CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
September 2011 (2)

# Anti-cartel Enforcement in Brazil: Lessons From the Recent Past and an Exercise to Look Forward

Barbara Rosenberg &
José Carlos da Matta Berardo

Barbosa, Müssnich & Aragão Advogados

# Anti-cartel Enforcement in Brazil: Lessons From the Recent Past and an Exercise to Look Forward

Barbara Rosenberg & Jose Carlos da Matta Berardo[1]

During the last decade Brazil, as well as few other Latin American countries, have taken great steps to improve the enforcement of their Competition Laws, and cartel prosecution should surely be counted as one of the most relevant improvements so far. Especially in Brazil, the numbers of cartel investigations and convictions have greatly risen, and the Brazilian authorities should be praised, beyond all, for their great work increasing the topic's public awareness of the seriousness of cartel infringement. Indeed, as the economy starts to blossom, the Government's efforts to detect and punish cartels should more than pay off in the next years.

In 2010 alone, for instance, the CADE decided approximately 10 cartel cases, with a finding of an infringement in two of them, including the investigation regarding the industrial gases cartel (case no. 08012.009888/2003-70, with fines amounting to approximately US$1.3 billion). CADE entered into six settlements regarding two other horizontal practice cases as well, collecting, in one of them, R$50million. Official reports indicate that up until September, 2010, SDE started 13 new cartel investigations; in 2011 a slower activity in cartel investigations can most likely be associated with the fact that the head of the investigative authority—the SDE—was replaced because of the changes in the Brazilian Government resulting from the election of President Dilma Roussef. In any case, SDE has just initiated a new international cartel investigation.

In addition, there are indications that, so far, CADE is holding its own in the courts, contrary to what common belief in Brazil would say. An independent research involving the judicial review of CADE's decisions does demonstrate that court decisions have not been biased towards companies. It is true that none of the most relevant cartel cases has yet received a final, unappealable decision from Brazilian higher courts, and it is also true that that the most controversial procedural issues being disputed have not been addressed by the courts. In any case, these cases may finally be decided in the near future as CADE was, after years of struggle, in 2010 able to confirm which section of the Federal Appellate Court (*Tribunal Federal Regional*) has authority to review cases involving antitrust fines. The outcome of these cases is yet to be seen.

However, all these accomplishments do not mean that there is not much yet to be done. Practitioners would not need much time to state a number of problems with cartel enforcement in Brazil, and most—if not all—of these problems are likely to derive from barely staffed authorities, troubled procedural rules, or lack of consistent precedents regarding substantive law. For instance, the authorities in charge of enforcement of the Competition Law have less than 100 officials, and around 30 are directly involved in cartel detection and prosecution. Procedural

[1] Partner and Attorney, respectively, at Barbosa, Müssnich & Aragão Advogados.

rules, as another example, are not clear with respect to several factors, including weighting of evidence—especially in leniency cases—and burden of proof. Likewise, joint investigations with the criminal authorities, even though resulting in a larger number of cases and theoretically producing better evidence (such as wire tapping), also raise a substantial amount of procedural issues.

The (ever) imminent passing of Bill no. 6/2009 by the Brazilian Congress, which reformulates the Competition Law and strengthens CADE, may help mitigate a part of these problems: First, because the Bill is allegedly accompanied by 200 new permanent jobs for officials at the "new" CADE; Second, because the Bill frees more resources for anti-cartel enforcement (as it eliminates some duplications in the tasks of the authorities existing in the current Law and diminishes the number of merger cases to be mandatorily submitted); and Third, because it brings small but important changes to relevant aspects of the proceedings.

As to the procedural aspects, a change in the way the proceeding is designed is certainly necessary to minimize questions, but it may not be entirely sufficient to eliminate the problems. Currently, there are two different types of proceedings set out by the Competition Law: the "Preliminary Investigations" (*Averiguações Preliminares*) and the "Administrative Proceeding" (*Processo Administrativo*), and the requirements for initiation are not clearly set out for either of them. Bill no. 6 clarifies these requirements, in a measure that may allow the authorities to smooth the investigations. In addition, the Bill establishes that the authorities are required to issue a "Statement of Objections" of some sort, clarifying a question that exists today regarding the initiation of an Administrative Proceeding.

It is yet to be seen, however, if the authorities are going to concentrate their efforts on clarifying the substantive law regarding cartels, from which most of the trouble associated with enforcement in Brazil derive. Substantive law remains largely unchanged by Bill no. 6, and the broad language of the law (Law no. 8,884/1994, article 20, or Bill no. 6 article 36) is likely to render unlawful in Brazil almost every behavior deemed to be anticompetitive in other jurisdictions, and this certainly includes cartel behavior. More specifically, Brazilian law sets out that a violation occurs if the investigated practice has the restriction of competition either as its object or as its effect.

Cartels, which are defined by the authorities broadly as any agreements among competitors regarding competitively sensitive variables that may result in lessening of competition in the Brazilian territory, have been consistently prohibited because their object is the restriction of competition. Indeed, without further inquiries into the effects or benefits of the practice, the CADE has found violations upon evidence of the existence of an agreement regarding competitively sensitive information involving competitors that collectively held some degree of market power.

A puzzling aspect is that the CADE has adopted certain Guidelines in the past (Resolution no. 20/1999, and still in force) indicating expressly (Exhibit I, Section A) that the lawfulness of cartels and other horizontal practices depend on the evaluation of their possible economic benefits. This suggests an inconsistency between the authorities' guidelines and their decision practices: While the former suggest the authorities would need to review the overall economic effects of any "horizontal practices" before finding a violation (as the guidelines do not distinguish between hard-core cartels or other practices among competitors, such as information exchanges, standardization agreements, and joint-venture efforts), the latter indicate a full

assessment of effects is never to be taken into consideration, as evidence regarding objectives and parties' market shares are sometimes sufficient for a condemnation.

Even if the thought of an "efficient hard-core cartel" may be a contradiction in terms, this inconsistency raises, at least, a burden of proof issue *vis-à-vis* the presumption of innocence: Are the authorities required to prove the cartel is harmful to consumers and the society? Are the parties required to submit evidence showing their behavior produced economic benefits, in the absence of which the authorities could find an infringement existed?

The current state of affairs in cartel enforcement in Brazil should not allow for the existence of these types of (unanswered) questions, if CADE is to claim it has reached maturity. In fact, even though the law or case law does not say so in Brazil, cartels have been, in practice, treated as *per se* illegal conducts, provided that the parties have a joint market share of 20 percent or more. A review of case records regarding CADE's precedents shows a never-ending struggle—sometimes not expressly—between companies and authorities on this specific point, even in hard-core cartel cases, without a satisfactory reaction from the authorities (even if only to derogate Regulation no. 20/1999).