutional fragilities common to most part of the Latin-American legal systems like deficient institutional ability, no image of invincibility, risks to the autonomy and independence, absence of PIGs, lack of transparency and risk of corruption. Other factors influencing on the tradeoffs for cartel members could be pointed out, such as the tardiness of the Judiciary Branch, and which are present, in different degrees, in several Latin-American countries. These forces could produce undesirable results like (i) politicization of the regulatory agencies for election purposes and (ii) confinement of the execution of leniency agreements to multinational companies involved in international cartels and that are willing to take the risks related to the institutional endowment of Latin-American countries.

All these factors related to consent decrees could adversely affect the operation of leniency agreements. Notwithstanding the existence of this trend to distort the purposes of consent decrees, the outcomes remain uncertain. Only the institutional fight among all political forces involved shall determine the exact extent of the success or failure of the introduction of consent decrees vis-à-vis leniency agreements in the antitrust system of Latin-American countries, especially in the Brazilian system.

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