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Cartel enforcement around the world and in Brazil

Article by Mariana Tavares de Araujo[1]

The globalisation of markets has led to the internationalisation of competition law. The scope of cartel enforcement currently encompasses a wide geographical reach, raising new legal issues and challenges for companies operating globally. Many of the cartels that have been uncovered in recent years have an international dimension. Brazil has not been left behind being today an important player in the global cartel prosecution. A good example of this is the simultaneous dawn raid launched in February 2009 by the Brazilian competition authorities and its Federal Police in connection with an international cartel investigation, together with the United States Department of Justice and the European Commission.

This paper provides a summary of anti-cartel enforcement in Brazil. It also provides an overview of its increasingly important role in the international context of global cartel prosecution. It is organised as follows. Section one discusses the current trends of cartel enforcement globally. The second section looks at the current institutional framework to combat cartels in Brazil, covering both cartel detection tools and sanctions (administrative and criminal) available. Some conclusions are also provided.

1. International context

The global fight against cartels has changed substantially in the last decade. Some of these amendments are particularly relevant for the decision making process of companies that are subject to global cartel investigations. The spread and the strengthening of leniency programs; international cooperation between competition authorities; substantial increase of administrative and criminal fines; criminalisation of cartels and the increasing tendency to impose jail sentences in different jurisdictions; extradition of company employees; the introduction of settlement mechanisms; and the possibility to be sued for damages. These are some of the important aspects that need to be factored in when assessing the most adequate strategy.

The success of the leniency program adopted by the DOJ in 1993 had soon spillover effects in other jurisdictions. There was a consensus that it was the most efficient tool to uncover illegal practices between competitors and soon became essential for the viability of the fight against cartels. In 1993, other than the United States, only Canada had a leniency program in place. Today, there are more than 50 jurisdictions which include the European Union, United Kingdom, Japan, South Korea, Spain, Portugal, Australia, South Africa, Holland, Germany, Austria, Belgium, México, France, Argentina and Brazil.

Leniency programs are not identical around the world. Each jurisdiction has its own intrinsic characteristics on how to persuade cartelists to confess. A certain degree of harmonisation regarding the main aspects of leniency programs is necessary in order to encourage companies involved in international cartels to blow the whistle. If the rules of one jurisdiction were particularly unattractive to the extent to dissuade applicants, taking into account the degree of interaction between the jurisdictions, that could have as a result companies discarding the strategy to run for leniency. The authorities are aware of these inconsistencies and are trying to obtain a certain degree of harmonisation. The International Competition Network (ICN), which is a virtual network that gathers the antitrust authorities of different countries with the objective to enhance convergence and strengthen cooperation between the different jurisdictions, in one of the subgroups that deals with cartels, prepared a manual on conduct investigation and in one of the chapters it discusses about the characteristics of “functional” leniency programs.

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A company that has participated in an international cartel and that decides to seek leniency in different jurisdictions simultaneously finds itself confronted with different pieces of legislation and guidelines which sometimes are incompatible. In the United States, for instance, the competition authorities may allow the leniency applicants to continue taking part in the arrangements if it is necessary to prepare a dawn raid leading to the opening of an investigation. In Europe, the Commission also introduced in 2006 some flexibility as to the point in time when applicants should terminate their participation in the alleged cartel activities. By contrast, in Brazil leniency candidates are obliged to stop contacts with competitors once the application has been made. Within the European Union a similar conflict among its member states exist. The European Competition Network (ECN), which is a forum that gathers all 27 competition authorities in Europe and the Directorate General for Competition of the European Commission, agreed that the competent authority in each case could take discretional measures to prevent conflicts. In a similar way, in Brazil, the authorities have interpreted in the last years that the requirement to "stop its involvement in the infringement" cannot prevent the applicant from engaging in certain steps, such as answering telephone calls, which would be deemed necessary to protect the investigation. Still, different rules as regards the marker system or the kinds of information required to qualify for leniency increase the cost of coordination in different jurisdictions.

Private damages actions is also a concern that needs to be considered by potential leniency applicants. Evidence against leniency applicants are usually more easily accessible than those of the other parties to the cartel. The measures that different countries have introduced to protect corporate statements provided in the context of a leniency may sometimes not achieve the desired results. These considerations are essential considering the growing pattern of cartel victims seeking damages. The authorities of some countries are even encouraging damages actions, by sending copies of the decision condemning the cartel arrangements to the alleged victims of the cartel. In Brazil this measure was adopted for the first time in the *Industrial Gas* cartel.

In addition, there is another risk which is associated to new investigations being opened by jurisdictions where the company has not obtained the leniency benefit, either as a consequence of not making it in time or because at the time the anti-cartel enforcement was not sufficiently developed and the authority started the investigation *ex officio*. The moment in time in which a new investigation can be opened is therefore undetermined considering that the statute of limitation under which legal proceedings may be brought varies substantially. In Brazil, it can take up to 12 years. In the United States, 5 years and in Canada there is no limit. In the investigation of an international cartel, such the *Dynamic Random Access Memory* cartel, issues such as these may arise. The investigation started with a leniency agreement in some jurisdictions. Several years later, Brazil initiated administrative proceedings based on public documents that were made available in some jurisdictions in which the leniency applicants confessed and cooperated with the investigations. The purpose of this measure is clear and goes beyond investigating and imposing sanctions against the participants to this specific international cartel. The broader and more important goal is to signal to individuals and companies in other cases, that they should also consider filing for leniency with the Brazilian authorities.

The costs and risks mentioned above must be balanced with the likelihood that severe sanctions are imposed. There was a significant increase in the administrative and criminal fines levelled in most jurisdictions. Between 2005 and 2009, the Department of Justice of the US imposed fines of over $3 billion for cartel infringements. In Europe, companies are subject to draconian fines. Although the Commission has been relatively modest in the year 2011, imposing fines of €315 million so far, the previous years fines amounted to substantially higher values: €2.868 billion in 2010, €1.540 billion in 2009, and €2.270 billion in 2008. In Brazil, a $1 billion was imposed to a single company in the recent *Industrial Gas* decision.

With regard to criminal prosecution, the tendency of the United States to impose jail sentence to cartel members is being followed in other jurisdictions. Although there is not a EU system of criminalization of competition law, some EU member States have recently taken measures to implement it at national level. It is the case of France or the UK. With regard to Brazil,

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more than 250 executives are facing criminal proceedings for alleged cartel activities and at least 40 executives have been sentenced to serve jail time for their participation in cartel conduct. Extradition of company employees has become a hot topic in global cartel enforcement following the extradition in 2010 of a UK national to the US for the first time in the history to face charges arising from a criminal cartel investigation.[2]

Antitrust authorities around the world use a combination of developed investigatory techniques and high penalties to discourage cartel practices. It is still early to assess if this strategy will be successful. However, the number of search and seizure warrants and leniency agreements, together with the increasing importance of settlements, and the record penalties demonstrate that the two requirements to reach deterrence – the threat of being investigated and the severe punishments – constitute the driving policy on the fight against cartels in an increasing number of antitrust agencies around the world.

Two considerations are common with regard to the multiple efforts to apply severe sanctions for cartel infringements around the world. The first one relates to the potential consequences that the pecuniary penalties imposed against companies and individuals may have on the affected market. The second is the economic effects of these sanctions for deterrence purposes.

Sanctions are relevant in any regulatory system. They act as catalysts, ensuring that the law and the rules are strictly applied and also pointing out the kind of behaviors that will not be tolerated. There are different theories that look into the issue of what should be an optimal sanction, or, in other words, which would be the appropriate combination of sanctions that can deter companies from entering into cartel arrangements. Regarding pecuniary sanctions, antitrust authorities tend to make sure that the value of the fine at least covers the advantage obtained by the unlawful behavior. The logic behind is that substantial gains are presumed in cartels and that imposing fines not matching these gains would only represent an "extra cost" for companies. On the basis of this justification, significant fines have been applied recently, mainly in those jurisdictions where the cartel enforcement is only administrative.

Despite the tendency to impose high fines, there seems to be a consensus that the optimal sanctions will be dependant on whether the individuals responsible for the company's decision of joining a cartel will in effect be punished. Individual liability tends to be more effective and fair. Considering the seriousness of the cartel offense and that the final goal of the sanctioning system is to utterly discourage the cartels practices, it seems desirable that severe punishments, such as jail sentences be part of the toolbox of measures that can be used against executives of companies that collude with competitors.[3]

There are, however, certainly costs to society to take into account when considering these sanctions as an option in every case. It seems appropriate to evaluate if recurring to other kind of punishment, targeting the reputation of individuals, such as disbarment that would prevent holding positions which require decision-making over sensitive commercial matters, would be an adequate alternative in certain situations. These penalties could be applied combined with other sanctions such as the provision of community services and even reduced jail penalties.

Other than the effectiveness of the sanction to deter cartels practices, it is important to assess if it exists a relationship between the penalty and the nature of the regulatory system that imposes it, either administrative or criminal. Whether the sanction is proportional to the damage done is also relevant. Regarding the first issue, it is important to note that in many jurisdictions administrative fines are the only applicable sanction, either by law such us in the

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2 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.

3 See John M. Connor and Yuliya Bolotova, *Cartel Sanctions: An Empirical Analysis*, 2008; Douglas Ginsburg e Joshua Wright, *Antitrust Sanctions in Competition Policy International*, Vol. 6, Nº 2, 2010; International Competition Network (ICN), *Anti-cartel Enforcement Manual, How to Implement an Effective Leniency Program*, 2009; and Organization for Economic Cooperation and Development (OECD), *Fighting Hard Core Cartels; Harm, Effective Sanctions and Leniency Programs*, 2002.

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European Union, or *de facto* as it was in Brazil until recently. However, high fines have raised the question on whether multi-dollar billion fines are purely administrative or quasi criminal. In those systems in which there is a combination of administrative penalties against individuals and companies with criminal prosecution, there is a discussion on whether the principle of *bis in idem* applies.

Brazil's administrative and criminal authorities in charge of cartel enforcement share the view that stricter penalties than those that have been imposed so far are necessary to improve deterrence. It is expected that more individual, both foreign and national, will be sentenced to jail, and corporations and its executives will pay higher fines. To better understand the challenges and perspectives of the Brazilian anti-cartel enforcement system it is necessary to look at its intrinsic characteristics, both in terms of detection and sanctions of cartels.

2. Brazilian institutional framework to combat cartels

In 1994 the Brazilian Congress enacted Law 8.884 which governs Brazilian antitrust law, as amended in 2000 and 2007 ("Law 8.884/1994"). It created an administrative antitrust system 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'). Each agency has a different role. 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 an administrative tribunal with decision-making functions in connection with both anti-competitive practices and merger review, after reviewing SDE's and SEAE's opinions. CADE's decisions are 'independent', as they are based on the facts and the law and not on political considerations. These decisions are subject to judicial review.[4]

The nature of Brazil's anti-competitive sanctioning system is also criminal. In 1990, Congress 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. Federal and/or state public prosecutors have sole enforcement responsibility, pursuant to Brazil's Economic Crimes Law.

An amendment to the current competition law was proposed to Congress in 2005. After four years of discussion in the House of Representatives and the Senate, the new bill is expected to soon see the light. The new law will merge the three institutions (CADE, SDE, SEAE) into the new "Super CADE". The new organization will devote more resources to the authorities, which will allow them to handle more cases delivering effective and timely punishment. Moreover, the lower thresholds for merger notification purposes would probably lead to a significant reduction of merger notifications, which will probably allow the new authority to reallocate these remaining officials on the fight against cartels.

2.1. Cartel detection

During the first years of enforcement of the Law 8.884/1994, the Brazilian antitrust authorities focused primarily on merger review. Since 2003 we have seen a shift of priorities of antitrust enforcement placing hardcore cartel prosecution as the main concern. 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). SDE also decided to focus the available resources on cartels, waiving the merger review tasks to the other antitrust agencies on the basis of the principle of efficiency and better administration. As a result, there have been an increasing number of investigations of anti-competitive practices, leniency applications and dawn raids.

Investigative powers

The investigation of anticompetitive practices is conducted by SDE at administrative level.

4 See the study of the Law faculty of the University of Sao Paulo regarding judicial review of CADE decisions. "Inter-relações entre o processo administrativo e o judicial sob a perspectiva da segurança jurídica no plano da concorrência econômica e da eficácia da regulação pública". 2011.

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The law foresees two types of raids. SDE (and SEAE) may undertake on-site inspections after granting the parties a 24-hour prior notice. Such inspections do not depend on court approval and are not generally used by the SDE, except in few unilateral cases. In addition, SDE through the Attorney General Office may serve search and seizure warrants to gather evidence of the illegal conduct. To date, SDE has served more than 250 warrants (including residential premises), in most of the cases in cooperation with criminal authorities. As a rule, during dawn raids SDE seizes both electronic and paper data. In 2009, SDE created its own computer forensics unit for the purpose of analyzing electronic information obtained in dawn raids and by other means.

Leniency

The implementation of the leniency program has played an essential role on cartel detection in Brazil. The Brazilian Leniency Program was introduced by Federal Law No. 10,149/2000, which amended Article 35 of the Law 8.884/1994. The SDE is the agency responsible to enter into leniency agreements, on behalf of the Federal Government, with companies and individuals that have participated in an antitrust violation. It is a "winner takes all" approach where the first to confess its role in the conspiracy (and demonstrates willingness to collaborate during the investigation) will obtain full or partial immunity from administrative and criminal sanctions. Runners up get no benefit. Approximately 20 leniency agreements have been signed to date, in most of the cases with members to alleged international cartels.[5]

The Brazilian leniency program has the following general features: (i) full or partial immunity from administrative sanctions for the first company and/or individual to apply for the leniency agreement; (ii) immunity from criminal sanctions; (iii) full confidentiality of the application; (iv) requirement for immediate termination of the applicant's involvement in the alleged or investigated violation; and (v) requirement for effective and permanent cooperation of the applicant with the investigations conducted by SDE.

The proposal for a leniency agreement can be presented orally or in writing. An oral proposal must be made via a meeting with the head of SDE, who will then grant up to 30 days for the applicant to provide evidence on the violation reported and perfect the marker system. Until the leniency agreement is executed, the minutes of this meeting remain in the possession of the applicant as documentary proof of the applicant's "whistleblowing" status. The proposal can also be made via written communication to the head of SDE, which will be date and time stamped and considered strictly confidential by the competition authorities. Proposals for a leniency agreement refused by the head of SDE shall not be construed as confession as to matters of fact or acknowledgment of illegal conduct, and said refusal shall not be disclosed. As a rule, prosecutors are viewed by SDE as partners in the leniency process and they are invited to sign the leniency letters. This is a way to help maximize benefits for potential applicants and ensure that administrative and criminal liabilities are addressed together.

Should the leniency application be accepted, an agreement will be signed between SDE and the applicant. The leniency agreement is not subject to CADE review or approval. CADE, however, must verify whether the applicant has fully complied with its duties under the agreement, and either (a) determine full immunity for the applicant from administrative sanctions should the applicant have provided information about an anticompetitive practice that had been previously unknown to SDE; or (b) reduce the applicable sanctions by one to two thirds, should the information provided refer to an anticompetitive practice of which SDE was already aware prior to the application, and depending on the actual collaboration of the applicant with the investigations.

The new draft law also foresees an important development, extending the leniency benefit also to those undertakings that have played a determining role in the illegal activity as an instigator or ringleader.[6] The level of decisive contribution to the opening of an investigation or to the finding of an infringement will not be different from the other members of the cartel.

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5 SDE, *Cartilha sobre combate a cartéis em sindicatos e associações*.
6 See Article 35-B (2)(1).

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Settlements

In Brazil, the settlement program, commonly known as "cease-and-desist commitment" (*Termo de Compromisso de Cessação - "TCC"*) has been extended to cartels arrangements in 2007.[7] At any phase of the proceeding, CADE may enter into an agreement with cartel defendants in exchange of an undertaking to cease the conduct under investigation. In cases initiated following the signature of a leniency agreement, the defendant that proposes a TCC must also expressly plead guilty to the antitrust violation. Where no leniency agreement was signed, CADE has discretion to require the party to plead guilty or not. TCCs allow CADE to deal more quickly with cartel cases, freeing up resources to open new investigations. Companies also benefit from quicker decisions and fine reductions. Approximately ten settlements were executed in connection with cartel cases since 2007, including with members of international cartels.

Dual system

As stated above, Brazil has a dual enforcement system – cartels are both an administrative infringement and a crime. State and federal prosecutors are in charge of criminal prosecution and, together with the criminal courts, enforce Law 8.137/1990.

During the first years after Brazil's anti-cartel enforcement was launched, criminal authorities played an accessory role that mostly consisted in providing technical assistance during dawn raids and executing leniency agreements with the SDE. When criminal prosecution followed, until 2007 at least, 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.

The landmark case that occurred during this first 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. There was intense cooperation between SDE and the Public Prosecutor's Office of the State of Sao 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, however, all the criminal proceedings were settled with the payment of fines.

2.2. Sanctions

The tasks of the competition authorities in Brazil not only include the duty to detect and investigate cartels but also to sanction individually these infringements and to deter other undertakings from engaging in, or continuing, cartel arrangements. Companies and their employees may be subject to administrative fines. Employees can also be punished with criminal sanctions.

Administrative fines

Article 23(1) of the Law 888.4/1994 establishes that fines for anticompetitive behaviors for undertakings may range from 1% to 30% of the gross annual revenues of the company in question. These percentages will be double for recidivists.[8] The methodology to calculate this percentage is set out in Article 27 of the Competition Law. Eight factors are taken into account: (i) the seriousness of the offence; (ii) the good faith of the defendant; (iii) the economic advantage accruing to or aimed at by the defendant; (iv) the success of the conduct; (v) the degree of the damage or of the danger of damage to the free competition, to

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7 Law No. 11,482/2007 amended Article 53 of the Law to, among other things, reintroduce the possibility of TCC in cartel cases. CADE's Resolution No. 46/2007 provides further guidance on TCCs.
8 Where an undertaking repeats infringement the basic amount will be increased by 100 %. Note that in Brazil the recidivism test does not require similarity of infringements. For instance, in the *Industrial Gas cartel* in 2010 one of the company received fines of 50% of its turnover (initially it was 25%) because it was found guilty in 2002 for an infringement related to an abuse of its dominant position. See CADE decision of 26 June 2002 (P. A. 08012.022579/1997-05).

the national economy, to consumers or to third parties; (vi) the resulting negative economic effects in the market; (vii) the defendant's economic status; and (viii) any prior convictions for the same kind of illegal conduct. CADE has not published a specific set of guidelines on how fines are calculated, being CADE's decisional practice the only reference that is available. Unfortunately, CADE has not applied rigorously the methodology set forth in Article 27 in the past cartel decisions which provides a certain degree of legal uncertainty as to the parameters that are used to calculate fines.[9]

It is important to note that CADE has made different interpretations with regard to the value of reference established in Article 23(1). Although the law refers to "total turnover" of the undertaking, CADE has in exceptional case used a different value, i.e. the cartelized market. The *Crushed Rock* cartel is a good example of this alternative value of reference.[10] Using the literal interpretation of Article 23(1), CADE imposed fines on two multinationals that were disproportionate in relation their turnover in the crushed rock market. CADE accepted the companies' allegations and the initial fines of R$200 and R$ 20 million decreased drastically to approximately R$ 2.5 y R$ 5 million. In the *Airlines* cartel CADE also used the value of reference of the relevant market to calculate the fine. This time CADE considered that the poor financial performance of the companies as a consequence of the devaluation of the Real was sufficient to depart from the literal reading of Article 23(1).[11] The record fine was imposed by CADE in the *Industrial Gas* cartel case in 2010: R$2.3 billion (roughly US$1.4 billion).

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9 See a recent publication on this topic in Spanish "Política de multas contra los cárteles en brasil: evolución y consecuencias de la actual reforma legislative" by Jaime Garcia-Nieto and Marcio Chede. Eldial.com (pending publication).
10 CADE decision of 13 October 2005 (P. A. 08012.002127/2002-14).
11 CADE decision of 15 September 2004 (P. A. 08012.000677/1999-70).

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The following chart shows the fines imposed over the years in cartel cases.[12]

Case	Year	Undertaking	Fine (in R$)	Fine (in %)	Value of referen
Steel	1999	Cia. Siderúrgica Nacional - CSN Usinas Siderúrgicas de Minas Gerais - USIMINAS Cia. Siderúrgica Paulista-COSIPA	R$ 22.180.000,00 R$ 16.180.000,00 R$ 13.150.000,00	1%	Company turnover
Airlines	2004	Viação Aérea Rio Grandense - VARIG Transporte Aéreos Regionais - TAM Transbrasil Linhas Aéreas - VASP	N/A	1%	Relevant market
Rio de Janeiro newspapers	2005	Infoglobo Comunicações Jornal do Brasil O Dia	N/A	1%	Company turnover
Reinforcing steel	2005	Gerdau Companhia Siderúrgica Belgo-Mineira Siderúrgica Barra Mansa	N/A	7%	Company turnover
Crushed rock	2006	Holcim Embu Engenharia e Comércio Lafarge Brasil Pedreira Cachoeira Pedreira Sargon Geocal Mineração Itapiserra Mineração Iudice Mineração Indústria e Comércio de Extração de Areia Khour Mineradora Pedrix Pedreira Dutra Pedreira Mariutti Pedreira Santa Isabel Reago Indústria e Comércio Basalto Pedreira e Pavimentação Panorama Industrial de Granitos Pedreiras São Matheus	R$ 2.682.714,69 R$ 5.172.637,60 N/A	20% 15%	Relevant market Company turnover
Vitamins	2007	Aventis Animal Nutrition do Brasil BASF Aktiengesellschaft F. Hoffmann - La Roche	R$ 847.125,19 R$ 4.726.362,37 R$ 12.112.558,32	20%	Relevant market
Privaty security	2007	Rudder Segurança Empresa Brasileira de Vigilância Mobra Serviço de Segurança Segurança e Transporte de Valores Panambi Protevale Vigiância e Segurança Seltec Vigiância Especializada Vigilância Pedrozo Ondrepsb Serviços de Guarda e Vigilância Secure Sistemas de Segurança Ltda. Senior Segurança MD Serviço de Segurança Delta Serviços de Vigilância Reação Segurança e Vigilância Empresa Portoalegrense de Vigilância Rota Sul Empresa de Vigilância Protege Serviços de Vigilância	R$ 7.992.045,46 R$ 2.331.231,69 R$ 2.107.654,43 R$ 2.252.378,02 R$ 451.792,16 R$ 1.061.167,04 R$ 9.171.684,11 N/A N/A R$ 166.032,73 R$ 1.142.307,36 R$ 709.430,04 R$ 727.442,86 R$ 2.301.395,58 R$ 1.788.096,50 R$ 2.481.983,50	15% 20%	Company turnover
Meatpackers	2008	Bertin Indústria e Comércio de Carnes Minerva Franco Fabril Alimentos Frigorífico Mataboi	N/A	5%	Relevant market
Sand	2008	Aro Mineradoras Sociedade dos Mineradores do Rio Jacuí Sociedade Mineradora Arroio dos Ratos Consultoria Comprove	R$ 539.984,11 R$ 1.342.910,52 R$ 1.041.545,36 R$ 3.034,41	22,5% 20% 17,5% 10%	Company turnover
Industrial Gas	2010	White Martins Gases Industriais Air Liquide Brasil Air Product Brasil Linde Gases Indústria Brasileira de Gases	R$ 1.758.545.326,50 R$ 249.257.134,59 R$ 179.202.512,38 R$ 188.391.885,29 R$ 8.464.063,31	50% 25%	Company turnover

The bill that is currently being discussed introduces important amendments that will impact on the level of fines. For companies, the House of Representatives and the Senate have understood that the "company gross turnover" used to calculate fines may lead to inappropriate values which do not reflect the role played by each company in a conspiracy and which sometimes reaches draconian values. Both the House and the Senate have proposed to use the market where the infringement has taken place as the yardstick to calculate fines.[13] This is a significant amendment that will lead to values that are more in tune to the position of each company in the market rather than by the overall financial strength of each company. The question is whether the new criteria will lead to lower fines and therefore a decrease in the overall deterrence of the Brazilian enforcement system. A separate question is how the new CADE will define the relevant market and whether the courts will uphold it.

12 The chart does not include the fines imposed in the context of settlement agreements or TTCs.
13 The House of Representatives has proposed that it should be used the "relevant market" yardstick, typically used to assess merger filing. The Senate has used a different wording: "branch of activity".

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Apart from fines, the Law 8.884/1994 provides for other sanctions as well when ever the severity of the facts or the public interest so requires.[14] For instance, CADE may impose the prohibition of the wrongdoer from participating in public procurement procedures and from obtaining funding from public banks for up to five years. CADE may also recommend to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in instalments or obtain tax benefits. CADE may eventually require the annotation of the violator on the Brazilian Consumer Protection list. In addition, CADE may order the publication of the decision in a major newspaper at the wrongdoer's expense. Finally, CADE may also impose the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required.

In addition, the officers or employees of the company may be liable for fines, which in such cases may amount from 10% to 50% of the fine imposed on the company. Fines imposed on recurring violations shall be doubled. Individuals and companies may also be fined (i) for refusing or delaying to provide information, or for providing misleading information (in the daily amounts of R$ 5,000.00 up to R$ 100,000.00); (ii) for obstructing an on-site inspection (R$ 20,000.00 to R$ 400,000.00), or (iii) for failing to appear or failing to cooperate when summoned to give oral clarification (fines range from R$ 500.00 to R$ 10,000.00).

Under the new bill that is under discussion in Congress, company employees will also be subject to higher fines. The new draft law provides that fines to other individuals (than managers involved in the infringement) and other public or private legal entities, as well as associations of undertakings or persons may range from R$ 50.000 and R$ 2 billion.

Criminal sanctions

Cartels are also a crime in Brazil, punishable by a criminal fine or imprisonment from two to five years. Sanctions may only be imposed on individuals, not on corporations. 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.

Civil damages

In Brazil consumers may initiate claims directly or through associations, prosecutors or Consumer Protection Units for damages related to anticompetitive conducts.[15] There are a few private claims pending before the Judiciary, most of them related to alleged cartels. It is worth noting that CADE encouraged damages actions in the *Industrial Gas* cartel of 2010 when it sent the decision to hospitals and other institutions that were allegedly damaged by the cartel.

3. Conclusion

Undertakings (and their executives) operating internationally need to take into account different issues when facing parallel cartel investigations. Strengthening of leniency programs; international cooperation between competition authorities or extradition of company employees can be of paramount importance when deciding on a global strategy.

Brazil has become a jurisdiction that requires attention. Its authorities have demonstrated a high degree of determination to impose high fines against hard-core cartels that target Brazilian businesses and consumers. Individuals can be sentenced to jail, and corporations and individuals are subject to pay administrative fines which can reach quasi criminal values.

14 See Article 24 of the Law 8.884/1994.
15 Article 28 of Law 8.884/1994

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