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Brazil's Anti-cartel Program: What next?

Article by Mariana Tavares de Araujo[1]

I. INTRODUCTION

In October 2011, the Brazilian Congress approved Law No. 12,529, the country's new antitrust and unfair competition law, which was subsequently signed by President Dilma Rousseff on November 30th and will take effect on May 30th, 2012. The long expected reform was approved at the same time while the Ministry of Justice conducted a public consultation on proposed amendments to Brazil's Federal Economic Crimes Law ("Law No. 8,137/1990") and to the Public Procurement Law ("Law 8,666/1994"). The provisions in Law No. 12,529/2011 recently enacted, as well as those currently under discussion will bring in important changes into Brazil's anti-cartel program, both with regard to substantive issues, such as sanctions and the authority's investigative powers, and to process as, for example, the investigation timeline and the relationship between criminal and administrative authorities.

The modern era in competition policy in Brazil began with the antitrust law of 1994 (Law No. 8,884/1994), which coincided with the country's transition to a market-based economy. Law No. 8.884/1994 introduced the current institutional framework of the Brazilian Competition Policy System ("BCPS"), comprised of two investigative and advisory agencies, the Secretary of Economic Monitoring at the Ministry of Finance ("SEAE/MF") and the Antitrust Division of the Secretary of Economic Law at the Ministry of Justice ("SDE/MJ"), and a third component, the Council for Economic Defense ("CADE"), an administrative tribunal that issues final rulings in both merger and conduct cases. The inefficiencies of the current system became apparent fairly quickly, most of them related to its mandatory post-merger review system, the overlapping functions of the three agencies, and the lack of resources. As a result, policy makers began proposing amendments to the antitrust statute beginning in early 2000, but most were not enacted.

Notwithstanding such defects, during the past decade antitrust authorities in Brazil have made significant progress. Improvements since 2003 eliminated overlapping functions, so the SDE concentrated on anticompetitive conduct investigations, with special focus on anti-cartel enforcement, and the SEAE on merger analysis. Its anti-cartel program is now widely respected in Brazil and abroad, and merger review has been improved through infra-legal measures such as (i) the introduction of a "fast track" procedure for simple cases; (ii) consent decrees (*Medida Cautelar*) or agreements with the parties (*Acordo para Presevar a Reversibilidade da Operação* or *APRO*) that prevent complex transactions from being closed prior to CADE adjudicating the case; and (iii) the ability of administrative agencies to issue binding interpretations of law issued by CADE with the purpose of ensuring legal certainty regarding the notification thresholds. Further progress, however, depends on the long expected reform of the current system, recently approved by the Brazilian Congress.

The most relevant changes introduced by the new law are related to: (i) the new institutional framework; (ii) pre-merger review and new filing thresholds; (iii) enhanced human resources for the "new CADE" and for SEAE; and (iv) sanctions and other specific provisions addressing anticompetitive conduct investigation.

This paper will examine Brazil's developments in the anti-cartel enforcement area and assess the challenges ahead, taking into account the changes referred above. It is organized as follows: section II briefly describes the current legal and institutional framework and reviews the authorities' enforcement record during the past decade; section III provides a summary of the new provisions in the Law No. 12,529/2011 and of other proposed amendments to the relevant statutes; and section IV concludes.

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II. DEVELOPMENTS IN THE ANTI-CARTEL AREA DURING THE PAST DECADE

Brazil has a dual enforcement system – cartels are both an administrative infringement and a crime. In the current regime, state and federal prosecutors are in charge of criminal prosecution and, together with the criminal courts, enforce Law No. 8,137/1990 - the statute that establishes cartel activity and other anticompetitive conducts as crimes. At the administrative level, the applicable statute up to May 29th, 2012 will continue to be Law No. 8,884/1994 as will the prosecutorial role be performed by the SDE during the transition period.

Cartels, as an administrative offence, can be sanctioned with fines imposed on companies by CADE that may range from one to thirty percent 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 fifty percent 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[2] (approximately USD 3,500.00 to USD 3,500,000.00). Fines for repeated violations are doubled. Apart from fines, Law No. 8,884/1994 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 installments or obtain tax benefits.

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 2 to 5 years. According to Brazil's Federal 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 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.

Law No. 8,884/1994 was amended in 2000 to grant authorities enhanced investigative tools, such as dawn raids and leniency provisions. Brazil's Leniency Program shelters from both administrative and criminal sanctions the directors and managers of the cooperating firm if the individuals sign the agreement and fulfill the following requirements: (i) the applicant (a company[3] or an individual) is the first to come forward and confesses its participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the "leader" of the activity being reported; (iv) the applicant agrees to fully cooperate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; and (vi) at thetime the applicant comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.[4]

The SDE is the antitrust agency with power to execute the leniency letter. Later on, while adjudicating a case, CADE must verify whether the applicant complied with the terms and

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2 Brazilian reais
3 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 Program, 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.
4 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 Program 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.

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conditions provided in the leniency agreement and, if this is the case, confirm the full or partial immunity granted by the SDE. In the beginning, the Leniency Program received some criticism as some claimed that the SDE, as an administrative agency, could not ensure criminal immunity. The fact is that the law creates a legal fiction and provides for the automatic extinction of criminal and administrative liability at the time CADE verifies that the leniency applicant fulfilled all his obligations. However, to avoid any questioning and, although it is not a legal requirement, the SDE may involve the Prosecutors Office (state and federal, depending on the case) in the execution of the leniency letter.[5]

A number of international cases that have been initiated through a leniency agreement in Brazil, include the following products: marine hose, compressors, air cargo, air freight forwarding, gas-insulated switchgear, and several in the chemical and petrochemical sectors.

Additionally, the Brazilian cartel settlement program 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. Over ten 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).

Since 2003, Brazilian antitrust authorities have promoted a hierarchy of antitrust enforcement that placed hard-core cartel prosecution as their top priority and, as with other antitrust authorities across the world, have had to focus on developing better detection methods and increasing the sanctions that had previously been imposed against offenders. Also in 2003, the SDE executed the first leniency agreement and first search and seizure warrants. Furthermore the agency took the initial steps towards 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 utilize the best of both systems and improve deterrence. Such integration has been important for different reasons. For one, it has allowed the antitrust authority to improve its detection abilities, by 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 territories. For two, the authorities have been able to pursue convictions and jail sentences for executives who do not apply to Brazil's Leniency Program, in addition to imposing the administrative fines applicable to corporations and individuals under Law No. 8,884/1994. And finally, it has enhanced legal certainty regarding the Leniency Program.

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. This, in turn, had three important inter-related consequences: first, CADE began imposing higher sanctions due to the existence of direct evidence of collusion;[6] second, it increased litigation during and after the administrative prosecution along with the

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5 The Leniency Program was revised in 2010 to provide for additional incentives to self-report and cooperate (including the admission of additional individuals as signatories to the leniency agreement after its initial execution by the corporate applicant) and the SDE have taken other measures to make sure that the identity and the documents presented by the leniency applicant will remain confidential throughout the proceedings.

6 On various occasions, the CADE has shown its strong commitment to severely punishing hardcore cartels. In September 2010, for example, it received a lot of international attention for its decision in 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).

instances when CADE's decisions and the SDE's administrative acts were upheld by the courts; and third, it attracted a greater number of leniency applicants.[7]

These developments have impacted the dynamics of the cooperation between administrative and criminal authorities and 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.[8] In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the SDE in joint criminal and administrative investigations. This arrangement became a template for co-operation between SDE and other state prosecutors; currently there are agreements between SDE and state prosecutors in 23 states, in addition to a separate agreement with the federal prosecutors. These protocols culminated in the National Anti-Cartel Strategy ("ENACC"), a formal network to coordinate a plan of activities between criminal and administrative authorities, with the purpose of ensuring synergy and organization in anti-cartel enforcement around the country. Deeper integration became indispensable as enforcement changed the scale of activity, and also as criminal authorities began performing a more active role in the anti-cartel program.

II. CHANGES TO BRAZIL'S ANTI-CARTEL PROGRAM: NEW PROVISIONS IN THE LAW No. 12,529/2011 AND OTHER PROPOSED AMENDMENTS TO THE RELEVANT STATUTES

Law No. 12,529/2011

The most relevant features of the Law No. 12,529/2011 with respect to anticompetitive conduct enforcement are related to (i) the introduction of a revised list of types of anticompetitive conducts; (ii) a more detailed description of the procedural stages of an investigation; (iii) the applicable fines; and (iv) the Leniency Program. Furthermore, the law also introduces a new institutional framework, in which all enforcement powers within the administrative level are gathered under one single authority – CADE.

Law No. 8,884/1994 was enacted in the midst of the other liberalizing reforms of the 1990' and at the aftermath of the end of the price control regime that had been in place in Brazil for a number of years. Some of the behavior included as anticompetitive reflect government concerns of that time, such as "abandon or destroy crops or harvests without proven good cause"; "discontinue or significantly reduce production, without proven good cause"; and "abusive pricing", which were excluded of the new law. At the same time, Article 36 of Law No. 12,529/2011 brings in a new definition of sham litigation in addition to what is set forth in Article 21, XVI of Law No. 8,884/1994 (Article 36, XIV of Law No. 12,529/2011) as

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7 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.[1] 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.

This case was an important step as it was the first time that the Public Prosecutors from Sao Paulo argued a cartel case before the criminal court, but the fact is that the parties did not face severe criminal consequences for having taken part in the cartel. On the other hand, 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. Some of the parties challenged CADE's final ruling before the Judiciary; so far all the judicial decisions have unanimously upheld the fines imposed by CADE. In addition, at the request of CADE's legal service, the judges demanded a judicial deposit from the parties in the amount of the administrative fine, before appealing to the courts.

8 Due to enhanced 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 2010, more than 230 warrants were served. To date, more than 250 executives are facing criminal proceedings, over 40 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. One important investigation that resulted from a more active role played by the criminal authorities was in the fuel retail sector, in the Northern region of Brazil. In May 2007, SDE, together with SEAE, the Federal Police, and the State Prosecutors of the State of Paraiba launched a dawn raid in Joao Pessoa and Recife to obtain evidence of a cartel in this sector. The operation involved 190 agents who searched 26 different places and served 16 prison warrants. The dawn raid exercises were called "Pact 274," named after the price allegedly agreed for the liter of gasoline (R$ 2.74). The positive impact to the economy in this case was felt immediately after raids, as the average price of the type C gasoline in Joao Pessoa went from R$ 2.74/litre in April 2007 to R$ 2.37/litre in December the same year. Considering the price reduction and the increase in demand, consumer savings can be estimated up to R$ 32 million during the eight months after the raid.

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"engrossing or preventing the exploitation of industrial, intellectual or technology rights". Pursuant to Article 36, XX of Law No. 12,529/2011 may be anticompetitive to "abuse the use or exploitation of industrial, intellectual, technology rights or copyrights".

With respect to cartel offenses, the new law introduces two relevant changes. First it gathers all types of behavior under two provisions: Article 36, I, (a), (b), (c), and (d) of Law No. 12,529/2011 lists hard-cartel conducts (although it does not expressly name it as such); [9] and Article 36, II, of Law No. 12,529/2011 refers to other conducts such as facilitating practices and information exchanges among competitors.[10] Most of these conducts were already sanctioned under Law No. 8,884/1994, but were spread out in different provisions in Article 21.[11] Moreover, the wording is slightly different and it also establishes as anticompetitive the division of an existing market or a *potential* market of goods and services – while Law No. 8,884/1994 only referred to existing markets.

Articles 30 to 41 of the Law No. 8,884/1994 institute the general procedural stages in an anticompetitive conduct investigation. It refers to Preliminary Investigations ("*Averiguações Preliminares*") and to Administrative Processes ("*Processos Administrativos*"), which are generally public. However, prior to the initiation of a Preliminary Investigation, the SDE or SEAE usually carry out preparatory steps, which are most of the time confidential. This stage is labeled as Administrative Proceedings ("*Procedimento Administrativo*"), which is a general terminology set forth by the Administrative Process Law (Law No. 9,784/1999) that is not specific to preparatory stages of an investigation. Articles 48 to 83 of Law No. 12,529/2011 establish in greater detail the procedural stages of merger and anticompetitive conduct investigations under the new Law. With respect to cartel and other antitrust offences, for example, it institutes three separate stages: (i) Preparatory Proceeding for the Preliminary Investigation ("*Procedimento Preparatório de Inquérito Administrativo*"); (ii) Preliminary Investigation ("*Inquérito Administrativo*"); (iii) Administrative Process ("*Processo Administrativo*").[12] The Preparatory Proceeding and the Preliminary Investigation may be treated confidential. CADE is expected to issue an internal regulation with specific rules that will apply for each stage, including in which circumstances the investigation may be partially or fully confidential. It also institutes new deadlines for the conclusion of each of the investigative stages and provides that administrative, civil and criminal sanctions may apply to government employees that without proven good cause fail to conclude the investigations under those deadlines. According to the new provisions, the Preparatory Proceeding must be concluded in less than 30 days and the Preliminary Investigation in up to 240 days. There is no deadline for the conclusion of the Administrative Process, rather the law provides for specific a number of days for each of the investigative steps, except for the phase where evidence will be produced.

Pursuant to the sanctioning provisions in the new law, fines will range from 0.1 percent to 20 percent of a company's (group of companies' or conglomerate's) gross revenues generated from the relevant "sector of activity" in the year prior to the initiation of the investigation. CADE may resort to the total turnover, whenever information on revenue derived from the relevant "sector of activity" is unavailable. Moreover, as is true under the current Law, the fine may be no less than the amount of harm resulting from the conduct. Directors and other executives found responsible for anticompetitive behavior may be sanctioned from 1 percent

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9 Law No. 12,529/2011, Article 36 - "The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under this article' heading and items thereof:
I- to set, adjust or manipulate in any way − in collusion with competitors:
a) prices of a certain product or service;
b) the production or sales of a restricted quantity products or the provision of a certain number, volume or frequency, limited or restricted, of services;
c) the division of parts or segments of market, actual or potential, of products or services, by, among others, clients, suppliers, region or time distribution;
d) prices, conditions, advantages or abstention in public biddings."
10 Law No. 12,529/2011, Article 36, II – "to promote, obtain or influence the adoption of uniform or concerted business practices among competitors;"
11 Law No. 8,884/1994 , Article 21 - "The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:
I - to set or offer in any way − in collusion with competitors − prices and conditions for the sale of a certain product or service;
II - to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;"
12 See Article 48, I – III of Law No. 12,529/2011.

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to 20 percent of the fine imposed against the company. Individual liability for executives is dependent on proof of guilt or negligence in management.

The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. Case law and/or infra-legal regulation is expected to define the concept of "sector of activity" and also to set forth the criteria that will be applied to distinguish when fines will be imposed against the company, the group of companies, or the conglomerate. Based on the provision as it stands, although the range from 0.1 percent to 20 percent is narrower than the 1 to 30 percent in force today, it is unclear whether its scope will be constricted or broader and therefore sanctions may be higher than those CADE impose today.

Law No. 12,529/2011 also modifies the criminal sanctions applicable to anticompetitive conduct. The current provision of the Federal Economic Crimes Law sets forth jail terms of 2 to 5 years or the payment of a criminal fine. The new Law amends such provision and establishes that anticompetitive behavior may be punished with a jail term of 2 to 5 years plus the payment of a criminal fine. The fact that the criminal fine is no longer an alternative sanction to the jail sentence will prevent individuals from settling the criminal case.

Changes were also introduced into Brazil's Leniency Program. The current rule that leniency is not available to a "leader" of the cartel is eliminated. Further, a grant of leniency currently extends to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The new Law broadens the leniency grant to extend to these crimes as well.

The elimination of the disqualification of the "leader" as an applicant in the law does not necessarily mean that the authority will disregard the roles played by each cartel participant in determining whether to grant leniency or not − Article 86 of Law No. 12,529/2011 provides that the authority *may* grant leniency if the program requirements are fulfilled. On the other hand, Brazil's Leniency Policy already provided that the leadership requirement was interpreted in a very limited way.[13] Therefore, from now on, the authority will not be required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party.

Likewise, SDE and CADE have consistently acknowledged that leniency is one of the most effective investigative instruments to prevent and punish cartels and that for the incentives for undertakings to apply to remain high, there could be no prosecution for related crimes. Due to SDE's close cooperative relationship with the prosecutors, in practice this risk has been reduced. Even so, this change is unquestionably welcome since it will enhance legal certainty with respect to the immunity to such crimes and, therefore, increase the incentives for leniency.

Finally, with respect to the institutional framework, Law No. 12,529/2011 consolidates the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one autonomous agency. CADE will be restructured to include: (i) an administrative tribunal composed of six Commissioners and a President; (ii) a Directorate General for Competition ("*Superintendência Geral*"); and (iii) an Economics Department. The new DG will perform the former functions of SDE's Antitrust Division and SEAE. SEAE will continue to exist but will deal exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies.

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13 "The SDE recognizes that in many cartels there is no clear ring-leader. The mere fact that one party has arranged a meeting or maintained records will not necessarily exclude the application of the leniency to it. Furthermore, there will be no clear leader if two or more parties are properly considered equals in the conduct. For example, if in a two-firm conspiracy each firm played an equal role in the operation of the cartel, both firms are potentially eligible for leniency.

Finally, the fact that an undertaking is a market leader does not necessarily entail that it is the ring-leader of the cartel". See *Fighting Cartels: Brazil's Leniency Program*, p. 29. Issued by the SDE and CADE. Available at http://portal.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm

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During the first years of Brazil's anti-cartel program, the cooperation between the investigative authority in the administrative side – the SDE – and the criminal authorities − state and federal prosecutors and the police – has been significantly facilitated by the fact that the SDE is within the Ministry of Justice. For practical purposes, the fact that the Federal Police and the SDE are sister agencies and that other agencies under the Ministry of Justice, such as the National Secretary of Justice − in charge of implementing the anti-money laundering policy, among other functions – and the National Public Security Office – that articulates the security policies in the different states of the country −, already had strong ties established with the prosecutors and the state polices when the SDE launched the anti-cartel program contributed to the program's success.

The new institutional framework is in line with international best practices and is an improvement to the current one. It eliminates redundancies and the available human and financial resources tend to be better allocated. Still, the new DG/former SDE's Antitrust Division will have to bridge the gap that will naturally exist now that it will be part of an autonomous agency so as to make sure that Brazil's dual system remains integrated from hereon.

Other Proposed Amendments to Brazil's Relevant Statutes

In parallel to this comprehensive overhaul to Brazil's competition regime, the SDE put under public consultation a draft bill with proposed amendments to the Federal Economic Crimes Law, to the Public Procurement Law and to the provisions of Law No. 8,884/1994 that address private damages (replicated in Law No. 12,529/2011). The public consultation was concluded in December 2011 and during the first months of 2012 the government is expected to review the different contributions and then make available a revised version of the bill. The most significant changes regard: (i) the elimination of criminal liability for certain types of anticompetitive conducts; (ii) the increase of the criminal sanctions applicable to such conducts; and (iii) private damages.

The draft bill proposes to eliminate criminal liability for anticompetitive conducts other than cartels. Pursuant to the current criminal statute, all anticompetitive conducts and even mergers, acquisitions and other transactions may be treated criminally if deemed to be abusive. This is a welcome change and streamlines Brazil with international best practices.[14]

Under the suggested amendments, sentences for cartel offences would increase from between 2 to 5 years, to up to 8 years in prison, which is the equivalent to those levied in Brazil for offences such as robbery. Individuals would also face criminal fines of R$ 300,000.00 (approximately USD 175,000.00) to R$ 8,000,000.00 (approximately USD 4,700,000.00), which may be reduced in up to the tenth part or increased tenfold, if the judge finds them excessively burdensome or insufficient; and interdiction of rights. The current legislation only allows for imprisonment or a fine, but not both; does not set forth any range for the applicable fines; or provide for the interdiction of rights.

The draft amendments also propose enhanced prison sentences and criminal fines specific for bid-rigging. Currently, the Public Procurement Law establishes that individuals may be sentenced to 2 to 4 years of prison and a fine. The new suggested sanctions would be of 2 to 6 years and a fine ranging from R$500,000,00 (approximately USD 295,000.00) to R$ 10,000,000.00 (approximately USD 5,900,000.00), which may also be reduced in up to the tenth part or increased tenfold, if the judge finds it excessively burdensome or insufficient.

Different theories have been developed on which is the optimal combination of sanctions that will effectively discourage collusive behavior. The European Union and some other jurisdictions have opted for making enterprises the exclusive targets of enforcement and seek optimal deterrence of cartel activity through administrative sanctions alone. Several others

14 The wording of part of the proposed provision, however, still leaves open the possibility of prosecution of certain types of anticompetitive conducts that were expressly excluded from the list. Taking into account other proposed changes and speeches by the Secretary of the SDE where he has stated that the purpose of the proposed amendments is to enhance deterrence for hard-core cartels, there is the chance that such wording will be revised.

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along the past decade, following the example of the United States, have pursued individual liability, including criminal sanctions, to enhance deterrence. Such policy is based on the premise that holding individuals accountable would prevent the risk that cartel fines are passed on to consumers through price increases and punish shareholders and not the executives that were directly involved in the conspiracy. The increase of criminal sanctions for cartel behavior in general and bid-rigging in particular proposed by Brazil's Ministry of Justice mirrors the country's endorsement to the latter and comes as an expected development of its anti-cartel enforcement in the past decade.

Certain aspects of the amendments may, nonetheless, create discrepancies, as for example is the fact that bid-rigging and the other types of cartels do not have proportionate penalties. Jurisdictions around the world acknowledge that bid-rigging is the most serious cartel conduct, therefore the maximum penalty provided for cartel behavior in general should not be higher than the one provided exclusively for bid-rigging. Moreover, by raising the minimum sanction for cartel crimes to 2 years, the new provision would prevent settlements in the criminal investigation, which is possible today, since the minimum provided in the current statute is a fine. In numerous situations, settlements are to the advantage of both the defendant and the prosecution, saving time and resources for all parties involved. Finally, the interdiction of rights should be imposed for limited terms and as an alternative to prison sentences, not in addition to it.

The bill also proposes double damages in private lawsuits against cartel members in general and single damages for leniency applicants.[15] So as not to reduce the incentives for leniency, it would be necessary to also exclude the leniency applicant from joint and several liability among other cartel members.

IV. CONCLUSION

Effective cartel enforcement in Brazil is less than a decade old and it would be premature to reach definitive conclusions regarding deterrence. Nonetheless, empirical evidence on the number of search and seizure warrants served, on individuals sentenced to prison terms, as well as on the increasing number of leniency applications and settlements allows the conclusion that both requirements for deterrence of cartel activity − heightened fear of detection and threat of severe sanctions − were positively affected through the enforcement policy reviewed above.

The changes introduced through Law No. 12,529/2011 and the proposed amendments to Federal Economic Crimes Law, to the Public Procurement Law and to the provisions of Antitrust Law that address private damages are generally in line with international best practices and have the potential to enhance deterrence of hard-core cartels affecting Brazil. However, this result is dependent on addressing important aspects of the legal provisions reviewed above and on the new CADE ensuring that Brazil's dual system remains integrated.

Last but not least, the implementation of most if not all of the proposed changes depend on adequate human resources. A central element in the new Law is the provision for 200 permanent positions in CADE and SEAE. Until now, the most serious problem confronting the Brazilian authorities has been its lack of resources, compounded by a high rate of employee turnover, which has led to a backlog of investigations. The introduction of a pre-merger system and of fixed terms for the review to be concluded could magnify this problem, especially during the first years of the new regime. Yet, Brazil has made important progress with respect to anti-cartel enforcement under much less promising conditions; the challenges ahead are great but far from insurmountable.

15 The provision, however, refers to any type of anticompetitive conduct. See footnote 13.

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