CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
July 2010 (1)

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According to the OECD 2010 Competition Law & Policy in Brazil—A Peer Review, "Brazil's anti-cartel programme is now widely respected in Brazil and abroad" and "In 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 "There 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 U.S. Department of Justice, Antitrust Division, acknowledged "the great progress achieved on this front in Brazil."[2] How did Brazil get there? 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 the mid-nineties when the modern era of antitrust in Brazil began, after the country transitioned to a market-based economy. Among other reforms, in 1994 Congress enacted Law No. 8,884, which currently governs Brazilian administrative antitrust law and policy, as amended in 2000 and 2007 (the "Brazilian Competition Law"). A few years before, Congress enacted Brazil's Economic Crimes Law (Law No. 8,137/90), which establishes that some types of anticompetitive conduct may be considered a crime, subject to penalties of 2 to 5 years of imprisonment or payment of a criminal fine. The nature of Brazil's anticompetitive sanctioning system is thus dual (administrative and criminal).

At the administrative level, the Brazilian antitrust system is composed of three agencies—namely, 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, through its Antitrust Division, is the chief investigative body in matters related to anticompetitive practices. 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 anticompetitive practices and merger review, after reviewing SDE's and SEAE's opinions. CADE's decisions should be based on the facts and the law, and are subject to judicial review. At the criminal level, Federal 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, 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

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[2] Thomas O. Barnett, *Perspectives on Cartel Enforcement in the United States and Brazil*, April 2008.

have promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as their 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 (up to 22.5 percent of the company's gross turnover in the year preceding the initiation of the investigation) on companies and executives found liable for cartel conduct.

SDE's strategy of focusing available resources on cracking cartels has proven successful and there is an increasing number of investigations of anticompetitive practices, leniency applications, and dawn raids. There are a growing number of applicants to the Leniency Program. More than 15 leniency agreements were signed since 2003, and others are currently being negotiated, including with members of alleged international cartels. Well-known international cases, such as air cargo, marine hose, hermetic compressors, and CRT were initiated in Brazil through leniency applications filed before the SDE.

After developing some expertise and bringing complex cases, SDE started to build relationships with the criminal authorities to convince that them that, despite wide-ranging and already heavy caseloads, they should enforce the criminal statute to ensure optimal deterrence. But there are a number of other benefits beyond deterrence, including access to more sophisticated investigative techniques (as wiretaps) and the complementary expertise between the administrative and criminal authorities. Now 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 SDE's financial resources, dedicated criminal anti-cartel units were established in the States of São Paulo and Rio de Janeiro. More recently, in 2009, the SDE launched the "National Anti-Cartel Strategy," a permanent forum that gathers administrative and criminal authorities, both at the Federal and state-levels, for information sharing, discussion of cases, and investigative techniques. At the end of the first meeting, the authorities signed the "Brasilia Declaration," dedicated to re-affirming and enhancing the cooperation among these authorities in the anti-cartel program. The 2010 reunion gathered more than 200 criminal authorities who together established nine goals to be accomplished within one year.

Today, the benefits of this cooperative relationship are evident in the increased level of anti-cartel enforcement in different regions of Brazil. Due to the increased cooperation, the number of search warrants served—and consequently the quality of the evidence presented in cartel cases—has significantly increased: From 2003 to 2006, 30 warrants were served, while from 2007 to June 2010, more than 230 warrants were served. To date more than 250 executives are facing criminal proceedings, at least 21 executives have been sentenced to serve jail time, and another 19 executives have been sentenced to pay criminal fines for their participation in cartel conduct. Also, before the efforts to engage criminal prosecutors in the anti-cartel effort, investigations inevitably began with an SDE case. Due to these outreach and education efforts, recently police officers and prosecutors have begun to uncover their own leads and initiate cartel investigations themselves, asking for SDE's assistance.

The fact that members of international cartels are applying to Brazil's Leniency Program 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 should only be the first of a number of future joint actions with foreign authorities that Brazil will take part in, and reflects the maturity of the Brazilian Anti-Cartel Program.

Another development worth noting is the major media effort undertaken by the authorities during the last years to create a "culture of competition" in Brazil, increasing the awareness of the harm caused by cartels and the number of reported violations. To ensure the continuation of the Anti-Cartel Program, competition values must be understood and supported throughout society, including government, business, consumers, the courts, and academia. To create public awareness of Brazil's anti-cartel program, the government created an Anti-Cartel Day, to be celebrated every October 8th, launched nationwide airport campaigns, published five full color booklets and postal cards against cartels, and advertised in weekly magazines. During the 2009 Anti-Cartel Day celebrations, President Lula talked passionately about the importance of fighting cartels, sending a very strong message to the prosecutors and business community.

From all the above, it seems clear that, as a policy matter, enforcers are determined to impose stiffer sentences against harmful cartels that target Brazilian businesses and consumers. More individuals—both foreign and national—will be sentenced to jail, and corporations and individuals will pay higher administrative fines. In a certain sense, then, we can expect deterrence to increase in Brazil in the coming years—with corresponding aggregate welfare benefits.

In order to change the institutional framework in a way that is consistent with ever-increasing challenges in enforcement, antitrust authorities have proposed a fairly bold overhaul of the current regime. The reform seeks to increase efficiency and bring greater rationality to competition enforcement in Brazil. The proposed changes consist basically of (i) restructuring of the system, which will enable the government to eliminate existing overlaps among agencies and create a permanent staff; (ii) incorporating appropriate standards of materiality as to the level of the "local nexus" required for merger filing; (iii) adopting a pre-merger system; and (iv) increasing the level of criminal sanctions. If this long-awaited reform is approved, many of the current problems—such as insufficient resources and substantial staff turnover—will be resolved.

However, in spite of being aligned with international best practices and being definitely a step up in the ladder towards greater overall efficiency, there is a fundamental conundrum posed by the reformist agenda—should the improved anti-cartel system emphasize our courts and prosecutors as a 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, 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 jurisdiction—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 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 really final is the ruling issued by the new CADE (or, for that matter, the current CADE)? Sanctions imposed by antitrust authorities will, in all likelihood, be appealed in judicial courts (as granted by 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 jurisdiction

presents a number of challenges. Hence the main test for the future of anti-cartel enforcement in Brazil lies in optimizing a system that relies heavily on both administrative tools of enforcement (which renders as outcomes administrative investigation and administrative judgment) 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 might see new attempts at legislative reform. Simultaneously, as the highly decentralized 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, i.e. 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—who knows—we might even migrate towards a U.S. style system, skipping administrative jurisdiction altogether. Would it not 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?