

Brazil: Cartels and Leniency

Barbara Rosenberg and José da Matta Berardo
Barbosa Müssnich & Aragão

Aimed at strengthening competition law and policy in Brazil, the Brazilian antitrust authorities are maintaining their competition-advocacy efforts and continuing to draw the business community's attention to real risks posed by antitrust violations in Brazil.

The priority given to anti-cartel enforcement over the past four to five years, and to the rationalisation of the authorities' tasks, account for much of the recent relative success of the Brazilian antitrust authorities in fighting anti-competitive conducts, more particularly cartels. However, institutions are still maturing and there is a long way to go before a clean perception of enforcement deterrence is cemented among the business community.

This chapter examines the recent trends in anti-cartel enforcement in Brazil, its outcomes and future perspectives, and discusses the most stringent questions related to such enforcement, including investigation proceedings, a leniency programme, international cooperation, fines and criminal prosecution, in order to provide the reader with an overview of the main aspects of 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, as any practice that has as its object or effect the restraint of competition, which will be considered anti-competitive. Article 21 contains a list of some practices that 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 concerning 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 or 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 to 30 per cent of its pre-tax turnover in the year before the ini-

tiation of the administrative proceeding (which shall not be lower than the advantage obtained from the violation, if that is assessable). Managers of companies concerned in the collusion might have a fine imposed ranging from 10 to 50 per cent of that applied to the company, if their participation in the scheme is proved; trade associations that 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.

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 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 may 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 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 acts 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. These 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 will also depend on a change in the Competition Law, expected to occur by the end of 2007.

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). This could probably be resolved if the law was amended 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 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 these 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. Whereas 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 agreement 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 that 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 not yet known whether the courts will interpret the execution of a leniency agreement as a confession, as no cartel investigations initiated by means of such agreements have reached a conclusion. As a side note, none of the procedures started by means of leniency agreements was made public (ie, 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 if a leniency agreement is executed and implemented before 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.

Cease-and-desist commitments (Brazilian plea bargaining?)

Without a fanfare, on 31 May 2007 Law 11,482 came into force, bringing about a significant change to the provisions on cease-and-desist commitments under the Competition Law, with immediate effects.

The Competition Law already allowed the Brazilian authorities to enter in certain cease-and-desist commitments. In principle, such cease-and-desist commitments are beneficial to all parties involved: for companies and individuals, the investigation is suspended and the investigated practice is deemed not to be illicit, whereas for the Brazilian antitrust authorities, the allegedly anti-competitive practice ceases and no additional public resources are spent on the investigation, contributing to effective enforcement of the Competition Law. In 2000, however, the Competition Law was amended to exclude the possibility of cease-and-desist commitments in cartel investigations, reflecting the legislator's belief that permitting cease-and-desist commitments in hard-core cartel cases, with no penalties for the offenders, would have a counter-productive effect on the enforcement of the then newly introduced anti-cartel investigative rules.

By once again permitting cease-and-desist commitments in cartel cases, even though some general rules are maintained, Law 11,482/2007 introduced significant changes to the rules governing cease-and-desist commitments under the Competition Law. On the one hand, as it was the case in the previous regime, the authorities may accept an agreement proposal or not, according to their own discretion and the proposal may be submitted at any time, up until the beginning of CADE's judgment hearing. On the other hand, material changes take place, such as the requirement that the party entering into a cease-and-desist commitment for a cartel investigation necessarily pays an amount, which cannot be less than the penalties provided for anti-competitive behaviour in the Competition Law.

A crucial issue that is not clear in the new Law, and that needs to be ruled by CADE, is whether the cease-and-desist agreement

imposes the need of acknowledgement, by the individual or the company signing the commitment, of the unlawful nature of investigated practices. Some may say that if there is no acknowledgment, this new rule could jeopardise Brazil's leniency policy, as in leniency applications an explicit confession is required. Others could argue, however, that the acknowledgment might result in severe consequences in the criminal area, as well as in undeniable risks with respect to damages claims by consumers. At the time of going to press, CADE is yet to issue formal implementation rules regarding these new provisions.

It can be mentioned that under Law 11,482/2007 cease-and-desist commitments have become similar to plea bargains in antitrust investigations in the United States. Indeed, the new cease-and-desist commitment consists of a settlement between the investigated party and the competition authority, by means of which the investigated party shall agree to cease the conduct (and, yet to be defined, may be required to admit that the anti-competitive conduct was carried out) in exchange for substantially lower penalties and dismissal of the investigation, whereas the competition authority gains by not having to allocate further effort and resources to conclude the investigation. In Brazil, the amount to be paid by the party entering into the commitment is not formally a penalty, but rather a monetary contribution.

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 to request oral hearings, collect pieces of information of any kind and request expert reports and examinations. The SDE also has the authority to carry out dawn raids on the premises of companies, and managers' houses, to search 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, and some dispute exists as to whether 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-style 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 that 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 to 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.

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, separately 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 concerning 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.

<h2>Barbosa Müssnich & Aragão</h2>	
<p>Av Pres Juscelino Kubitschek 50 - 4th floor 04543-000 Sao Paulo, Brazil Tel: +55 11 3365 4559 Fax: +55 11 3365 5322</p>	<p>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.</p> <p>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.</p>
<p>Contact: Barbara Rosenberg • e-mail: brr@bmalaw.com.br</p>	