



Administrative and Criminal Anticartel Enforcement in Brazil: Two Sides of the Same Coin

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1. Leniency Programs & Public Interest

- Detection and dismantling of largest global cartels
- Record-breaking fines in both Civil and Common Law Countries
 - United States: almost US \$4 billion (1993-2007)
 - Over 90% of this total tied to investigations assisted by leniency applicants
 - 150 served jail time since 2000
 - EC: over EUR \$3 billion in 2007 alone





2. Leniency Programs & Public Interest

- Negative Connotation to Agreements (Leniency & “Plea Bargaining”) due to implication that prosecutors could be bargaining away justice by securing guilty pleas that allow defendants immunity or lesser charges
- Nothing could be further from the truth
- Numerous Benefits:
 - Government
 - Cooperating defendants
 - Administrative and Judicial System
 - Victims

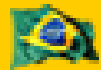




3. Leniency Programs & Public Interest

- Leniency programs would make no sense for most other antitrust offenses
- Cartels are inherently difficult to prove –insiders willing to cooperate may enable to uncover the cartel and build a strong case
 - Without the lure of leniency, it would be very difficult to attract a cartel member
- Cartels are conspiracies – so always other remaining companies/individuals left to prosecute after the first one reports the conduct
- Not for other reason, at least 30 civil and common law jurisdictions have adopted Leniency Programs in the past 10 years





4. Leniency Program in Brazil

- Leniency Program was inspired in models from other Successful Jurisdictions, but with necessary adaptations to our Legal Framework (no *one-size-fits-all* approach)

- Existing Parallels in Brazil:
 - Criminal System; and
 - Executive and Legislative Powers



5. Parallels in Brazil: No one is Bargaining Away Justice!

- Brazilian Criminal System
 - Law 9.099/95, art. 89 allows Prosecutors to settle under certain circumstances
 - The law encompasses specific categories of crimes
 - § 1º lists requirements needed to be fulfilled



6. Parallels in Brazil: Similar Powers to Other Bodies

➤ Brazilian Executive and Legislative Bodies

- Art. 107, Brazilian Criminal Code: “*Punishability ceases to exist: (...) II - through amnesty and individual or collective clemency*”
- Amnesty may be granted by Congress
- Clemencies are only granted by the President
- Art. 34, Law 9.249/95: “*Punishability of the crimes defined in the Law 8.137/90 and in the Law 4.729/65 ceases to exist when the party pays the tax or contribution, including any ancillary payment due, before any formal charges are brought*”





7. The Brazilian Leniency Program: SDE's most effective investigative tool

➤ **It turned out to be a revolution in our Anti-Cartel Program:**

- **8 out of the 10 main cartel cases being handled by SDE were initiated with the signing of a leniency agreement**
- **Provide critical cooperation of cartel participants, access to documents, access to witnesses**
- **Approximately 10 agreements signed since 2003**
- **Many of these cartels would have remained undetected to this day without the lure of leniency**
- **Growing number of candidates to the program, including members to international cartels**





8. The Brazilian Leniency Program: Stick and Carrot Approach

- Carrot: (i) no administrative penalties for the first company to self report; (ii) no criminal or administrative penalties for cooperating directors and managers
- Stick: The other companies (and their executives) face severe sanctions:
 - Fine of 1 to 30% of the gross revenues of the company in the year before the initiation of the proceedings;
Additional corporate penalties
 - Jail term of 2 to 5 years, plus criminal fines
- “*Winner-take-all approach*” severally destabilizes the cartel, creating a race to SDE





9. Additional Benefit: The Upward Spiral

- **Leniency and Dawn Raids walk hand in hand**
- ***Upward Spiral: Leniency Agreement* → More searches → Other candidates for leniency → Other searches**
- **Great advantage of leniency:**
 - **Commitment of one of the parties to present detailed insider information of the cartel**
 - **Which in turn will be used to convince judge to authorize raid**
 - **Raids with greater chances of success due to higher precision of information available**
 - **Success stories of previous dawn raids help to convince the judge to authorize future dawn raids**
- **Results:**
 - **From 2003 to 2005: 11 warrants served; 2 people detained without charges**
 - **2006: 19 warrants served**
 - **2007: 84 warrants served; 30 people detained without charges**





10. Criminal & Administrative: Two sides of the same coin

- **Since 2003, the SDE has been closely cooperating with the Federal Police and the Prosecutors**
- **Creation of an Intelligence Center with the Federal Police
→ Cooperation agreement executed in December 2007**
- **3 executives condemned to serve jail terms of 3 to 5 years in 2006; 7 executives condemned to serve jail terms of 2 and a half years in 2007 (both decisions on appeal)**
- **More than 100 executives are facing criminal proceedings and over 30 settled the case with the payment of criminal fines**

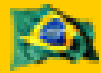




11. Conclusion: **Effective Leniency Program**

- **10 Agreements executed**
- **Sanctions will become harsher, especially in the criminal side**
- **Fear of Detection is increasing due to increased cooperation with Federal Police and Public Prosecutors and additional detection methods (such as “Click to Tip Us” at SDE’s website)**
- **Transparency enhanced with the release of Leniency Policy Interpretation Guidelines and Model Annotated Leniency Agreement**





Thank you

