

Brazil: Cartels & Leniency

Bruno L Peixoto

Lanna Peixoto Advogados

The National Anti-Cartel Strategy and the Challenges for the New Administration

Since October 2009 when President Lula, joined by former European Commissioner for Competition Neelie Kroes and the United States Deputy Assistant Attorney General Scott Hammond, launched the National Anti-Cartel Strategy, significant progress has been made and new goals have been set.

More than a plan and a list of goals to boost enforcement, the National Anti-Cartel Strategy (ENACC) has evolved into a network of government and criminal enforcers, headed by a council created to coordinate administrative investigations and criminal persecution in the state and federal levels.

ENACC's new goals include establishing a special division within the federal police to investigate bid rigging, increase cooperation between the enforcers and the executive branches of the several states and municipalities, and create at least two more special divisions within the Public Prosecutor's Office (MP) to enhance criminal enforcement.

Furthermore, ENACC's council has requested the Brazilian Securities and Exchange Commission (CVM) to require every publicly traded company to:

- implement an antitrust compliance programme; and
- inform shareholders in case the SDE initiates an administrative process to investigate the company for anti-competitive practices.

The fact that the Secretariat of Economic Law (SDE) has established and led such a network of enforcement agencies as diverse as the states' MPs and the federal police under the common goal of prosecuting hard-core cartels does not only highlight the creativity and outstanding work of an antitrust agency under severe budgetary and personnel constraints. It also highlights the urgent need to fight historical and entrenched collusive behaviour in highly concentrated industries, which might hamper economic growth, reduce allocative efficiency and distort competition in public procurement processes for the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro.

By means of continuous efforts and expanding alliances, officials from the SDE, the Administrative Council for Economic Defence (the adjudicating commission) (CADE) and the Secretariat of Economic Monitoring (SEAE) have been able to pose a very credible threat to cartelisation. Several major Brazilian and foreign companies and their executives have faced cartel investigations, dawn raids, increased penalties and criminal actions.

In addition, Brazil's recent leniency programme has been successfully implemented. In the past year, the SDE received eight new leniency applications and sought to provide further transparency and predictability by issuing a new regulation clarifying the procedures for oral applications as well as for obtaining a marker. The regulation also allows former and existing employees to join as parties of the leniency agreement after it is signed by the company and during the course of the investigation.

Finally, with the emergence of private actions for damages, the costs of collusion have substantially increased.

Nevertheless, significant challenges lay ahead. Firstly, the immediate challenge for the SDE is to conclude lengthy and highly litigated cases concerning key industries while promptly initiating investigations and responding to new claims. Secondly, the main challenge facing the new administration is to expand and build on the superb work done thus far. Getting the anti-trust reform bill approved in Congress and, therefore, being able to hire more than 100 additional antitrust enforcers would be essential to ensure that the authorities are able to consolidate their gains and effectively investigate every case, enhancing deterrence as a result.

For leading companies, the central challenge is to implement comprehensive compliance programs in order to avoid administrative, civil and criminal liability in an era of coordinated global enforcement and increasing cooperation and convergence among antitrust authorities.

International cooperation, the effects doctrine and multi-jurisdictional cartel investigations

Having joined the DoJ and the DG Comp in the international anti-cartel enforcement network, established to coordinate multi-jurisdictional investigations, and after playing a major role in the joint operation launched to investigate an international cartel in the industry of compressors for refrigeration, the SDE remains in close contact with both authorities.

Pursuant to article 2 of the Antitrust Act, foreign companies are subject to Brazilian jurisdiction when anti-competitive practices 'produce or may produce effects' in Brazil even if the companies do not operate in the country ('the effects doctrine').

Following the DoJ and the DG Comp findings concerning an international cartel in the industry for dynamic random access memory for computers (DRAM), the SDE initiated an administrative process against foreign producers for allegedly harming Brazilian consumers by means of its exports to the country as well as the sales to several original equipment manufacturers which eventually exported personal computers and servers to Brazil. According to the SDE, the cartel may have produced a wealth transfer from Brazilian purchasers and a significant deadweight loss. For the same reasons, the SDE initiated a similar investigation against producers of LCD screens (TFT-LCD), although none of them operates directly in the country and all of Brazil's demand for flat screens is met through imports.

In addition, concluding a two-year investigation triggered by a leniency agreement, the SDE has recommended that CADE fines seven airlines for agreeing to fix air cargo rates, imposing a fuel surcharge for flights from Brazil between 2003 and 2005. The SDE also recommended fining 15 executives and employees who allegedly exchanged e-mails, agreeing on measures to compel other airlines to raise prices and join the collusive scheme. Executives directly involved in cartels might be fined 10 to 50 per cent of the fine imposed on the respective company.

Updated overview of the law

The economic approach

Antitrust enforcers and courts of law alike have construed Act 8,884 of 1994 ('the Antitrust Act') according to the rule of reason and increasingly through the lens of economic theory. SEAE, the SDE and CADE have repeatedly verified whether investigated firms jointly have market power and, therefore, are able to successfully restrict industry output and increase prices. Moreover, the agencies have considered whether the market structure and dynamics are conducive to effective collusion, according to the well-known 'checklist' of market conditions. Importantly, CADE has admitted market contestability as an effective defence against claims of cartelisation.

Pursuant to article 20 of the Antitrust Act, 'any act or conduct, regardless of fault, having as its object or being able to lessen, restrain or in any way harm competition or free enterprise; [or] result in dominance of a relevant market of goods or services; [or] increase profits arbitrarily; [or] abuse a dominant position' is an infringement of the economic order (anti-competitive conduct).

Additionally, article 21 of the Antitrust Act establishes that the following conducts, among several others, are infringements of the economic order, provided that the article 20 effects are produced:

- to fix or adopt, in agreement with competitors, prices and conditions for the sale of a certain product or service;
- to obtain or influence the adoption of uniform or concerted business practices among competitors;
- to allocate the markets for finished or semi-finished products or services, or sources of supply of inputs or intermediate products; and
- to agree in advance on prices or advantages in public or administrative biddings.

In this context, CADE has reaffirmed that conscious parallelism is illegal under Brazilian law when 'plus factors', such as a focal point and facilitating practices, are verified.

Penalties and criminal enforcement

CADE may impose fines on cartels ranging from 1 to 30 per cent of each company's gross turnover in the fiscal year before the initiation of the administrative process. In a case of naked price fixing by suppliers of sand for construction, CADE stated that companies involved in hard-core cartels should be fined at least 15 per cent of their annual gross turnover. CADE fined the cartel leader 22.5 per cent of its turnover, imposing fines of 17 to 20 per cent on the other cartel members.

The SDE has pushed further and recommended that producers of industrial and medical gases be fined 30 per cent of their gross turnover for market division, bid rigging and vertical restraints aimed at sustaining a collusive scheme. The SDE has also recommended fining the companies' managers and directors who participated in the scheme 50 per cent of the fine imposed on their companies, which is also the upper limit.

CADE has regularly ordered publication of the administrative rulings in major newspapers and often prohibited companies from participating in public procurement processes for five years. Moreover, it has often issued recommendations for the Chamber of Foreign Commerce (CAMEX) to reduce import tariffs of relevant products to promote competition in domestic markets affected by collusion.

Administrative penalties established by articles 23 and 24 of the Antitrust Act nevertheless also include compulsory licensing of intellectual property, the end of tax benefits, divestiture, breakup or 'any other measure required to end the detrimental effects to the

economic order.'

CADE may impose fines on any entity or person that cooperates with or facilitates collusion. Several trade associations as well as accountancy and consultancy firms have been fined for formatting, promoting and/or facilitating collusion.

In recent years, several decisions issued by federal courts have upheld fines imposed by CADE on companies and individuals for participation in price-fixing or bid-rigging schemes. Notably, after a decade-long appeal, the Federal Court of Appeals for the First Region (TRF1) upheld one of the first cartel rulings by CADE that fined a group of flat steel producers for collusive behaviour. In order to expedite the review of appeals pending before the TRF1, stalled by a lengthy internal dispute over which of the court's panels has authority to adjudicate such cases, CADE petitioned the National Council of Justice (CNJ), which oversees the functioning of the Judiciary, to intervene. In addition, appellants have been required to either deposit the fine imposed by CADE with the court or to post a bond guaranteeing its future payment in order to have the case reviewed.

With regard to criminal enforcement, as of July 2010, over 200 executives were facing criminal actions for cartelisation and 34 have been sentenced to jail time ranging from two to five years, although in several cases appeals are pending. Moreover, the Public Prosecutor's Office has charged eight executives for their role in the alleged cartel in the air cargo industry. Collusion was criminalised by means of Act 8,137 of 1990 and participants in collusive schemes are subject to detention and imprisonment for up to five years for cartelisation, besides possible indictment for conspiracy.

Enhanced enforcement

Dawn raids

The Superior Court of Justice and federal courts of appeals have reaffirmed that the SDE may examine documents and files seized in cartel dawn raids even if they include potentially unrelated confidential data regarding business strategy and product development, provided that the documents and files seized are not disclosed to third parties and the administrative process remain confidential until the merits of the actions challenging the validity of the raids are reviewed.

The SDE's antitrust department conducted 29 dawn raids directly related to cartel investigations in the last year, contributing to the arrest of several executives who have allegedly participated in price fixing, market allocation and/or bid rigging. Since 2007, the federal police has temporarily arrested more than 90 executives in cartel dawn raids in order to avoid spoliation of evidence.

Leniency programme

Brazil's leniency programme has been considered increasingly reliable and effective, having been repeatedly praised by DoJ officials. Companies have shown a growing interest in the programme as a consequence of both coordinated international investigations and the higher risk of substantial administrative and criminal penalties in Brazil.

Leniency agreements grant full or partial administrative immunity for companies and/or individuals depending on whether the SDE was aware of the reported collusive behaviour at the time of the application. If the SDE was unaware of the scheme, the applicant may be granted full immunity. In cases in which the SDE was previously aware of the cartel, the applicable administrative penalties may be reduced by between one-third and two-thirds, according to the results of the party's cooperation and its good faith.

If a company qualifies for leniency, all its directors, officers and employees may benefit as well, by admitting their involvement, joining the agreement, and fully cooperating with the investigations. From the date the agreement is signed, the Public Prosecutor's Office cannot bring a criminal action against the party and the limitation period is suspended until CADE issues a decision on the merits of the case. After CADE has adjudicated the case and verified that the party has fully complied with the agreement, the party receives definitive immunity from criminal persecution. Applicants should request that the Public Prosecutor Offices (both at the federal and state levels) sign the leniency agreement to ensure that no charges are filed.

Leniency applications must meet the following requirements:

- the applicant (entities or individuals) must agree to fully cooperate with the investigation;
- the cooperation must result in the identification of the other members of the conspiracy, and production of information or documents that prove the anti-competitive practice;
- the applicant must be the first to self-report and confess participation in the scheme;
- the applicant must not be the leader of the reported collusive conduct;
- when the applicant self-reports, the SDE must not have collected evidence of the applicant's infringement; and
- the applicant must cease the collusive behaviour.

The SDE's new regulation (Regulation no. 456/2010) has limited the scope of conduct information to be included in the leniency agreement, abolished the requirement that parties seeking a marker or submitting oral applications provide information about leniency applications in other jurisdictions, and clarified that access to the leniency materials and documents shall be granted only to defendants as required by due process and their rights of defence. A provision has also been added forbidding the disclosure or sharing of leniency materials and documents with 'entities from other jurisdictions' and third parties, although such provision may not be effective or enforceable or avoid that such materials become discoverable, pursuant to Brazilian laws.

An applicant that does not qualify for leniency, but reports a second collusive scheme, meeting the other applicable requirements, may be granted full administrative and criminal immunity for the second infringement plus a reduction of one-third in the fine to be imposed with respect to the first reported scheme ('leniency plus'). To receive such benefits, the applicant must report the second scheme before the process concerning the first one is sent to CADE for final judgment.

The SDE has widely publicised the leniency programme, having issued and distributed brochures, aimed mainly at companies' middle-management, which explains why and how to report a collusive scheme and file an application.

New task forces

The SDE has signed cooperation agreements with MPs from several states. Moreover, following the state of São Paulo, the MP of the state of Rio de Janeiro has recently set up a special anti-cartel division (DACAR) to boost criminal investigations and prosecution of participating individuals.

The SDE and the federal police have jointly established the Centre for Cartel Investigation to enhance cooperation in investigations of interstate and international cartels. Federal agents have received training in the National Academy of Police.

Trade associations

The SDE has increasingly focused on trade associations believed to foster and/or monitor collusive agreements. In the last year, it recommended fining the National Federation of Fuel and Lubricant Retailers as well as the National Syndicate of Translators for price-fixing; the National Association of Toy Manufactures for promoting collusion; and the Brazilian Union of Poultry Producers for promoting an output reduction of 12 per cent in the national market.

Moreover, CADE fined associations of driving schools and drug-stores for price fixing. According to the SDE, more than 100 other investigations currently underway involve associations. In this context, the agency has issued and distributed a brochure which outlines the limits of information sharing and the best practices within trade associations.

Bid-rigging investigations

Bid-rigging investigations and preventive measures have taken the prime position in the past year due to the forthcoming public procurement processes related to the 2014 FIFA World Cup and the 2016 Olympic Games. Participants in federal public procurement process will be required to file a certificate confirming that they have not engaged in any form of bid rigging and are aware they could face prosecution for both cartelisation and fraudulent misrepresentation.

The SDE's Public Procurement Unit, created two years ago, has been very active, providing training for federal and state officials responsible for conducting procurement processes and initiating several investigations. Among the conducts under investigation is alleged cover bidding and bidding rotation by suppliers of IT products and services, including software development and support for networks and databases; alleged market allocation by waste collectors; alleged bid suppression by suppliers of revolving doors with built-in metal detectors for banks; and alleged bid suppression and cover bidding by dredging and marine engineering companies that participated in public biddings to improve and increase the capacity of the ports of Santos and Rio Grande.

Settlements

Administrative consent orders (TCC)

CADE has established an internal committee for negotiating settlements with investigated parties and has entered a landmark administrative consent order with Whirlpool and its executives regarding the ongoing investigation of alleged cartelisation among producers of hermetic compressors for refrigeration. The company agreed to cease the conducts under investigation, pay 100 million reais in fines and not challenge in court the raids conducted by the SDE. Whirlpool admitted the occurrence of 'contacts between its employees and competitors' employees in which there was exchange of commercial information, including information related to prices and price increases concerning the Brazilian market'. Thus, CADE has stayed the administrative process against Whirlpool and its executives and shall terminate it if it verifies that the company has fulfilled its obligations. In February 2009, the SDE raided several producers of compressors for refrigeration in the states of São Paulo and Santa Catarina in the first coordinated operation with the DoJ and the DG Comp. According to SDE, the targets have allegedly fixed prices and shared sensitive commercial information through e-mails, phone calls and meetings in hotels and restaurants. The investigations were triggered by a leniency agreement.

Since the Antitrust Act was amended in 2007 to permit administrative consent orders (TCC) in cartel cases, 15 consent orders have

been entered concerning investigations in the marine hose, cement, meat packing, compressors and flexible plastic packing industries, among others. In order to sanction a TCC, CADE requires that the applicant:

- ceases the investigated conduct;
- pays a reduced fine, no lower than 1 per cent of company's gross turnover in the fiscal year before the initiation of the administrative process;
- agrees to implement an extensive compliance programme;
- agrees to grant CADE and SDE's officials access to their facilities and allow them to participate in trade association meetings; and
- agrees to provide technical assistance to the antitrust agencies regarding the productive and marketing processes of the relevant products.

Following the approval of a TCC by CADE, the administrative process against the company is stayed for a period of time set by CADE and afterward terminated in case it verifies that the company has fulfilled its obligations. If the party does not comply with its terms, CADE imposes a fine for violation and resumes the administrative process. TCCs may also be revised and modified to avoid imposing excessive burden on the company.

In investigations in which a leniency agreement has been executed, TCCs must include the party's confession. In the other cases, a confession is not mandatory and CADE may discretionally require it.

Enforcers have disagreed over whether a confession should be required. The SDE and the MP have feared that TCCs may result in underdeterrence since the reduced penalties are unlikely to offset the gains from cartelisation. In this sense, a confession would facilitate private actions for damages and propel an increasing number of lawsuits raising the costs of collusion. The majority of CADE commissioners, however, have argued that the confession requirement would put off potential applicants. The issue remains unsettled. TCCs, however, do not extinguish the applicants' civil or criminal liability.

Settlements of judicial appeals

For the first time CADE has settled a cartel ruling under judicial review, agreeing to collect 85 to 87 per cent of the fines imposed on three companies in the industry of crushed rocks for construction. CADE's commissioners have stated that they are aware that such settlements might create further incentives for companies to appeal to the Judiciary, but decided it should not overlook the cost-savings for the Administration from ending lengthy litigation and immediately collecting a substantial part of the fines originally imposed. For the purpose of calculating the amount of fines to be paid under settlements, CADE has considered it has a 95 per cent chance of winning in federal courts, although the time generally required to prevail after a possible series of four appeals all the way up to the Supreme Court was also a key factor.

Private actions

The first private antitrust actions in Brazilian legal history for collecting damages and lost profits attributable to cartelisation were filed following a ruling by CADE condemning producers of steel rebars used in the civil construction industry for concrete reinforcement for consumer allocation, resale price maintenance and collusion for fixing prices ('steel rebars cartel'). The private actions were brought by independent steel distributors allocated by the producers and

allegedly injured by:

- a price squeeze resulting from the combination of cartel prices in the upstream and resale price maintenance downstream; and
- boycott and price discrimination as defendants established their own distribution system to sustain the collusion.

In a landmark decision, judges of first instance have granted preliminary injunctive relief, ordering defendants to sell steel rebars to the plaintiffs either for the pre-cartel prices, adjusted for inflation (status quo ante), or the prices the firm currently sells to its controlled distributors. The Court of Justice of the state of Minas Gerais, on appeal, considered the opinions of CADE, SEAE and the SDE as 'unequivocal evidence' of anti-competitive practices and unanimously upheld the preliminary injunction. Analogous actions have followed.

It is important to point out that Courts of Justice from four different states have reaffirmed that coordinated conducts challenged by private actions must be assessed through the lens of the economic theory and under the rule of reason, pursuant to the Antitrust Act.

Standing

Pursuant to article 29 of the Antitrust Act, any injured or potentially injured person by an anti-competitive practice may bring a private antitrust action. Injured or potentially injured persons may be represented by:

- the MP in the defence of 'collective or diffuse interests' (the MP may request injunctive relief and application of remedies to halt collusive practices, but is not allowed to sue for money damages representing private parties);
- the union, states, municipalities and the federal district;
- administrative agencies or departments; and
- associations legally established at least for one year, provided that representing the injured class is one of its primary legal objectives. Lawsuits filed by recently established associations may be allowed to proceed in cases in which there is 'a clear social interest demonstrated by the dimension or nature of the injury or by the relevance of the value to be safeguarded.'

Pursuant to article 89 of the Antitrust Act, in every action regarding the application of the Antitrust Act, CADE must be notified so it may assess the need to intervene at its own discretion.

Collective actions

Two types of collective actions may be filed to halt or remedy anti-competitive practices: firstly, public civil actions, and secondly, collective actions for the defence of 'homogeneous individual rights'. The former aims at halting and/or remedying infringements that affect collective or diffuse interests, not specifically individualised. The latter aims at obtaining injunctive relief and/or money damages for a class of plaintiffs, besides specific behavioural or structural remedies.

Public civil actions are often filed either by consumer associations or the MP, although the union, the states, municipalities, the federal district and administrative agencies or departments also have standing. Plaintiffs cannot recover money damages, although defendants may be ordered to pay compensation to a public fund in order to redress the harm. A major public civil action has been filed by the MP against the steel rebars producers requesting both compensation and injunctive relief.

Collective actions for defence of homogeneous individual rights may be filed by trade associations, the MP, the union, the states,

municipalities, the federal district, administrative agencies or departments. Following the filing, courts publish a notice in the official gazette to interested parties to intervene and join the plaintiffs (opt-in). Major collective actions have been filed against the steel rebars and medical and industrial gases producers.

The antitrust reform bill

The antitrust reform bill passed by the House of Representatives has been approved by five committees in the Senate, but has not reach the floor yet due to last minute amendments from two senators.

The bill substantially changes the institutional design of antitrust enforcement by merging SEAE and SDE powers into CADE, creating, as a consequence, a single antitrust agency. Although no substantial changes on the regulation of anti-competitive conducts are expected, senators have not reached an agreement yet on whether confessions should be mandatory in consent orders. The new law would substantially enhance CADE's capabilities by allowing it to hire more than 100 additional enforcers.

Lanna Peixoto Advogados

Rua Sergipe 925, 14th floor
Belo Horizonte, MG, 30.130-171
Brazil

Tel.: +55 31 3244-0076
Fax: +55 31 3244-0086

Av. Roque Petroni Jr. 999, 13th floor
São Paulo, SP, 04707-000
Brazil

Tel.: +55 11 5185-2848
Fax: +55 11 5185-2899

Bruno L Peixoto

bpeixoto@lpglobal.com.br

www.lpglobal.com.br

Lanna Peixoto Advogados (LP) is a highly specialised boutique firm, providing premier and customised legal services in the areas of Brazilian and international antitrust law, international trade, trademarks and unfair competition and regulation of network industries.

LP has distinctive experience and expertise in highly complex and multifaceted cartel litigation, having played a major role in shaping the application and interpretation of Brazilian antitrust law in state and federal courts. LP has successfully elaborated and filed the first private actions for damages caused by cartelisation in Brazil, including the first collective actions. The Antitrust Practice Group has also represented clients in high-profile cartel investigations before CADE and the SDE. In addition, LP has obtained cease-and-desist orders and injunctive relief for his clients in landmark decisions in actions involving coordinated and unilateral anti-competitive conducts.

LP regularly advises leading companies on its commercial practices and business strategies. Drawing from the previous experience of its partners as enforcers, LP analyses the impact and consequences of global price fixing and market allocation in Brazil and Latin America, implementing local measures and helping to devise global strategies.

Furthermore, LP has conducted notifications of mergers and acquisitions in a variety of industries, performing a comprehensive assessment of specific efficiencies derived from transactions as well as their effects on Brazilian and Latin American markets. It has also markedly contributed to promoting a better understanding of the core goals of Brazilian antitrust law through distinctive achievements, as defending merger-specific dynamic efficiencies as a relevant factor in assessing a merger's net effects on consumer and aggregate welfare, and effectively advocating that merger review focus on post-merger market dynamics and output or price equilibria rather than on traditional static structural analyses.



Bruno L Peixoto

Lanna Peixoto Advogados

Bruno L Peixoto received his Master of Laws (LLM) degree from the University of Chicago Law School, is vice chair of the international antitrust law committee of the American Bar Association, section of international law, and currently heads the antitrust law practice group at Lanna Peixoto Advogados in São Paulo, Belo Horizonte and Brasilia.

Before founding Lanna Peixoto Advogados, Bruno was an attorney at the antitrust department of the Ministry of Justice (SDE) where he held positions in the merger control division and in the anti-competitive practices division.

Bruno has distinguished experience in complex and multifaceted antitrust litigation in Brazil, having not only represented leading companies from a variety of industries in investigations concerning cartelisation and unilateral conducts before CADE and the SDE, but also obtained landmark decisions in private actions in federal and state courts. Notably, Bruno has successfully elaborated and filed the first private actions in Brazilian legal history for damages caused by cartelisation, including the first antitrust collective actions (a hybrid of US class actions and EU-style representative actions).

Bruno has also advised merging companies on complex transactions, performing a comprehensive assessment of specific efficiencies derived from integration as well as their effects on Brazilian and Latin American markets. He has elaborated and conducted notifications of mergers and acquisitions in industries as diverse as steel, retailing, telecommunications and food processing.

Bruno regularly advises leading companies on their commercial practices and business strategies.

Bruno is also founder and president of the Brazilian Institute for Economic Analysis of Law, a non-profit organisation to advance economic analysis of Brazilian law and issue public policy recommendations whose members include politicians, scholars and practitioners who have conducted research in law and economics in the world's leading universities. He is also active in the academic community and has lectured extensively and published articles on antitrust law in both Brazilian and American law journals.