

The Antitrust Review of the Americas

2009

Published by Global Competition Review
in association with
Lanna Peixoto Advogados

GCR
GLOBAL COMPETITION REVIEW

Brazil: Cartels and Leniency

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When the head of the Antitrust Department (DPDE) of the Secretariat of Economic Law (SDE) told members of the ICN's Cartels Working Group that the SDE has been conducting nearly 300 cartel investigations, she was met with distrust and numerous questions. It is not surprising, though, that Brazilian executives and large companies have developed a culture of cooperation and collusion, after having been under a centralised economy in which the state fixed prices in agreement with producers until the 1990s. Add the appeal of monopoly profits, highly concentrated industries, an economy based primarily on commodities or homogeneous products, antitrust authorities with scarce resources, and underdeveloped private enforcement of competition laws and you have the perfect formula for widespread, pervasive cartelisation. However, thanks to the continuous efforts of enforcers from the SDE, CADE (Administrative Council for Economic Defence, the adjudicating commission), and SEAE (the Secretariat of Economic Monitoring), the situation is rapidly changing.

As of August 2008, several of Brazilian (and foreign) major companies as well as their executives have faced cartel investigations, dawn raids, increased penalties, and criminal actions. Moreover, Brazil's recent leniency programme has been successfully implemented; at least 10 companies or individuals have self-reported and cooperated with the investigations in their industries and several other requests for leniency are currently under analysis. In addition, with the emergence of private actions for damages, the costs of collusion have significantly increased. Furthermore, in-house and outside counsels alike have decisively contributed to prevent collusion by exposing the risks of domestic and international prosecution and implementing state-of-the-art compliance programmes. Accordingly, firms have gradually internalised the costs of cartelisation and the hard work of enforcers is paying off.

Nevertheless, significant challenges lay ahead. The challenge facing CADE, the SDE and SEAE is two-fold: consolidate their gains and, thus, enhance deterrence; and increase penalties to effectively punish future collusive schemes, since firms are expected to weigh the costs and benefits of cartelisation based on the current levels of punishment. On the other hand, for leading companies, the central challenge is to effectively implement compliance programmes in order to avoid administrative, civil and criminal liability.

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.

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

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; or
- to agree in advance on prices or advantages in public or administrative biddings.

Penalties

CADE has punished cartels with fines ranging from 1 to 20 per cent of each company's gross turnover in the fiscal year before the initiation of the administrative process, besides ordering publication of the administrative ruling in newspapers, and often issuing recommendations for the Chamber of Foreign Commerce (CAMEX) to reduce import tariffs of relevant products to promote competition in domestic markets affected by collusion.

Recently, the SDE has pushed further and recommended that White Martins Ltda, Air Liquide Brasil Ltda, AGA SA and Air Products Brasil Ltda be fined 30 per cent of their gross turnover – the upper limit – for market division and bid rigging in the industrial and medical gases market, as well as vertical restraints aimed at sustaining a collusive scheme. The SDE has also recommended fining the managers and directors who have participated in the scheme 50 per cent of the fine imposed on their companies, which is also the upper limit.

Administrative penalties established by articles 23 and 24 of the Antitrust Act, however, also include prohibition from participating in public biddings for at least five years, compulsory licensing of intellectual property, end of tax benefits, divestiture, breakup or 'any other measure required to extinguish the detrimental effects to the economic order'.

It is relevant to note that CADE may impose fines on any entity or person that cooperates with or facilitates collusion. Several trade associations have been fined for promoting collusion. Recently, the SDE has charged an accountancy and consultancy firm for facilitating price fixing.

Furthermore, as of August 2008, over 100 executives were facing criminal actions for cartelisation and 10 have been sentenced to jail time ranging from two to five years. Moreover, the Public

Prosecutor's Office (PPO) has recently charged eight executives for their role in the air cargo industry cartel. Collusion was criminalised by means of Act 8,137 of 1990 and participants in collusive schemes are subject to criminal penalties, including detention and imprisonment for up to five years.

With respect to international cartels, it is crucial to note that Brazilian antitrust law explicitly embraces the effects doctrine. 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.

Enhanced enforcement

Dawn raids

The SDE and the Federal Police recently conducted the largest operation ever in South America against cartelisation, resulting in 42 simultaneous raids and 24 arrests for collusion to fix the prices of fuel and adopt vertical restraints to sustain the scheme. The operation, which targeted fuel distributors and retailers in the city of Belo Horizonte, was called operation 'Invisible Hand'. The SDE has made anti-cartel enforcement its highest priority and has conducted an increasing number of dawn raids (more than 90 since 2007) with support from both the Federal Police and the PPO, in industries ranging from the cement to medical gases, from the orange juice to the gas-insulated switch gear industry, from fuel distribution to flexible plastic packing. Since 2007, the Federal Police have temporarily arrested more than 60 executives in cartel dawn raids, in order to avoid spoliation of evidence.

In another important development, the Superior Court of Justice (STJ) has ruled 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 remains confidential until the merits of the action challenging the validity of the raid are reviewed.

Leniency programme

The SDE also has widely publicised its leniency programme through meetings with both Brazilian and foreign law firms and lectures in several states. It has also issued and distributed a brochure, aimed mainly at companies' middle management, which explains why and how one should report a collusive scheme and file a leniency application.

Leniency agreements grant full or partial administrative immunity for companies and 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 where the SDE was previously aware of the cartel, the applicable administrative penalties may be reduced by one to 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, signing the agreement along with the company, and agreeing to fully cooperate with the investigations. From the date the agreement is signed, the PPO 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

prosecution. Applicants should request that the PPOs (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 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;
- at the time the applicant self-reports, the SDE must not have collected sufficient evidence to ensure the applicant's conviction; and
- the applicant must cease the collusive behaviour from the date of the filing onwards.

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.

Anti-cartel task forces

The SDE and the Federal Police have jointly established the Center for Cartel Investigation to enhance cooperation in investigations of interstate and international cartels. Furthermore, the SDE has created a new division within DPDE to investigate bid-rigging in both the federal and state spheres and has signed cooperation agreements with PPOs from several states. Moreover, the PPO of the State of São Paulo has recently set up a special anti-cartel task force to boost criminal investigations and prosecution of participating individuals.

Administrative consent orders (TCC)

The Antitrust Act has been amended in 2007 to permit administrative consent orders (TCC) in cartel cases. As of August 2008, four consent orders have been entered concerning investigations in the cement, marine hose, meat packing and flexible plastic packing industries and several other requests were analysed but denied. 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 the 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 the 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 if 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. Three TCCs entered thus far, however, have provided that they do not represent a confession or admission of the alleged anti-competitive behaviour.

The growing interest of investigated companies in obtaining a TCC may be associated to the higher risk of increased administrative penalties. However, TCCs do not grant immunity from private actions or extinguish the party's civil or criminal liability. On the contrary, as TCCs create the obligation to cooperate with the agencies, providing technical assistance regarding the productive and marketing processes of the relevant products, and considering that the administrative investigation concerning the non-signing participants continues, a TCC may help convict co-participants and generate evidence which may be used as well in private actions for damages against the signing party. Companies, therefore, should balance the possibility of increased administrative penalties with the risk of facilitating private actions for damages.

Private actions against collusive schemes

The first private antitrust action in Brazilian legal history for collecting damages and lost profits attributable to cartelisation was filed in 2006 (*Cobraço Group v ArcelorMittal*). The action followed a ruling by CADE condemning steel producers ArcelorMittal, Barra Mansa (Votorantim Group), and Gerdau for consumer allocation, resale price maintenance and collusion for fixing prices of steel rebars used in the civil construction industry for concrete reinforcement (the Steel Rebars cartel).

The private action was brought by independent steel distributors allocated by the producers and allegedly injured by 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, the state judge of first instance has 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 the anti-competitive practices and unanimously upheld the preliminary injunction. Analogous actions by injured parties have followed.

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 PPO in the defence of 'collective or diffuse interests.' The PPO 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'.

Collective actions

Two types of collective actions may be filed to halt or remedy anti-competitive practices: public civil actions and collective actions for defence of 'homogeneous individual rights'. The former aims at halting and remedying infringements that affect collective or diffuse interests, not specifically individualised. The latter aims at obtaining injunctive relief and 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 PPO, 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 PPO against the Steel Rebars cartel requesting both compensation and injunctive relief.

Collective actions for defence of homogeneous individual rights may be filed by trade associations, the PPO, the Union, the states, municipalities, the Federal District, administrative agencies or departments. Following the filing, courts publish a notice in the Official Gazette asking interested parties to intervene and join the plaintiffs (*opt in*).

Emerging issues and trends

TCCs and the requirement of confession

Enforcers have disagreed over whether a confession should be required in every TCC. The SDE and the PPO have feared that TCCs may result in under-deterrence, 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 as five new CADE commissioners, including its president, have been recently appointed. On other issues though, fundamental change is not expected to take place as the new group of commissioners comprises, besides antitrust lawyers, economists who have worked extensively at the SEAE.

Leniency and private actions

As the number of private actions for damages increases, the Antitrust Act should be amended to limit the civil liability of successful applicants for leniency, in order to avoid undermining the leniency program. In a system of civil law traditionally based on corrective justice, however, it may prove difficult to extinguish civil liability. As a second-best solution, thus, courts should craft specific rules for considering evidence based on a systemic interpretation of the Antitrust Act and should not admit that evidence produced as a result of a leniency application is used against the successful applicant.

Amendments to the Antitrust Act

Congress is considering a bill that will substantially change the institutional design of antitrust enforcement by merging the SEAE and the SDE antitrust regulation powers into CADE, creating, as a consequence, a single antitrust agency. Although no substantial

changes on the regulation of anti-competitive conducts are expected, representatives have not reached an agreement on whether confessions should be mandatory in consent orders. Voting in the House of Representatives is expected to occur by late 2008, but it is still uncertain when the bill will reach the Senate floor.

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Lanna Peixoto Advogados (LP) is a highly specialised firm which provides 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. The Antitrust Practice Group has 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 cartelization in Brazil. It has also obtained injunctive relief for its clients in landmark decisions in actions involving coordinated and unilateral anti-competitive conducts.

In addition, LP has advised leading companies on its commercial practices and business strategies and has developed and implemented state-of-the-art antitrust compliance programmes.

LP has also conducted notifications of mergers and acquisitions in a variety of industries, performing a comprehensive assessment of specific efficiencies derived from operations 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, such 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.

About the Authors



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Bruno Peixoto received his Master of Laws (LLM) degree from the University of Chicago Law School and is the head of the antitrust practice group of Lanna Peixoto Advogados. Bruno Peixoto has successfully elaborated and filed the first private actions in Brazilian legal history for damages caused by cartelisation.

Mr Peixoto has counselled leading companies regarding their commercial practices and business strategies and has developed and implemented antitrust compliance programmes.

Bruno Peixoto has also conducted notifications of mergers and acquisitions in a variety of industries, from mining and steel to retailing, telecoms and technology. He has advised merging companies in complex transactions, performing a comprehensive assessment of specific efficiencies derived from operations as well as their effects on Brazilian and Latin American markets.

Before founding Lanna Peixoto Advogados, Mr Peixoto was an attorney at the Antitrust Department of the Ministry of Justice (SDE). He held positions both in the Merger Control Division, where he conducted reviews of operations in several industries, and in the Anti-competitive Practices Division where he prosecuted international cartels.

Bruno Peixoto is also the founder and president of the Brazilian Institute for Economic Analysis of Law, a non-profit making organisation to advance economic analysis of Brazilian law and issue public policy recommendations. Its members include politicians, scholars, and practitioners who have conducted research in law and economics in the world's leading universities.

Mr Peixoto is also active in the academic community and has lectured extensively and published articles on antitrust law in both Brazilian and US law journals. ■