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An Exercise in Complexity

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I. INTRODUCTION

What change a decade brings. Ten years ago the calls for a spread of leniency policies[2] were undisputed. Their success in detecting cartels in a few jurisdictions, notably the United States and the European Union, seemed to justify the expectation that their adoption by more and more countries would only improve enforcement and desincentivize cartels worldwide. A little less undisputed, but with similar claims of increased deterrence, the call for criminalization was also spreading and the discussion on pros and cons of including this weapon in the anticartel arsenal grew and spread.

The success of those evangelizing movements is reflected in the increased number of jurisdictions that have adopted criminal provisions, and the much larger number of those that have introduced leniency programs. It should therefore be somewhat surprising to see that *pari passu* with the trend, when defenders of these developments should be celebrating, the debate has shifted somewhat to ponder whether we have gone too far, and whether the risk today is that leniency itself may be disincentivized by the growing complexity, uncertainty, and cost associated with its dissemination.

There are many reasons for this shift in the leniency debate and this publication will explore several of them. This paper will focus on only one, that of criminalization of cartel enforcement and its impacts on the incentives for leniency. As most countries that have contemplated criminalizing cartels will attest, this is a challenging enterprise that increases the level of complexity in the system—and could therefore increase the risk and reduce predictability for potential cooperators. The counter-bet is obviously that the added deterrence effect will more than outweigh those negative impacts.

In this debate, Brazil may offer a very interesting practical example of the effects to leniency caused by criminal enforcement, and it serves as a real life experiment of how positive and negative incentives interplay. It also serves as a sobering reminder both of the imperative of carefully planning and designing a proper institutional and legal framework for criminalization,

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[2] Leniency terminology is not uniform throughout the antitrust world. In Brazil, leniency is the term reserved for the first applicant to reveal the conduct and cooperate, and generally offers full immunity, while an agreement with a reduction in fines available for the following cooperators who come after the first one in is called a settlement (even though it is more akin to a second-in leniency in Europe than to the settlement program of the European Commission). Unless indicated—as when referring to Brazilian specific programs that will follow the Brazilian nomenclature—the term leniency will be used more broadly to encompass all cooperation programs, be it the immunity for the first cooperator or the reduced sentences for the following ones. The author hopes that these references will be self-explanatory in the context of the paper.

and of the likelihood that unexpected developments will happen anyway, challenging the authorities to adjust in a way that will protect leniency.

II. THE CHALLENGE OF CREATING AN INSTITUTIONAL DESIGN MODEL

In general, in most countries criminal enforcement tends to be traditionally (and understandably) subjected to very stringent procedural and formalistic requirements, often much more so than civil or administrative antitrust law. Further, in most countries enforcement of criminal law is entrusted to specific entities—such as public prosecutors—that have been around for much longer than competition authorities, are part of much larger and more established organizations, and have their own agendas, priorities, discourse, practices and concepts—and are much less permeable to the international debates that are one of the hallmarks of antitrust today.

Most countries in fact do not have the luxury of having the criminal and the antitrust enforcers rolled into one, such as the Department of Justice in the United States. Constitutional or other restrictions in many jurisdictions may actually prevent administrative competition authorities themselves from becoming a criminal enforcer, which means that criminalizing cartels necessarily brings new players into the antitrust enforcement scenario, with multiple and often unforeseeable consequences.

The criminalization of cartels requires an institutional design that will obey the legal framework of the specific jurisdiction while at the same time stimulating efficiency and rationality, as well as coordination between criminal and antitrust agencies. In this sense, the definition of the model itself becomes crucial, and several variations are possible, ranging from complete separation between criminal prosecutors and the competition authority to interdependence (as when criminal prosecutors can only pursue a case upon referral by the competition agency, similar to Japan and South Korea); and from separate and independent to overlapping jurisdictions.

Evidently there is no right or wrong model, and any model will have to adapt to the legal culture, framework, and idiosyncrasies of each country. But they can be more or less efficient, bring more or less complexity and uncertainty, and ultimately offer more or less incentives for leniency applications. And, as a rule, all are subject to improvements with experience.

III. THE BRAZILIAN EXPERIENCE

A. Administrative vs. Criminal Charges

In Brazil cartels are not only an administrative violation according to the Competition Law[3] but also a crime, subject to criminal Law n. 8.137/1990[4]. If the competition authority CADE[5] is in charge of enforcing the Competition Law, the police and the public prosecutors (both at the Federal and State levels) are responsible for investigating cartel crimes and bringing cases before criminal courts.

[3] Law n. 12.529/11

[4] Other criminal statutes, such as public bids Law n. 8.666/1993 and others, may also provide criminal penalties for cartel-like behavior.

[5] Conselho Administrativo de Defesa Econômica (Administrative Council for Economic Defense).

Administratively, both companies and individuals can be convicted and punished with fines, cease-and-desist orders, and a host of other potential penalties provided in the Competition Law. Criminally, only individuals can be prosecuted, and companies face no criminal liability in Brazil. Thus, an individual can simultaneously face both an administrative and a criminal prosecution and, as a consequence, be penalized under the Competition Law and also face imprisonment and a criminal fine under Law n. 8.137/90. The investigations can run completely in parallel or can communicate with each other.

Though in the books for over 20 years, the crime of cartels was very seldom prosecuted until the last ten years, having really taken off in the last five years, before reaching the point today where over 300 individuals are currently facing criminal prosecution in Brazil.

B. The Leniency Program

This duality had been taken into account already in the creation of the leniency program in Brazil in 2000, providing both administrative immunity for companies and administrative and criminal immunity for individuals. This proved to be a crucial element in the development of the program. As leniency requires the confession of a violation, an individual would be exposing himself/herself criminally if the protection of leniency was restricted to the administrative sphere.

Ensuring that leniency will have this dual effect—criminal as well as administrative immunity—has proven instrumental to secure the cooperation of individuals. In fact, practical experience in negotiating leniency unavoidably involves addressing the understandable doubts and concerns from individuals contemplating cooperation, regarding their risks and exposure on the criminal front. The fact that criminal immunity is granted is unsurprisingly an enormous incentive for cooperation. This stands in stark contrast to the lack of criminal effects of the Brazilian settlement system, which will be discussed below. But even in the context of leniency the criminal dimension remains an uncertainty factor.

The negotiation and execution of a leniency agreement in Brazil was entrusted by the law to the competition authority, even if the effects would include both administrative and criminal immunity. Allocating the power to grant leniency is not a trivial matter in a system that has criminal enforcement, and has been an issue in other countries as well, given that it requires either giving an administrative agency the power to grant criminal immunity, or providing that both authorities (jointly or independently) will have to negotiate and decide to grant immunity.

In Brazil, in order to preemptively avoid any questioning, the competition authority chose not to rely on the power granted by the law and has traditionally called the criminal prosecutors to also sign leniency agreements, while trying to maintain the bulk of the actual negotiation centralized with the competition authority. It is a delicate balance that has worked so far, but depends on the goodwill of the prosecutors to continue.

The Brazilian experience so far indicates that the criminal prosecution of individuals can be a very effective tool in cartel enforcement, and acts as powerful incentive for individuals to cooperate with an investigation. The contribution by individuals helps the company strengthen its case in seeking leniency while, for the authority, it strengthens a conviction decision and certainly improves the odds when facing an appeal in court. In this sense, by increasing the chance of a successful conviction, cooperation by individuals also provides an added incentive

for other defendants who were not the first ones in to also cooperate and seek a settlement with the authority, thereby further reducing the chances of an appeal in the courts and snow-balling yet other defendants into cooperation.

With a view to further increasing the deterrence effect of criminal sanctions (and by-passing any discussion on reasonability or fairness), the Brazilian criminal statute was amended in 2011 with a small but extremely significant change. The previous penalty for cartels of two to five years of imprisonment "or" a fine was altered to two to five years of imprisonment "and" a fine. As a consequence, convicted individuals are no longer eligible for some alternative penalties and judges have less discretion to impose lighter sentences. Also, the maximum jail time of 5 years can be, and has been, exceeded in several cases if there are aggravating circumstances. This happened for instance in the criminal investigation of the air cargo cartel, in which the judge sentenced one of the defendants to a prison term of 10 years.[6]

C. Criminal Charges Against Foreigners

An important recent development—particularly from an international perspective—is that Brazilian criminal prosecutors have, in what appears to be for the first time, brought criminal cartel charges against a foreigner residing abroad. This was in the context of the high-profile investigation on alleged bid-rigging in the sale and maintenance of subway trains (the "Subway case").[7]

CADE has often prosecuted foreigners administratively, but criminal prosecutors had shown little appetite to face the significant procedural obstacles of cross-border prosecution—possibly also because of the more uncertain application of the extraterritorial effects doctrine in the criminal sphere. It is uncertain whether the Subway case heralds a more permanent change in the practice of the criminal prosecutors or if it just reflects the exceptional media attention this investigation received. In any case, given the treaties Brazil has signed regarding extradition and mutual legal assistance with many countries, including the United States, this development should further stimulate foreign individuals to cooperate with their companies in leniency applications in Brazil.

D. The Petrobras "Lava Jato" Case

At the same time, the upsurge in domestic criminal investigations more recently is providing an incentive for Brazilian individuals (who have in many cases been somewhat reluctant to cooperate with the government) to also apply for leniency. The on-going case involving state-owned oil giant Petrobras[8] (Operation "Lava Jato" or "Car Wash," as it was code-named by the police and prosecutors) has in this sense undoubtedly had an major impact in the perception of leniency and cooperation in Brazil. The largest investigation ever to take place in the country, unfolding in the media in real time and spreading to several different areas, from antitrust to corruption and money laundering, it has captured the eyes and minds of the country.

[6] This decision is currently under appeal.

[7] CADE Administrative Proceeding n. 08700.004617/2013-4 and multiple other criminal, civil, and administrative investigations before different courts and agencies around the country.

[8] CADE Administrative Inquiry n. 08700.002086/2015-14 and, like the Subway case referred above, multiple other criminal, civil, and administrative investigations before different courts and agencies around the country.

Just to give an idea of the dimension of the investigation so far, according to the Federal Prosecutor's Office,[9] as of August 2015 (in figures that will quickly grow outdated): at least 715 investigation proceedings had been initiated involving allegations of corruption, money laundering, cartels, and other criminal offenses; more than 140 individuals were under investigation; 28 plea agreements had been signed; 356 search warrants had been carried out; 105 individuals had been arrested; 53 requests for international cooperation were issued; R $870 million (approximately U.S. $248.5 million) had been recovered; and the sum of convictions by then was 225 years, 3 months, and 25 days.

Also in the context of the Petrobras investigation, leniency agreements have already been signed with CADE and other agencies, and the leniency program adopted by the new anticorruption statute[10] (largely inspired by the antitrust one) is about to be tested for the first time. Not to mention the civil actions popping up, some of them with claims of hundreds of millions of U.S. dollars.

Even if the largest part of this scandal refers to corruption and bribery (though sometimes linked to competition matters), the concepts of leniency and cooperation are gaining great recognition and momentum both within the government and the public in general, given the obvious positive impact to the effectiveness of the investigation. Also, the large number and the political and economic prominence of many of the individuals arrested are starting to convince defendants that the threat of jail is much more real than the long history of impunity in Brazil would suggest.

E. Scope of Criminal Protection

But the Petrobras case is also highlighting another issue that requires careful attention from any jurisdiction planning to introduce criminal sanctions for cartels—some that only became clear with practical experience in Brazil—and may have important effects to the leniency program.

The question refers to the exact scope of the criminal protection awarded by leniency. Is it limited to the crime of cartel, or does it cover other related crimes? Can cartel charges be combined with conspiracy, and does leniency provide protection against that? What if other crimes are also involved, such bid-rigging or corruption? Will the leniency applicants expose themselves to criminal prosecution for a conduct for which they are not covered by the leniency agreement? What if the evidence for the antitrust violation also proves other crimes, such as corruption and bribery? These matters are less simple to deal with in practice then it may seem, taking into account that sometimes different violations are subject to different criminal statutes and possibly even to different specific enforcing agents.

The new Brazilian law of 2011 increased the scope of protection for leniency from only cartels to include also conspiracy and bid-rigging and "other crimes directly related to the practice of cartel." The record of the congressional debates shows that the possibility of charges

[9] http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros. Information as of 14 August 2015, accessed on 24 August 2015.

[10] Law n. 12.846/2013 and regulating Decree n. 8.420/2015.

of conspiracy being brought against leniency applicants only protected for cartels is a real concern. But even with the changes, the exact reach of this expanded protection is still uncertain.

Is a corruption scheme that provides for bribery payments linked to bid-rigging "directly related" to the cartel? This will ultimately be decided in the courts, but it has an impact in terms of incentivizing leniency applications. As with all things related to leniency, the more transparency and predictability that can be offered, the better, and countries considering criminalizing cartels should take the chance of preventively addressing this issue as carefully and holistically as possible before it arises in a concrete case. If, as is almost inevitable, unforeseen difficulties arise, the Brazilian experience throughout some of these trials has shown how important it is for the competition authority to firmly stand on the side of protecting the leniency program.

F. Settlement Programs

Even with all of these concerns regarding leniency and the first one in, maybe the biggest challenge to antitrust cooperation programs in Brazil in the face of growing criminal enforcement comes in the context of the settlement program—that is, the benefits offered to those cooperators who come in second or later to the authority.

The settlement program in Brazil underwent a major change in March 2013, when CADE issued Resolution No. 5[11] containing new provisions designed to make negotiations and benefits more transparent, predictable, and attractive. The new Resolution created a scale of discounts based on the timing of an applicant's presentation of a settlement proposal and the degree of cooperation, with a reduction of 30 percent to 50 percent of the fine that would be imposed for the first proponent; reduction of 25 percent to 40 percent of the fine that would be imposed to the second proponent; and reductions of up to 25 percent to any following proponents. A settlement proposal made after the investigation phase has ended can provide a maximum of reduction of 15 percent.

The law however does not provide any criminal effect to a settlement. When the CADE settlement resolution mentioned above was being drafted, there was considerable debate as to whether a settlement should necessarily require parties to confess, given the obvious potential criminal repercussions. Many contended that this requirement would reduce the number of settlements. CADE ultimately decided to maintain the requirement of a guilty plea, considering that since leniency mandated a confession, a settlement for someone coming in later in the investigation could not be more beneficial. The impact of a confession for civil claims is considerable, and there was a concern that exposing a leniency applicant more than a settlement signatory on the civil front could also be a disincentive for leniency.

The fact is that this new regulation has launched a new era of settlements in Brazil. According to CADE, more than 50 such settlements were signed since March 2014 when the new Resolution came into force. This is in stark contrast to the old system, in which settlements were few and far between and most defendants fought the charges before CADE and later in the

[11] Resolution n. 5, dated 6 March 2013, *available at* http://www.cade.gov.br/upload/Resolução%205_2013.pdf, accessed on 24 August 2015.

courts. The authority has in this result an easy rebuke to the claims that this confession requirement would scare away potential settlement proposals.

This rebuke obviously has to be taken with a grain of salt. The question that could be asked is whether the success is due to the increased transparency of the rules and benefits, and could be even bigger if it were not for the criminal risks. Also, a more careful analysis still has to be made as to whether companies are settling more but maybe individuals are participating less. Further, given the fast-growing interest of criminal prosecutors in pursuing cartel investigations—no doubt spurred by the very visible Petrobras and Subway cases—it could be risky to make predictions as to the attractiveness of a settlement program that criminally exposes a cooperating individual.

It may be a matter of fairness—and good leniency policy—not to expose the first cooperator more than those who follow later, but the impacts of this choice must be assessed. This understanding could be a basis, for instance, for proposing and facilitating coordinated approaches involving both the competition authorities and the criminal prosecutors, so that individuals interested in resolving an investigation could reach parallel but simultaneous settlements in both spheres.

IV. CONCLUSION

If more enforcement and stiffer penalties from multiple agencies may act as a stimulus for companies and individuals to cooperate, excessive complexity, lack of coordination, and risk of cross-exposure can disincetivize potential applicants. Even if it is still unfolding, and the courts have yet to significantly weigh in on this process, the Brazilian experience with leniency, settlements, and criminalization so far seems to point to very positive results in terms of enforcement.

The issue however is that this experience also suggests that it is crucial to constantly reassess and seek a better equilibrium. Legislation and institutional design, regulation, and coordination between government officials can and must constantly be improved.

Criminalization of cartels is a complicated affair anywhere, and affects leniency and cooperation programs in a dramatic way. Authorities considering that path have to acknowledge the complexities of such an environment and offer predictable alternatives for resolution. As detection and penalty figures increase and are celebrated by authorities, companies, individuals, the authorities themselves are navigating more uncertain waters. In this scenario, it becomes even more important to strive to reduce the uncertainty and to maximize the incentives in order to strengthen the cooperation programs that have been so important for improving cartel enforcement around the world.