

The international journal of competition policy and regulation

# The Antitrust Review of the Americas 2007

Published by **GLOBAL COMPETITION REVIEW**

In association with

Araújo e Policastro

Arnold & Porter LLP

Barbosa Müssnich & Aragão

Basham Ringe & Correa SC

Crowell & Moring LLP

Davies Ward Phillips & Vineberg LLP

Fasken Martineau DuMoulin LLP

Fraser Milner Casgrain LLP

Freshfields Bruckhaus Deringer LLP

Goodmans LLP

Goodrich Riqueime y Asociados

Heller Ehrman LLP

Helling Lindeman Goldstein & Siegal LLP

Hoet Peláez Castillo & Duque

Hogan & Hartson LLP

Howrey LLP

Hunton & Williams LLP

Latham & Watkins LLP

McCarthy Tétrault LLP

McMillan Binch Mendelsohn LLP

Munger Tolles & Olson LLP

Ogilvy Renault

Proskauer Rose LLP

Santos y Quijano

Simpson Thacher & Bartlett LLP

Steptoe & Johnson LLP

Sullivan & Cromwell LLP

Urenda Rencoret Orrego y Dórr

Von Wobeser y Sierra SC

Weil Gotshal & Manges LLP



THE QUEEN'S AWARDS  
FOR ENTERPRISE  
2006

# Brazil: cartels and leniency

Barbara Rosenberg and José Carlos da Matta Berardo

Barbosa Müssnich & Aragão

It is indisputable that the Brazilian antitrust authorities are reaping the benefits of their intense competition-advocacy efforts promoted in the early 2000s: the business community's attention has finally been drawn to real risks posed by antitrust violations in Brazil.

The international community also acknowledged that antitrust enforcement in Brazil has improved: the OCDE stated that the Brazilian antitrust authorities have “made substantial headway during the past five years in implementing sound competition policy in Brazil”, and some have recognised that Brazil is to be taken into consideration in cases of leniency or immunity applications.

Most of this enthusiasm can probably be attributed to the priority given to anti-cartel enforcement in the last three to four years and to the rationalisation of the authorities' tasks. Nonetheless, with institutions still maturing, there is a long way to go before a clean perception of enforcement deterrence is cemented among the business community.

Aiming to examine the recent trends in anti-cartel enforcement in Brazil, its outcomes and future perspectives, this article will discuss the most stringent questions related to such enforcement, including investigation proceedings, a leniency programme, international cooperation, fines and criminal prosecution, so as to provide the reader with an overview of the main aspects of the Brazilian anti-cartel enforcement.

## Competition law

Cartel violations, as well as other antitrust violations, are prohibited in Brazil under article 20 of Federal Law No. 8,884/1994 (the Competition Law). Even though there is much debate regarding various possible legal interpretations, the provisions of article 20 can be summarised – for the purposes of this overview – in the following sentence: any practice which has as its object or effect the restraint of competition will be considered anti-competitive. Article 21 contains a list of some practices, which are often understood as examples of usual anti-competitive behaviour.

Although it is not necessary to discuss the harm caused by cartels, the broad language of CADE, the Administrative Council for Economic Defence's Guidelines on Anti-competitive Practices (Resolution No. 20/1999) indicate, on the one hand, that the analysis of cartels should also depend on the evaluation of their possible benefits (‘economic efficiencies’). CADE's decision practice, on the other hand, never paid much attention to this point in the guidelines, and CADE has consistently – although not always expressly – condemned companies involved in cartel schemes if those companies collectively held some degree of market power, without any further inquiries into the effects of the collusion.

That CADE's guidelines on cartels are not consistent with CADE's practice raises many questions on the standard and burden of proof, as there is not much predictability as to whether an argument will be considered valid or not in a certain context (eg, whether a certain cartel lacks potential anti-competitive effects or not). This is especially true for cases involving non hard-core cartel cases.

Nonetheless, it is important to point out that CADE has found companies guilty in several distinct hard-core cartel types (naked client/territorial allocation and naked price-fixing, in addition to

‘parallelism plus’ cartel cases), as well as several trade-associations arrangements that impose (or suggest) uniform pricing.

The penalties for antitrust violations are set out under article 23 of the Competition Law. A company involved can be fined from 1 per cent to 30 per cent of its pre-tax turnover in the year before the initiation of the administrative proceeding (which shall not be lower than the advantage obtained from the violation, if that is assessable). Managers of companies involved in the collusion might have a fine imposed ranging from 10 per cent to 50 per cent of that applied to the company, if their participation in the scheme is proved; trade associations which have fostered coordinated behaviour, as well as other individuals (not managers) may have fines imposed of up to US\$2.5 million. Additional penalties may be imposed upon companies, as set out in article 24, such as limitations in public bids, restrictions on tax benefits and partial discontinuance of activities.

The fact that the Competition Law does not fix any formula to calculate the administrative penalties to be imposed on companies condemned for cartel violations (ie, there are no sentencing guidelines) makes the cost benefit evaluation of possible defence strategies very difficult. Historically speaking, fines for cartel cases have ranged from 1 per cent to 20 per cent of a company's turnover; fines applied, however, lack consistency to be taken as a pattern of decisions capable of giving indications for future decisions.

It is important to indicate that the Competition Law does not set forth any kind of exception or industry-specific provision or immunities. As a consequence, export cartels, crisis cartels, agreements among professionals or agricultural products are all equally treated as cartels and are, therefore, punishable under the Competition Law; a recent decision by the authorities confirms this understanding.

## Investigation proceedings

A cartel investigation might be initiated either *ex officio* by the authorities or through a complaint filed by an interested party (even an anonymous letter has been accepted). The main authority responsible for investigating cartel violations is the SDE, the Secretariat of Economic Law of the Ministry of Justice. CADE issues a final decision based on the SDE's opinion on the matter; CADE's decision is subject to review only by the federal courts. The SEAE, the Secretariat of Economic Monitoring of the Ministry of Finance, may choose to issue an economic, non-binding opinion on the cases under the SDE's review, which will serve as an auxiliary tool for the punishment or dismissal of the case.

If the SDE believes there is enough evidence to pursue the case, an administrative proceeding (*processo administrativo*) is initiated; if not, the complaint may be dismissed or further evidence may be sought by the SDE through a proceeding named preliminary investigations (*averiguações preliminares*). If during the preliminary investigations strong evidence of anti-competitive behaviour is gathered, the SDE must close the preliminary investigations and initiate an administrative proceeding, which should, according to the law, follow all due process rules.

This structure provided for by the Competition Law for the investigation of antitrust violations creates a lot of discussions during the proceedings, mainly because during the fact-finding phase

the SDE ends up acting as both a prosecutor and a judge, opening the investigations, pursuing inspections or dawn raids and, later on, deciding issues that in a civil law country are typically pursued by the judge to form its opinion, such as determining which hearings should or should not be held. Such decisions tend to be controversial from a legal perspective and in many cases they are usually taken to the courts before the investigation is finished; as a result, the proceedings are subject to being suspended until there is a final decision from the courts. The solution to this problem, however, does not depend only on the SDE's efforts; it depends basically on a change in the Competition Law, which will probably not occur for a couple of years.

Besides that, the Competition Law defines certain deadlines within which the authorities should comply in their investigations: in theory, within these deadlines, an investigation should take no longer than six to seven months. As those deadlines are constantly extended (by both the parties and the authorities), some investigations may take more time than really necessary (three or more years). Probably this could be resolved, if the law was amended so as to include a final enforceable deadline by which the authorities would be legally bound to conclude the investigation.

### Leniency

One of the most relevant changes in competition and cartel enforcement in Brazil was the introduction of a leniency programme, back in 2000. A number of substantial examples from foreign authorities indicate that leniency programmes, coupled with severe penalties and active antitrust investigations, can substantially deter companies from continuing to operate or from entering into cartel arrangements.

Through the leniency programme, the SDE may execute, under certain restrictive conditions, leniency agreements in cartel cases. The benefits associated with such leniency agreements are reductions – varying from one to two thirds – of applicable pecuniary sanctions, or even full immunity from such sanctions, plus the right of the individual or individuals involved not to be criminally indicted.

To be entitled to such benefits the interested person or company must: (i) be the first to come to the authorities (there is no provision on benefits for second-comers under the Brazilian leniency programme); (ii) confess the practice; (iii) commit to cease its participation in the conspiracy; and (iv) effectively cooperate with the investigation. A leniency agreement will only be entered into by the SDE, if the involved person or company is capable of providing enough evidence to support the allegations.

In an effort to encourage immunity applications (despite the authorities efforts, estimates based on public sources indicate that there are five to seven known cartel cases initiated by means of leniency applications) and counter the deterrent effect caused by the need to gather all the information before contact is made with the authorities, the procedural rules have been revamped to introduce a marker system. While previously a potential beneficiary was required to pursue a formal written application, including the submission of enough evidence of the conspiracy, under the new regulations (Ordinance MJ No. 4/2006) a company can secure its place in the line by providing notice of the cartel (even anonymously, through its attorneys), being allowed to formally submit all the necessary data for the immunity application later on (within a maximum of 30 days).

The signing of a leniency agreement is prohibited if, by the time the applicant steps forward, the SDE has already gathered sufficient evidence on the conspiracy. In addition, a leniency agreement cannot be entered into by the authorities if the applicant was the cartel member that 'instigated the illegal conduct'. Even though it is up to the SDE to enter into leniency agreements, the administrative immunity or fine reduction has to be confirmed by CADE. In other words, the Competition Law does not make the signing of the agree-

ment dependent upon CADE's approval. While receiving the case to be judged, CADE will, however, review the compliance of the involved company or person with the agreement; if it is found that the applicant somehow violated the agreement, the applicant will no longer be subject to the leniency benefits. Even though this is highly unlikely to happen, the 'confirmation of immunity' procedure poses an additional risk to be accounted for when evaluating the benefits of a leniency application in Brazil.

A topic which is rarely associated with the leniency policy in Brazil is the civil damage claims resulting from antitrust violations. These claims can be sought through specific judicial proceedings – as set out by article 927 of the Brazilian Civil Code and by article 29 of the Brazilian Competition Law – by the prosecutor's office or by consumer's associations, or by the directly affected consumers harmed by the practice. It is yet to be seen if the courts will interpret the execution of a leniency agreement as confession, as no cartel investigations initiated by means of such agreements has reached a conclusion. As a side note, none of the procedures started by means of leniency agreements were made public (ie, their access is restricted to applicants and the authorities) and, therefore, it is not possible to say whether or not they could be used in damage suits brought on other jurisdictions. The United States adopts measures to reduce the beneficiary's exposure to civil actions, such as limiting the fine and excluding the joint and several liability, something that so far has not been considered by the Brazilian authorities.

Criminal amnesty (that prevents even the indictment) is also provided for in case the leniency agreement is executed and implemented prior to the proposition of the criminal suit by the prosecutor in charge of the matter. Recent news is that the prosecutor's office has just indicted the individuals incriminated by the first leniency agreement signed in Brazil and, confirming the rule, it did not include the beneficiary. This is, undoubtedly, a very important precedent aiming to reinforce the programme.

### Investigative powers and international cooperation

All three antitrust authorities have substantial investigative powers to determine the submission of information and documents from the parties, its competitors and consumers. These investigative powers include powers a judge would have, such as requesting oral hearings, collecting pieces of information of any kind and requesting expert reports and examinations. The SDE also has the authority to perform dawn raids on the premises of companies – and managers' houses – to seek for documents, computer files and any other evidence in connection with its investigations, provided that a previous court decision authorises such a procedure. In addition, in some cases courts have allowed that evidence collected in criminal investigations be used as a 'borrowed' evidence in administrative antitrust investigations, some dispute exists as to whether a wiretapping pursued in a criminal investigation may be used in an administrative proceeding.

Recent CADE condemnations on cartel cases were based on evidence produced by means of police-like investigations made by the SDE together with the federal police, the public prosecutor's office or both. Those investigations served to strengthen the image of the antitrust authorities in the eyes of the general public, also leading to increased awareness among the business community to antitrust risks. To some extent, it is possible to say that the authorities have strengthened their competition advocacy activities by means of the dissemination of the results of those investigations.

It is important to note also, that in the past few years, the Brazilian antitrust authorities have announced they are consistently committed to strengthening their cooperation activities with foreign authorities (most notably the United States), either by means of agency to agency agreements or by means of mutual

legal assistance treaties (MLATs), as well as by means of informal cooperation.

There is no record of a case in which cooperation with another jurisdiction's antitrust authorities was used to initiate an investigation or to exchange evidence or information in a specific case; however, there is at least one case known to have benefited from the public information resulting from investigations pursued abroad (ie, the international cartel vitamins case) and, in practice, provided that the legal framework exists, there should not be many barriers preventing the implementation of cooperation activities in actual enforcement cases. It is reasonable to assume that the increasing number of leniency agreements entered in Brazil by companies that file leniency agreements in other jurisdictions is to some extent a result of the alleged enlargement of formal and informal cooperation among the authorities.

The Competition Law also provides for cease and desist commitment for all other antitrust violations, except, expressly, for hard-core cartels. Nonetheless, a very recent initiative from the authorities – who proposed a cease and desist commitment for a very complex cartel case – may create a some precedent for other cartel cases that occurred previously to 2000. In any case, the outcome and effects thereof are yet to be seen.

### Criminal law

Criminal penalties may also be imposed for individuals liable for cartel violations, according to Federal Law No. 8,137/1990. In Brazil, except for environmental matters, criminal laws are not applicable to legal entities.

Criminal investigations and related judicial procedures are not necessarily linked to the administrative investigations led by the administrative antitrust authorities and might occur in parallel, separate or in joint or related procedures. The criminal sanction for the contemplated antitrust violations is of imprisonment (*pena de reclusão*) ranging from two to five years or a fine.

As a practical matter, recent cases have ended up with the payment of fines, and in the near future there is no clear evidence that criminal condemnation for any antitrust offences is to result in the violator being non-temporarily confined. In a number of recent cases involving concerted price fixing by gas retailers, in which the agreement was coordinated by an association, the judge ordered, in the course of the proceeding, that the officers of the trade association be preventively arrested, but they were soon released.

### Trends

The number of cartel investigations in Brazil tends to increase, if we consider that the authorities are keeping their focus on getting more convictions, so as to support their competition-advocacy campaign. The adoption of the marker system for leniency applications is likely to lead to enlargement of the anti-cartel enforcement activities. Nonetheless, there is a political element which must be taken into account when discussing future trends in competition policy in Brazil for the next few years: even though CADE is composed of seven independent commissioners with a fixed term, both the SDE and SEAE are hierarchic and linked to the Ministry of Justice and the Ministry of Finance, respectively, and the indications of the ministries (and consequently those of both secretariats) depend on a political element, and are not only strictly based on technical aspects. The maintenance of the focus on fighting anti-competitive conduct performed by the authorities is not assured.

This state of continued uncertainty as to the future of competition policy in Brazil could only be resolved by means of an institutional reform of the existing structure of the authorities, which would demand a change in the competition legislation. For this purpose, there is currently a bill before Congress, which proposes substantial modifications of the Competition Law, especially with regard to structure of the antitrust authorities and merger control proceedings. But there is still too much uncertainty as to whether this bill will actually be enacted.

### Conclusion

No one can dispute that cartel legislation and prosecution in Brazil have substantially improved over the last few years, thus allowing the authorities to effectively bring the Brazilian business community's attention to its records. Both the changes made to the Competition Law in 2000 and the authorities' more recent efforts to rationalise their tasks and focus on anti-competitive conduct investigations and competition advocacy are important; this has all been leading the business community to devote more attention to the leniency programme. Mature authorities already stated that increasing awareness on deterrence and punishment fosters leniency programmes, especially if well designed. For these reasons, the continuity of the strategy, added to the ability to maintain the level of enforcement without having decisions overruled by the judiciary, are key elements if the objective is to keep (or increase) the perception of (effective) enforcement that has currently been achieved.

## Barbosa, Müssnich & Aragão

Av Pres Juscelino Kubitschek  
50 - 4º andar  
04543-000 Sao Paulo, Brazil  
Tel: +55 11 3365 4559  
Fax: +55 11 3365 5322

Contact  
Barbara Rosenberg  
brr@bmalaw.com.br

Founded in 1995 by experienced attorneys with well-established reputations, Barbosa, Müssnich & Aragão provides specialised knowledge and understanding of the current legal and economic scenarios. The practice of law at the firm is characterised by rigorous legal analysis, coupled with creative solutions that maximise clients' business opportunities and a multidisciplinary approach that provides clients with comprehensive support in all legal aspects of business transactions. The firm's practice encompasses the most diverse aspects of business law and the impact of business transactions in areas such as corporate, tax, financial, competition, environmental, administrative, litigation, real estate, labour law, arbitration and intellectual property.

The antitrust practice has a very solid academic background and also has extensive experience in transactions engineering and in representing local and foreign clients in antitrust investigations and merger control cases, in several different industries. The team has also assisted clients in the development and implementation of compliance programmes and in several business negotiations in order to assure antitrust legislation compliance, shaping their business strategies to meet both legal requirements and business objectives. The competition law attorneys are also experienced in regulated markets and in international trade regulation, such as anti-dumping investigations.