ANTITRUST INVESTIGATIONS IN BRAZIL: PRIVILEGE AND OTHER CRITICAL ISSUES

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Executive Summary

This paper will examine key issues in antitrust investigations in Brazil, including the major changes introduced by the new Antitrust Law (Law No. 12,529/2011) and the new Settlement Regulation; the current framework for attorney-client privilege and international cooperation.

Law No. 12,529/2011: The new Law introduces (i) a revised list of types of anticompetitive conducts; (ii) a more detailed description of the procedural stages of an investigation; (iii) revised sanctioning provisions; and (iv) changes to the Leniency Program. It also amends the criminal statute with respect to the sanctions applicable to anticompetitive conduct.

New Settlement Regulation: The most relevant rules apply to defendants in cartel investigations, in particular the provisions on (i) mandatory "confession" and cooperation requirements for all cases; (ii) a scale of discounts for the settling sum; and (iii) the requirement that parties that settle will be bound to cooperate with the authorities until the end of the investigation.

Attorney-Client Privilege: No provisions in the Antitrust Law or in secondary legislation set forth rules on privilege. The general rules and case law apply, which would support the view that for CADE's DG to file in court for search and seizure warrant that would include in-house department (or even the compliance division), it should have specific and detailed evidence of their participation in the cartel.

International Cooperation: Brazil has cooperation agreements with antitrust authorities in different jurisdictions. Those protocols have been particularly fruitful for multi-jurisdictional mergers and for technical assistance purposes, but have had limited use in connection with cartel investigations, where effective cooperation only happened after waivers have been issued by leniency applicants.

Key Words: antitrust, cartel, privilege, international cooperation, settlement, CADE, Law No. 12,529/2011, Brazil, criminal sanctions.

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I. INTRODUCTION

Law No. 12,529 of November 30, 2011 ("Law No. 12,529/2011" or "the new Law") took effect on May 29, 2012 and is expected to change the landscape of competition law and policy in Brazil during the coming years. The long expected reform was approved at the same time while proposed amendments to Brazil's Federal Economic Crimes Law ("Law No. 8,137/1990") and to the Public Procurement Law ("Law 8,666/1994") were put under public consultation; and followed by another round of debates in 2012 on Brazil's Settlement Program. The provisions in Law No. 12,529/2011, the revised Settlement Regulation, as well as the amendments currently under discussion will bring in important changes to antitrust investigations in general and to Brazil's Anti-Cartel Program in particular, 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. Moreover, there have been recent developments in pivotal areas such as privilege and international cooperation between antitrust authorities in connection with multi-jurisdictional cartel investigations that may also affect the parties' standing in such cases.

This paper will examine these key issues in antitrust investigations in Brazil. It is organized as follows: section II reviews the new provisions in Law No. 12,529/2011 and in the Settlement Regulation, and proposed amendments to relevant statutes; section III assesses the current framework for attorney-client privilege and international cooperation; and section IV concludes.

II. NEW PROVISIONS IN THE LAW No. 12,529/2011 AND OTHER PROPOSED AMENDMENTS TO RELEVANT STATUTES AND REGULATIONS

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 introduced a new institutional framework, in which all enforcement powers within the administrative level are gathered under one single authority – the Administrative Council for Economic Defense ("CADE").

CADE was restructured to include (i) a Tribunal composed of six Commissioners and a President; (ii) a Directorate General for Competition ("DG") and (iii) an Economics Department. The Tribunal issues final decisions on anticompetitive conduct investigations and on complex merger cases. The new DG is responsible for the former functions of the Secretariat of Economic Law's ("SDE") Antitrust Division and Secretariat for Economic Monitoring ("SEAE"), and is also in charge of clearing all simple merger cases. SEAE now deals exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies.

Law No. 8,884 of June 12, 1994 ("Law No. 8,884/1994" or "the previous Antitrust Law") was enacted in the midst of 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 "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);[2]

[2] 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;

and Article 36, II, of Law No. 12,529/2011 refers to other conducts such as facilitating practices and information exchanges among competitors.[3] Most of these conducts were already sanctioned under Law No. 8,884/1994, but were spread out in different provisions in Article 21.[4] 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. The new Law applies to cases pending final judgment if it provides more favorable treatment to the parties as well as on procedural matters.

Articles 30 to 41 of the Law No. 8,884/1994 instituted the general procedural stages in an anticompetitive conduct investigation. It referred to Preliminary Investigations ("*Averiguações Preliminares*") and to Administrative Processes ("*Processos Administrativos*"), which were generally public. However, prior to the initiation of a Preliminary Investigation, the SDE or SEAE usually carried out preparatory steps, which were most of the time confidential. This stage was labeled as Administrative Proceedings ("*Procedimento Administrativo*"), which is a general terminology set forth by the Administrative Process Law (Law No. 9,784, of January 29, 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*").[5] The Preparatory Proceeding and the Preliminary Investigation may be treated confidential, pursuant to Article 52 of CADE's Resolution No. 1, issued on May 29, 2012 ("*Regimento Interno").*

The new Law 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.

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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."

[3] Law No. 12,529/2011, Article 36, II – "to promote, obtain or influence the adoption of uniform or concerted business practices among competitors;"

[4] 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;"

[5] See Article 48, I – III of Law No. 12,529/2011.

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 which is a new concept, different from the relevant market in which the offense was perpetrated. A list of "sectors of activities" was put forward by CADE through Resolution No. 3, issued on May 29, 2012. If the anticompetitive conduct occurred in more than one sector of activity, the gross revenues generated in all sectors involved must be combined. CADE may resort to the total turnover, whenever information on revenue derived from the relevant "sector of activity" is unavailable. Moreover, as it was true under the previous 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 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 was expected to define the criteria that will be applied to distinguish when fines will be imposed against the company, the group of companies, or the conglomerate, but such issue was not addressed in the regulations published by CADE immediately after the new Law entered into force. Until now, sanctions have been generally imposed against parties in the Administrative Procedures, which varied according to the evidence available to the authority. Therefore, although the range from 0.1 percent to 20 percent provided for in the new Law is narrower than the 1 to 30 percent set forth by the previous stature, it is unclear whether its scope will be constricted or broader, considering CADE's definition of "sector of activity" and the possibility that it could encompass parent companies' turnover as well.

Brazil has a dual enforcement system – certain anticompetitive conducts such as cartels are both an administrative infringement and a crime. State and federal prosecutors are in charge of criminal prosecution against individuals and, together with the criminal courts, enforce the criminal statute. Law No. 12,529/2011 also modifies the criminal sanctions applicable to anticompetitive conduct. The previous 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.

Brazil's Leniency Program had been introduced in 2000 through an amendment to the previous Antitrust Law. Two relevant aspects of the Program - the prohibition that leniency is awarded to the cartel leader and the scope of criminal immunity - were modified in the new Law.

Under Law No. 12,529/2011, the DG 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 conditions provided in the leniency agreement and, if this was the case, confirm the full or partial immunity granted by the DG.

The applicant must fulfill the following requirements to benefit from full or partial Leniency: (i) the applicant (a company 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 agrees to fully cooperate with the investigation; (iv) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; and (v) at the time the applicant comes forward, the DG had not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

Companies and individuals will be eligible for full or partial Leniency depending on whether the DG was aware of the illegal conduct at issue. If the DG was unaware, the party may be entitled to a waiver from any penalties. If the Agency was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the parties' good faith in complying with the Program's requirements. Directors and managers of the cooperating firm will be sheltered both from administrative and criminal sanctions if the individuals sign the agreement and fulfill the same requirements.

Under the previous Law, Leniency was not available to a "leader" of the cartel; such requirement was eliminated from Law No. 12,529/2011. 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.[6] 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.

Further, a grant of leniency under the previous antitrust Law extended 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. In the past, CADE and the SDE had been able to prevent that criminal charges for other conducts were pressed against individuals that had confessed their participation in a cartel due to their close cooperative relationship with the criminal authorities. Still, such amendment significantly enhances legal certainly and therefore tends to increase incentives for the Leniency Program, in particular for individuals involved in domestic bid-rigging cases.

[6] "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.

Settlement Regulation

Brazil's Settlement Program for cartel investigations was introduced in 2007, through an amendment to the previous Antitrust Law. This represented a remarkable improvement as early cooperation on the part of the defendants saves public resources, cuts down litigation, 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.

30 settlements have been executed by CADE since 2007 when CADE issued its revised Settlement Regulation, 15 of which in connection with cartel investigations. Parties to international cartel investigations, such as the marine hose and the compressors cases, have also settled with CADE. The 2007 Settlement Regulation also included rules on Settlements for other types of anticompetitive conduct, which had been in place since 1994.

On December 2012, CADE put under public consultation a draft Regulation on Settlement for antitrust investigations. The agency received numerous submissions on different provisions of the draft; and in March 2013 issued the revised rules, which raise imperative issues for the parties to ongoing cartel investigations.

One of the most important provisions in the new Regulation refers to the requirement that the parties *acknowledge their involvement in the investigated conduct*. Such requirement would apply for all cartel cases, and not only for those initiated through a leniency agreement, as it is today. There has been some criticism to preventing defendants from pleading *nolo contendere*, as it could decrease the incentives for settlements where CADE does not have a strong case, where it could also be in the government's best interest to do so. The provision does not refer to a "confession" and the requirement "to acknowledge participation" may allow for some flexibility with respect to its terms, compared to a strict "confession" requirement. Still, since the amendment to the criminal statute, this may prevent individuals from settling with CADE, since "acknowledging its participation" in connection with the administrative investigation may compromise their respective defenses in criminal investigations in case the conduct at issue continued until after May 29, 2012. This situation is specific to Brazil, where there is dual enforcement by administrative and criminal authorities with respect to individuals. Differently therefore, than jurisdictions such as the United States, that is purely criminal, or the EU, that is exclusively administrative, where the investigated party has to deal with only one investigation in each jurisdiction and does not have to take into account the consequences of its strategy in another parallel case.

The Regulation also introduces a scale of discounts that will apply to the settling sum that defendants that wish to settle are required to pay. Reductions may very between (i) 30% and 50% for the first to propose to settle; (i) 25% to 40% for the second in; and (iii) for up to 25% to the other parties that come after. For settlement proposals submitted after the DG has concluded the investigation the reductions may be no greater than 15%. Those discounts are in theory based on the fine that would apply to the parties under investigation for cartel and are supposed to vary according to (i) the order in which the parties come forward; and (ii) the extent and usefulness of what the parties provide in cooperation (that is also mandatory now) with the authorities. Clearly the purpose of providing benchmarks is to increase transparency and predictability for the parties, however, since CADE is yet to issue sentencing guidelines, and case law for hard core cartel cases is still limited, these standards may be of little help.

With respect to the negotiation rules, as it was the case before, defendants can propose to settle at any stage of the investigation, regardless of whether the case is being handled by the SG or the Tribunal. The general rules are: (i) defendants can only try to settle once ("one-shot game"), and (ii) the negotiation period is for 30 days, renewable for another 30 days. The negotiation process may be confidential at the discretion of CADE. The revised Settlement Regulation now provides that the negotiation will take place at the DG for all cases still under investigation, differently than before, where the entire procedure was conducted at the Tribunal.

Finally, pursuant to the 2007 rules, the investigation was suspended for the parties that settle, during a specified period of time for the conditions set forth to be fulfilled, after which, they would be excluded from the proceedings. Under the new Regulation though, the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE adjudicates the case, and therefore, just like the leniency applicant, the parties that settle will be bound to cooperate with the authorities until the end of the investigation.

Proposed Amendments to Other 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 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.[7]

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 BRL 300,000.00 (approximately USD 175,000.00) to BRL 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 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

[7] 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.

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 BRL 500,000,00 (approximately USD 295,000.00) to BRL 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 ("EU") 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 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. 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.[8] 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.

[8] The provision, however, refers to any type of anticompetitive conduct. See footnote 13.

III. RECENT DEVELOPMENTS IN BRAZIL REGARDING KEY ISSUES THAT ARISE IN CONNECTION WITH MULTIJURISCTIONAL CARTEL INVESTIGATIONS: PRIVILEGE AND INTERNATIONAL COOPERATION

Attorney-Client Privilege

Since the Brazilian antitrust authorities ran the first dawn raid to uncover evidence of a cartel in the crushed rock sector in 2003,[9] discussions on the extent of the attorney-privilege in connection with cartel investigations have been very frequent. No provisions in the Law or in secondary legislation set forth the rules on privilege or make public if/when CADE would request access to in-house counsel and compliance personnel material. Moreover, none of the several decisions issued by the courts in the lawsuits that follow the dawn raids ran in cartel cases include public rulings on the extent to which the general rule on privilege applies with respect to emails and other documents created by or directed to in-house counsel and compliance personnel or to communications with outside counsel.

The Brazilian Constitution provides the basis for attorney-client privilege, which derives from the fact that the legal profession is deemed indispensable for the enforcement of justice.[10] Such protection is further detailed in Law No. 8,906, of July 4, 1994 ("Law 8,906/1994"), which establishes prerogatives, procedural and other substantive rules that apply to the Brazilian Bar Association ("OAB") and to the legal profession.

Law No. 8,906/1994 was amended in 2008 in the midst of the heated discussions that followed several dawn raids in attorneys' offices regarding the scope of privilege, in cases where the lawyer was also investigated for having allegedly abetted white collar crimes, such as fraud and money laundering. Law No. 11,767 of August 7, 2008 ("Law No. 11,767/2008") determines that privilege applies to the *lawyer's office or workplace, working tools and written, electronic, through telephone and telematics*.[11] It also provides for the exception to such protection, when there is evidence that a crime has been committed, in that case the court

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[9] The crushed-rock cartel investigation was the first case where administrative authorities, in close cooperation with criminal authorities, executed an antitrust dawn raid. There was intense cooperation between the 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.

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.

[10] Brazilian Constitution, Article 133: *The lawyer is indispensable to the administration of justice and is inviolable for his acts or manifestations in the exercise of his profession, within the limits of the law.*

[11] Article 7, II of Law No. 11,767/08

may determine that privilege will not apply *and that specific and detailed search and seizure warrants will be issued, to be executed before a representative from the Bar*. In any case, clients' documents, media and other objects may not be seized, unless the client is also under investigation for the same crime and covered by the same warrant.[12] There is a similar provision in Brazil's Code of Criminal Procedure, which establishes that no document in the possession of a lawyer may be seized, unless such document is a *corpus delicti.*[13]

Recent case law has mostly discussed the scope of the search and seizure warrant, whether *specific and detailed* and has not provided clear rules on whether in-house and compliance personnel are encompassed by the protection described above.[14] But the broad standard set forth by the courts is, in theory at least, high: for privilege to be overruled there must be strong evidence to support a search warrant that must include comprehensive information on the lawyers' participation in the crime. The Brazilian Bar Association has stated that since under Law No. 11,767/2008 privilege applies to lawyer's *office or workplace, working tools* and the different sorts of communication, it would also apply to in-house counsel. Arguably it would also extend to materials produced by compliance personnel. Therefore, there are strong arguments to support the view that under the recent case law, for CADE's DG to file in court for search and seizure warrant that would include in-house department (or even the compliance division), it should have *specific and detailed* evidence of their participation in the cartel.

International Cooperation

Brazil has executed cooperation agreements with antitrust authorities in different jurisdictions including the United States, the European Union, Portugal, Canada, Chile, Argentina and France.[15] Such agreements set forth a useful framework for cooperation that build upon the cooperative ties that are formed through the agencies' participation in international forum such as the International Competition Network ("ICN") and the Competition Committee of the Organization for Economic Cooperation and Development ("OECD"). All of those are first generation agreements that provide for technical assistance and the exchange of non-confidential information between the agencies. Those protocols are important from an institutional perspective and have been particularly fruitful for multi-jurisdictional mergers and for technical assistance purposes, but have had limited use in connection with cartel investigations, where effective cooperation only happened after waivers have been issued by leniency applicants.

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[12] Article 7, II, Paragraphs 6 and 7 of Law No. 11,767/08

[13] Article 243, Paragraph 2 of the Code of Criminal Procedure

[14] Brazil's Superior Court of Justice has dealt with the attorney-client privilege on the following cases: (i) Case No. 22.200/SP, Reporting Justice Arnaldo Esteves Lima; (ii) Case No. 27.419/SP, Reporting Justice Napoleão Nunes Maia Filho; (iii) Case No. 227.799/RS, Reporting Justice Sebastião Reis Jr.; (iv) Case No. 149.008/PR, Reporting Justice Napoleão Nunes Maia Filho; (v) Case No. 21.455/RJ, Reporting Justice Jorge Mussi; (vi) Case No. 19.772/MT, Reporting Justice, Laurita Vaz and (vii) Case No. 19.244/RJ, Reporting Justice Gilson Dipp.

[15] Brazil has executed cooperation agreements with the United States, the European Union, Mercosur, Canada, France, Chile, Portugal, Argentina, Russia, China, and Peru. Such agreements can be found in CADE's website: http://www.cade.gov.br/Default.aspx?a88888889473b595af98

A number of international cases have been initiated through a leniency agreement in Brazil, including cases involving the following products: marine hose, compressors, air cargo, air freight forwarding, gas-insulated switchgear, and several in the chemical and petrochemical sectors. There are no public rules or policy issued by the Brazilian authorities on the cooperation expected from the parties in such investigations, although in international cases, the authorities have been known to exchange confidential information only if the parties issue waivers that allow them to do so. Such waivers are usually requested, but the parties are the ones to decide whether to issue it or not. Although most waivers have been limited to the exchange of oral information, this has been sufficient to allow strong cooperation between different competition authorities, as what happened in the compressors case.

In the compressors cartel investigation, simultaneous dawn raids were conducted in Brazil, the United States, and Europe of suspected participants. More than 60 officers from SDE, the federal police, and state prosecutors from Sao Paulo conducted the operation in Brazil. Three Brazilian subsidiaries of the U.S. appliance maker Whirlpool reached a settlement agreement with CADE under which the company would pay a fine of BRL 100 million (about USD 52 million) and six executives would pay fines totaling BRL 3 million (USD 1.6 million).

IV. CONCLUSION

2013 is an important year for antitrust enforcement in Brazil and for the country's Anti-Cartel Enforcement Program in particular. CADE has started to issue the first decisions in antitrust investigations concluded after the new Law took effect; and a revised Settlement Regulation has just been enacted. Both will significantly impact the standing of parties to ongoing investigations.

Moreover, this year marks the 10th anniversary of Brazil's Anti-Cartel Enforcement Program. It may be still too soon 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 allow the conclusion that both requirements for deterrence of cartel activity − heightened fear of detection and threat of severe sanctions – are at the crux of Brazil's Program.

The changes introduced through Law No. 12,529/2011 and the Settlement Regulation; as well as 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, which will ensure that the parties' defense rights will continue to be dully protected and the right incentives for both Leniency and Settlement are safeguarded. Furthermore, clear guidelines on privilege from CADE and from the Brazilian courts would also be most welcome.

Brazil has made substantive progress on antitrust enforcement along the past decade. There are tough tests ahead, but the future looks promising.