Brazil's Anti-Cartel Enforcement: Preparing for the Future

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Recent developments

According to the OECD 2010 *Competition Law and Policy in Brazil – A Peer Review*, 'Brazil's anti-cartel programme is now widely respected in Brazil and abroad' and '[i]n a few short years Brazil has developed a programme for criminally prosecuting cartels that places it as one of the most active of all countries in this area.' Similarly, the 2008 and 2009 'Rating Enforcement' published by the *Global Competition Review* states, respectively, that 'Brazil has the fastest-growing cartel enforcers in the world' and that '[t]here were some notable achievements in the SDE's cartel busting programme in 2009, in terms of both results and procedure.' Along the same lines, Thomas O Barnett, while Assistant Attorney General of the US Department of Justice Antitrust Division, acknowledged 'the great progress achieved on this front in Brazil'.[1] In 2010, a US$1 billion fine was imposed by CADE to a single company in a cartel case and to date more than 250 executives are facing criminal proceedings for alleged cartel activities – including foreign executives, and at least 40 executives have been sentenced to serve jail time for their participation in cartel conduct.

How did Brazil manage to achieve those results? To better answer this question it is important to look back a few decades.

The first Brazilian competition law dates from 1962, but it was only in 1994 that the modern era of antitrust in Brazil began. In that year, Congress enacted Law No 8,884 which governs Brazilian antitrust law and policy, as amended in 2000 and 2007 (the 'Brazilian Competition Law'). A few years before, Congress had enacted Brazil's Economic Crimes Law (Law No 8,137/90), which establishes that some types of anti-competitive conduct may be considered a crime, subject to a penalty of two to five years of imprisonment or payment of a criminal fine. The nature of Brazil's anti-competitive sanctioning system is thus dual (administrative and criminal).

At the administrative level, the Brazilian antitrust system is composed of three agencies: the Secretariat for Economic Monitoring of the Ministry of Finance ('SEAE'), the Secretariat of Economic Law of the Ministry of Justice ('SDE'), and the Administrative Council for Economic Defence ('CADE'). The SDE is the chief investigative body in matters related to anti-competitive practices and also issues non-binding opinions in merger cases. The SEAE primarily issues non-binding opinions in merger cases. The CADE is the administrative tribunal, which makes the final rulings in connection with both anti-competitive practices and merger review, after reviewing SDE's and SEAE's opinions. CADE's decisions should be 'independent', that is they should be based on the facts and the law and not on political considerations, and all decisions are subject to judicial review. On the criminal side, federal and/or state public prosecutors have sole enforcement responsibility, pursuant to Brazil's Economic Crimes Law.

During the first years of enforcement of the 1994 Competition Law,[2] the Brazilian antitrust authorities focused primarily on merger review and substantial resources were devoted to the review of competitively innocuous mergers. Since 2003, the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that placed hardcore cartel prosecution as the top priority. As of that year, the SDE started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct.

SDE's strategy of focusing the available resources on cracking down on cartels has proven successful, and there is an increasing number of investigations of anti-competitive practices, leniency applications and dawn raids. There are a growing number of applicants to the leniency programme, and approximately 20 leniency agreements have been signed since 2003, mostly with members of international cartels. Also, the SDE has substantially increased cooperation with the criminal authorities to strengthen anti-cartel enforcement in Brazil. As a result, the number of search warrants served has significantly increased: from 2003 to 2006, 30 warrants were served and two people were detained without charges; from 2007 to 2010, almost 300 warrants were served and more than 100 executives were detained without charges.

The fact that members of international cartels are applying to Brazil's leniency programme enhances the existing international cooperation between Brazil and foreign competition agencies. In February 2009, Brazil took part for the first time in a joint dawn raid with the United States and the European Commission to collect evidence of an international cartel. This seems to be the first of a number of expected future joint actions with foreign authorities in which Brazil will take part and reflects the maturity of the Brazilian anti-cartel programme.

As a result of the above, Brazil has shifted from exclusively being a recipient of technical assistance – and in this respect, it is worth noting the assistance received from the US authorities during the late 1990s and early 2000s – to being a provider of technical assistance to countries interested in improving their anti-cartel programme, such as Chile and Argentina.

The recent success of Brazil's anti-cartel programme presents a number of enforcement challenges and difficult practical issues to be addressed by the Brazilian administrative and criminal authorities, as will be further discussed in this article. Before discussing it, we will present a brief overview of administrative and criminal enforcement, including a few lines on the leniency programme.

Administrative enforcement

Cartels, as an administrative offence, can be sanctioned with fines imposed on companies by CADE that may range from one to 30 per cent of a company's pre-tax revenues in the year preceding the initiation of the proceedings. Managers and directors responsible for unlawful corporate conduct may be fined an amount ranging from ten to 50 per cent of corporate fines. Other individuals, business associations and other entities that do not engage in commercial activities may be fined anything from approximately R$6,000 to R$6 million (Brazilian reais). Fines for repeated violations are doubled.

Apart from fines, the Brazilian Competition Law provides for other sanctions as well, such as publication of the decision in a major newspaper at the wrongdoer's expense; the prohibition of the wrongdoer from participating in public procurement procedures and obtaining funding from public banks for up to five years; and the recommendation to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in instalments or obtain tax benefits.

On various occasions, the CADE has shown its strong commitment to severely punishing hardcore cartels. The most recent example (September 2010), which received a lot of international attention, was the decision related to the industrial gases cartel case: CADE based the fine on 25 per cent of the companies' gross revenues in 2003, when the investigation started, and the total fine amounted to a record fine of R$2.3 billion (approximately US$1.3 billion) to five industrial gas manufacturers for alleged long-term cartel activity. Other cartels were also sanctioned by the CADE such as the airlines cartel (2004), crushed rock cartel (2005), newspaper cartel (2005), pharmaceuticals cartel (2005), international vitamins cartel (2007), security services cartel (2007), and sand extractors cartel (2008).

Additionally, the Brazilian cartel settlement programme was introduced in 2007, through an amendment to the Brazilian Competition Law. This represents a remarkable improvement as early cooperation on the part of the defendants saves public resources, cuts down litigation, enables early payment of a significant sum of money and provides expedited treatment and more certainty and transparency to the business community. Settling also proves beneficial for the defendant, as it often means a more efficient use of resources on the part of the company. More than five settlements have been executed by CADE since 2007, including with members of international cartels (for example, the marine hose cartel investigation and compressors cartel investigation).[3]

Criminal enforcement

Apart from being an administrative infringement, participating in a cartel is also a crime in Brazil, punishable (only to individuals, not to corporations) by a criminal fine or imprisonment from two to five years. According to Brazil's Economic Crimes Law, this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market

essential to life or health. As for bid-rigging, there is a special provision in the Public Procurement Law (Law No 8,666/93) which provides for a jail term of two to four years and a criminal fine.

Brazilian federal and state public prosecutors are in charge of criminal enforcement in Brazil. Also, the police (local or federal police) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who may or may not indict the reported individuals.

As previously stated, in 2003 the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that places hardcore cartel prosecution as their top priority and, as with other antitrust authorities across the world, they have had to focus on developing better detection methods and increasing the sanctions that had previously been imposed against offenders. Brazil's choice was to create an integrated system where the administrative authorities in the federal government and the criminal authorities at the federal and state levels work as a team, so as to utilise the best of both systems and improve deterrence.

Brazil's integrated system has three main and equally important purposes. The first is to enhance the detection abilities of the antitrust authority, taking advantage of the complementary expertise in the administrative and criminal spheres, as well as of the resources of police and prosecutors around the Brazilian territory. The second is to secure convictions and jail sentences for executives who do not apply to Brazil's leniency programme, in addition to collecting the administrative fines applicable to corporations and individuals under the Brazilian Competition Law. And the third purpose is to increase overall deterrence and legal certainty regarding the leniency programme.

Until very recently, criminal authorities played a supporting role that mostly consisted in providing technical assistance during dawn raids. When criminal prosecution followed, in the vast majority of the cases it happened as a consequence of enforcement at the administrative level. These first steps of integration boosted SDE's and CADE's reputations as tough enforcers and made available a variety of investigative tools that had not been used before, thereby strengthening the cases prosecuted at the administrative level. This, in turn, had three important inter-related consequences:

- CADE began imposing higher sanctions due to the existence of direct evidence of collusion;
- it increased litigation during and after the administrative prosecution along with the instances when CADE's decisions and the SDE's administrative acts were upheld by the courts; and
- it attracted a greater number of leniency applicants.

The landmark case of this new phase of Brazil's anti-cartel enforcement was the crushed-rock cartel investigation. It was the first time that administrative authorities, in close cooperation with criminal authorities, executed an antitrust dawn raid.[4] There was intense cooperation between SDE and the Public Prosecutor's Office of the State of São Paulo throughout the case and, as a result, criminal proceedings were also filed before the judiciary. The proceedings led to joint interviews of witnesses by SDE and the police as well as criminal indictments of several individuals. Ultimately, the criminal proceedings were settled with the payment of fines. At the administrative level, using the SDE's report as a basis, CADE fined the defendant companies along with the trade association in amounts ranging from 15 to 20 per cent of their 2001 gross revenues, depending on the degree of their involvement.

The numerous dawn raids that have been run since 2003, the growing number of leniency applicants and the hefty fines imposed by CADE have been decisive in attracting attention from criminal authorities from the different states of the country and encouraging anti-cartel enforcement to be treated as a relevant matter for criminal enforcement. As a result, police officers and prosecutors have begun to uncover their own leads and initiate cartel investigations themselves, asking for the SDE's assistance.

In 2008, the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to cooperate with the SDE in joint criminal and administrative investigations. This arrangement became a template for cooperation between the SDE and other state prosecutors and now the SDE has cooperation agreements with the federal police, 23 out of the 27 Public Prosecutor State Offices, and some local police forces. With the use of the Ministry of Justice's financial resources, dedicated criminal anti-cartel units were or are planned to be established in the states of São Paulo, Rio de Janeiro, Paraíba, Santa Catarina, Amazonas, Minas Gerais, Rio Grande do Norte and Piauí. The federal police have also created dedicated units: one devoted to cartels in general and the other exclusively dedicated to investigate bid-rigging.

More recently, in 2009, the SDE launched the 'National Anti-Cartel Strategy' ('ENACC'),[5] a permanent forum that gathers administrative and criminal authorities, both at the federal and state levels, for information sharing and discussion of cases and investigative techniques. At the end of the first meeting, the authorities signed the 'Brasilia Declaration', dedicated to reaffirming and enhancing the cooperation among these authorities in the anti-cartel programme. The 2010 reunion gathered more than 200 criminal authorities who together established

nine goals to be accomplished within one year. As seen, deeper integration became indispensable as enforcement changed the scale of activity, and also as criminal authorities began performing a leading role instead of a supporting one.

Foreign executives are also subject to Brazil's criminal system as long as their conduct produces effects in Brazil. In fact, some of the criminal settlements executed in Brazil involved foreign executives, who had, as part of their obligations, to appear every other month before a Brazilian embassy located in their country of residence. The Brazilian authorities are also considering making use of Interpol's Red Notice system to make sure that individuals located outside Brazil and considered liable for cartel conduct with effects in Brazil will face the imposed sanctions.

Brazil's leniency programme

Cartels are often difficult to detect and investigate without the cooperation of parties involved in the conduct, as they rely upon the elements of secrecy and deception. For that reason, a significant number of jurisdictions have adopted leniency programmes in order to uncover such conduct. Brazil is no exception to that: the Brazilian Competition Law considers that it is in the interest of Brazilian consumers to reward cartel participants which are willing to confess, put an end to their participation in the cartel and fully cooperate with the Brazilian antitrust authorities to ensure condemnation of the practice.

The Brazilian leniency programme was launched in 2000, and it was inspired by the US leniency programme, adopting a 'winner-takes-all approach'.[6] Article 35-B of the Brazilian Competition Law authorises the SDE to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or *all* of the administrative penalties for cartel conduct under the law.[7]

Article 35-C provides that successful fulfillment of a leniency agreement also protects cooperating parties from criminal prosecution under Brazil's Economic Crimes Law. Prosecutors are viewed by the SDE as partners in the leniency process and they may be involved (both at the federal and state levels, when applicable) in the execution of the leniency agreement. No beneficiary of a leniency agreement (out of the 20 signed) has ever faced criminal proceedings in Brazil for the cartel conduct reported. The reason this is so is because prosecutors seem to be convinced of the importance of fighting cartels and the value of leniency for achieving good results in that respect.

Pursuant to the Brazilian Competition Law, in order to benefit from the leniency agreement, the following requirements have to be fulfilled:

- the applicant (a company[8] or an individual) is the first to come forward and confess its participation in the unlawful practice;
- the applicant ceases its involvement in the anti-competitive practice;
- the applicant was not the ring-leader of the activity being reported;[9]
- the applicant agrees to fully cooperate with the investigation;
- the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anti-competitive practice; and
- at the time the applicant comes forward, the SDE had not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

While adjudicating a case, CADE must verify whether the applicant complied with the terms and conditions provided in the leniency agreement and, if this is the case, confirm the full or partial immunity granted by the SDE.

Finally, due to an increasing concern with respect to discovery issues, the SDE has taken additional precautionary measures to make sure that the identity and the documents presented by the leniency applicant will remain confidential throughout the proceedings.

CADE on various occasions has clearly recognised that the leniency programme is the most cost-effective investigative tool to deter and punish cartels. In 2007, CADE fully confirmed the leniency agreement executed in connection with the security service provider companies' cartel, the first leniency agreement ever signed in Brazil. Other cases still need to be reviewed by the tribunal.

As in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (either by being the second to come forward, or by being the cartel ring-leader), but discloses a second cartel, and meets the other leniency programme requirements, will receive full administrative and criminal immunity for the second offence and a one-third reduction in fine with respect to the first offence. The goal is to encourage subjects and targets of ongoing investigations to consider whether they may qualify for leniency in other markets where they are active. To receive such benefits, the applicant has to disclose the second cartel before the first case is sent by the SDE to the CADE for final judgment.

The first leniency applicant came before SDE in 2003 after two dawn raids had taken place during that year and

the SDE had already amassed some positive information on its ability to uncover anti-competitive behaviour. At that point, in addition to search and seizure procedures, the agency had intensified the use of other means of proof, in cooperation with the criminal authorities (such as wire-tapping). Since that year, the SDE has improved the leniency programme in order to provide more transparency and certainty to the programme. In 2008, the SDE issued the Leniency Policy Interpretation Guidelines and a Model Annotated Leniency Agreement, both of which are available in English.

Challenges and perspectives

As a policy matter, enforcers are determined to impose stiffer sentences against harmful cartels that target Brazilian businesses and consumers. It is expected that more individuals – both foreign and national – will be sentenced to jail, and corporations and individuals will pay higher administrative fines.

No doubt that the recent accomplishments by Brazil's antitrust authorities themselves foster new challenges. The expanding numbers of actors that share responsibilities over cartels, even more so since the institution of the ENACC, invite careful and creative thoughts about how to manage the multiplicity of voices and the different perspectives on effective anti-cartel enforcement. This is a work in progress and, during this transition, there will be some discomfort which is natural and part of the growth process. The results ahead seem promising, but success depends on increased integration and coordination. Administrative and criminal authorities have different backgrounds and, on occasion, may have different priorities. It is quite natural for an antitrust authority to set anti-cartel enforcement as a top priority, but not as natural for criminal authorities that usually are involved with the investigation of other serious crimes to do the same. And even when that happens, and specialised units are created, it does not necessarily follow that they will have the same views as the antitrust authorities on a given case. This has several consequences as, for example, to which penalties will be sought or what will be required to settle a case.

In the background of these developments lies the Congressional review of the bill that will amend the Brazilian Competition Law, with the purpose of enhancing efficiency and further aligning competition enforcement in Brazil to international best practices. The primary changes encompass:

- the elimination of existing overlaps among agencies and the creation of a permanent staff;
- the adoption of a pre-merger system and new thresholds for notification; and
- higher criminal sanctions.

If this reform is approved, many of the current problems – as insufficient resources and substantial staff turnover – will be solved.

However, in spite of being aligned with international best practices and being a definite step up the ladder towards greater overall efficiency, there is a fundamental conundrum posed by the reformist agenda: should the improved anti-cartel system emphasise our courts and prosecutors as the primary tool for competition enforcement to the detriment of administrative agencies, or should it be the other way around?

The path we choose will determine the nature of our enforcement efforts for a long time, and in spite of being absolutely critical, it is seldom discussed in academia or in policy-making circles. The alternative currently chosen for shaping the new competition regime is clearly geared towards administrative adjudication – that is the one carried out by federal agencies and administrative tribunals: the 'new CADE', incorporated as a federal agency within the Ministry of Justice, will have both an administrative tribunal and an enforcement division. Proceedings will take place against both companies and executives – in an adversarial fashion – within the realm of the new agency, leading to a final ruling issued by the administrative tribunal.

But how final will a ruling issued by the new CADE (or, for that matter, the current CADE) actually be? Sanctions imposed by antitrust authorities will, in all likelihood, be appealed in judicial courts (as granted by the Brazilian Constitution), and the whole proceeding – under due process standards – will resume. In order to put these options in context, it is important to understand that, as mentioned, prior to 2003 the bulk of antitrust activity was oriented towards merger control, thus making a 'one-stop shop' antitrust agency the obvious logical choice. However, in a world in which anti-cartel is the priority, a dual-system (in which, Anglo-Saxon style, all goes through the court system) that lives together with European style administrative adjudication presents a number of challenges. Hence the main test for the future of anti-cartel enforcement in Brazil lies in optimising a system that relies heavily on both administrative tools of enforcement (which renders as outcomes administrative investigations and administrative judgments) and judicial ones (criminal prosecution, local courts' oversight of administrative decisions). And, as the number of cases pick up (as we predict it will), the case flow must not be bottlenecked.

In the long run, we may see new attempts at legislative reform. Simultaneously, as the highly decentralised criminal prosecution system in Brazil becomes more and more involved in the anti-cartel enforcement, some co-evolution might lead to a hybrid system in

which each enforcement entity investigates, without overlap, the type of case it is best fit to pursue, ie, public prosecutors go after establishing individual liability while administrative agencies try to establish corporate liability and assess the respective fines.

With time, as institutional settings compete with one another to establish enforcement predominance, Brazil may even migrate towards a US style system, skipping administrative jurisdiction altogether. It would be ironic, then, that by bringing the criminal prosecution system into the antitrust enforcement arena we unleashed the benefits of competition (this time, among institutions) and transformed our own enforcement framework.

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Notes

1 See Thomas O Barnett, *Perspectives on Cartel Enforcement in the United States and Brazil*, Brasilia, April 2008.

2 As in other competition laws, the Brazilian Competition Law includes four basic substantive elements: provisions dealing with agreements between and among competitors ('horizontal agreements'); agreements between producers and distributors ('vertical restraints'); abuses of dominance; and merger review.

3 Copy of the settlements executed is available at: **www.cade.gov.br**.

4 In 2002, SDE received an anonymous tip of an alleged cartel involving crushed rock companies in São Paulo. According to CADE's decision, the companies took part in a cartel to fix prices, allocate customers, restrict production, and rig public auctions in the market for crushed rock, an essential raw material in the civil construction industry. The companies also used sophisticated software in order to steer sales and check compliance with the agreement. In July 2003, an administrative proceeding was initiated against 21 companies and one trade association in order to investigate the alleged cartel violations. The anonymous tip provided the authorities with plenty of information which enabled SDE and the public prosecutors to run the first antitrust dawn raid in Brazil's history. The procedure was conducted at the offices of the industry association Sindipedras.

5 Many of the criminal authorities who take part in the ENACC are also in charge of prosecuting other white collar crimes. This allows those developing strategy for cartel enforcement to learn from positive experiences in different areas such as money laundering and insider trading. Following existing examples in other areas, the ENACC issued two recommendations directed to Brazil's Security and Exchange Commission ('CVM'), with the purpose of preventing wrongful conduct and improving transparency to stockholders. The first recommendation requires that all listed companies adopt antitrust compliance programmes; and the second requires that companies give notice to stockholders when enforcement action is initiated for price-fixing and other types of collusive behaviour.

6 'Brazil has leniency and settlement programmes that are similar in many ways to those in the United States.' (Thomas O Barnett, former Assistant Attorney General, Antitrust Division, US Department of Justice, *Perspectives on Cartel Enforcement in the United States and Brazil*, April 2008).

7 Full or partial administrative immunity for companies and individuals depending on whether the SDE was previously aware of the illegal conduct at issue. If the SDE was unaware of the cartel, the party may be entitled to a waiver from any applicable penalties. If the SDE was previously aware of the cartel, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the 'good faith' of the party in complying with the leniency agreement. In the leniency agreement, the SDE states whether it was previously aware of the conduct, in order to give more transparency to the party as to the expected benefits.

8 If a company qualifies for leniency, directors, officers and employees of the company who admit their involvement in the cartel as part of the corporate admission may receive leniency in the same form as the corporation. In order to benefit from the leniency programme, directors, officers and employees have to sign the agreement along with the company (not necessarily at the same time), and agree to cooperate with the SDE in the same manner as the company during the investigations.

9 The bill currently pending before Congress makes some changes in the leniency programme. The current rule that leniency is not available to a 'leader' of the cartel is eliminated. The main reason for this is because it is difficult to determine which of the cartel participants was 'a leader'.