



**MINISTRY OF JUSTICE
SECRETARIAT OF ECONOMIC LAW**

BRAZIL'S ANTI-CARTEL PROGRAM

The prosecution of hard-core cartels is a top priority in Brazil since 2003. As of that year, the SDE¹ started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct. Also, the SDE significantly improved the interaction and cooperation with criminal prosecutors to strengthen anti-cartel enforcement in Brazil.

The strategy of focusing the available resources on cracking cartels has proven successful and there are an increasing number of investigations of anticompetitive practices, leniency applications and dawn raids. There are a growing number of applicants for the Leniency Program, including members to international cartels. Approximately 15 leniency agreements were signed since 2003, and others are currently being negotiated. As a result, the number of search warrants served has significantly increased: from 2003 to 2006, 30 warrants were served and 2 people were detained without charges; and in 2007 and 2008, 177 warrants were served and 83 people were detained without charges. Ten executives were already sentenced to serve jail time (decisions under appeal) and there are currently more than 100 executives in Brazil facing criminal proceedings for their alleged participation in cartels. Other 19 executives were sentenced to pay criminal fines (no appeals pending).

Cartels, *as an administrative offence*, can be sanctioned with fines imposed on companies by the CADE that may range from 1 to 30 per cent of a company's pre-tax revenues in the year preceding the initiation of the proceedings. Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine.

Other individuals, trade associations and other entities that do not engage in commercial activities may be fined from approximately R\$ 6 thousand to R\$ 6 million. Fines for

¹ The Competition law and policy in Brazil at the administrative level is governed primarily by Law No. 8,884, of 1994, as amended in 2000 and 2007 (the "Brazilian Competition Law"). The Brazilian antitrust system is composed of three agencies - namely, the Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE"), the Secretariat of Economic Law of the Ministry of Justice ("SDE"), and the Administrative Council for Economic Defence ("CADE"). The SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. The SEAE issues non-binding opinions in merger cases and it may also issue non-binding opinions related to anticompetitive practices. The CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with both anticompetitive practices and merger review, after reviewing SDE's and SEAE's opinions.



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repeated violations are doubled. Apart from fines, the Brazilian Competition Law 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 recommendation to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in installments or obtain tax benefits.

In various occasions the CADE has shown its strong commitment to severely punish hard-core cartels. One great example was the crushed rock cartel case, where the tribunal fined the defendant companies in amounts ranging from 15 to 20 per cent of their 2001 pre-tax revenues. Other cartels were also sanctioned by the CADE such as the airlines cartel (2004), newspaper cartel (2005), pharmaceuticals cartel (2005), international vitamins cartel (2007), security services cartel (2007), and the sand extraction cartel case (2008).

Additionally, the Brazilian Cartel Settlement Program was introduced in 2007, by an amendment to the Brazilian Competition Law. The CADE is the antitrust agency with power to enter into settlements, and the SDE may issue a non-binding opinion directed to the CADE on whether to settle or not. In September 2007, the CADE issued Resolution No. 46/2007, establishing the negotiation rules. A number of settlements were already reached and others are being negotiated.

Apart from being an administrative infringement, *cartel is also a crime in Brazil*, punishable by a criminal fine or imprisonment from two to five years.² Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Since 2003, the SDE, as the chief investigative antitrust authority, is increasing cooperation with the Federal Police and Public Prosecutors to ensure that managers and directors of companies that do not come forward and take part in the Leniency Program face full criminal liability.

In order to achieve effective cooperation with the criminal prosecutors, a number of initiatives were taken:

Getting public prosecutors interested and included in the enforcement process. SDE has convinced prosecutors of the importance of fighting cartels and that leniency is as valuable a tool for their prosecution efforts as it is for the administrative agencies. Prosecutors are viewed by SDE as partners in the leniency process and they are invited to sign the leniency letters. This is a way to help maximize benefits for potential applicants and ensure that administrative and criminal liability are addressed together. Also, in 2008, a Presidential

² According to Brazil's Economic Crimes Law (Law No. 8,137/90), 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.



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Decree created a ‘*National Anti-Cartel Day*’ (October 8th) to raise public awareness that included an economic crimes workshop with prosecutors.

Cultivating a relationship with public prosecutors. Each one of the 27 Brazilian States has a State Public Prosecutor’s Office. Early in its efforts to increase cooperation, SDE established a relationship with prosecutors in Sao Paulo and encouraged the creation of a special unit within the Sao Paulo State Prosecutor’s Office to investigate cartels and cooperate with the competition agencies in joint criminal and administrative investigations. The cooperation experience with São Paulo was used by SDE as a reference point to foster relationships with other prosecutors. Now, there are 27 state cooperation agreements. There is also a cooperation agreement with the Federal Public Prosecutor’s Office.

Using complementary expertise from different sources for a team effort in the fight against cartels. SDE’s interaction and cooperation with public prosecutors gives SDE the ability to tap into the different investigation tools and resources available through the police and prosecutors (for instance, the use of wiretaps). An extensive network of police and prosecutors more attuned to cartel conduct helps with cartel detection. In December 2007, the SDE and the Federal Police executed a cooperation agreement and an “*Intelligence Centre for Cartel Investigations*” was established to advance cooperative anti-cartel efforts.

With time and consistent efforts, a partnership develops. Before the efforts to engage prosecutors, cartel investigations inevitably began with the agency’s administrative case. When SDE initiates an investigation of hard-core cartel conduct, they routinely ask prosecutors to start a parallel criminal investigation. Due to the recent outreach and education efforts, recently, prosecutors have begun to uncover their own leads and initiate cartel investigations themselves. Due to the existing relationships, the prosecutors have sought the competition agencies’ assistance in such investigations.

The results of competition agencies’ efforts to build relationships with public prosecutors are based on significant time, effort and resources. SDE has made anti-cartel enforcement its number one priority and views criminal prosecution of such conduct as critical to ensuring effective deterrence. To bolster enforcement, a real commitment was made to develop relationships with prosecutors founded on mutual respect and expertise sharing. Today, the benefits of this cooperative relationship are evident in the increased level of anti-cartel enforcement in Brazil.

More information on these and other initiatives can be found at SDE’s website at (English section):

<http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>