Painel II – O CARTEL E SUA PROVA – BUSCA E APREENSÃO: EXPERIÊNCIA COMPARADA / *CARTEL AND ITS EVIDENCE – DOWNRAIDS: COMPARING EXPERIENCES*

Coordenadores / ***Chairpersons*: Mauro Grinberg** – *Araújo e Policastro*; **Pedro Zanotta** – *Albino Advogados Associados*
Barbara Rosenberg – *Diretora do DPDE*
Luc Gyselen – *Arnold & Porter – Brussels*
Robert Kwinter – *Blake, Casssels & Graydon – Toronto*
Peter Niggemann – *Freshfields Bruckhaus Heringer – Düsseldorf*
Luiz Carlos Thadeu Delorme Prado – *Conselheiro do CADE*
Questionadores:
Célia Cleim – *AGA – São Paulo*
Reinaldo Silveira – *SOLVAY – São Paulo*

■ Mauro Grinberg

Meus amigos, muito boa tarde. Vocês quando entraram aqui perceberam que havia alguma coisa de diferente na sala. Nós eliminamos a mesa, porque a nossa idéia era tornar esse painel um pouco menos formal, ou melhor, mais informal e ter um contato mais direto de todos com a audiência. O único problema é que ninguém vai falar dos membros da Mesa, porque não há mesa. Mas isto nós iremos solucionar de algum outro jeito.

Eu quero explicar o seguinte: nós criamos um Painel com três personalidades estrangeiras, duas personalidades brasileiras e dois questionadores.

Os questionadores estão aqui porque são advogados de empresas, e o próprio Reinaldo fez uma conta e disse que só 8% dos inscritos são advogados de empresas. Na verdade, nós queremos estimular a presença de advogados de empresas porque o Ibrac é de todos. E dando o exemplo chamamos a Célia e o Reinaldo.

Então, como nós não estamos aqui para falar mas para conduzir, eu vou pedir ao Pedro para apresentar os expositores.

■ Pedro Zanotta

Boa tarde a todos. Este é o horário da preguiça, mas vamos nos esforçar.

Nosso Painel é a respeito do cartel e sua evidência ou a prova na investigação de cartel. E para isso nós temos três jurisdições que vão nos falar a respeito de suas experiências: Canadá, Comunidade Européia e Brasil.

Nós dividimos a primeira parte com os apresentadores brasileiros, depois os apresentadores estrangeiros e, por último, os questionamentos dos dois advogados.

Então, o primeiro palestrante é o Dr. Luiz Carlos Delorme Prado, que dispensa apresentações, mas eu vou apresentá-lo mesmo assim.

O Dr. Magalhães disse que nós estamos com poucos advogados no Conselho agora, mas todos esquecem que o Dr. Prado é advogado também, pelo menos bacharel em Direito. O Dr. Prado é bacharel em Direito e Economia pela Universidade Federal do Rio de Janeiro, tem Mestrado em Engenharia de Produção pela COPPE, da Universidade do Rio de Janeiro também, PhD em Economia pela Universidade de Londres, é professor do Instituto de Economia da UFRJ, tem mais de 60 artigos em revistas acadêmicas tanto no Brasil como no exterior, e é autor de vários livros e capítulos de livros em matéria de Economia.

Dr. Prado. Até 20 minutos.

■ Luiz Carlos Delorme Prado

Primeiramente, é um prazer estar aqui discutindo, tendo a oportunidade de realizar este debate.

O tema que foi colocado, "Provas em Direito da Concorrência", eu vou tratá-lo com o viés do acadêmico e com o viés do economista. Vou olhar a questão das provas a partir do ângulo de visão de um economista, que tem que difere um pouco da visão tradicional feita por um jurista.

E o meu ponto de partida, assim que eu conseguir trabalhar com essa tecnologia aqui, seria justamente fazer uma discussão econômica sobre provas. Mas eu vou partir de uma discussão filosófica prévia: os fatos não falam por si. Se a realidade pudesse ser direta e inequivocamente conhecida, não haveria um problema de prova. Hegel, na *Introdução à história da filosofia*,

dizia que se a essência e a aparência fossem similares, todo conhecimento seria supérfluo.

Como a realidade é complexa, os fatos jurídicos só podem ser conhecidos por meio de provas. Mas provas são essencialmente evidências que indicam a existência de determinados fatos jurídicos, isto é, são elementos que sustentam a alegação de direito pelas partes de uma contenda legal. São também elementos que permitem ao julgador formar a sua convicção sobre fatos, permitindo que ele se decida sobre a questão legal.

A realidade não pode ser conhecida de forma absoluta; portanto, todo conhecimento dessa realidade é intermediado por uma interpretação da complexidade do real. As provas sustentam a interpretação dessa realidade, ou seja – e este é um ponto que eu gostaria de ressaltar –, provas não levam inequivocamente à verdade, mas indicam a probabilidade de uma determinada interpretação, entre duas ou mais, ser adequada. Quer dizer, o problema, para nós que temos que tomar decisões com implicações jurídicas, é que as provas vão de alguma maneira nos ajudar a tomar uma decisão. Portanto, estou partindo para discutir o problema de provas essencialmente como um problema de informação, isto é, meu problema é com a quantidade e a qualidade de provas que são suficientes para o julgador tomar a sua decisão.

Há um problema, que é bastante discutido em economia, de informação. Como um problema informacional, o primeiro problema que surge da análise das provas é que para o julgador há um *trade-off* entre a quantidade de informação obtida e o custo de obtê-la. Esse custo pode ser imputado ao tempo, ou ainda à dificuldade de se obter uma quantidade adicional de evidências. No ponto, o fato é que, se nós tivéssemos um orçamento ilimitado e um tempo ilimitado, poderíamos chegar o mais próximo possível da verdade. Mas o problema é que há um custo também de esperar para tomar uma decisão e limitações para a busca dessa verdade. Portanto, é necessário considerar que há um equilíbrio entre as informações disponíveis para uma tomada de decisão e o custo de espera de novas evidências importantes da postergação de uma tomada de decisão. Esse é um momento em que as provas têm de ser valoradas juridicamente, as questões de interpretação legal consideradas, e a decisão proferida. No caso, o que estou querendo dizer aos senhores é o seguinte: se eu considero como pS, perco uma probabilidade de uma decisão errada, e pS como custo do erro, isto é, como a probabilidade do erro ponderada pelas conseqüências econômicas ou sociais do que está em disputa, eu posso dizer que pS = custo social do erro. Isto é, tomar uma decisão errada tem um custo privado e tem um custo social. Quanto mais alto esse custo, mais cautela eu tenho que ter quanto à minha tomada de decisão. Em contrapartida, um sistema jurídico eficiente deve minimizar o custo do

erro, mas deve considerar também um custo de denegação da Justiça. Isto é, o juiz não pode evitar tomar a decisão por medo de errar, porque o custo de não decidir pode ser socialmente muito elevado. Portanto, há um custo derivado da obtenção de provas ou da postergação da decisão, que chamarei de custo de evitar o erro, como PE. Portanto, o problema da busca de provas ou da determinação do momento adequado para a tomada de decisão pode ser definido como o problema de minimizar a soma do custo erro e do custo de evitar o erro, ou seja, eu fiz uma representação simples, aritmética, de um ponto em que seria desejável, seria necessário, se tomar uma decisão. O que estou dizendo em última instância é que a procura de provas deve ser levada até o ponto em que o custo da procura por provas adicionais seja superior ao custo social de evitar o erro. Isso posto, vou entrar no nosso problema concreto, que é o problema do cartel. O problema que eu vejo no cartel é o seguinte: o quanto de prova vai permitir tomar uma decisão sobre o problema de cartel? O cartel tem um custo social elevado para a sociedade. Se eu buscar provas insuficientes, vou estar prejudicando profundamente as empresas. Se eu demorar um tempo infinito ou procurara usar recursos de que não disponho, não conseguirei chegar a uma decisão. Para isso, eu defini o problema de cartel, pois normalmente é trabalhado apenas um aspecto. Eu distingui o que eu chamo de cartel clássico, ou *hardcore cartel* inglês, do que eu estou chamando de cartel difuso.

Cartel clássico seriam fundamentalmente acordos secretos entre competidores com alguma forma de institucionalidade importante, com o objetivo de fixar preços ou condições de venda, dividir consumidores, definir nível de produção e impedir a entrada de novas empresas no mercado. O que caracteriza esse tipo de cartel é a coordenação institucionalizada, que podem ser: reuniões periódicas, manuais de operação, princípios de comportamento etc. Portanto, a sua ação não decorre de uma situação eventual de coordenação, mas da construção de um mecanismo permanente para alcançar seus objetivos.

Outro tipo de cartel, que eu estou chamando de cartel difuso, é também um ato de coordenação horizontal entre empresas. Pode ter um objetivo similar ao do cartel clássico, mas tem fundamentalmente um caráter eventual e não institucionalizado. Ocorre quando um grupo de empresas se reúne, eventualmente, por uma razão muitas vezes externa, uma crise econômica, por exemplo, uma situação que leva as empresas a considerarem importante naquele momento ter algum grau de colusão. Nesse caso, o tratamento e a questão de provas eu os colocaria de forma distinta. Eu trataria de maneira distinta cada um desses diferentes cartéis.

O ponto para o qual eu quero chamar aqui a atenção dos senhores, na questão de caracterização de cartel, é que, ao se tratar de cartel clássico, eu considero que se trata de uma exceção no direito antitruste brasileiro e pode ser considerado como ilícito *per se*, ou seja, é suficiente provar sua existência para determinar sua ilicitude.

Eu sei que essa afirmação é sujeita a controvérsias, já que a visão da imensa maioria ou da quase totalidade dos juristas é de que no direito brasileiro não há ilícitos *per se*.

Eu, com a devida vênia, discordo dessa visão porque a existência da prova da institucionalidade de um cartel em si caracteriza algumas coisas. Por exemplo, por que cartéis são reprimidos, e não concentrações, atos de concentração? Porque quando duas empresas se fundem, aumenta o seu poder de mercado, mas há ganhos para a sociedade via efeitos sobre eficiência.

A essência do cartel é que há um aumento do poder de mercado, portanto prejuízo ao consumidor, sem nenhum ganho de eficiência. Portanto, no momento em que um grupo de empresas se reúne, monta algum tipo de reunião periódica, assume os custos e os riscos de montar um cartel, há que se presumir que pelo menos os seus dirigentes esperam que haja efeitos no mercado. Não há que se tentar provar aquilo que os próprios dirigentes, ao incorrerem nos riscos e nos custos de organizar o cartel, já indicaram que há. Então, esse já é um momento suficiente para determinara o ilícito. Portanto, nesse ponto, a busca e apreensão e as evidências obtidas por meio de acordos de leniência passam a ser muito importantes no cartel clássico.

Quando eu caminho em direção ao cartel difuso, o problema é um pouco diferente, porque, como eu chamei a atenção, ele é produto de uma situação eventual – no caso da Comunidade Européia, em alguns casos aceita-se, ou pelo menos há um tratamento diferenciado para os chamados "cartéis de crise".

No caso brasileiro, vemos que depois da desvalorização de 1999, houve várias situações de colusão entre empresas. Nesse caso, a meu juízo, é necessário, para se provar a existência de um ilícito, não apenas mostrar que houve algum tipo de contato, de relação entre as empresas envolvidas; é necessário mostrar que houve sim algum tipo de colusão, da qual participam duas ou mais empresas que atuam nesse mercado relevante. Mas, nesse caso, evidências de que essa ação é passível de prejudicar o mercado ou que o tenha efetivamente prejudicado passam a ser necessárias.

As evidências econômicas nessa forma de coordenação horizontal, nessa forma que eu estou chamando de cartel difuso, passam a ser muito importantes.

Portanto, o ponto a que quero chegar é que o trabalho da SDE, na sua busca das evidências para a definição da natureza de cartel, deve distinguir essas duas formas: quando há institucionalidade, quando há elementos que mostram que esse cartel é durável ao longo do tempo – normalmente se dá, curiosamente, quando há um grande número de empresas, porque quando há um pequeno número de empresas, o próprio paralelismo consciente pode muitas vezes substituir até um determinado tipo de ação colusiva –, é mais fácil ter um cartel com um grau maior de institucionalidades quando há um problema complexo de controle, porque, como é patente na literatura econômica, os membros de um cartel têm grande estímulo a, de alguma maneira, ter um comportamento *free rider* dentro dele. Portanto, todo cartel tem um problema de estabilidade.

Nesse sentido, a ênfase dos estudos econômicos para mostrar o dano de uma ação colusiva é particularmente importante nesses casos em que a ação colusiva foi mais difusa.

Para concluir, pois o meu tempo é bastante curto, então, o cartel difuso não tem institucionalidade, quer dizer, não tem ata, portanto é muito difícil provar a existência de um cartel difuso com provas materiais, pois muitas vezes não há essa materialidade.

Já num cartel clássico, há essa materialidade; portanto num cartel difuso as provas econômicas passam a ser fundamentais.

A título de conclusão, eu considero que, como é patente também na literatura econômica, cartel é um dos pontos de maior preocupação de qualquer autoridade de defesa da concorrência. O Cade sempre coloca esse tema como prioritário. No entanto, eu chamo a atenção de que a própria tomada de decisão do cartel deve ser realizada levando em conta, cuidando para que haja os elementos de prova necessários para que não se tomem decisões açodadas nesse setor.

Portanto, a correta definição da natureza de prova para o tipo de ilícito passa a ser absolutamente fundamental na caracterização de um cartel.

Mais do que nunca no Brasil nós necessitamos de recursos, para que fique mais barato o custo de procurar prova adicional, e de mais pessoal para desenvolver trabalhos de investigação, de busca e apreensão, de análise de informação, e também melhor infra-estrutura para a avaliação técnica, para os estudos econômicos e econométricos para os casos de cartel difuso, de tal forma que possamos lidar com esse problema, que é particularmente grave em países em desenvolvimento como os nossos, com a cautela necessária de que uma autoridade antitruste precisa para não cometer injustiças nem tomar decisões apressadas. É isso, obrigado.

PROVAS EM DIREITO DA CONCORRÊNCIA: O CASO DO CARTEL

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Provas: Uma Abordagem Econômica

- A realidade não pode ser conhecida de forma absoluta. Todo conhecimento dessa realidade é intermediada por uma interpretação da complexidade do real. As provas sustentam uma interpretação dessa realidade. Ou seja, provas não levam inequivocamente à verdade, mas indicam a probabilidade de uma determinada interpretação, entre duas ou mais, ser a mais adequada.
- Como a verdade não é passível de ser integralmente e diretamente conhecida, o problema de provas é um problema de informação: Qual a quantidade e qualidade de provas que são suficientes para um julgador tomar sua decisão.
- Como um problema informacional, a primeira questão que surge do análise das provas é que, para o julgador, há um *trade off* entre a quantidade de informação obtida e o custo de obtê-la.

Informação e Decisão

- Mas, como a decisão baseia-se em informações, uma das questões importantes é a determinação da probabilidade dessa ter sido equivocada por problemas informacionais. Essa questão pode se posta na seguinte forma:
- Seja p a probabilidade de uma decisão errada e seja pS o custo do erro, isto é, a probabilidade do erro ponderada pelas conseqüências (econômicas ou sociais) do que está em disputa. Pode-se, portanto, postular que pS é igual ao custo social do erro.

Custo do Erro

- Um sistema jurídico eficiente deve minimizar o custo do erro, mas considerando, também, o custo de denegação da justiça. Um juiz não pode evitar a decisão com medo de errar, porque o custo de não decidir pode ser socialmente muito elevado. Portanto, há um custo, derivado da obtenção de provas ou da postergação da decisão que chamarei de custo de evitar o erro de pE. Portanto o problema da busca de provas (ou da determinação do momento adequado para a tomada de decisão) pode ser definido como o problema de minimizar a soma do custo do erro e do custo de evitar o erro, ou seja: D= pS + pE
- Ou seja, a procura por provas deve ser levada até o ponto em que o custo da procura por provas adicionais seja superior ao custo social de evitar o erro.

Definições de Cartel

- Cartel Clássico – acordos secretos entre competidores, com alguma forma de institucionalidade, com objetivo de fixar preços e condições de venda, dividir consumidores, definir nível de produção ou impedir a entrada de novas empresas no mercado. Este tipo de cartel opera através de um mecanismo de coordenação institucionalizado, podendo ser reuniões periódicas, manuais de operação, princípios de comportamento etc. Isto é, sua ação não decorre de uma situação eventual de coordenação, mas da construção de mecanismos permanentes para alcançar seus objetivos
- Cartel Difuso – é um ato de coordenação da ação entre empresas com objetivo similar ao do Cartel Clássico, mas de caráter eventual e não institucionalizado. Esse é o caso quando um grupo de empresas decide reunir-se para coordenar um aumento de preço, muitas vezes em função de um evento externo que as afetou simultaneamente. Isto é, tal ação pode ser considerada eventual e não decorreu de uma organização permanente para coordenar as ações das empresas envolvidas.

Efeitos dos Cartéis

- Os cartéis geram apenas os efeitos negativos do aumento de poder de mercado, sem qualquer efeito de aumento de eficiência. Portanto, cartéis, particularmente, cartéis clássicos são sem qualquer ambigüidade, nocivos ao bem-estar dos consumidores, e são conseqüentemente um delito *per se*, sem possibilidade de qualquer mitigação, por argumentos da regra da razão.

Caracterização de Cartéis Difusos

- Nesses casos não há uma institucionalidade, sendo que a coordenação de políticas comerciais podem ser passageiras e pouco estáveis. Tais condutas são claramente ilegais na legislação brasileira, embora não sejam tão nocivas quanto aos cartéis clássicos.

- Nesses casos não é possível fazer condenação baseando-se apenas em provas de eventuais reuniões entre empresários, mas é necessárias mostrar a racionalidade econômica do comportamento colusivo.. Isto porque o que caracteriza o cartel difuso é a falta da institucionalidade da prática.

- O caráter eventual do delito que pode ser muitas vezes praticado sem registro escrito ou prova documental implica uma avaliação mais cuidadosa da racionalidade econômica e dos indícios obtidos pelo tratamento dos dados de mercado disponíveis, tais como preços praticados, áreas de atuação, distribuição por categoria e região de clientes, correlação entre taxas de aumentos de preços, política de descontos ou data de alteração de tabela etc.

Conclusão

- Em todo o mundo as autoridades de defesa da concorrência têm na repressão do cartel sua prioridade.
- Em países onde as agências de defesa da concorrência são mais recentes e, onde não há larga tradição de repressão de comportamentos anticompetitivos, as limitações humanas e técnicas dificultam a caracterização e repressão de tais delitos.
- Entretanto, o desafio desses países é desenvolver os instrumentos e as condições materiais e humanas necessárias para o exercício de sua função legal. Nesse caso, o maior serviço da autoridade é construir sua credibilidade, condenando práticas anticoncorrenciais que possam ser efetivamente caracterizadas, segundo a legislação vigente, respeitados integralmente o princípio do contraditório e o devido processo legal.
- Condenações heróicas, com provas insuficientes ou indícios frágeis, por enfraquecer a credibilidade da agência antitruste, não leva a resultados eficientes na repressão a tais práticas. É melhor reprimir cartéis com o aprimoramento dos instrumentos de investigação, impondo-lhes riscos crescentes, e julgando-os com dureza, mas com justiça, do que condenando-os com provas frágeis .

■ Barbara Rosenberg

Antes de tudo, obrigada ao Ibrac. Eu não ia fazer comentários com relação a palestras provocativas, mas dado o comentário do Pedro, eu não posso me abster. Eu brinquei com ele, quando eu recebi o convite, dizendo: "achei que depois do ano passado, eu teria sido banida de qualquer apresentação", se bem que acreditamos que fizemos o que deveríamos ter feito. E a prova é que fui convidada novamente. Então, não houve nada de irregular na apresentação do ano passado.

Mas, na verdade, é importante – eu sempre tenho dito isso quando temos a oportunidade de falar com o público, em especial com o público

com que nós lidamos na verdade no dia-a-dia, que são os representantes das empresas junto ao Sistema de Defesa da Concorrência – essa interação e essa construção do Sistema de Defesa da Concorrência feito pelos dois lados, quer dizer, não adianta que seja feito um trabalho pelo Sistema de Defesa da Concorrência que seja separado ou que não tenha nenhum tipo de interface com o Ibrac, o que indubitavelmente tem acontecido, e é um grande mérito, eu acredito, desse tipo de seminário e que eu acho que o Painel da manhã deixou muito claro.

A minha apresentação vai muito à luz do que foi discutido hoje de manhã, na medida em que o que observamos é que, cada vez mais, os processos vão ao Judiciário e se questionam tanto questões de mérito, que serão ou não apreciadas à luz de tudo o que foi dito e discutido hoje de manhã, mas não há nenhuma dúvida – isso ninguém questiona – que também questões probatórias podem e devem ser questionadas junto ao Judiciário. E nesse sentido o que eu pretendo tratar aqui é justamente a preocupação com a utilização de provas válida, ou seja, que não possam colocar em risco a validade do processo seguido e, à luz do que dizia também o Conselheiro Prado, a devida alocação de recursos por um órgão de defesa da concorrência no momento em que decide ou não aprofundar uma investigação.

Sabemos que no Brasil não temos a prerrogativa de dizer "não vamos investigar porque esse mercado é irrelevante", por exemplo, como outras jurisdições, que têm regras *de minimis*. Mas inevitavelmente um órgão que tem recursos escassos decide priorizar uma ou outra investigação, dado o efeito justamente que tem sobre a economia e a sociedade e às vezes até com o elemento de prova que já está disponível ou não. Então, nesse sentido, a SDE tem tido uma preocupação muito grande com a garantia da validade dessas provas. E, para isso, o que fazemos é uma avaliação constante do *standard* probatório que o Cade tenha feito e como o Judiciário tem apreciado essas questões, muitas delas inclusive em casos que não são de concorrência, porque ainda não temos decisões em casos de concorrência apreciando determinadas questões. Mas elas foram apreciadas em questões relativas à produção de provas e podem ser utilizadas ou não, por analogia – é o que iremos ver –, ao longo da construção jurisprudencial que vai se dar na matéria. Isso é uma garantia da validade do processo, que é fundamental para o administrado.

As formas de produção de prova da Secretaria são variadas e todas elas previstas na Lei de Defesa da Concorrência, e especificamente o objeto principal do Painel é a busca e apreensão, sobre o qual eu vou me deter de forma mais específica. Mas a Secretaria pode desde requisitar informações ou

fazê-lo por meio de esclarecimentos orais, até fazer inspeções nas empresas, realizar busca e apreensão, obter provas por meio de acordos de leniência, utilizar provas emprestadas produzidas em outras esferas e, inclusive, à luz da cooperação internacional, obter provas que já foram produzidas em outras jurisdições.

Nós não temos a menor dúvida, existe um consenso internacional e nós temos uma troca constante com autoridades internacionais, de que a forma mais custo-efetiva de investigar é por meio de um acordo de leniência, na medida em que a autoridade não entra às cegas ou baseada em uma informação que ela não tem muito como valorar se vale à pena ou não levar adiante e, no caso do acordo de leniência, obviamente as chances de sucesso da investigação e o seu foco são muito facilitadas.

No entanto, se por um lado no Brasil sabemos que acordo de leniência é algo bastante incipiente – temos tido um sucesso do ponto de vista da Secretaria bastante importante, é um instituto que tem se consolidado, que tem caminhado bem junto ao Ministério Público –, não podemos contar, como ocorre nos Estados Unidos, que todas as investigações se iniciarão a partir de acordos de leniência. Ainda é incipiente no Brasil o número de investigações que se originam de acordos de leniência.

Mas, ainda que todas as investigações se originassem de acordos de leniência, não estaríamos isentos de toda preocupação com a validade da prova, seja porque existe uma regularidade a ser perseguida na celebração do acordo de leniência, seja porque a celebração do acordo de leniência não dispensa a produção de provas adicionais em princípio. A não ser que houvesse um acordo de leniência em que de fato a parte traz 100% das provas suficientes para uma condenação, o que é raro que aconteça, é importante que a preocupação com essas provas continue, para garantir essa preocupação do administrado.

Algo para o qual eu gostaria de chamar a atenção é que a SDE tem dito, de forma bastante veemente, e o Sistema Brasileiro de Defesa da Concorrência tem atuado também de forma bastante explícita – a Dra. Elizabeth mostrou os dados de julgamentos de processos hoje de manhã, e isso ficou bastante claro –, que o objetivo do Sistema não é condenar todas as empresas investigadas, ou levar a cabo essas investigações simplesmente para condená-las. Eu acredito que, se por um lado talvez todo esse trabalho que foi feito de incrementar as formas de investigação apareceu muito, eu acredito também que nunca se arquivou tanto ou se sugeriu, para falar a verdade, tantos arquivamentos de averiguação preliminar e processos como ocorreu nesses últimos três anos,

isso também levando em consideração o ônus que é para a parte que tem um processo pendente, que fica num limbo e não é levado adiante.

Então, tem havido um esforço na Secretaria, para além da preocupação com a produção de provas, de tentar também arquivar aqueles processos em que não há indícios, ou no qual os indícios são fracos a ponto de que de fato não se possa sugerir a condenação, para poder fazer uma certa limpeza do estoque que existia na Secretaria.

Se formos falar de números genéricos, há três anos havia um estoque de cerca de 1.300 expedientes na Secretaria e hoje há menos de 800, ou seja, estamos falando de uma redução substancial em termos de estoques de casos. E muitos deles com sugestão de arquivamento, ou seja, não é a condenação pura e simplesmente o foco da Secretaria. Por outro lado, em havendo provas, em havendo indícios, a Secretaria levará sim adiante a investigação e terá interesse em efetivamente sugerir ao Cade a punição dos envolvidos nesse tipo de prática.

Se a investigação não decorre de um acordo de leniência, ela pode nascer de representações trazidas à Secretaria, de denúncias anônimas trazidas à Secretaria e de outros tipos de documentos ou de atas que também sejam entregues às autoridades. E esse momento é o primeiro momento em que a autoridade tem que fazer uma análise de valoração das provas que existem, para decidir se vale a pena ou não iniciar uma investigação à luz daquilo. Em momento algum será levada uma investigação adiante única e exclusivamente baseada em uma denúncia anônima que diz "existe um cartel em determinado setor". De outra parte, havendo uma denúncia anônima que tem elementos de verossimilhança que justificam a sua investigação, a autoridade não só tem o poder como o dever de apurar esse tipo de infração.

Essa é uma questão que ainda não foi tratada especificamente dentro da defesa da concorrência, mas na Secretaria têm sido levadas adiante investigações a partir de denúncias anônimas não porque ela acredite que deva fazê-lo e tem esperança de que simplesmente o Judiciário assim reconheça: temos um cuidado muito grande, como eu dizia, em observar o que o Cade tem analisado e o que o Judiciário tem apreciado. E aqui, só para dar alguns exemplos, já há decisões do STF em que o início de uma sindicância administrativa se deu a partir de uma denúncia anônima, ou então diversos julgados do STJ, sendo que eu mencionei um aqui, em que a parte que eu deixei grifada em vermelho traduz um pouco como que a SDE recebe qualquer tipo de informação para iniciar uma investigação.

A denúncia anônima não deve ser desconsiderada a ponto de acarretar uma nulidade do processo. Ela deve ser considerada sim, mas a autoridade deve proceder com a maior cautela a fim de que se evitem danos ao eventualmente inocente. Dessa forma, o fato de a denúncia ser anônima não implica a nulidade do processo e, mais do que isso, obriga a instauração de investigação *ex officio* sempre que a autoridade tiver indícios de infração. Isso eu digo por quê? Porque obviamente é um dos pontos que tem originado uma série de investigações na Secretaria que têm sido levadas adiante, e a SDE não levaria adiante processos que no nosso entendimento já nascessem viciados.

Pode acontecer que haja uma decisão contrária – isso acho que o Painel da manhã deixou muito claro –, ou seja, que todas as decisões tanto de procedimento da SDE contra o julgamento de mérito do Cade, sobre o procedimento em si, serão objeto de revisão, e a SDE tem feito isso justamente à luz do que entendemos que é a jurisprudência nesse tipo de caso. Aqui temos uma série de outros julgados do STF e do STJ. Vocês podem dizer que eu só coletei jurisprudência favorável; e eu posso dizer a vocês que eu fiz uma pesquisa extensa da jurisprudência e eu coletei a jurisprudência majoritária, e não foi para esta apresentação. Este é um trabalho que temos feito na Secretaria desde o início para poder garantir toda a validade. Eu poderia até colocar julgados contrários aqui sim, mas o que observamos é que a jurisprudência majoritária caminha nesse sentido e por isso temos nos sentido confortáveis, digamos assim, para prosseguir com esse tipo de investigação, seja iniciando uma investigação por meio de uma representação, de uma denúncia anônima, de outro tipo de documento, ou de informações trazidas à Secretaria. Anormalidades verificadas no mercado, muitas vezes uma licitação pública, em que um órgão público remete à Secretaria informações para uma licitação e diz "há algo de estranho nesse mercado", seja qual for a origem da investigação, a oportunidade de coletar provas *in loco*, se resultar de fato em identificação de indícios, é obviamente a melhor forma de obter evidências concretas da realização de acordos.

Se de fato a representação foi conduzida, foi feita uma série de instruções posteriores e se procedeu a uma busca e apreensão, a chance de que se consigam documentos que de fato sirvam para instruir é substancialmente maior do que se fizermos simplesmente com os dados voluntariamente disponibilizados à Secretaria.

Dada a ilicitude do ato, dado o envolvimento dos executivos nesse tipo de prática, nós sabemos que as provas tendem a não estar explícitas e registradas em cartórios públicos, apesar de que há um processo até que tem

uma ata registrada em cartório, mas aí acho que é um problema da advocacia da concorrência, no limite.

E eu queria chamar a atenção nesse sentido para o fato de que, da mesma forma que a SDE tem tido uma preocupação grande em como originar as investigações, os procedimentos adotados na Secretaria na realização das buscas e apreensões também têm levado em consideração uma preocupação muito grande em garantir a validade da prova.

As buscas e apreensões feitas pela Secretaria são sempre realizadas nos termos da lei, por meio de autorizações judiciais. Uma equipe da SDE é destacada para tal busca, e é feita uma reunião prévia na qual são passadas orientações sobre a atividade que será realizada, sobre como proceder e que tipo de documento deve ser coletado.

Eu não tenho problema algum em dizer que houve uma clara evolução na forma como os procedimentos da SDE têm sido feitos. Nós obviamente aprendemos ao longo desse período, e eu creio que cada vez mais as operações de busca e apreensão têm sido feitas de forma o mais cirúrgica possível e causando o menor ônus ao investigado, na medida em que se tem podido especificar as pessoas, as mesas de pessoas específicas que eventualmente serão examinadas e o tipo de documento que será apreendido. É feita uma análise prévia no local; nós não temos a prerrogativa de fazer algo que nos Estados Unidos é feito: quando é feita uma busca e apreensão, se deixa uma mandado dizendo que se for destruída alguma prova depois da busca e apreensão, ainda assim serão penalizados. Nós infelizmente não só não temos esse tipo de garantia, como temos tido problemas em casos de obstrução de prova durante os procedimentos ou posteriormente, o que é algo que a SDE agora também terá que focar efetivamente na atividade, na medida em que é importante que provas não sejam invalidadas uma vez iniciada a investigação. Mas todos esses procedimentos têm sido feitos com alguma tranqüilidade, à luz do que são consideradas as melhores práticas de realização de busca e apreensão segundo um manual que foi elaborado no âmbito do International Competition Network, que é um grupo do qual o Brasil participa, inclusive como *co-chair* do grupo de cartéis, efetivamente, que é um manual que eu acredito possa interessar a todo esse público e que está disponível no *site* da ICN.

Existem algumas diretrizes de como deve ser realizada uma busca e apreensão. Só para dar alguns exemplos, pois obviamente o documento é muito mais longo do que isso, sugere-se que se estime a dimensão da operação de busca e a apreensão para que se possam alocar os recursos necessários e

prever quantas pessoas devem ou não se direcionar a esse tipo de local além de avaliar o tipo de documento a ser apreendido, ou seja, se serão apreendidos documentos eletrônicos, se serão apreendidos papéis, documentos em lixeira, se vão ser apreendidos telefones, *palm-tops* etc.

Eu acabo de voltar do Seminário Internacional sobre Cartéis e um dia e meio dos 3 dias foi dedicado às evidências magnéticas, aí compreendidos não só computadores mas também telefones, *palm-tops* e outros tipos de instrumentos que facilitam esse tipo de prova. E a SDE, nesse sentido, tem incluído em todas as realizações de busca e apreensão *experts* em questões de tecnologia com duas finalidades: a primeira delas, mais uma vez, é garantir a validade da prova, uma vez que a alteração de dados magnéticos é mais simples do que a de um documento concreto. Então a SDE tem sido muito cautelosa na forma de coletar, copiar e lacrar qualquer tipo de informação magnética. E também tem feito isso para tentar evitar danos ao investigado, na medida em que, se houver interesse da empresa, no momento em que está sendo realizada a busca – todas as buscas e apreensões que têm sido conduzidas pela Secretaria de Direito Econômico atualmente têm sido acompanhadas por *experts* em questões de informática, o que tem permitido à empresa fazer uma cópia completa do documento que é feito –, muitas vezes é feito um *rash*, que é a cópia exata daquilo que está sendo examinado, que é justamente para garantir e validar as provas que estão sendo coletadas. Então, existe efetivamente uma preocupação com isso.

As demais práticas que estão ali listadas são outras práticas que a SDE tem adotado como regra e – repito – tem-se aprimorado. Talvez de uma a outra possa ter havido algum tipo de diferença, mas efetivamente há uma preocupação da Secretaria em garantir que as provas que serão utilizadas sejam efetivamente válidas para sua utilização.

Como eu dizia, então, nós fazemos reuniões prévias com a equipe (essa é outra sugestão da ICN), que é formada sempre à luz do conhecimento e da competência das pessoas que estão diretamente envolvidas, se possível, naquele caso, obviamente dadas as restrições de recursos da Secretaria, que tem 30 técnicos e, dependendo do número de pessoas alocadas numa busca e apreensão, às vezes 2/3 da Secretaria têm que ser alocados a uma única busca e apreensão. A ICN sugere que o número ideal seria de 2 a 6 pessoas por local inspecionado. Houve situações em que fizemos inspeções simultâneas em 6 lugares, e obviamente há uma limitação de quanto se pode alocar de técnicos: nós não teríamos gente suficiente nem que chamássemos o DPDC para poder fazer a busca e apreensão em conjunto. Mas há uma idéia de alocação de

recursos que vai muito à luz do que o Conselheiro Prado dizia antes sobre até que ponto valia a pena alocar recursos e a como alocá-los efetivamente.

E há um cuidado muito grande também no momento da coleta de documentos, da listagem e da guarda desses documentos com o depositário nomeado pelo juiz. A SDE não tem alterado a titularidade de depositários, não tem tirado documentos originais da guarda de depositários sem autorização do Judiciário, não tem feito qualquer tipo de manuseio desses documentos sem autorização do poder judicial, mais uma vez com vistas a validar esse tipo de processo.

E, para concluir, outro tipo de provas que a SDE tem utilizado e que não necessariamente decorre de busca e apreensão, mas que o Cade também tem aceitado são as hipóteses de provas emprestadas da Justiça criminal, por exemplo a interceptação telefônica. Mas nós poderíamos ter uma série de outros tipos de prova, que, mais uma vez, podem ser objeto de questionamento. No entanto, a SDE só tem utilizado esse tipo de prova, uma vez que o Cade e decisões no Judiciário, inclusive no âmbito do STJ, já têm aceitado a prova emprestada, inclusive – e por isso eu utilizei esse exemplo da interceptação telefônica.

Pela Constituição nós sabemos que a interceptação telefônica só pode ser obtida em processos criminais. No entanto, à luz de decisões do STJ, temos que nada impede que posteriormente à sua realização, essa prova venha a instruir o processo administrativo.

O Cade já aceitou isso como prova nos casos dos cartéis de Florianópolis, de Lajes, de Goiânia, e há uma menção aqui de que seria impossível admitir que o Estado, tendo legitimidade para utilizar a prova decorrente de interceptação telefônica no processo penal, não a tenha para utilizá-la no processo administrativo.

Essa decisão foi levada à apreciação do STJ, especificamente nesse caso, e foi dada uma decisão no mesmo sentido que o dispositivo constitucional esclarece, ou seja, que o juiz só pode determinar a interceptação telefônica a requerimento das autoridades criminais. No entanto, não dispõe nada sobre a impossibilidade de utilização desta para fins de investigação administrativa. Nesse caso específico, que é uma apreciação do caso de Florianópolis, o STJ disse que a Administração valeu-se das gravações para fins de prova no processo administrativo, mas a interceptação foi requerida nos exatos termos da legislação em comento. Então, nesse sentido, a SDE também tem utilizado

esse tipo de prova, uma vez que, até o presente momento, entende que o Cade e o Judiciário têm considerado esse tipo de prova válida.

Eu acredito que essas informações são relevantes para que não se diga que a SDE tem-se utilizado de todo e qualquer expediente simplesmente para condenar ou abrir processos. A SDE tem sido cautelosa, porque não nos interessa simplesmente abrir um processo. O interesse é de abrir e concluir os processos e, nos casos em que há sugestão de condenação e em que o Cade efetivamente concorde com o parecer da SDE, mais do que isso, que isso levado ao Judiciário seja uma garantia para o administrado de que todos os procedimentos foram devidamente seguidos.

E a última referência a outro tipo de prova que também já tem sido aceita pelo Cade e que também está sendo utilizada é a possibilidade de utilização não de interceptação telefônica, que é aquela feita no âmbito criminal, com autorização judicial, mas a utilização de gravações feitas com a própria participação da pessoa envolvida. São as gravações realizadas por um dos interlocutores. Já em 1999 o Cade aceitou que a gravação feita por uma das próprias partes – até o dialogo é bastante curioso, porque é do Prefeito da cidade com o vice-presidente de uma associação –, em que o prefeito pergunta ao vice-presidente da associação se eles haviam conseguido um entendimento para transferir os pacientes para hospitais da região, porque não conseguiam contratar anestesiologistas. E o vice-presidente disse que antes que os anestesiologistas de Panambi chegassem a um entendimento com a prefeitura, nenhum hospital ou anestesista deveria ir lá. Isso foi comunicado aos anestesistas da região. O prefeito perguntou se isso não era cartel. E ele disse: "olha, eu acredito que não, eu acho que isso é defesa da categoria, porque senão o que vai ocorrer é que vamos disputar preço, ou seja, aquele que oferecer o preço mais barato vai ser contratado e isso nós não podemos admitir". Então, para além do teor desse caso que foi julgado pelo Cade em 2000, já temos decisões do Cade e do Judiciário também que, nesse sentido, eu citei um *habeas corpus*, que é bastante interessante, porque ele analisou de forma muito aprofundada a questão da utilização de gravação por terceiros, mas ele entende nesse sentido a gravação de conversa telefônica feita por um dos interlocutores, com a sua ciência, sem a autorização do outro, o que vale também, por fim, para a gravação ambiental, ou seja, alguém que autoriza a gravação. No caso do cartel de BH, que também já foi julgado pelo Cade em 2003, foi autorizada uma gravação audiovisual pela TV Globo de uma reunião pública, com autorização inclusive do sindicato, e o que foi dito é que "o que eu estou

querendo é que vocês me ajudem a formar uma prova documental robusta de que o mercado teve motivo para sair de R$ 1,17 para R$ 1,32. A Shell manteve o preço. Como é que quem tem posto Shell justifica o aumento de R$ 0,15 na bomba? O Cade não tem nenhum bobo, o pessoal lá está acostumado a lidar – e aí cita uma série de empresas e tal – com coisas maiores do que a nossa. Para além dessa gravação, quer dizer, não estamos entrando no mérito específico sobre se tem ou não algum bobo no Cade – eu tenho certeza de que não, e acredito que tampouco na SDE e na SEAE, e nem nesta sala. Então, todos nós estamos falando de forma muito franca e aberta. Mas é no sentido de que a SDE tem sido extremamente cautelosa na utilização de provas com vistas a validá-las. E por isso eu faço questão de cumprimentar a toda a equipe da SDE, os que estão aqui e os que não estão, pelo empenho que tem sido dedicado, pelo trabalho que não tem medido esforços, pelas horas despendidas. E eu acredito que, ainda que com limitações de recursos, temos a possibilidade de fazer o nosso trabalho e melhorar, para contribuir junto com todos vocês para o fortalecimento do Sistema de Defesa da Concorrência. Muito obrigada.

XI SEMINÁRIO INTERNACIONAL DE DEFESA DA CONCORRÊNCIA – IBRAC

Provas em Investigações de Cartel

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São Paulo, 25 de novembro de 2005

Investigações de Cartéis

- Combate aos cartéis: foco da SDE e do SBDC
- Preocupação com a validade das provas
  – SDE tem estado atenta ao *standard* probatório requerido pelo CADE e com a apreciação, pelo Poder Judiciário, da validade de provas produzidas, que é uma garantia ao administrado.

Instrumentos de Investigação e Produção de Provas

- Requisição de informações
- Esclarecimentos orais
- Inspeção
- Busca e apreensão
- Acordo de Leniência
- Provas emprestadas
  – Ex.: Interceptação telefônica e ambiental produzidas no âmbito criminal
- Cooperação Internacional

Acordos de Leniência

- Há consenso internacional de que é o instrumento mais efetivo para investigação
  – Maior foco nos aspectos relevantes do caso
  – Chances maiores de sucesso na investigação
- A existência de Acordo de Leniência – além de seguir um procedimento próprio – não descarta a necessidade de eventual produção de provas adicionais pela autoridade
- – Preocupação com validade das provas prevalece

Outros Indícios que Podem Originar Investigações

- Tipos de indícios:
  – Representações
  – Denúncia anônima
  – Atas de reunião e outros documentos entregues à SDE
- Ao receber informações, trata-se de apreciar e valorar os indícios, a fim de definir se há elementos suficientes que justifiquem o prosseguimento da investigação

Buscas e Apreensão

- Oportunidades de coletar, *in loco*, indícios e provas para instrução do caso: cuidado para não invalidar provas coletadas
- Procedimentos adotados pela SDE:
  - B&A sempre mediante autorização judicial
  - Destaca-se equipe própria da SDE para a busca: reunião prévia na qual são passadas orientações sobre a atividade que realizará
  - Procedimentos acompanhados de Oficiais de Justiça designados pelo Juízo
  - Cuidado no processo de seleção e arrolamento dos documentos, bem como com o processo posterior de lacramento, transporte e manutenção dos originais com depositário
  - Especial atenção às provas digitais (peritos acompanham)

***Best Practices* ICN**

- Estimar a dimensão da operação de B&A, para bem alocar recursos
- Avaliar o tipo de documento a ser apreendido, especificando-o no pedido judicial
- Definir a composição da equipe à luz da experiência, competência e conhecimento, incluindo técnicos em informática
- Realizar reunião prévia com a equipe
- Realizar buscas de forma simultânea, para não perder o elemento surpresa
- Listar os documentos apreendidos e cuidar de sua guarda
- Instruir as empresas a não obstruir provas

Provas Emprestadas da Justiça Criminal:
Interceptação Telefônica

- Se a interceptação foi feita no âmbito de processo ou inquérito criminal, nada impede que posteriormente venha a instruir processo administrativo (STJ)
- CADE já aceitou como prova nos casos de Cartel de Florianópolis (2002), Lages (2003) e Goiânia (2003)

"Sendo a sanção administrativa um *minus* em relação à sanção penal, impossível admitir-se que o Estado tendo legitimidade para utilizar a prova decorrente de interceptação telefônica no processo penal e não a tenha para utilizá-la no processo administrativo" (ProCADE, Cartel de Florianópolis, 2002)

Provas Emprestadas da Justiça Criminal:
Interceptação Telefônica

- STJ, no tocante ao Cartel de Florianópolis:

"[...] Ultrapassada mais essa afirmação, examino a última delas, que diz respeito à ilegalidade da escuta telefônica para fins de utilização no procedimento administrativo, com base no art. 3.º da Lei n. 9.296/96 [...]. O argumento não tem qualquer fundamento. Como visto, o dispositivo esclarece que somente o juiz pode determinar a interceptação telefônica, a requerimento das autoridades que elenca, nada dispondo sobre a impossibilidade de utilização da mesma para fins de investigação administrativa. No caso, a Administração valeu-se das gravações para fins de prova no processo administrativo, mas a interceptação foi requerida nos exatos termos do inciso I, art. 3.º, da legislação em comento, como consta do alvará de escuta, uma vez que os dois policiais impetrantes também respondem a processo criminal [...]. Não vejo, portanto, qualquer pertinência quanto à última das alegações"

Interceptação Telefônica X Gravação Realizada por um dos Interlocutores

- CADE aceitou como prova gravação realizada pela parte no caso do Cartel dos Anestesiologistas (1999). O Prefeito do Município de Panambi-RS relatou "intransigência propiciada pelos dois únicos médicos anestesistas radicados em Panambi, que negavam-se a firmar qualquer tipo de convênio com instituições de saúde do município, seguindo orientação da Sociedade de Anestesiologia do Estado do Rio Grande do Sul"
- Gravação:

"Prefeito: conseguimos um entendimento para transferir os nossos pacientes para hospitais da região (...) e aí depois de dois dias veio a informação de que não podiam porque é área de conflito. Existe isso, doutor?

Vice-Presidente: Definimos que antes de que os anestesiologistas de Panambi chegassem a um entendimento com a Prefeitura, nenhum hospital ou anestesista deveria ir lá. Isso foi comunicado aos anestesistas [da região].

Prefeito: Isso não é cartel, doutor?

Vice-Presidente. Olha, eu acredito que não. Eu acho que isso é defesa da categoria. Porque senão o que acontece: nós vamos disputar preço por preço. Ou seja, aquele que oferecer preço mais barato vai ser feito, e isso não podemos admitir.

Prefeito: Isso não é liberdade de mercado, doutor?

Vice-Presidente: Pois é, mas por enquanto felizmente, nós temos tido condições de manter os colegas, respeitando a situação dos outros..."

Gravação Telefônica
Interceptação Telefônica X Gravação Realizada por um dos Interlocutores

- "EMENTA: *HABEAS CORPUS*. PROVA. LICITUDE. GRAVAÇÃO DE TELEFONEMA POR INTERLOCUTOR. É LÍCITA A GRAVAÇÃO DE CONVERSA TELEFÔNICA FEITA POR UM DOS INTERLOCUTORES, OU COM SUA AUTORIZAÇÃO SEM CIÊNCIA DO OUTRO, QUANDO HÁ INVESTIDA CRIMINOSA DESTE ÚLTIMO (...)".
  Quando "um dos interlocutores grava conversa havida entre ambos; isso não se inclui na proibição referida no art. 5º, inciso XII [da CF/88]. (STF, HC n. 75.338-8, r. Nelson Jobim)
- Nesse mesmo HC, o Min. Carlos Velloso decidiu que "deve ser entendido que o direito à intimidade não é, como há pouco dizíamos, absoluto, devendo ceder diante de interesses público, social e da justiça. Ora, a justiça não tem apenas um prato, mas dois. Em um deles estão os direitos individuais; mas, no outro, estão os não menos importantes direitos sociais e coletivos. O interesse da justiça assenta-se, sobretudo, na realização do interesse social, da coletividade."

Gravação Ambiental

- Caso do cartel de postos de combustíveis em BH
- Representante: MP/MG
- Gravação audiovisual realizada pela TV Globo de reunião pública na sede do Sindicato dos Postos para discutir o aumento do preço da gasolina:
  "Eu tô querendo é que vocês me ajudem a formar uma prova documental robusta de que o mercado teve motivo para sair de R$ 1,17 para 1,32. A Shell manteve o preço. Como é que quem tem posto Shell justifica o aumento de R$ 0,15 na bomba? O CADE não tem nenhum bobo. O pessoal lá ta acostumado a lidar com [... – cita grandes empresas], é com coisa maior que o nosso."
- É admitida a gravação audiovisual como prova; o que a Constituição proíbe é a gravação de conversa telefônica sem autorização judicial" (STF, HC 76397, Rel. Min. Ilmar Galvão)

Obrigada
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■ **ROBERT KWINTER**

INTERNATIONAL CARTEL ENFORCEMENT: A CANADIAN PERSPECTIVE

Calvin S. Goldman, Q.C. and Robert Kwinter*

I. INTRODUCTION

Canada has figured prominently in the global trend toward greater and more effective international cartel enforcement. There have been a number of major international cartel cases prosecuted in Canada in the last several years that have yielded record fines[1] and numerous follow-on civil proceedings. This proliferation has been fuelled by a variety of factors: the growth in the number of jurisdictions that have adopted antitrust laws; increased recognition by government authorities and the business community of the pernicious nature of hardcore cartel behaviour; and, perhaps most significantly, the availability of immunity/leniency programs in many jurisdictions around the world.

Virtually all of the Canadian cases in recent years have ended in guilty pleas, rather than contested trials. Again, there are a variety of factors that have yielded this result: in many cases the Canadian proceedings have followed after convictions (also generally based on guilty pleas) in other jurisdictions (most frequently the U.S.); the Canadian authorities have gathered information from immunity applicants, making it difficult for other participants to lead positive defences; similarly, greater co-operation and information exchange between and among international antitrust enforcement agencies (particularly the U.S., Europe and Canada) can also lead parties to conclude that a positive defence is more difficult; and the not uncommon decision of firms to choose

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1 See, e.g., "Federal Court Imposes Fines Totalling $88.4 Million for International Vitamin Conspiracies," Competition Bureau News Release, Sept. 22, 1999. One of the parties alone was fined over $50 million.

the certainty of an agreed resolution over the uncertainty of a protracted trial process.[2]

One also cannot emphasise enough the need for Canadian counsel to co-ordinate their activities and approach to the case with those of their counterparts in foreign jurisdictions where the client faces concurrent investigations in respect of the cartel in issue. In our practise, we have worked particularly closely with counsel in the U.S., Europe, Japan and other countries. In most of these instances, we are all acting for the same corporation that is the subject of parallel investigations in a number of jurisdictions. In this regard, we have had the responsibility of representing a number of different corporations based in Japan in relation to Canadian *Competition Act* proceedings.

In this paper, we have tried to highlight some of the more significant matters that parties and counsel (especially those outside of Canada) should be aware of in the defence of Canadian cartel proceedings.

II. AN OVERVIEW OF THE CANADIAN LAW OF CONSPIRACY

A. Section 45[3]

Canadian conspiracy law is generally similar to U.S. law in most respects, including the important fact that conspiracies are dealt with in both jurisdictions as a criminal matter. This contrasts with the EU law where cartel offences are subject to administrative proceedings in the Member States.

The principal prohibition against agreements or arrangements among competitors in Canadian law is contained in section 45 of the *Competition Act* (the "Act"). Section 45 makes it an indictable criminal offence to conspire or otherwise agree with another person to prevent or lessen competition "unduly" in the provision of a good or service in Canada.[4] Parties convicted of contrave-

[2] Such a result can be even more compelling in cases where the defendant may be facing proceedings in numerous jurisdictions and where its limited presence in Canada may make mounting a defence particularly challenging, although in some cases there may be unique Canadian issues, as discussed below, which should be considered before any final decision is made.

[3] For a more detailed discussion of Canadian conspiracy law, see "Competition Law of Canada" (New York: Juris Publishing, Inc.), C. Goldman and J. Bodrug, eds.

[4] In a few cases, the Bureau has elected to prosecute certain agreements among competitors under the Act's price maintenance provision, which is sufficiently broad to encompass both vertical *and* horizontal agreements to fix prices. Unlike the general

ning section 45 are liable to imprisonment for up to five years (in the case of individuals) and/or to a fine of up to $10 million (Cdn.), per count.[5]

Despite the similarities, there are important differences between the Canadian and U.S. treatment of conspiracies.[6] Substantively, the principal distinction is that Canadian conspiracy law does not incorporate either the "*per se*" or the "rule of reason" elements of U.S. antitrust law. Rather, the focus of section 45 is whether the agreement or arrangement in question prevents or lessens competition "unduly". Whether the effect of any agreement is "undue" is assessed based on the severity of its impact on competition in the relevant markets, coupled with the degree of market power that the parties have. The Supreme Court of Canada has described this type of analysis as a "partial rule of reason" approach.[7] While this means that price fixing agreements or arrangements among competitors are not *per se* illegal in Canada, in contrast to the U.S. "rule of reason" approach, Canadian courts do not consider any pro-competitive elements, such as efficiency gains or other possible benefits arising from the agreement, in determining whether the agreement or arrangement has the requisite "undue" effect on competition.[8]

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conspiracy provision in section 45, horizontal price maintenance under section 61 is a *per se* offence and does not require proof of an "undue" (or any other) effect on competition.

5 There is no statutory limitation on the ability of the Attorney General to charge the same entity with multiple counts and to seek total fines well in excess of $10 million (Cdn.) for violations of section 45, as was recently done in the Vitamins Cartel prosecutions.

6 For a more detailed discussion of the differences between Canadian and U.S. conspiracy law, see "Promoting International Cartel Enforcement: A Canadian Perspective," by Calvin S. Goldman, Q.C., Robert Kwinter and Kikelomo Lawal, British Chamber of Commerce in Belgium, Brussels, Belgium (February 11, 2003). See also "A Canadian Perspective on International Cartel Criminal and Civil Enforcement," by Calvin S. Goldman, Q.C., Robert Kwinter, Mark Katz and Chris Hersh, presented at the American Bar Association section of Antitrust Law, 2002 Advanced International Cartel Program, New York, New York City.

7 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

8 Because U.S. and Canadian conspiracy laws currently differ in their respective approaches, it is conceivable that the same type of activity could attract different consequences in the two countries, for example, arrangements between competitors to embrace a common distribution network, to co-operate in the creation of a new product, or to benchmark with respect to matters which comprise a significant proportion of their total costs. Under the U.S. "rule of reason" approach, such agreements

Another key distinction between Canadian and U.S. law is that there is no limitation period in Canada for prosecuting criminal conspiracy offences. Accordingly, it may be necessary to take a longer-term approach when considering issues of potential liability and relevance insofar as Canada is concerned.

B. Related Criminal Conspiracy Provisions

Apart from the Act's general conspiracy offence, a number of related provisions have also figured in international cartel investigations and convictions in Canada. For example, in three of the more recent global cartel prosecutions in Canada charges were laid under section 46 of the Act, which makes it a criminal offence for a corporation carrying on business in Canada to implement a directive or instruction from a person outside Canada in order to give effect to a conspiracy or agreement that would have contravened Canadian law had it been arranged in Canada.[9]

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may be considered legal; in Canada, the same arrangements would be illegal under section 45 if they lessen competition unduly, regardless of any efficiencies or other pro-competitive effects. In contrast, an agreement between two local competitors who have a very small share of a relevant market is not likely to offend section 45 (although it could raise issues under the Act's horizontal price maintenance provision, which is a *per se* offence), but would be *per se* illegal in the U.S. The Government of Canada is currently considering amending the Act's conspiracy provisions by, among other things, more closely emulating the U.S. approach and making certain practices (in particular, price fixing, market allocation, boycotts, restrictions on production) *per se* criminal offences. See Government of Canada, "Discussion Paper: Options for Amending the Competition Act: Fostering a Competitive Marketplace", June 20, 2003 and Konrad von Finckenstein, Q.C., "Section 45 at the Crossroads", 2001 Invitational Forum on Competition Law, October 12, 2001.

9 UCAR Inc. was convicted of implementing pricing directives from its U.S. parent company, UCAR International Inc., as part of a world-wide scheme designed to co-ordinate the prices of graphite electrodes. UCAR Inc. was sentenced to pay a fine of $11 million (Cdn.). See "Record $30 Million Fine and Restitution by UCAR Inc. for Price-Fixing Affecting the Steel Industry", Competition Bureau News Release, March 18, 1999. In addition, Roussel Canada Inc., a subsidiary of Hoechst Marion Roussel S.A., pled guilty under section 46 of implementing a foreign-directed conspiracy involving vitamin B-12. See "Federal Court Imposes a Fine for a Foreign-Directed Conspiracy Under the *Competition Act*", Competition Bureau News Release, October 26, 1999. SGL AG of Germany was also convicted under section 46 for implementing pricing directives in Canada as part of an international conspiracy to fix prices and allocate markets for graphite electrodes and was fined $12.5 million, which is the largest fine

Although the issue has not yet been specifically considered by the courts, on the face of section 46, it is no defence that the entity's officers or directors in Canada were either unaware of the foreign conspiracy or did not know that the actions they were directed to perform were intended to further that conspiracy.[10]

The Act's bid rigging provision (section 47), which does not require a finding of undueness, has also been used to convict participants in international cartels.[11] In 2001, for example, the Canadian subsidiary of a French-based company pled guilty to participating in what was described as "an international bid rigging scheme" relating to the Hibernia oil project in St. John's, Newfoundland.[12]

C. Jurisdictional Scope of Canada's Anti-Conspiracy Laws

The Act does not contain any provision that deals generally with the issue of extraterritorial application. Accordingly, this issue must be considered on a provision-by-provision basis. There is nothing expressly in section 45, the Act's key conspiracy provision, setting out the territorial limits of its application. Moreover, this issue has not yet been litigated in a contested proceeding against international cartel participants. To date, all of the prosecutions of international cartels in Canada have been resolved by way of guilty pleas, which have involved foreign parties voluntarily attorning to Canadian jurisdiction in return for more lenient treatment. (Voluntary attornment is usually one of the key bargaining chips available to foreign cartel participants in their negotiations with the Canadian authorities.) It remains to be seen, therefore, how Canadian courts will decide this issue should a foreign entity decide to challenge jurisdiction.

As a practical matter, however, it is clear from the enforcement track records of the Canadian authorities against international cartels that their

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imposed to date under section 46. See "Foreign Corporation Fined $12.5 Million for Price Fixing", Competition Bureau News Release, July 18, 2000.

10 This raises a number of issues related to the proper interpretation and constitutionality of this section that may be determined in a future case.

11 Section 47 of the Act makes it a *per se* offence for parties to, in response to a request for bids, agree to submit a pre-arranged price or agree that one or more of the parties will not submit a bid, unless the agreement is made known to the entity requesting the bids.

12 See "Company Pleads Guilty to Bid Rigging Under the *Competition Act*", Competition Bureau News Release, January 8, 2001.

position is that section 45 of the Act provides the authority to prosecute participants in conspiracies regardless of whether the agreement in question was entered into in Canada (the act of agreement being the key element of the offence) or whether any steps were actively taken in Canada to implement that conspiracy. While either of those acts would be relied upon by the Bureau and its Justice advisors, the key determinant from the enforcement perspective of the Canadian authorities is whether or not the effects of the conspiracy were felt in Canada or by Canadians in a significant manner.

Some degree of support for the position of the Canadian authorities can be found in various judgments of the Supreme Court of Canada, decided in a non-competition law context, in which that Court held that extraterritorial jurisdiction may be asserted over parties and conduct whenever there is a "real and substantial link" between the offending act and Canada. The extent of these decisions' application under the Act remains to be specifically addressed by the courts.[13] One caveat is that this exercise of extraterritorial jurisdiction should not unduly interfere with the sovereign interests of any foreign jurisdictions in question. In several ways, the Supreme Court of Canada's position approximates the "effects based" doctrine that is applied in U.S. antitrust law.[14]

Canadian authorities have adopted an expansive approach towards the meaning of the "real and substantial link" test enunciated in *Libman* in that neither the conspirators' physical presence nor entering into of the prohibited agreement need to have taken place in Canada. In the *Thermal Fax Paper* inquiry, for instance, guilty pleas were obtained from foreign companies where the price-fixing agreement was made outside of Canada, but for Canadian sales of thermal fax paper. Similarly, in the *Citric Acid* and *Bulk Vitamins* inquiries, the conduct prohibited by section 45 was outside of Canada and the actual individual participants never conspired within the country. However, there was evidence demonstrating an intent to increase prices or allocate customers in Canada specifically. Again, the extent to which the Bureau's position on jurisdiction will be upheld in a contested case remains to be determined.

One related issue for the Canadian authorities is how to bring foreign cartel participants before the Canadian courts even where they *do* have suffi-

[13] See, for example, *R.* v. *Libman*, [1985] 2 S.C.R. 178 and *Morguard* v. *De Savoye*, [1990] 3 S.C.R. 1088.

[14] See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993).

cient evidence to prosecute.[15] The general rule in Canada is that non-resident persons (including corporations) cannot be served with a summons or other form of criminal process unless the statute pursuant to which the charges are brought specifically allows for service outside the jurisdiction. Without service of initiating process, the Canadian courts cannot assume jurisdiction over non-residents.[16] Given that neither the Act nor the Canadian *Criminal Code* expressly provide for the service of charges extraterritorially, there may be situations in which the Canadian authorities cannot initiate charges against a cartel participant even where the cartel is alleged to have had an impact on Canada. This situation may arise where the party merely sells into Canada (e.g., through a third-party distributor) but has no physical presence here. The only option for the authorities in these circumstances may be to request a "border watch" for any individual who is charged and to hope that a representative of the party either (a) travels to Canada or (b) travels to a country from which he/she may be subjected to extradition proceedings.[17]

In addition to jurisdictional issues relating to initiation of originating process, there are also jurisdictional issues relating to enforcement of judgements, particularly where an entity does not have assets or operations in Canada. A discussion of these issues is outside the scope of this paper.

III. THE INVESTIGATION OF CARTELS IN CANADA

In the U.S., the Department of Justice both investigates and prosecutes criminal matters. In Canada, however, the Competition Bureau investigates

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15 For a discussion of this issue in a Canadian context, see William J. Miller, "Pacific Rim Cartels: A Canadian Perspective", CBA/ABA Conference on International Cartels – The Pacific Rim Experience, Vancouver, British Columbia, May 31-June 1, 2001.

16 *Re Schulman and the Queen* (1975), 58 D.L.R. (3d) 586.

17 These issues are discussed further, *infra* at p. 10. The MLAT between Canada and the U.S. contains a provision regarding cooperation in the service of documents. It is not clear, however, that the MLAT procedures can be used where there is no authority *ab initio* to issue extra-jurisdictional process under the Act. In other words, it is arguable that the MLAT provisions are available only to assist in effecting service of process documents that are *properly issued* in Canada. The MLAT does not, and cannot, provide the authority to issue process documents themselves. Also, and in any event, it does not appear that the MLAT addresses the issue of enforcement of service, i.e., there does not appear to be any recourse under the MLAT if service is simply ignored.

alleged criminal violations of the Act, such as conspiracies and, if the Bureau finds evidence of criminal conduct, it refers the matter to the Canadian Department of Justice (referred to generally as the "Attorney General" or the "Crown") for prosecution.[18] Prosecutions are brought before the criminal court and the requisite elements of the offence charged must be proved beyond a reasonable doubt, the criminal standard of proof.[19] Although the Attorney General's office has official carriage of these cases, Bureau staff will work closely with counsel for the Attorney General throughout the prosecution process, including any plea negotiations.[20]

A. Search Warrants and Section 11 Orders

The Commissioner and her staff have considerable enforcement powers at their disposal to deal with alleged conspiracies. Once a formal inquiry into a possible violation of the Act is initiated, the Commissioner has the ability to obtain search warrants *ex parte* where she can satisfy a judge, on sworn affidavit evidence, that there are reasonable grounds to believe that (i) a criminal offence under the Act has been committed, and (ii) a record or other thing that will afford evidence of that offence is on the premises in question.[21] Like "dawn raids" in other jurisdictions, searches in Canada are typically executed without warning by Bureau staff, sometimes assisted by the police. Canada, the U.S., the EU and even Japan will also participate in co-ordinated searches.

The Commissioner is also increasingly resorting to powers under section 11 of the Act. Section 11 allows the Commissioner to obtain *ex parte* judicial orders authorizing the oral examination of individuals on sworn

18 See section 23 of the Act.

19 This is in contrast to the standard of proof used in civil proceedings, which is the lower threshold of "on the balance of probabilities." For a recent discussion of what is meant in practical terms by proof "beyond a reasonable doubt," see the Supreme Court of Canada's decision in *R.* v. *Litchus*, [1997] 3 S.C.R. 320.

20 For a more detailed discussion of the process, please see "A Canadian Perspective on International Cartel Criminal and Civil Enforcement", by Calvin S. Goldman, Q.C., Robert Kwinter, Mark Katz and Chris Hersh, presented at the American Bar Association section of Antitrust Law, 2002 Advanced International Cartel Program, New York, New York City.

21 See section 15 of the Act.

affidavit evidence,[22] the compulsory production of documents[23] and written responses to questions on oath or affirmation. To obtain an order under section 11, the Bureau need only satisfy the issuing judge that (i) an inquiry has been commenced under section 10 of the Act, and (ii) the subject of the order is likely to have information relevant to that inquiry. The use of this section raises a number of issues related to its constitutionality especially in the area of compulsory testimony of a subject of a criminal investigation having regard to a recent Supreme Court of Canada decision.[24] Subsection 11(2) of the Act ostensibly extends the compulsory production of documents to the foreign affiliates of corporations that are the subject of the order. This provision raises further constitutional/jurisdictional issues that have yet to be determined by Canadian courts.

By virtue of Canada's *Criminal Code*, the Bureau now also has the power to seek judicial authorization to use wiretaps when investigating suspected violations of certain matters, including conspiracies and bid-rigging.[25] Pursuant to the same series of amendments, the Act also now specifically provides for the protection of the identity of informants who report offences to the Bureau and makes it an offence for any employer to take reprisals against

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22 See section 11(1)(a) of the Act. Section 11 (3) of the Act specifically provides that a person may not refuse to answer a question asked pursuant to a compulsory order to testify under oath solely on the grounds of possible self-incrimination. However, a limited form of "use" immunity is available under the Act in the sense that no testimony given by the person may be used or received against him/her in any criminal proceedings other than for perjury or similar offences. *Id.* There are a number of constitutional issues raised. While Canada has no direct equivalent to the Fifth Amendment, section 11 of the Canadian Charter of Rights and Freedoms states that "Any person charged with an offence has the right...not to be compelled to be a witness in proceedings against that person in respect of the offence." As well, the Supreme Court of Canada has held that a form of "derivative use immunity" is part of the constitutional protections afforded to the subjects of criminal investigations. See *B.C. Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3 and *R.* v. *S. (R.J.)*, [1995] 1 S.C.R. 451.

23 See section 11(1)(b) of the Act. Subsection 11(2) of the Act ostensibly extends the compulsory production of documents to the foreign affiliates of that corporation.

24 *R.* v. *Jarvis*, [2002] 3 S.C.R. 757. This case deals with the area of tax, but raises a number of relevant issues. The reasoning in *Jarvis* is not the only basis upon which section 11 may be challenged.

25 See section 183 *et seq.* of the *Criminal Code* (Canada).

employees who make such reports in good faith.[26] These "whistleblower" provisions are designed to assist the Commissioner in her inquiries.

B. Computer Searches

In Canada, computer searches are authorized by section 16 of the Act, which provides that during a search, a Bureau officer may use or cause to be used any computer system on the premises to search any data "contained in or available to the computer system", and reproduce and seize any records of such data. To make full use of its section 16 powers, the Commissioner has established a specialized Electronic Evidence Unit to conduct forensic searches of computer systems and to handle other electronic evidence obtained through efforts such as Internet sweeps and website captures.[27]

Computer searches raise a host of new and evolving issues for companies that find themselves subjected to them. One important issue is that the seizure of electronic data may result in an inadvertent breach of solicitor/client or litigation privilege, because the information seized may not include the contextual information needed to determine whether it is privileged.

Another significant issue that remains unresolved is whether section 16 of the Act authorizes the Bureau to use a Canadian firm's computer system to access records located in the databases of foreign affiliates. This is a matter of considerable concern because of the increasing use by multinational corporations of computers to link their businesses in different jurisdictions.[28]

The Commissioner's position is that, for the purposes of section 16, the term "computer system" includes components of the "system" that are not located at the physical search site. As such, section 16 does not preclude accessing electronic data in other countries. As a practical matter, however,

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26 See section 66.1 of the Act.

27 For a more expansive discussion of the issues concerning computer searches, see Goldman, Witterick and Kissack, "Cross-Border Computer Searches", Grocery Manufacturers of America 1997 Annual Legal Conference, Washington, D.C., October 7, 1997.

28 It may be noted that a U.S. District Court judge recently ruled in a non-antitrust case that the Fourth Amendment right against unreasonable search and seizure does not apply to computers that are the property of non-residents and are located outside the United States or to the data until it gets to the United States. This case may have significant implications on U.S. authorities' position on searching computers located outside the United States.

the Bureau's experience has been that offsite data can often only be accessed with a password and knowledge of the system protocols, which requires the Bureau officer to obtain the assistance of the party being searched to retrieve offsite data known to fall within the warrant. Failing such co-operation, the Bureau may seek a section 11 order requiring the production of the records sought or delivery of written returns under oath.

The Commissioner's position regarding the permissible scope of computer searches is still untested in the courts, and there are reasons to doubt its validity. For example, it is arguable that accessing computer data from outside the country represents an unwarranted extraterritorial application of Canadian law. There are grounds for asserting that an antitrust authority's seizure of computer records stored in a foreign jurisdiction constitutes an infringement of national sovereignty or a breach of national privacy laws.[29]

There may be a temptation on the part of some individuals or entities to preclude the Bureau from gaining access to off-shore databases during a search by simply "pulling the plug" and severing the computer links between the Canadian subsidiary and its foreign affiliates. This would be an inherently risky course of action, as such an action may raise an issue of criminal obstruction under the Act.[30] Canadian counsel should be consulted before taking such action.

Until the issues relating to the permissible scope of computer searches is resolved by the courts, it is likely that the Canadian enforcement authorities will take an expansive view of their rights under section 16.

IV. INTERNATIONAL CO-OPERATION AND INTER-AGENCY INFORMATION EXCHANGES

Despite the difficulties in obtaining evidence from foreign jurisdictions, foreign entities should not be lulled into the mistaken belief that they are completely beyond the reach of the Canadian authorities in certain limited

[29] See Goldman, Witterick and Kissack, *supra*; Goldman and Kissack, "U.S./Canada Antitrust Cooperation and Cross-Border Corporate Searches", ABA 1998 Annual Meeting, Toronto, Canada, August 3, 1998.

[30] Section 64 of the Act provides that no person shall in any manner impede or prevent or attempt to impede or prevent any inquiry or examination under the Act. Every person who contravenes this provision is liable to a fine of up to $5,000 (Cdn.) and/or to imprisonment for a term up to two years.

instances. First, (as discussed above) the Commissioner and/or Attorney General may be able to access either by search warrant or section 11 order relevant documents and personnel if the foreign entity has a Canadian subsidiary. Second, as discussed below, the Bureau has both formal and informal avenues for securing the co-operation of foreign authorities to further cartel investigations. Finally, the Commissioner and Attorney General will insist on full disclosure, including the production of foreign documents and witnesses, as a condition of any international plea or immunity/leniency agreement.

A. The Growth of International Co-operation

It is not coincidental that the recent Canadian successes in cracking down on international cartels have coincided with increasing levels of co-operation between Canadian and other antitrust enforcement authorities[31]. Historically, Canadian authorities were less willing to participate in reciprocal international enforcement efforts due to concerns regarding the extraterritorial (i.e., "long arm") application of U.S. antitrust law. Over the past several years, however, the enforcement of Canadian competition law has taken on an increasingly international dimension.

One product of this new policy direction has been the growth of a close working relationship between Canadian and U.S. antitrust authorities. There has been a very significant degree of enforcement co-operation across the Canada/U.S. border with respect to a number of cartel investigations, in industries as diverse as: thermal fax paper, plastic dinnerware, ductile pipe, graphite electrodes and bulk vitamins. These co-operative efforts have involved the exchange of documents and information, conducting joint interviews of witnesses, simultaneous execution of search warrants and searches conducted on behalf of each other.[32]

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[31] Canada has played a leading role in international co-operative initiatives including the OECD's Committee on Competition Law and Policy (Working Party 3 was previously chaired by former Commissioner von Finckenstein) and the ICN (where Commissioner von Finckenstein served as Chairman of the Steering Group).

[32] Debra Valentine, "Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions", Canada/United States Law Institute, Case Western Reserve University School of Law, April 15, 2000; Charles Stark, "Improving Bilateral Antitrust Cooperation", Competition Policy in the Global Trading System, Washington, D.C., June 23, 2000; Calvin S. Goldman, Q.C., Mark Katz and Brian A. Facey, "Cross-Border Cooperation and Information Sharing in International Antitrust Cases: The Need for Balance", Southwest Legal Foundation Annual Symposium on Private Investments Abroad, Dallas, Texas, June 19-20, 2001.

The close co-operation between Canada and the U.S. is the product of efforts by the enforcement staff of both agencies and is based upon a number of initiatives, including:

- the signing, on March 18, 1985, of the Treaty on Mutual Legal Assistance in Criminal Matters between the Government of Canada and the Government of the United States of America (the "MLAT"), which came into force on January 14, 1990.[33]
- the extension in 1991 of the Extradition Treaty between Canada and the United States to offences punishable by the laws of both countries by imprisonment for a term exceeding one year or any greater punishment (which includes antitrust offences);[34]
- the signing on August 3, 1995 of an agreement between Canada and the United States regarding the application of their competition and deceptive marketing practices laws.[35]

The MLAT, in particular, has provided a unique basis for co-operation between Canada and the United States. Other co-operation agreements do not permit the same degree of information exchange and co-operation as the MLAT does. For example, U.S. Grand Jury transcripts can be sent to Canadian officials even though these cannot be sent to state Attorneys General. In sum, because of (i) the MLAT, (ii) the similarity of their respective criminal laws,

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33 1990 Can. T.S., No. 19. The MLAT provides that Canada and the U.S. will assist each other in "all matters relating to the investigation, prosecution and suppression of offences". In Canadian terms, this applies to all indictable offences, such as conspiracies. Examples of the kinds of assistance that may be provided under the MLAT include exchanging information, providing documents and records, executing searches and obtaining testimony. Extensive cooperation under the MLAT was a feature of both the fax paper and plastic dinnerware investigations referred to above

34 Treaty of Extradition, March 22, 1976, United States-Canada, 1976 Can. T.S., No. 3 (as amended by an exchange of Notes on June 28th and July 29, 1974 and a Protocol dated January 11, 1988). This extradition process has been used in at least one case under the Act where Canada sought, and was granted, extradition from the U.S. of an executive charged with misleading advertising.

35 Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws, August 3, 1995. In a recent speech, the Commissioner stated that the Bureau makes use of the 1995 Agreement "almost on a daily basis." Konrad von Finckenstein, Q.C., "Opening Remarks", American Bar Association, Section of Antitrust Law Panel on Global Warming: International Reaction to the ICPAC Report, New York City, July 11, 2000.

and (iii) the geographic proximity of the two countries, enforcement officials in Canada and the United States have developed a particularly close working relationship on cross-border cartel cases.

B. Extradition

There is currently an extradition treaty between Canada and the U.S. and there is at least one case where Canada successfully extradited an individual from the U.S. to Canada for the purposes of a prosecution under the *Competition Act*. Extradition, however, is not always available. For example, while Japan is an "extradition partner" of Canada, all this means is that there is a process by which the Government of Canada can make a request to the Japanese authorities for the extradition of an individual located in Japan; there is currently no extradition treaty between Canada and Japan. We understand that under the Japanese *Extradition Act*, Japan would not extradite Japanese nationals to Canada for prosecution. Given the significance and complexity of these issues, local counsel should be consulted with respect to the availability and likelihood of extradition in respect of any particular jurisdiction.

C. Interpol Red Notice

Should a foreign national fail to appear pursuant to a summons validly served under an MLAT or otherwise, the Government of Canada will obtain a warrant for the person's arrest. Once a warrant has been obtained, if there is an extradition treaty or arrangement with the country where the individual is located, the Government of Canada can commence extradition proceedings. Additionally, the Government of Canada can request that Interpol post a Red Notice for the person's arrest and detention should that person enter any Interpol-member-state who is willing to do so on Canada's behalf. Our research indicates that neither Japan nor the U.S. will treat a Red Notice as a valid request for provisional arrest unless there is an extradition treaty (as distinct from an MLAT) in place.

V. THE IMMUNITY PROCESS IN CANADA

A. The Immunity Bulletin

One of the key factors underlying the recent spate of cartel convictions has been the willingness of participants to come forward and disclose to the authorities the nature of their own wrongdoing and that of their co-conspirators.

This is principally a result of the growing adoption by antitrust authorities of immunity or amnesty programs. These programs have substantially altered the incentives for those participating in cartel conduct to co-operate with the authorities, and thus raised the corresponding risks associated with any failure to offer such co-operation.

In Canada, the number of convictions in respect of both domestic and international cartel behaviour has almost doubled since the Bureau first introduced its immunity program, while the level of fines levied by the Bureau has increased exponentially.[36]

The Competition Bureau's approach to immunity is set out in an information bulletin dated September 21, 2000 (the "Immunity Bulletin").[37] Some of the key elements of the Immunity Bulletin are as follows.

The Attorney General of Canada has the sole authority to grant immunity to a party implicated in an offence under the Act. This reflects the fact that, as discussed previously, it is the Attorney General, and not the Bureau, who decides whether or not to prosecute under the Act[38]. Accordingly, the Bureau will provide the Attorney General with a recommendation of immunity, which the Attorney General will then consider in light of his own separate policy on immunity.[39]

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36 For an example in which the Bureau has expressly noted the importance of its immunity program in disclosing illegal conduct, see the Bureau's News Release dated January 8, 2001, "Company Pleads Guilty to Bid Rigging Under the *Competition Act*".

37 Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (2000). For a detailed discussion of the Immunity Bulletin, see Paul S. Crampton, "Canada's New Competition Law Immunity Policy – Warts and All", paper presented to a conference on Using Immunity to Fight Criminal Cartels, Dublin, Ireland, November 17, 2000.

38 The Canadian Department of Justice is apparently in the process of revising its immunity policies, as are currently set out in Part 7, Chapter 1 of the Department's *Federal Prosecution Service Desk Book*. This will extend to offences under the Act as well.

39 The Attorney General's official position is that "serious and careful consideration [will be given] to the recommendations of the Bureau in respect of both grants of immunity and leniency in sentencing." As a practical matter, however, the Attorney General will rarely, if ever, decline to accept the Bureau's recommendation regarding immunity, and the Immunity Bulletin was expressly drafted to reflect current practices jointly employed by both the Bureau and the Attorney General.

As used by the Bureau, the term *immunity* refers to a grant of *full immunity* under the Act. When a party does not qualify for such full immunity, the Commissioner may still recommend that the Attorney General grant a lesser form of leniency. Similarly, if a party believes that it will not qualify for full immunity, it may nonetheless offer to co-operate on the basis of a request for a lesser form of leniency. However, what might constitute lesser forms of leniency, or the circumstances under which they may be granted, are not discussed in any detail.[40]

Anyone implicated in activity that might have violated the Act may request immunity and offer to co-operate with the Bureau. That extends to business enterprises or individuals, as the case may be. A company may, but does not have to, initiate an application on behalf of its employees. Employees also may approach the Bureau on their own behalf.

Requests for immunity will be subject to close scrutiny by the Attorney General and the Commissioner. All things being equal, the Commissioner will recommend to the Attorney General that immunity be granted where a party is the *first* to disclose an offence of which the Bureau is unaware, or is the *first* to come forward with evidence in a situation where the Bureau is aware of an offence but has not yet obtained sufficient evidence to warrant a criminal referral.

In addition to being "first in", a party must fulfil the following requirements in order to secure a recommendation of immunity:

(i) The party must take effective steps to terminate its participation in the illegal activity.

(ii) The party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada.

(iii) The party must reveal any and all offences in which it may have been involved and provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control relating to the offence(s) under investigation.

[40] This is similar to the approach in the United States' Corporate Leniency Policy but different from the EU's Leniency Program, as embodied in the Leniency Notice of 1996 (Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases). The EU program is not confined to discussing the requirements for total immunity – it also deals with the possible reduction of the otherwise appropriate penalty.

(iv) The party must agree to co-operate fully, on a continuing basis, expeditiously and, when the party is a business enterprise, at its own expense, for the duration of the Bureau's investigation and any ensuing prosecutions. For corporate applicants, this also means taking all *lawful* measures to promote the continuing co-operation of directors, officers and employees (as opposed to more extreme measures that could amount to, for example, wrongful dismissal).

(v) Where possible, the party will make restitution for the illegal activity.

If the party "first in" fails to meet these requirements, a subsequent party that does meet these requirements may be recommended for immunity.

If a company qualifies for immunity, all *present* directors, officers and employees who admit their involvement in the illegal activity as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation for immunity. *Former* directors, officers and employees who offer to co-operate with the Bureau's investigation may also qualify for immunity. This determination will be made on a case-by-case basis.

Failure to comply with any of the requirements of the immunity agreement may result in the Attorney General revoking the grant of immunity. This will be the likely result where: (i) a company does not promote fully the complete and timely co-operation of its employees; or (ii) a party fails to disclose any and all offences or does not provide full, frank and truthful disclosure of all relevant evidence and information known or available to it or under its control.

The Bureau will treat as confidential the identity of a party requesting immunity and any information obtained from that party except when:

(i) there has been public disclosure by the party;

(ii) the disclosure is for the purpose of the administration and enforcement of the Act *and* the party has consented to disclosure;

(iii) disclosure is required by law; or

(iv) disclosure is necessary to prevent the commission of a serious criminal offence.

In the context of civil actions under the Act, the Bureau will take all reasonable steps to protect the information provided by an immunity applicant and will not make production to a civil litigant except in response to a court order.

The Immunity Bulletin also addresses issues arising specifically out of "transitional criminal anti-competitive activity". Most importantly, the Bulletin states that: *"The Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favourable treatment in another jurisdiction"* (emphasis added). Accordingly, the Bulletin states that parties whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

The Immunity Bulletin's insistence that a party be "first in" to obtain immunity represents a shift from the Bureau's prior position on this issue. Previously, the Bureau had stated that the timing of a party's approach would be an "important" consideration, but not necessarily an absolute precondition for immunity. The Bureau's new position has the advantage of offering greater certainty[41] and of being more consistent with the practice in other key jurisdictions, such as the United States and the EU. Exploring the possible availability of immunity is one of the first things Canadian counsel should do upon being retained in an international cartel matter. As a rule, once the decision to apply for immunity is made, contact with the authorities should be made as quickly as possible to maximize the likelihood of being "first in" as only the first qualified applicant will receive immunity (immunity being defined as complete amnesty from prosecution). Where there is reason to believe that other parties to the cartel may be considering applying for immunity, the decision to apply and contact the authorities must be made as quickly as possible; as the race goes to the swiftest and there are no prizes for second place.

The Bulletin's admonition that being the first to come forward in another jurisdiction will not benefit a party in Canada is a *fundamental* point on which there can be no misunderstanding by U.S. and other foreign counsel. Parties

[41] It might also be noted in this regard that the Immunity Bulletin states that the Commissioner *will* recommend immunity where the applicant is "first in" in the circumstances described therein. This represents a step forward from earlier Bureau statements, where it was only held out that the Bureau "may" recommend immunity where its requirements were met.

must be sure to contact the Bureau immediately or run the risk of receiving less favourable treatment in Canada than might have been obtained otherwise. This has happened to a number of parties in the last several years.

In another interesting shift from prior practice, the Immunity Bulletin does not make it a condition for receiving immunity that the applicant bring forward information that is "decisive" or even "important and valuable" to the Bureau's investigation. All that seems necessary now is that the party be the first to come forward to advise the Bureau of an offence of which it was unaware, or the first to come forward where the Bureau is aware of an offence but does not yet have sufficient evidence to warrant a referral of the matter to the Attorney General. Again, this is more consistent with the position in the U.S. The EU appears to be moving in this direction as well.[42]

Although the Immunity Bulletin does not discuss in any detail when the Bureau may be prepared to grant leniency short of full immunity, the Bureau has now released a supplement to the Immunity Bulletin (the "Supplementary Bulletin") which does address one such scenario. Thus, the Supplementary Bulletin, issued in November 2001, states that where a party does not qualify for immunity with respect to one instance of cartel activity, it may be able to obtain a reduced penalty if it is the first to disclose another occurrence of cartel conduct of which the Bureau is unaware. This concept of "immunity plus", is also used by U.S. authorities.

The Supplementary Bulletin also clarifies the requirement in the Immunity Bulletin that "full, frank and truthful disclosure" be made of *"any and all offences"*. There had been concerns that this obliged parties to disclose any possible criminal offence under Canadian law or, at the very least, any possible criminal offence under the Act. The Supplementary Bulletin now makes it clear that the obligation on the immunity applicant is to disclose "all criminal anti-competitive behaviour contrary to the Act relating to the product for which immunity is sought".

It also should be noted that the Bureau will no longer insist that an applicant for immunity agree to a prohibition order under section 34(2) of

[42] The EU's 1996 *Leniency Notice* currently requires that an applicant for immunity be the first to adduce "decisive evidence" of the cartel. A draft revised *Leniency Notice* issued by the EU on July 18, 2001 proposes to reduce that standard to that of providing sufficient evidence or information to enable the Commission to order a "dawn raid". See Joshua and von Hinten–Reed, "Rethinking Leniency at the European Commission", *Global Competition Review* (Oct. – Nov. 2001).

the Act. This requirement likely discouraged potential immunity applicants in the past from approaching the Bureau, because of concerns that an Agreed Statement of Facts would have to be placed on the court record to form the factual basis for the order. Given that Agreed Statements of Fact tend to be more detailed in Canada than in U.S. proceedings, U.S. corporations in particular were concerned that evidence placed on the public record in Canada could significantly increase the prospects for liability in civil proceedings in their own country. Consequently, the elimination of this requirement has removed a significant impediment to U.S. and other foreign corporations seeking immunity in Canada concurrently with similar amnesty applications outside of Canada.

Another change in practice is the Immunity Bulletin's stricture that only *present* directors/officers/employees will automatically come under the umbrella of an immunity grant made to a corporation, whereas the situation of *former* directors/officers/employees will be considered on a case-by-case basis. There does not appear to be any legitimate reason why former directors/officers/employees should be prevented from gaining immunity if they fully co-operate with the Bureau's investigation. Corporations often justifiably want to protect past employees who retired or departed on good terms, and it is often the case that these individuals will have the most helpful information available to them.

The Immunity Bulletin's exception for "instigators" is generally consistent with the position in other jurisdictions such as the U.S. and EU Again, the Supplementary Bulletin now clarifies that this exemption is meant to apply only where a single corporation or individual played the leading role in, or instigated, the cartel. Corporations or individuals that were "co-leaders" or "co-instigators" of illegal activity may still be eligible for immunity, provided that they meet all of the requirements set out in the Immunity Bulletin. The Supplementary Bulletin provides further, however, that only one participant per cartel will be granted immunity; joint requests for immunity will not be considered.

The introduction of the concept of a "provisional guarantee of immunity" ("PGI") is another welcome development, bringing Canadian practice further into line with that of the U.S. As a practical matter, a PGI can be obtained after a brief disclosure of basic facts and prior to the time at which any individuals are interviewed. To the extent that the receipt of a PGI significantly alleviates an applicant's sense of anxiety early in the process, it

typically leads to a more fluid and productive process of interaction between the enforcement authorities and the applicant.[43]

As set out in the Immunity Bulletin, the immunity negotiation process will take place essentially on a private and confidential basis. However, there are a number of exceptions worth noting. For example, pursuant to the rule established by the Supreme Court of Canada's decision in *Stinchcombe* v. *The Queen*[44] the Crown is required to disclose to an accused all of the material it proposes to use at trial and all other evidence that may assist the accused in making its defence. It is our understanding that the Bureau takes the view that the *Stinchcombe* rule will oblige the Crown to disclose to an accused the information provided by an immunity applicant. It is not clear, however, whether this obligation also extends to the immunity agreement itself.[45]

The Immunity Bulletin also sets out the standard basis for disclosure codified in section 29 of the Act, i.e., if it is necessary for the "administration and enforcement of the Act" (see below). However, the Bulletin adds the further condition that disclosure also requires the consent of the immunity applicant.[46] The Supplementary Bulletin now clarifies that the requirement for consent also applies to the exchange of information with foreign agencies. At the same time, the Supplementary Bulletin also states that the Bureau will

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43 The Bureau is developing model forms for the PGI as well as for immunity agreements. The Bureau has also recently (October 17, 2005) revised its Responses to Frequently Asked Questions in respect of immunity. One issue addressed in the responses is the Bureau's general requirement that a proffer be provided within 30 days of a party establishing its "marker" with the Bureau in respect of a request for a PGI. (http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&lg=e). It may be noted that the EU is also proposing to adopt some form of provisional or conditional immunity as an initial step in the leniency process. This is designed to address one of the major criticisms of the EU's current leniency program, namely that the Commission now only evaluates the potential grant of leniency at the very end of the process, which can take years to complete. See Joshua and von Hinton-Reed *supra* note 38.

44 (1991), 68 C.C.C. (3d) 1 at 14.

45 It may be noted in this regard, however, that at least one Canadian court has held that the Bureau need not disclose a copy of the immunity agreement to a *civil plaintiff*: *Forest Productions Ltd.* v. *Bayer A.G. et al.* (March 24, 1999, unreported N.B.Q.B.).

46 Representatives of the Bureau have confirmed that no disclosure to a foreign agency will be made without consent even in the context of a request made under the MLAT.

not agree to this condition in cases where a party has not applied for or does not qualify for immunity.

VI. REMEDIAL PROVISIONS

A. Fines and Sentencing

Parties convicted criminally for cartel activity in Canada are facing increasingly severe penalties, in terms of both the amount of fines and the likelihood and duration of imprisonment. The Act sets out a maximum fine of $10 million and jail term of five years for violation of section 45. However, because there is no statutory limitation on the Attorney General's ability to charge the same entity with multiple counts, aggregate fines (or imprisonment) can exceed the specified statutory maximums.

Canadian authorities have not developed and publicly distributed formalized sentencing guidelines analogous to those employed in the U.S. or the EU Moreover, while courts in Canada have certainly considered sentencing principles in determining fines or other penalties, there has not been a recent case involving international cartels that has analysed sentencing issues to any significant degree. Speaking generally, Canadian authorities take the position that the penalties imposed in conspiracy pleas must be sufficiently onerous to deter others from engaging in similar conduct, i.e., they should not be a mere licence fee. Factors that the authorities will generally consider in sentencing include: the size of the entity involved, the volume of commerce affected, the role of the party in the offence, the duration of the conduct, and the degree and nature of co-operation provided to the authorities. A guiding principle in the court's exercise of discretion on sentencing is the need to deter the guilty party and others that might engage in similar conduct.[47] Offenders that plead guilty and co-operate with enforcement officials generally receive favourable consideration. While penalties for individuals are based on the same considerations used for corporations, there is a wider range of sanctions available than there is for corporations, including fines, probation, community service and/or imprisonment.

Contested prosecutions under the Act's conspiracy provisions, and particularly successful ones, have been very rare in recent years. Accordingly, most of the sentences imposed for participation in international cartels are

[47] *R.* v. *Armco Canada Ltd. and 9 Other Corporations (No. 2)* (1975), 19 C.P.R. (2d) 273 at p. 274.

the product of plea agreements, although always subject to the ultimate discretion of the courts, who are not bound to accept plea agreements put forward by the parties.[48]

In recent inquiries, fines imposed by Canadian authorities against corporations for violation of sections 45, 46 and related provisions of the Act have been substantial. For example, in the *Bulk Vitamins* inquiry, ten companies were fined a total of $91,495,000 (Cdn.) (Hoffmann-LaRoche Ltd. alone was fined $48,000,000). In the *Graphite Electrodes* inquiry, three companies were fined a total of $23,750,000. In the *Lysine* inquiry, three companies were fined a total of $17,570,000.

Fines against individuals for conspiracy related convictions have been as high as $550,000 (in the *Déchets Trois Rivères* inquiry). While the maximum penalty for an individual convicted under section 45 is 5 years in jail, Canadian courts have rarely imposed prison terms, let alone prison terms for five years, on individuals for conspiracy related offences. For instance, in the *Déchets Trois Rivères* inquiry, two individuals were sentenced to twelve months in prison (to be served in the community) and in the *Choline* inquiry, one person was sentenced to nine months in prison (to be served in the community) plus 50 hours of community service. Most individuals who are convicted are subject to fines (e.g., the *Bulk Vitamins* inquiry resulted in fines against individuals of $250,000).

B. Prohibition Orders

Canadian courts are also empowered under section 34 of the Act to issue prohibition orders precluding a person from continuing or repeating the offensive conduct, or conduct that is directed towards the continuation or repetition of the offence. Prosecution for an offence is not a prerequisite for issuance of a prohibition order and a prohibition order can be issued even where the illegality of the conduct is uncertain. In many cases, a party will consent to a prohibition order without admitting guilt to avoid an expensive

[48] In Canada, a guilty plea arising out of a criminal conspiracy investigation can have significant implications for civil proceedings as well. Section 36 of the Act allows any person who has suffered loss or damage as a result of anti-competitive conduct contrary to section 45 (or any of the criminal offences described in Part VI of the Act) to bring an action to recover damages from the breaching party. Additionally, section 36 specifically allows the person bringing the action to claim the full cost of investigating and of bringing proceedings under the section.

and burdensome prosecution and to potentially reduce the likelihood of follow-on civil claims for damages. A prohibition order issued in lieu of a conviction precludes the commencement of subsequent proceedings for offences based on the same or substantially the same facts.

Prohibition orders are not automatically issued following a conviction but, rather, are often made in addition to another penalty such as a fine, and are issued when a fine is likely not sufficient to prevent the repetition or continuation of objectionable behaviour.[49] Some of the factors considered by the court in determining whether a prohibition order is warranted include: the likelihood of continuation, duration of the conduct, the isolated nature of the act, company policy, deliberation, and the control the company has in the market. No one factor is determinative and while an order can be granted based on the existence of any one or more of the relevant factors, the likelihood of continuation of the conduct in question often emerges as a significant factor.

Prohibition orders have a maximum duration of ten years unless the court expressly orders a shorter period (at one time, they could be perpetual). A court may vary or rescind an order if the circumstances that originally led to the order have changed. The punishments for violating a prohibition order include either or both discretionary fines or up to two years imprisonment.

C. Prohibition Order Alternative

As discussed above, the Act provides for the availability of a prohibition order, which is not dependent on a finding of a guilt. The prohibition order can refer to actions "directed toward" the commission of an offence, rather than the commission of an actual offence. As such, a prohibition order minimizes the admissions available to civil plaintiffs. In appropriate cases, the Canadian authorities may consider accepting a prohibition order in lieu of a plea and counsel may wish to explore the possible availability of this option. Circumstances in which this option may be available include those where the party's involvement in the cartel is limited and the party has come forward early and has provided full co-operation. In other instances, the authorities

[49] The Bureau has generally taken the position that prohibition orders, alone, are insufficient to effectively deter and punish anti-competitive conduct. See, for example, Harry Chandler, Deputy Director of Investigation and Research, Criminal Matters, Competition Bureau, "Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada", March 10, 1994.

may ask for a prohibition order as well as a conviction. Breach of such an order gives rise to separate enforcement proceedings; these should only be agreed to with recognition of the potential consequences if a breach occurs.

VII. NEW CHALLENGES ARISING OUT OF RECENT U.S. DEVELOPMENTS

The growing likelihood of civil claims (particularly class proceedings), as a result of the public disclosure of the existence of involvement in an international cartel, has greatly increased the risks and potential costs faced by parties who participated or are alleged to have participated. Unlike in the U.S., Canadian competition law does not provide for treble damages in civil cases based on violations of the *Competition Act*.[50] Nevertheless, exposure to civil damages and legal costs can still be extensive in Canada. The already high risks have potentially been ratcheted even higher by recent legal developments in the United States.

The recent U.S. cases have implications that will potentially have a significant impact on civil enforcement in cartel cases. One line of cases suggests that civil plaintiffs in U.S. antitrust proceedings can obtain disclosure of certain types of documents provided by the defendants to the Canadian authorities in the context of plea negotiations or leniency applications despite the fact that such documents would be subject to settlement privilege under Canadian law.[51]

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50 Unlike the U.S., Canada does not have Supreme Court authority equivalents to Hanover Shoe 392 U.S. 481 (1968) and Illinois Brick 431 U.S. 720 (1977) that specifically preclude indirect purchasers from bringing antitrust damages actions. In *Chadha*, the Ontario Court of Appeal upheld the Divisional Court decision denying certification to a class consisting of purchasers of new homes who alleged that they had sustained damages as a result of an alleged iron oxide (a pigment used to colour bricks and concrete blocks) price-fixing conspiracy that ran from 1984 to 1992 (essentially, a class of indirect purchasers of iron oxide). It was estimated that iron oxide represented approximately 5% of the price of the bricks or blocks in which it was used. The evidence indicated that the average estimated overcharge resulting from the alleged conspiracy was between CDN$70 to CDN$112 on a CDN$150,000 house. The Court of Appeal Decision does not preclude indirect purchaser actions, but does suggest that the evidentiary burden faced by plaintiffs in such actions will be very high.

51 See Re: Vitamins Antitrust Litigation, Misc. No. 99-197 (TFH) MDL No. 1285 (D. Columbia April 4, 2002).

A. Disclosure of Information Provided to Canadian Authorities

In the context of the U.S. MDL Vitamins antitrust litigation,[52] the plaintiffs sought production of documents submitted to the Attorney General during the plea negotiation process. The Special Master hearing the motion in Washington for production acknowledged that Canadian settlement privilege applied to all of the documents in question and that potential harm could result to the Immunity Program if the documents sought by the plaintiffs were ordered disclosed. Because of the perceived harm to the ability of Canada to enforce its competition laws, the Attorney General of Canada intervened in the case to make submissions on these issues. The EC also intervened and made similar submissions. After balancing the competing factors for and against disclosure and considering comity principles, the Special Master recommended the production of certain documents – despite the fact that they had not yet been made public and may not have been under ordinary Canadian procedures. The only documents that were not recommended to be produced were those the Special Master believed would harm Canada's ability to enforce its competition laws in the future. While weight was given to the interests and submissions of the foreign antitrust enforcement agencies, minimal weight was given to any expectation of confidentiality or privilege under Canadian law that the defendants may have had.

The Methionine class proceeding stands in sharp contrast to the outcome of the production motion in the Vitamins litigation referred to above.[53] In the Methionine case, U.S. class plaintiffs sought information provided to the EC and Australian competition authorities. Counsel for the party challenging production made virtually identical arguments to those made by Canada and the EC in the Vitamins litigation and the court took judicial notice of the *amicus* brief filed by the EC in that litigation (the production motion in the Vitamins litigation not having been heard). In contrast to the Special Master in the Vitamins litigation, the Methionine court declined to order production on the following grounds: (i) U.S. investigative and self-evaluative privileges applied to the documents in question; (ii) production would cause considerable harm to foreign leniency programs and antitrust enforcement generally; and (iii) principles of international comity.

[52] *Id*.

[53] See Re: Methionine Antitrust Litigation, (Case No. C-99-3491 CRB (JCS) MDL No 1311 (Northern District of California July 29, 2002)).

Given the divisional split in the U.S. on this issue, the possibility exists that immunity applicants or parties who negotiate pleas may be compelled to produce documents created and correspondence exchanged between counsel and the Competition Bureau/Department of Justice during the context of an immunity application or plea negotiation in connection with United States civil litigation. For this reason, parties seeking immunity or negotiating a plea must appreciate there are risks of foreign discovery of various documents that would otherwise be protected from production in Canada and may be well advised to treat settlement documents as potentially discoverable in U.S. proceedings, notwithstanding any settlement and public interest privileges that may be applicable in Canada, or the existence of confidentiality covenants with the Bureau or Attorney General.

B. U.S. International Damages Actions

U.S. antitrust lawsuits often involve treble damages, making the U.S. an attractive venue for plaintiffs – even foreign ones. In a landmark decision in *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S. A. et al.* ("Empagran"),[54] the U.S. Supreme Court has held that, absent related U.S. effects, non-U.S. plaintiffs cannot bring claims under U.S. antitrust law for foreign transactions alleged to have caused harm outside the U.S.

In reversing the decision of the Court of Appeals for the District of Columbia, the Court held that the Foreign Trade Antitrust Improvement Act ("FTAIA") exception that effectively applies U.S. antitrust law to conduct involving trade or commerce with foreign nations does not apply in the absence of a related effect in the U.S. This decision effectively precludes non-U.S. plaintiffs (including Canadians) transacting business outside the U.S. from bringing claims under U.S. antitrust law based solely on the foreign effects of international cartel activity.

In reaching its conclusion, the Court gave considerable weight to the international comity issues raised in the briefs filed by several foreign governments, including Canada. In particular, the foreign governments expressed concern that the Court of Appeal's interpretation of the FTAIA offended principles of national sovereignty and comity by applying U.S. legal remedies that would "unjustifiably permit their citizens to bypass their own less generous

[54] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S.Ct. 2359 (2004),

remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."

The issue of whether the foreign injury was linked to the domestic effects was not addressed at the Court of Appeals and the case was sent back to that court to consider whether the plaintiffs properly preserved this alternative argument and, if so, decide the related claim. Accordingly, some uncertainty still remains regarding the extra-territorial reach of U.S. treble damages proceedings.

VIII. CONCLUSION AND COMPLIANCE RECOMMENDATIONS

In this paper, we have attempted to provide a practical summary of considerations relevant to Canadian cartel proceedings. The growing complexity of the international legal environment and the substantial potential costs associated with involvement in international cartel activity suggest it is prudent to adopt proactive measures to avoid competition law violations from the outset and to ensure that appropriate processes are in place in the event of a challenge. With respect to the former point, an effective compliance program that addresses the relevant legal requirements together with a compliance audit is of key importance. With respect to the second point, it is important that Canadian based entities be counselled on appropriate steps to take in the event of a search or section 11 order, including key steps to avoid possible issues of obstruction (a key concern in the post-Enron environment). Given the potential penalties and the increased enforcement vigilance, in the context of a search or subpoena, we usually advise the CEO or in-house legal counsel to issue as soon as possible a notice to all employees that includes, among other things, the following directives:

1. Do not destroy or delete any documents without speaking first with legal counsel to get advice; please note that "documents" include e-mails.
2. Do not remove documents or laptop computers from the premises.

In our experience, this not only protects against possible obstruction issues, but also removes one of the arguments against sealing the search warrant or section 11 order. Subsequently, there is also a need to address the appropriateness of ongoing document retention policies.

Some key considerations that companies and their advisors should have regard to in dealing with an international cartel matter that relates to Canada

include: (i) retaining experienced counsel knowledgeable in defence issues and strategies; (ii) determining whether immunity is available in Canada and moving quickly to secure it if the client so instructs; (iii) conducting a thorough factual review and ensuring the appropriate handling of confidential documents and the assertion and protection of legal privilege; and (iv) considering the possible impact of any step taken on exposure to civil proceedings in Canada and elsewhere. Perhaps most importantly, where there is a co-ordinated simultaneous search or service of subpoenas in multiple jurisdictions – or even a multi-jurisdictional investigation – (we have seen examples of all these in the past few years) – it is fundamentally important for experienced counsel in each jurisdiction to immediately co-ordinate their defence strategy, usually under the umbrella of a joint defence agreement.

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FIVE KEY POINTS IN RESPECT OF CARTEL ENFORCEMENT IN CANADA

Price Fixing is a Criminal Offence in Canada

- Maximum penalty is $10 Million per count and/or five years in prison
- Recent legislative proposal would increase maximum fine to $25 Million per count
- Imprisonment is very unusual but remains a possibility

Price Fixing is Not a Per Se Offence in Canada

- The government must prove an "undue lessening of competition"
- The government is considering amending the legislation to make hardcore cartel conduct a per se offence

The Canadian Competition Bureau has Extensive Investigative Powers

- Section 11 orders allow the government to request production of documents, answers to interrogatories and to examine witnesses under oath
- Such orders can require a Canadian-based company to obtain relevant documents from a foreign affiliate

The Canadian Competition Bureau has Extensive Investigative Powers

- Constitutional concerns have been raised in respect of the application and operation of section 11 orders, that have yet to be resolved
- In addition to section 11 orders, the Competition Bureau has extensive search and seizure powers

The Competition Bureau has Special Powers in Respect of Computer Records

- The Competition Bureau's position, which is untested, is that it is entitled to any and all information that is accessible through a computer terminal located in Canada
- Accordingly, if a computer in Canada is linked to a server outside Canada, the Competition Bureau's position is that any information located on the foreign server is fair game

Canada Works Closely with Foreign Investigative Agencies, Particularly, U.S.A.

- Under both the MLAT and the confidentiality provisions of the Competition Act, the Competition Bureau exchanges information with foreign investigative agencies
- It should be assumed that any information provided to the Canadian authorities will be shared, in particular, with the U.S.

Canada Works Closely with Foreign Investigative Agencies, Particularly, U.S.A.

- It is therefore imperative that parties coordinate their legal response and ensure that their legal advisers work together cooperatively and effectively

■ PETER NIGGEMANN

Thank you very much for this invitation. I'm glad to be here because I think it's an excellent idea to invite, when you have such a meeting, not only your own people, people from your own jurisdiction, but also from other jurisdictions because I think there is hardly any area of law in the world where people, on a worldwide basis, can talk to each other and can discuss and find common rules and also find differences where they can learn from each other because if you look at corporate law or other areas that is nearly impossible because they address only national issues, and therefore I think it's a very good idea to have this international event. You know, I had never been to Brazil before I arrived yesterday, but every antitrust lawyer in Europe knows Brazil because of your fantastic low threshold in merger control. So whenever there is a transaction in the world, and I know there has been a kind of change in interpretation, but it took quite some time to get the clients used to the filing requirement in Brazil. When a German company buys something in France and it has a tiny little sale in Brazil, they are in the trap and they have to file in Brazil. You can imagine how difficult this is. Of course they know of Brazil, but only for vacation. And then you must tell them, listen you have to file in Germany, in France and in Brazil and they look at you and they think this guy is trying to make money for himself and his Brazilian colleague. So that is something that antitrust lawyers, even those very far away from Brazil, are aware of. Brazil's merger control regime is well known and we are all lucky that you don't have a standstill provision. We only have to file and then we can do what we want. However, I heard that you are about to change that so please be kind with us and find a rule which we can sell to our clients. So let me then start with the topic cartel disclosure, evidence, and how we get our evidence for the decisions. The European Union has been very active in cartel investigations. They have and you heard Michael Reynolds before lunch. In 2004, 30 companies were fined with an overall amount of roughly €900 million, which is, if I calculate correctly, approximately 2.7 billion reais, I guess, it may be even more, but 2004 was rather a bad year. There have been better years for the European Commission where they had much higher fines. So they are very active in that. And what causes the antitrust lawyers problems is the international network which I just praised as being a good thing that we discussed previously. Unfortunately the authorities live it and therefore it is a very dangerous thing for companies

that the authorities speak to each other on an international level and they find infringements to fine on an international level. So there is an international tendency in the process of investigating. When we look at sources of evidence in the European Union, we have basically three columns. The first one is that the authority, on its own initiative, investigates, because there has been a complaint. Perhaps they have discovered something, through research, they have found an infringement and so they investigate usually through dawn raids. So they go to the companies and they look for documents. This used to be the most common way to get evidence. And this is the way it used to be except that today leniency, the second column, the leniency programs within the EU, but also within the EU member states, there are 17 programs within the EU and one EU program. The leniency program has been a huge success. So most cartels are currently disclosed by their own cartel members. Therefore many of the questions you discuss here and what you think about standards of evidence and how we get evidence are, of course, also discussed within the European Union, but they are of a lower importance. Because lots of companies, they come on their own initiative not because they are so honest, but because of management changes they then see the possibility of immunity and avoiding fines. This is why the leniency programs are now the main source for cartel disclosure in Europe and in the member states. Private enforcement, on the other hand, is something we really don't need to discuss. The fact is that in Europe and in the European member states the private claimants, who report infringements, don't have the tools to provide the evidence because they don't have these discovery rules like in the US and the UK which allow them to get a lot of evidence from the other side. That is something which does not play a role at all in Europe so far. But that doesn't mean that after cartel proceedings, once the authority has fined the companies, that there are no damage claims. There are lots of damage claims now. But infringements and cartels are not disclosed and made public by private enforcement. That simply doesn't happen. Just one word before I want to raise some really practical issues. Just a few words about the investigating power of the European Commission. In rough terms you can say they want to see everything. That starts with correspondence. That starts with memos, diaries, electronic data, e-mails, and travel expenses and all these things are very valuable because then they can find out where people have met and then usually somebody has taken notes and then you have the whole cartel. Another thing is that the European Union is only allowed to take copies. So they go into the companies and I'll go into this is more detail in a second. They take copies. Other jurisdictions like Germany, for example, they take the originals

and I will describe what kind of problems this causes, but the European Union just takes copies. Before May 1, 2004, because this is the old law, the commission was only allowed to ask some questions about documents like asking: what does this abbreviation stand for and what does this mean, what does that mean. They were not allowed to do interviews about any infringements and they have changed this now. So they now have the possibility of conducting on-the-spot interviews during the dawn raid. They can ask the people questions about their involvement in infringements and all these things which, as you can imagine, are very tricky because during the dawn raid everybody is quite nervous and there is so many human things happening that people feel insecure. Some people want to show you that they have not done anything wrong and therefore they tell their whole life story and of course you can imagine that is not only boring, but sometimes it is a real pain and a real problem. Formerly they could only go to the business premises. They could only go to the offices. Now the European Commission can also search private homes if there is a suspicion that documents are there and sometimes that happens. And they have substantially increased the fines for any false statements in these interviews. When you say something false it can be quite expensive: 1% of the annual turnover of the company if it is incomplete, wrong or misleading and that can, depending on the company, be quite a bit. So what does a dawn raid look like in Europe. Of course they always try to come in the dawn, but since getting up in the morning is quite difficult dawn in Europe means roughly 9, 9:30, 10 o'clock. I'm not sure if this is completely different here in Brazil. I can imagine that sometimes it's difficult to get up in the morning in Brazil as well. So that's the dawn raid and they always come together with the national authorities. I don't want to bore you with this system of having the European Union and the member states with the national authorities, but they always do it together therefore we don't need to really discuss the differences and they always come with the police because they are experts in storing IT media and all that stuff. They always do, as everywhere I guess, parallel investigations. So the last investigation was all over Europe. I think there were roughly four to five hundred people traveling around and doing this investigation from the investigators' side. Because the European Union does not have a search warrant, they cannot get a search warrant for a national member state so they ask the national authority to get this so they can do everything that the national authority is also allowed to do and so they come with their own decision, but also with a search warrant which I think is also fairly international. They look for hard copies. They look for computers and try to copy everything but

that is exactly where the number one problem starts. I promised you to say something on the issue of originals and copies. The EU commission only copies the documents, which you can imagine can take some time. That means an investigation is not only always one day but could be two or three days. After that, in the evening, because they need sleep and don't have any security people with them, they just seal the place. They seal the premises and then they come back in the morning. The German Federal Cartel Office, for example, and there are some others in Europe. They simply take the originals and they don't care if you need them for your business. So they tell you, oh that's fine, if you need them, please send us a letter and we will copy it, but they say there are so many files we have and there are so many companies we just raided that it will take some time. So it can take a week or two or three weeks until you get the copies of the files they've taken away and that is, as you can imagine, a huge problem because at the end of the day after a dawn raid, everyone knows that the most important thing is for a lawyer and for the company is to have a clear picture of what has been taken away, what is the risk situation. That is the point of the internal investigation. You have to find out whether there's any truth in it. And you can't do that if you don't have the documents. So that is a serious problem. And it is still unresolved. But maybe the authorities may be more inclined in the future to copy this immediately because after a dawn raid usually you have lots of leniency applications. However, if the companies cannot decide whether they go for leniency or not, this is not in the interest of the investigator. They, of course, want to have as many leniency applications as they can. Therefore this may be a policy that the Germans and other authorities rethink and maybe next time they'll take copies. But there's one more serious problem. And that is something which I, to my pleasure, heard that Brazil is thinking about and discussing. That is the question of IT storage media. I don't have any problem with investigators coming into the company and asking for certain people and, for example, taking their Outlook files or other documents which they have in their personal folders or in their work folders. However, what the authorities, at least some national authorities currently do is, instead of going to the people, they go to the server room. They go to the server and they take a backup tape. The tape from the evening before. But everything is on this tape. There is everything regardless of the scope of the investigation and you know as investigators but also as lawyers that the main document you need in your dawn raid is a document saying what is the scope of the investigation so that, in fact, you can tell the investigator: listen, this is a different product, you're not allowed to enter this room. You may have a look to see whether

there are files related to the other product in there, but you're not allowed to take them away. Because for some reason a decision has been made and you cannot go beyond this scope, but with the IT storage media this is nearly impossible because you get everything from a server even if you only want, let's say, recycled products, you get all the sales data worldwide for the company if you are unlucky enough to take data from the server for the worldwide activities of the company. And that is something which is a huge problem in a lot of member states where the authorities are quite mature and they say, well, we are allowed to do that. And that is something which is usually not legal because that would be called a fishing expedition. That is where you go into a company and see what you can find, try your luck. You're lucky if you find something and if you don't, then no problem. So that is a fishing expedition. It is very dangerous I think and I would be very interested in how this issue is resolved here in Brazil and what solutions we could find. For me, the main point is that, of course, first the authorities must limit themselves to documents and files from people involved or allegedly involved in the infringement. They cannot simply go to the server room and take whatever they can get and the second thing is that a German court has decided in one case that if you take the server tapes, you must seal them and once you open them within the authority, you have to give the company the opportunity to join you and conduct and continue the investigation within the premises of the authority so that the company can be present once they go through the files. Of course you can say they can also do it at night without you and you wouldn't know, but at night they are not working and hopefully there is enough trust between the parties involved. But that is, I think, an interesting solution where if you cannot get the individual files because for some reason and since you have to take more than you are allowed to take then at least you must give the companies and the lawyers the opportunity to be present when this data is reviewed. Let me just say a few words to leniency. As I've already said, it's a huge success. The new leniency program is a huge success. Since 2002, we have had 550 to 560 immunity applications and there is currently a saying that there is probably one application per month for a new cartel so the European Commission can definitely not handle all cases involving leniency applications so there's no space for any further investigations. Of course once there is a leniency application they still do a dawn raid because they also want to have evidence from the other companies, but usually they are quick and they do the same. In the US, there is a similar situation and just for your information I've listed all the countries within the European Union so you can see the leniency programs are really increasing.

But there's one problem within leniency and you may have heard this over lunch from Michael Reynolds and this is a problem which we face and it's probably one of the biggest problems with leniency. Leniency, on the one hand, means you must tell everything you know and provide the authority with all the evidence you have. The problem is if a third party gets access to that you then have a huge problem with damage claims because then you have no chance of defending yourself because everything is on the table so it is extremely important to consider what kind of documents are submitted in a leniency proceeding and whether third parties can gain access. Neither the DOJ or the commission can be forced to disclose leniency documents, but once the leniency application is also in the hand of your client, US claimants can force the company to hand it over. This is because of the discovery rules. And that is something which is very dangerous in these cases. In Germany for example and in many other national member states within the EU, you have a simple right of access to the files. So you can tell the authority, well, I have an interest, my interest is that I want to make a claim for damages and therefore I need to have access to the files. And that interestingly enough has led to a few curious things. For example, we only accept oral applications when we go to the European Commission. An oral application means that we take notes, internal notes as lawyers and then we read or dictate into the dictaphones of the European Commission officials. So we sit there for a couple of hours telling them a long story. Once it's in their dictaphone and once they type it, it's an internal document and you cannot have access to an internal document even when you have access to internal documents of the commission and the same applies to the DOJ in the US. The internal documents do not have to be disclosed. And that why we do this weird thing so we don't submit anything in writing, only orally. And I'm not sure whether you have this problem here as well. Whether this is something you also have in practice. It would be interesting to know whether this is something that you have considered here. The problem is that because of damage claims—in Germany currently there is one claim for €150 million and this is only the start as the claimants says—against cement manufacturers. This claim is similar to a class action suit in the US, although we don't have a class action legally, but they established a company in Belgium and they bought all the claims against the cement manufactures and now they're claiming €150 million, which is approximately 450 million reais, which I think is quite a bit and if it's only a start, then the question is whether next time, when we advise the client in the context of a dawn raid, whether they should really go for leniency because if the fine is only, let's say, something that you can pay out of your pocket, whereas the damage claims really hurt

then you are probably better off not going for leniency and you better defend your case against the damages. That is something which of course will affect the advice given by lawyers, but we will have to see how this develops. So, many thanks for your attention. If you have questions, I think we will take them later. Thank you very much.

IBRAC – CARTELS AND THEIR EVIDENCE

Dr. Peter Niggemann, LL.M.
Brazil, 25. November 2005

Cartel Disclosure:

- In 2004, over 30 companies were fined for anti-competitive practices resulting in a staggering € 893 million of fines by the EU-Commission
- Competition Authorities all over the world get more and more focussed on hard-core cartels and their disclosure. Also their methods get more and more effective
- Increasing international cooperation of cartel Authorities (exchange of information, coordination of investigations)

Sources of Evidence in the European Union

Authorities'own Initiative

- Awareness through complaints or its own research
- Investigations through Dawn Raids or Request for Information
- Used to be the main source of Cartel Disclosure

Leniency programs

- Full cooperation of companies involved in cartel infringements
- Disclosure on the company's own initiative or following a Dawn Raid
- Currently the main source of Cartel Disclosure

Private enforcement

- Cartel disclosure through civil damage claims
- Rarely happening due to the lack of investigative tools of private claimants

Dawn Raids as a Source of Evidence

Increased Investigation Power of the EU Commission (1)

Prior to 1 May 2004:
Examine books and other business records, including correspondence, memoranda, diaries, electronic data carriers and e-mails relating to the subject matter of the investigation
Take or obtain in any form copies of, or extracts from, the investigated company's books and business records
Ask for oral explanations regarding documents on the spot
Enter company premises, land and vehicles

Dawn Raids as a Source of Evidence

Increased Investigation Power of the EU Commission (2)

As of 1 May 2004:
Seal premises for the period and the extent necessary for the investigation
Interview any person for purposes of collecting information in relation to the subject matter of the investigation
Enter non-business premises, i.e. private homes when there is a reasonable suspicion that books and other business records are kept there
Significant increase in fines: up to 1 % of the annual turnover for incomplete, wrong or misleading information

Dawn Raids as a Source of Evidence

What does a Dawn Raid look like in Europe?

EU Commission appears in the "dawn", accompanied by the respective national Authority and the Police
Parallel investigations all over Europe and at all relevant companies
National Authority has usually obtained a search warrant granted by a Court
Scope of the investigation is defined in the EU Commission's decision and in the national search warrant
Examination of documents and computers/servers (e.g. hardcopy files; e-mail accounts; voice mails; calendars; travel expenses; telephone records)
Copies are taken or original documents seized

Dawn Raids as a Source of Evidence

Issue 1: Taking Originals instead of Copies

EU Commission is only allowed to take copies; process of copying is time consuming and may not be manageable within the timeframe of a dawn raid
E.g. the German Federal Cartel Office takes the originals
Problem:
after the dawn raid, companies are lacking a clear picture of what has been seized
Internal investigation for leniency purposes is made more difficult

Dawn Raids as a Source of Evidence

Issue 2: IT-Storage media exceeding scope of investigation (1)

Strong tendency of the investigators to take backup/server tapes containing the most recent e-mails, documents, and data
Problem:
The information on the backup/server tape exceeds the scope of the investigation
The companies cannot control whether the Authority only analyses the data within the scope of the investigation
Doors are open for „fishing expeditions“, which are prohibited under EU and most national laws

Dawn Raids as a Source of Evidence

Issue 2: IT-Storage media exceeding scope of investigation (2)

Suggestion:
Focus must be on individual files and computers of people allegedly involved in the cartel infringement (e.g. copying of individual mail boxes and electronic files)
If not possible, tapes may be seized, but companies must be allowed to join the review of the back-up tapes within the EU Commission/National Authority (see Decision of a German Court)

Dawn Raids as a Source of Evidence

Issue 3: On-Spot Interviews

Employees are in a difficult position due to the special situation of a dawn raid
Tentious atmosphere
Employees often do not know the legal background and implications of the questions
EU Commission only allows a limited waiting period for legal support
Chances to obtain leniency advantages after the dawn raid are significantly limited

Dawn Raids as a Source of Evidence

Issue 4: Legal Privilege / Protected Documents

European Union
Yes: documents produced by EU qualified external lawyers; protection before the beginning of preliminary proceedings, if the correspondence is in the context of the right of defence
No: documents produced by in-house counsel, except for documents summarising external lawyers` advice (strict application!)
No: documents produced by lawyers from other jurisdictions => documents sent to Europe or stored in databases accessible from Europe are not privileged under European law
It does not matter where the documents are kept (in-house or with external counsel)

Leniency – The main Source of Evidence

Leniency in the European Union

EU Leniency Regime
Immunity from fines for the first company that provides evidence enabling the Commission to carry out a dawn raid or to find a cartel infringement; requires broad cooperation, submission of all available evidence
Scaled reductions in fines for latecomers who add significant value
Immunity / reductions will only be granted, if an undertaking can produce "added value", i.e. (evidence for) facts which were previously unknown to the authority / which the authority did not have evidence for
In most / all jurisdictions with leniency systems, immunity from fines / a substantial reduction of fines requires absolute / close cooperation with the investigators

Leniency – The main Source of Evidence

Increased Success of Leniency Programs

EU "New" 2002 Notice: approx. 50 – 60 immunity applications to date (currently at a rate of 1 application per month)
US Amnesty Program: Currently over 50 international cartel matters pending before the DOJ (currently at a rate of 3 applications per month)
Other Countries with amnesty/leniency programs include Germany, UK, France, Sweden, Canada, Netherlands, Ireland, Czech Republic, Hungary, Slovac Republic, South Korea, Brazil, EFTA (Norway, Iceland, Liechtenstein)

Leniency – Selected Issues

Issue: Full Cooperation vs. Risk of Damages Claims (1)

Access of third parties to documents provided for leniency application:
Neither DOJ nor the Commission can be forced to disclose leniency documents
BUT: US rules allow litigants extensive pre-trial discovery: Amnesty/leniency applications in the hands of the company are generally discoverable => Amnesty/leniency applications can provide private damage plaintiffs with a "roadmap"
BUT: national laws may provide for a right of access to the file by third parties (e.g. Germany)
Conflict between reduction of fine by leniency and increasing risk of damage claims

Leniency – Selected Issues

Issue: Full Cooperation vs. Risk of Damages Claims (2)

How to reduce the risk that leniency applications facilitate successful damage claims?
Information policy regarding leniency applications should be careful in order to avoid damage claims in the first place
DOJ and the Commission will accept oral applications to minimize the risks of US pre-trial discovery
Before disclosing documents in the EU, consider the impact on the discoverability of those documents in the US
Problem: Leniency applications in several states lead to highly complex administrative procedures

Many thanks for your attention – Any Questions?

■ Luc Gyselen

I, too, am delighted to be here. It's also my first time in Brazil. It's a wonderful resort. The weather here is rather Belgian, more than it is Brazilian, so I feel really at home. I think Peter has greatly facilitated my task here, in that he has covered most of the issues. I will go into depth for a few of those and hope that you'll see it as a sort of a salad, a side salad with a nice dressing, on the menu that you have already had. And I'm sure you're all longing for a coffee break so I will try to really stay within the time limit that has been allotted to me. First a general remark. I'll say a few words about dawn raids and leniency. We've heard a couple times that the leniency program has been extremely successful. This all depends on what you understand by successful. If you look at the figures, I'm afraid the European commission, at least, is no longer capable of processing these leniency applications properly. And that causes a real management problem. Now, today I'm in private practice so I don't need to address the management problem. But if you look at the figures, the figures that I have received from the director that is leading the dedicated cartel force that is now in place, for almost a year, are pretty striking. In the last three years, we've seen only13, just 13 decisions with fines. We have seen 39 dawn raids. And we've seen 127 leniency applications. Now that suggests two things: first, that the European Commission is, I think, more reactive than it is proactive and second, that it has a tremendous backlog of applications. You should bear in mind that of the 52 dawn raids, I guess, my best guess is that most of them have been triggered by an immunity application, so by a leniency application, so they are not really the proactive *sua sponte* initiatives that you would expect from a pro-competitive enforcer. But as I said that is, fortunately for me, no longer my problem. A few very elementary things. When does a commission undertake a dawn raid? Well, when it has some but not enough evidence of a cartel. It doesn't have enough evidence to build its case so it needs more and secondly it knows the companies are not going to cough up that evidence voluntarily. So it will undertake a dawn raid. Where are these dawn raids conducted? At the premises of the companies or their associations. One very important point. We should not forget that the commission very often visits industry associations and as has already been mentioned, the private premises of managers, directors or other company staff. That's a novelty in the sense that there is a legal basis for it in the regulation. In my experience, I was once on a dawn raid where the business premises actually coincided with the private home of the director and where

the bedroom was the main place to go to find the smoking gun material, but that's a comment aside. Now, since the purpose of the dawn raid is really to find evidence, the best evidence is documentary evidence so the focus of the commission officials will be on documents rather than on declarations or statements. But we've heard that there is now also a legal basis for interviewing people. I'll come to that in a second. Very briefly also, no search power I have said. There is a case that says exactly that, but in practice, it might be completely different. There is no search power in the sense that the commission inspectors cannot go on fishing expeditions. However, they do not need to specify exactly which documents they want to see. They can't of course. Obviously, they can't. But they can describe the scope of the investigation to the company people and then ask to have the documents shown to them. They can also ask to go to the premises within the company where they would like to pay a visit. They can point at cupboards and drawers that they would like to have a look at or rather the contents of these drawers. So in that sense there is no search power; however, they can basically involve the companies staff in the exercise. They don't have the power to force the company staff to show these documents. But if the company staff refuses to cooperate with the commission officials, then the commission will turn to the national competition authority people, who are always with it, and ask them to provide assistance. This assistance has to be such that it will make the dawn raid effective. It also means that at that point the commission inspector, the team leader, I should perhaps say that there is always a team leader. He will show the search warrant, the judicial warrant. It is, I think, not all that difficult for the commission officials to procure such as search warrant because a national judge of the country in which the dawn raid is taking place can only, to a limited extent, ask for specifications as to why it is that this inspection is really necessary. I'd be very happy to develop that should you have a question in this regard. I have only eight slides, just so you know where we are. The focus is on documents. We have already heard that there are copies made of paper material and there are copies made of IT material. I would submit, certainly in light of the German experience, I have also been involved in my new capacity in a German cartel case and I must say that I was pretty shocked when I learned how the German cartel office does things. I think that my former colleagues do a pretty good job in the way in which they copy the material. They are very meticulous in doing this. Each inspector makes or puts his initials on preformatted charts. He will describe the document that he wants to have copied. And he will point to exactly where he has found that document in the company. He will ask someone, usually a secretary,

although I once asked a policeman who was with me and otherwise unoccupied to do because the company was very cooperative, I asked him to make the copies for me. That went much quicker. And in a couple of hours we were done. Two stacks of copies are made, one of which will be left with the company and at the very end of the dawn raid, we will compare notes to make sure that what the commission has taken is no more than what the company is left with. And again the originals stay with the company. A little footnote. I said when the dawn raid is finished, be very aware that I'm talking to the in-house counsel now, a dawn raid is never finished. The commission will never tell you it's now over, you are not going to see us again. And it has happened, in the recent past, that after an initial dawn raid, with one part of the company, a week later, the commission officials showed up at the premises of the mother company because they had found out, after reviewing the papers, that there was perhaps more to be found at that other premises. So a dawn raid is never over. I close the parenthesis. So I think all in all, the way in which the European commission undertakes the copying exercise is the best practice that should be copied by the other national authorities in the EU. Only relevant documents are copied. What is relevant? Well, that is what is related to the subject matter of the inspection, that's obvious. The commission officials claim, and there is something to support their case I must say. They claim that it is for them to decide what is relevant, and not for the company staff. In my experience, there is a way when you're involved in a controversy over the relevance of a document. There must be a way of finding a pragmatic solution to this. I'm happy again to address that later should you have a question. Legal privilege. Legal privilege in a nutshell, something about the case law. Something about the practice and something about the case law that we may see in future. Case law today is the old AM&S judgment. The AM&S judgment says that documents of privilege are only those that concern communications between the company and its outside counsel for the purpose and in interest of the preservation of the rights of defense of that company. Again I will not develop that. It would take me too long. But it's pretty restrictive. It's pretty restrictive. Most specifically it leaves out in-house counsel documents and in-house counsel who wants to give advice to his or her management is sort of in jeopardy because those documents could be seized. That's the case today. In practice, when in doubt and after a very quick look at the documents, the commission officials will put the relevant documents in an envelope, seal the envelope, take it back home to Brussels and submit that envelope with its contents to the hearing officer, who is an independent official, sort of a judge, who looks after your

process and he will decide whether these documents are privileged or not. If the hearing officer decides they are not privileged, the company can still challenge that decision in the European court. And that's how the Akzo-Nobel case got to the courts in Luxembourg. In that case, we had two sets of documents. I will not again go into the details. The most relevant set of documents were in-house counsel documents. The president of the CFI, the Court of First Instance, who was asked to suspend the commission's decision to use these documents, made a couple of very interesting remarks in an audit. He did suspend the commission's decision and he said a few things that if they were to find their way into a final judgment, will overrule AM&S. He said for instance, I'm just going to pick one statement. He said, perhaps the days are over that one should presume that the link of employment between an in-house counsel and the company should have everyone in doubt about the independence of that in-house counsel. So that's quite a sweeping remark. And it's so sweeping because it was precisely that presumption: if you're employed you're not independent. It was that presumption that led the European Court of Justice back in '82 to hand down a very restrictive definition of legal privilege. As I said, the focus is on documents, but declarations can be made. First of all, it has been standard practice for the commission inspectors to ask for explanations as Peter has said: could you please explain this or that acronym in a particular document. Purely factual clarifications. I would advise the companies to be helpful to the commission officials, but also to warn their staff not to be overzealous. I know that commission officials in particular, maybe not in particular, the inspectors have a tendency to turn to those people they've found particularly cooperative. You always have people in your staff who think this is sort of their moment of glory. They will explain to the commission officials a bit more about the company, because they feel they have to be helpful. Secretaries, for instance, are a prime target for that sort of exercise. Secretaries tend to be a bit talkative. So we have to be very careful. So we have to strike the right balance between active cooperation, which is the company's duty, but in Italian they would say, *ma non troppo*, not too much. Now on declarations, there is a legal basis for taking interviews. In my experience, in some of the cases that I've handled, my people did take interviews, without that legal basis, on a consent basis. And that is also what has now been plugged into that legal provision. It is consent based so people of the staff need to consent to the interview, but as Peter has explained, it is tricky and you have to be careful. You have to be particularly careful if you are the legal representative of the company and you are interviewed because you're supposed to speak on behalf of the

company. You are the spokesman or woman. The other staff that will be interviewed. Their declarations can afterward always be rectified, amended or supplemented so that's slightly less tricky. Next slide. Leniency. Very quick. You've heard. I mean you are familiar with leniency, but I will try to focus on a couple of points you have not heard about yet. So it's the first one in the door. Only the first one that comes through the door that has a chance of getting full immunity. If he produces sufficient evidence to trigger a dawn raid or to establish an infringement. It's abundantly clear to me that the best chances are with those that bring an immunity application with some evidence, just enough for the commission to go out and undertake the dawn raid. Because that doesn't take much. It's quite a different matter to bring the whole case to the commission. So most of this successful immunity applications are, I have no doubt, are of the first type. Immunity is granted immediately, we've heard. Immediately, that is as soon as the commission has verified whether the material is good enough to undertake a dawn raid. Immediately is a very relative notion. My unit got the very first immunity application under the new notice and I must confess, now I can do that, it took us months before we had figured out whether this was good enough. The second case where there was an immunity application is the Italian Raw Tobacco case. This is an interesting case. After four years, after almost four years of new leniency notice practice, this is the first final decision with fines in which the commission has brought on the basis of an immunity application. I've mentioned to you that there are 80 of them. It's only now, after three and a half years, that the commission has finally managed to adopt one decision based on an immunity application and for the immunity applicant, in this case it's a poor story. Initially they received conditional immunity. The commission then announced they would withdraw the immunity and that has been confirmed in this final decision. Why was that? In a nutshell, because the company that had coughed up the evidence mentioned that in public before the commission had undertaken a dawn raid. So that was seen as less than cooperative and less than helpful for the commission and that is why in this case the immunity application submitted by Delta Fina, a subsidiary of Universal Tobacco was withdrawn. There can be contact on a no-names basis if the company is not really at ease with what to do. You can have your lawyer go forward to the European Commission at least and submit a hypothetical application. The commission will then say whether it looks good enough and then you have to do the real thing. You submit the evidence then you have to hope for the best. One more, rejection of fines. For those that are too late to get full immunity, they can still get significant reductions of the fines

provided they produce evidence with significant added value. I will not define that. It is in the notice. You could read it. The reduction varies. If you are the number 2, you can get 30 to 50%, number three between 20 and 30% and the others between 0 and 20%. There's only one condition. You have to stop the infringement. Full cooperation is not a condition that is taken into account to set the exact amount of the reduction. It's granted no later than at the time of the SO (Statement of Objections). Basically, the commission will not even look at applications for a reduction until it has concluded what it will do with the immunity application so there are cases where these reduction applications are left in the cupboards for a couple of months before they are really handled. I go on. This has already been mentioned. Leniency applications again, successful, well from the management's point of view on the commission side I'm not so sure. And from the company's point of view, perhaps there was initially a rush to exploit the benefits of the leniency program in the first few years but now we all begin to wonder whether that's such a good thing to do, because it does not give you immunity from damage suits. Now in Europe there are not a lot of damage suits being brought until commission has adopted its decision. But it becomes a parameter in the equation for the companies when they make a sort of feasibility study as to what to do. To be cooperative or not. Now the commission has taken some measures in order to preserve confidentiality. I will skip the first point about confidentiality within the commission procedures. I will focus on the confidentiality in the courts. The case mentioned, Intel versus AMD, is a case where the commission thought that it was worth intervening in the US court because it saw a danger that leniency applications brought to it might become discoverable in US courts with all the consequences in terms of damage suits that that entailed. Again I'm happy to develop that in a bit more detail. The key take away is, Peter has already mentioned this, that today the European commission accepts so-called oral statements. Peter has described I think the main features of it. You basically read your brief. It's taped and then there's a transcript. And I think the key point is that the commission today accepts that you do not have to sign this to certify that what you have said accurately reflects your story. The commission accepts the authenticity of the statement even without such a signature. Why is that so important? Because if you were to sign it, it's your document. If you don't sign it, it's the commission's internal document. And that would not make it discoverable in a US court. Now it's an internal document. Normally the commission doesn't use internal documents in its statement of objections. It goes without saying that the contents or excerpts of the leniency applications are then copied into statement of objections

because they contain views and they contain evidence that is used against the companies. Very briefly, but that's a technical point that is of little interest to you, I believe. There is also an issue of confidentiality in the EU courts. You may want to know that the EU commission has, in 2001, proposed and then the council and department adopted a regulation which gives every single citizen in Europe access to documents held by the commission. So there are a few qualifications. Now one of them is if the revelation of the contents of the documents would lead to problems in effecting dawn raids. It's literally there. The bottom line of all this is that the commission has the right to refuse access to leniency applications on the basis of this regulation, but it might run into a management problem here to because it has to be very specific and has to make sure that its file is well structured and that the commission can quickly identify documents that are not accessible. The acronym V. F. K. stands for an Austrian consumer organization that asked the European commission access to the whole file in the biggest banking cartel that the commission has taken on. My very first cartel case, I must say, the Lombard Club case. And the commission said 47,000 pages. I mean. I will not review every single document to find out what is accessible and what is not. You shall not have access to these documents. The court of first instance annulled the decision and the commission basically knows that, in the future, they will have to make sure that prior to any such requests it will have identified the documents that it will not want to reveal. So I think the judgment is not all that important in the end, but the commission will make sure that it puts in place a mechanism that allows it to handle the issue. I'm almost there. It's my last slide. I've said this already. No immunity against private damage actions. I haven't said this so far but at the EU level, antitrust offenses are not criminal. They are not criminal. So if I say that the immunity does not give you immunity against imprisonment that is not very relevant at the EU level. But there are some member states in the EU that have criminalized the antitrust offenses. The UK is one of them. And that raises a couple of issues. Very, very, very last point to pick up on where I started. Will we see development whereby the commission moves to waive it from leniency to plea-bargaining? What is plea-bargaining? This is where I confess my sins and I try to negotiate the level of the fine I am prepared to pay with the commission. Nelly Cruz, the commissioner, currently in charge of competition, is a big fan of plea-bargaining but it raises all sorts of procedural issues today under the current procedural regulation and I don't think that we will see plea-bargaining practiced in the coming months, perhaps not even the coming

years. I'll leave it at that and I guess after the coffee break we will return to answer your questions. Thanks.

CARTELS IN THE E.U.
Dawn Raids and Leniency

Luc Gyselen
Arnold & Porter LLP

DAWN RAIDS (1)

- When?
- Where?
- No search power (Hoechst – 1989) but in practice …
- Focus on documents, not on declarations but in practice …

DAWN RAIDS (2)

- Documents:
  paper
  IT
- Only « relevant » documents
- No « privileged » documents: from AM & S (1982) to Akzo Nobel (pending)

DAWN RAIDS (3)

- Declarations: to be distinguished from informal explanations
- Declarations:
  – company representative
  – other company employees

LENIENCY (1)

- Full immunity from fines:
  – if sufficient evidence to trigger a dawn raid or to establish an infringement
  – conditional (cf. Italian Raw Tobacco – 2005)
  – granted up front
  – contact on a no names basis (« marker ») is possible

LENIENCY (2)

- Reduction of fines:
  – if evidence with significant added value
  – reduction varies
  – conditional
  – granted no later than at time of SO

LENIENCY (3)

- Confidentiality in Commission procedures
- Confidentiality in courts
  in US Courts: cf. Intel v. AMD (2004)
  in EU Courts: Reg. 1049/2001 and VfK (2005)

LENIENCY (4)

- No immunity against private damage actions
- No immunity against imprisonment (but no criminalization at EU level)
- From leniency to plea bargaining?

DEBATE

Pedro Zanotta: Na segunda parte do nosso Painel, como o Mauro havia dito, além dos palestrantes, nós teremos mais duas outras personalidades aqui, que são dois advogados de empresa que passaram por *dawnraides* e terão a incumbência de iniciar os debates. Então, eu chamarei primeiramente a Dra. Célia Cleim, que é gerente jurídica da AGA no Brasil, formada em Administração de Empresas e em Direito, e que fez MBA na Fundação Getulio Vargas de São Paulo. Célia, por favor.

Célia Cleim: Boa tarde a todos. Como uma das finalidades do nosso Painel é a comparação de experiências, minha pergunta vai para o Dr. Robert Kwinter. No Brasil, a busca e apreensão como instrumento da autoridade administrativa para o combate de condutas anticompetitivas é relativamente novo. Então, nós não temos, vamos dizer assim, muita experiência nesse sentido. Como a própria Dra. Barbara disse, nós estamos aprendendo, e eles mesmos estão melhorando dia a dia. Então, nesse sentido, eu gostaria que o Dr. Robert comentasse se no Canadá existem procedimentos ou regras claras com relação a como uma busca e apreensão deve se dar. Por exemplo, se se aguarda a chegada de advogados, quando não existe um advogado no local onde está acontecendo a busca e apreensão. Com relação à cópia de documentos, como nós ouvimos um pouco sobre a experiência da União Européia, então eu gostaria de saber no Canadá como se faz? Se é permitida a cópia dos documentos pela empresa e, se não for permitida essa cópia, quanto tempo leva para a empresa conseguir a cópia. E, paralelamente a isso, depois do comentário do Dr. Robert, eu gostaria de ouvir a Dra. Barbara, qual o procedimento, como estão sendo feitas agora no Brasil as buscas e apreensões.

Pedro Zanotta: Eu quero lembrar a todos os expositores que podem interferir uns nas respostas dos outros. Fiquem à vontade para tornar isso bastante informal e interativo.

Robert Kwinter: Those who understand Portuguese are gonna be at a distinct advantage in this give and take I'm afraid. It's an interesting question that you raise. Canada, interestingly enough has a very old cartel law. Our pricefixing law actually predates the U.S. pricefixing law by one year. Our law dates from 1889 and the U.S. Law came in 1890. So, we've had this law around for a very long time and what is interesting is, what is interesting is

although there have been searches and seizures done in connection with this law enforcement for many many years, there is not really a well developed procedure that one can point to. So I can only give you a sense from our experience and say that we've... I've been involved in searches and seizures in Canada for close to 20 years and probably have been on maybe a dozen or so searches which is interesting in itself. These kinds of processes don't happen all the time, as I say I've probably been involved in a dozen or so in my career and I've probably done more than most. So it doesn't happen as frequently as you might think. On to your specific points what I'd say is that is a lot of it comes down to cooperation. One of the situations we have in Canada which probably is similar to Brazil is that our agency is quite small. The agency is quite small and the competition bar is quite small. So most of the competition lawyers know most of the competition law investigators quite well. We've been in battle many times. And so there is a rapport that is established and a lot of the processes that happen on a search really depend on a degree of cooperation. To give you a couple of examples: I was involved in a case where a non-competition lawyer showed up at the search scene and announced to the investigators that everything was privileged. Now under our law, if it's privileged, they can't take it, it all has to be sealed up and it has to be ruled on by a judge. This was an office that had, you know, a thousand filing cabinets and this lawyer says "it's all privileged". Well, that didn't get the search off to a very good start, as you can imagine, because you know, faced with that kind of attitude, the investigators then took a very firm strict attitude going forward. We came in, we knew the officers well, we lowered the temperature and things moved on much better. Generally speaking though, it will be cooperative. Typically we'll get a call from a very panicked person from the company, because the officers have arrived, as I said it usually happens first thing in the morning and they will say "we got 6 competition law officers in our lobby; they are gonna search, they handed us a warrant, what do we do?" In almost every case that I can recall, the competition officers will wait until a lawyer arrives on scene before the actually start the physical search. So, we'll dispatch someone as quickly as we can. I was thinking that if we lived in São Paulo, it would be very difficult, because we may not get there until tomorrow, in which case, who knows what would've happened to the search. But we don't have quite the same traffic in Canada, so we can get there usually within a half an hour no matter where it is. So, once we get to the scene, we begin to talk to the officers about how the search will work. My colleagues talked about, you know, on the spot interviews. There's really no right on the part of the investigators in Canada to interview people within the

company, but what often happens in these situations is a thing that is referred to... the officers may be there for a week or more and they become a part of the furniture. You know, they come in: hi, good morning, how are you? And before you know it, people start talking. So, one of the things we do with the employees, we say "look, these people are here to do a job, you're here to do your job, we discourage them from talking too much with the officers. By the same token, you know, you wanna get, with no offense to my friends from the regulatory site. You wanna get them out of there as quickly as you can. So, it is often helpful to be cooperative. So, if we know, for example, that certain documents are in certain places, we will say "look, you probably wanna look there, but not there", and if there is trust between the officers and the lawyers then that will work. So, a lot of it is built on trust, at one point, several years ago, the government would tend to allow you to take copies as they went along. I think what's happened though... everything has become so much more document intensive. I mean, many many years ago, I don't think anyone produced as many documents as they do today. And so, it's now become impractical if you're gonna copy everything. So that'll usually be done, they'll take the documents away and then we'll arrange the copies, and it's usually done very quickly. Usually within a few days you'll have your copies. We also try to set up a protocol to deal, and this answers one of the questions that Peter raised. I'll deal with two things and I'll stop and let others answer. On the issue of relevance. What typically will happen is the officers will find a room in the office, they will collect their documents for the day and then they will typically give the lawyers an opportunity to go through them. With the competition officers there, we'll go through them, we will flag and it really depends on good faith, we will flag documents that we say are beyond the scope of the warrant. Those will then be put aside, and at some point, usually at the end of the search, we all sit down together go through them, and we'll again hopefully acting in good faith agree on what stays and what goes. And my experience is that the government doesn't want have any more paper that they need either, as everyone has pointed out that there is a lot of these cases, so if you we can work cooperatively to limit the amount of paper it's really to everyone's advantage. So, on the question of relevance that's how we do it. On the electronic file again, that's a similar process. We will usually find some opportunity to go through the electronic file. Now, what they will do in Canada is they will take the hard drive right out of the computers they wanna search, they'll take the hard drive, take it back to the office and analyse it. So, it does raise the problem that Peter raised. There is gonna be a tremendous oversearch on the electronic side, but my

experience is been that our authority is quite cooperative in allowing counsel to review that material before they keep it. And by the same token there could be privileged information in that hard drive and they will allow us to work on it. So a lot of it in my experience is based on mutual cooperation. It may be better if we had actual rules, that people could, but as I say it's never really developed that way in Canada. I hope that responds, thank you.

Barbara Rosenberg: Na verdade, eu preciso até agradecer à pergunta que foi feita, porque eu não tive tempo de entrar nesse tipo de detalhe durante a apresentação, pois eu teria ultrapassado os 20 minutos que o Mauro havia me dado. Então, eu tentei me ater a uma visão mais geral. De qualquer maneira, acho que muito do que acabou de ser comentado são as preocupações que são levadas em consideração do lado da autoridade. E eu gostaria de pontuar algumas dessas preocupações.

A SDE desenvolve, antes de realizar qualquer tipo de busca e apreensão, e até inspeção, em algumas hipóteses, apesar de que isso tem sido menos utilizado, o máximo de pré-investigação possível, de maneira que quando entramos em uma empresa, saibamos para onde nos direcionar e que mesas examinar, que tipos de documento procurar, porque, como foi muito bem colocado, nós não temos interesse algum de trazer muito mais documentos do que temos condições de examinar, dados os recursos limitados e dado até o volume. Isto é, nós tivemos situações em que houve um volume tão extenso de material, que só para autuar os documentos nós talvez tenhamos demorado umas duas, três semanas. Isto ocorreu na primeira busca e apreensão realizada. Isso não é interesse nem da autoridade nem da parte. Eu acho que é um aspecto que foi comentado em diversos momentos, que é a questão da cooperação. A SDE, então, faz o máximo de investigação anterior, no pedido de busca e apreensão. Sempre que possível, são especificadas as pessoas cujas mesas ou cujos computadores ou documentos serão examinados e, em geral, com relação ao tipo de documento, nós pedimos a maior variedade de documentos possível, desde documentos que estejam na cesta de lixo até documentos em meio magnético, documentos que estejam nas mesas etc. Nisso nós não nos limitamos, porque a forma pela qual os documentos são produzidos pode ser a mais variada, e nós não temos a menor idéia de como essas informações podem existir dentro da empresa. Uma vez chegando à empresa, nós nunca tivemos problemas – e eu estou falando especificamente das situações nas quais a SDE conduziu e requereu a busca e apreensão, em que a SDE já foi chamada para atuar como "perito", para auxiliar a busca e apreensão realizada pelas autoridades criminais. Esses procedimentos são con-

duzidos pelas autoridades criminais, sem qualquer tipo de interferência de como conduzir ou não conduzir ou que tipo de documentos procurar. Naquelas em que a SDE fez a busca, nós nunca tivemos uma situação na qual foi dito "esperem que um advogado chegue", mas se houvesse sido feito isso, não seria esse, acredito eu, um ponto de obstrução. Poderia dizer "voltaremos no dia seguinte", mas se for para esperar meia hora um advogado chegar... Eu me lembro de uma situação específica em que solicitaram que aguardássemos ali, desde que ninguém tocasse em nenhum documento. Não seria, portanto, esse um ponto, porque eu volto à questão da cooperação, que é de fato o ponto mais sensível de toda essa análise. No caso das buscas e apreensão feitas pela SDE, nós só podemos fazê-las com mandado judicial. Quando entramos na empresa é o oficial de justiça que lê o mandado. Ele especifica qual é a extensão da ordem. Houve situações em que o mandado cobria uma área e nos defrontamos com documentos relativos a outro possível cartel. Nós nem tocamos nesses outros documentos. Eventualmente poderia até se alegar prevaricação, mas nós não quisemos ir além do nosso mandado e de fato não mexemos nesses documentos, porque no nosso entendimento a autoridade administrativa não tinha a prerrogativa de fazer aquilo. E, em relação a que documentos são efetivamente apreendidos e como são listados e organizados, isso varia muito, dependendo da cooperação da empresa sim. Se nós entramos em uma empresa que é cooperativa, que disponibiliza suas máquinas de xeróx, por exemplo, e diz que também quer fazer uma cópia, isso facilita o acesso às informações. Nós tivemos situações nas quais a empresa ficou integralmente com todas as cópias que foram retiradas naquele dia. Caso isso não aconteça, de qualquer forma os documentos são juntados aos autos em geral em uma semana ou dez dias, e a parte tem pleno acesso aos documentos. De qualquer maneira, são sempre feitas cópias, juntadas aos autos e é feita uma triagem no local. Na nossa experiência – e eu até gostaria de ouvir a experiência européia e canadense depois – existe uma questão de equilíbrio que é que, se levamos muita gente, dizem que estamos gerando um escândalo, que está todo mundo percebendo: "vocês entraram com 20 pessoas na minha empresa e causaram um mal-estar", que, então, estamos abusando do nosso poder de autoridade. Então, para não fazer isso, preferimos ir com 5 ou 6, que, segundo o guia de melhores práticas da SDE, é um número adequado de pessoas para fazê-lo. Isso significa que é impossível fazer uma triagem de cada documento que será retirado da empresa. Então, é uma questão de equilíbrio. Muitas vezes o que é feito é que os documentos são levados, tem que ser feito um arrolamento, muitas vezes não é possível fazer no grau de detalhamento que foi comentado pela autoridade européia, dado o volume

de documentos que às vezes é levado. Muitas vezes, se identificamos que há documentos impertinentes, estes são devolvidos. Então ouvimos do outro lado que houve excesso de mandado, porque como a SDE devolveu, admitiu que levou mais do que o necessário, e portanto abusou do poder de autoridade. Então, esse leva-e-traz acontece sempre, mas esse não é o ponto que nos preocupa. Quer dizer, havendo cooperação, a SDE tem conseguido e acredito que seja uma evolução sim, a Célia colocou bem. Eu acho que não é uma questão de ter desenvolvido isso. Isso foi evoluindo ao longo do trabalho, mas o que se procurou foi tentar gerar o menor ônus para a empresa, principalmente no que tange à questão magnética, porque nós sabemos o ônus que gera para a empresa quando é levado por exemplo um HD ou um computador. As buscas e apreensão mais recentes que foram feitas, todas foram acompanhadas por técnicos de informática. E, em algumas situações, por uma questão de materialidade, nós ficamos com o original mas fazemos uma cópia integral do HD, inclusive deixamos o HD para a empresa, porque ela não estava esperando que nós chegássemos. E a empresa nos devolve o HD depois, ou seja, é feita uma cópia integral do HD que nós levamos e a empresa fica com 100% da documentação que ela tinha naquele computador. E, com relação aos documentos, se é possível fazer cópia ou não isso vai depender do seu volume, mas eu diria que nós temos conseguido melhorar de forma substancial e, mais do que isso, em algumas situações em geral nós não acessamos o servidor da empresa se há procura de documentos específicos. Isso mais uma vez depende da cooperação. No entanto, se há necessidade de acesso ao servidor, o que é feito muitas vezes é a cópia do servidor, uma cópia fiel daquele documento, algo que, do ponto de vista bem técnico, é como se fosse uma cópia autenticada, e aquilo fica selado, e qualquer manipulação daqueles dados aparece depois como tendo havido uma violação. Isso tem sido garantido, de maneira que quando nós levamos de volta a cópia para a Secretaria, aquele documento só é aberto com a autorização do juiz para que se inicie a perícia. Então, não é que a perícia é acompanhada passo a passo pela empresa, até porque o perito trabalha noites após noites, mas ela é feita com autorização do Juízo, e depois é aberto o laudo para manifestação de terceiros, e de forma alguma há interesse em acessar documentos que sejam impertinentes à investigação, porque isso não interessa, em última instância, à autoridade. O cuidado que nós podemos ter é, no limite, quando entramos em empresas, não entrar no departamento jurídico. Até hoje nós não o fizemos, porque não houve uma orientação de que jamais será feito. Nós não precisamos discutir ainda a questão de privilégio legal nesses casos de busca e apreensão, porque nunca foi feita uma busca e apreensão em um escritório ou em um departa-

mento jurídico ou na mesa de um diretor jurídico de empresa, Então, eu diria com alguma tranqüilidade que a SDE tem tentado ser o mais cautelosa possível dentro dos recursos de que dispomos e, na medida em que a cooperação existe, isso tem sido na minha opinião bem-sucedido, mas sujeito obviamente a críticas e comentários, inclusive em termos de melhora. Perdão. O último comentário que eu faria é que estamos agora preparando um documento interno da Secretaria, que obviamente não será 100% divulgado, na medida em que isso pode até envolver questões de abrir inteligência de investigação etc., mas que seja um guia interno sobre como proceder exatamente nas buscas e apreensão e que tipo de documento deve ser produzido. Nós esperamos ter isso até o começo do ano que vem. Obrigada.

Mauro Grinberg: Obrigado, Barbara. Eu queria pedir aos palestrantes que tentassem ser rápidos nas respostas para que possamos aproveitar melhor o tempo e as perguntas. Depois do final deste Painel, vamos imediatamente passar para a entrega do Prêmio de Melhor Monografia Ibrac-Esso. Está aqui o representante da Esso, o Dr. Victor Schneider. Então, eu pediria que ninguém se retirasse quando acabar o Painel para que possamos assistir à entrega do prêmio. Luc, please.

Luc Gyselen: Just a very brief, a couple of comments on what Barbara said. I think I agree with everything she said. I think the European practice is very similar to what you described and it is indeed from the public authorities' point of view absolutely key to make sure that the file that they will get, it remains manageable. So, the commission officers will not go out there and try and collect too many documents that they don't need. Having said that, two specific points about relevance of documents: first, what is relevant document? Background material, that gives an insight in the working on a fench of a particular sector can be highly relevant for a proper understanding of smoking gun documents, so to speak. So, very often the commission officials will collect that sort of background document. In my own personal experience, I have once collected a background document, I had to ask the employee whose office I was raiding what some acronyms meant, and much later that day I found the smoking gun document that I would never have identified as smoking gun, had I not had the background information that the employee gave me in the morning. So background information is just as important and relevant as smoking gun material. Two, for the Commission, The European Commission, has often a language problem, that means that its teams which are typically around five to six people will be populated so

to speak with people who are not experts in competition law. They do not necessarily come solely from DG competition. The Commission often takes people from the interpreter services, because they speak the language, but they are by no means experts, and they tend to cast their net so much more widely then the guy who knows the sector. So, that is a sort of collateral damage if you want that is almost unavoidable. Those were the two points I wanted to make. 3rd) Maybe the search warrant that the judge gives, it is very very rarely used. It will be mentioned by the commission officials, and if a company or a particular employee persists in its position the whole inspection will be handed over to the national official, but it is rare that this happens. Then, one last comment regarding the wating time for outside counsel to arrive. I think at least in European practice, it's essential to make a key distinction between two things: First, the checking of the validity of the commissions that mandate the decision. And secondly, the physical search. For the first point, checking the validity of the decision, the commission officials will not wait for an outside counsel to arrive. They will want to speak to the CEO. If the CEO is not there, they will turn to the secretary general. If he is not there, or if he is there, but says "I need a lawyer", the commission official will say: "Bring in an inhouse counsel". But the inhouse counsel is on a trip, in a conference in Brazil. Too bad. There will always be someone who can give you advice, just a piece of advice. If the inhouse counsel is really away, I would advise the CEO of my client to be sure then to be at least able to make a call, to make a telephone call to the outside counsel. I think the commission officers of Europe would accept this, provided that inspectors can occupy the officers that they have identified as the offices they want to raid, because if they can do that, they can preserve the secrecy of the whole exercise and they will be happy to order, at least it will be comfortable waiting for a little while, and they can do the consultation over the phone. The physical search in itself maybe can wait for thirty minutes, but in most cases it will not be enough. So, in effective terms, I think the inspection will start and it will either be in-house counsel, who will look over the shoulder of the inspectors or the employees themselves. That's what I would advise: I would advise every employee whose office is raided to watch out for what the guy, the inspector is doing. Again in my little experience I was often the case manager not on the ground but in a few inspections I was doing the raid myself whenever I spent more than 15 seconds looking at a document, the guy was there and said "Can I help you?" And I think that it's a good attitude. Unfortunately, as I said previously, in one occasion he gave me the evidence, or he gave me

the explanation that unfortunately was then turned against the company later in the afternoon. But it's too bad. That happens.

Mauro Grinberg: Thank you Luc. Peter.

Peter Niggeman: Just a brief comment. Maybe it's not so popular here, because for me there is too much trust involved in the panel here, and we say always "trust" between the regulator and the companies. Of course, there needs to be cooperation, but we are talking about human beings, and if for example, there is no leniency application. So, if the authority has to investigate on their own. I have not seen so many people from the authority who exactly know where they have to look and I felt a huge insecurity that they may overlook something. That is something that creates an atmosphere of – better I take everything than leaving something here which is afterwards gone. So, for me there is a little bit, too much trust, we like each other, and we are having a cup of coffee together and that may happen after three weeks, but in Europe, for example, investigations never take three weeks. It's one day usually, and maybe two days, and then maybe following dawn raids, but they are not living and staying together. So, that is something I think that mainly depends we have to distinguish between cases where are leniency applications are there, it might well be that the regulators exactly know where to look at, because they have asked witnesses and asked for people and so on, but in the other cases which used to be quite often in Europe before leniency we had the regulator of course tried to get everything and I think with this IT media for me this is still unsolved this problem, because you must trust the authority that they say "well listen, I only want to have the relevant documents within my scope", and I somehow don't believe that, because what you want is, of course, and that is fair, because that is your function, and that is what you have to do: you have to find cutting infringements. And if the one who have within your scope is something you can find that, but you can find three other ones, that's also fine, Therefore, the investigator is still looking around and I cannot blame him for doing that, but therefore I think there must be a way to...that both parties have their rights to protect their legal rights that they can, that they may have a discussion about the scope of the investigation and so on, and that is taken away if you take server tapes. As simple as that. You can trust as much as you want, but trust sometimes, control is sometimes better as you may know.

Mauro Grinberg: Thank you, Vamos ao nosso último convidado, mas não menos importante, o Dr. Reinaldo Silveira, que é o General Counselor do Grupo Solvay da América do Sul. Foi responsável pelo Programa de implementação do *antritrust compliance* em toda a região, e é especialista em direito processual civil e tributário.

Reinaldo Silveira: Boa tarde. Eu vou procurar ser breve. Antes das questões, eu só queria fazer um comentário de como a indústria, que é um setor que eu conheço, vê o sistema hoje. Acho que isso pode ser útil para este público. Até 1994, a visão geral da indústria é que não havia sistema algum. Depois disso, após a Lei 8.884, ficou a impressão de que algo estava sendo feito e hoje a indústria reconhece que há um sistema, que ele opera, e eu acho que isso é digno de todos os elogios à SDE e ao Cade. Mas como nem tudo são flores, um aspecto que a indústria vê com muito cuidado é a questão formal das investigações, porque a percepção da indústria é a seguinte: "OK, há investigações, há condenações pelo Cade, mas onde está a efetividade dessas condenações?" A indústria não consegue ver ninguém pagando multa. Então, esse é um ponto de preocupação para a indústria. Superada essa primeira fase, eu queria já partir diretamente às perguntas antes que eu seja fuzilado pelos organizadores devido ao tempo. A primeira delas é a seguinte: hoje em dia, as organizações, grandes corporações em especial, têm setores matriciais de comando, e em geral estão sujeitas a normas ISO entre outras. Aliás, como já foi mencionado aqui há pouco, muito do que se faz, ou quase tudo o que se faz, para não dizer tudo, precisa ser registrado. Com isso, o volume de informações sob registro é imenso hoje em dia. E com a evolução da técnica, uma grande parte dessas informações está hoje em sistema eletrônico. E me preocupa quando percebo, tanto fora como aqui, quando eu aprendo que o servidor acaba sendo um dos alvos das operações de busca e apreensão, porque esses servidores acabam tendo um volume realmente imenso de informações, uma boa parte deles com segredos de indústria, informações estratégicas de negócio, que para mim obviamente não são de interesse das investigações, nem para mim nem para as autoridades. Então, a pergunta que se faz, já meio como uma sugestão, pois eu ouvi da Dra. Barbara que está sendo preparado quase que um código de conduta, alguma coisa assim para as investigações, seria talvez inserir um real especialista em Informática capaz de, no curso dessa busca e apreensão, que imagino não deva ser tão rápida, separar do servidor aquilo que rigorosamente é preciso, e não questões como RH ou outras que não têm a menor importância. Faço todas as questões ou paro? Essa é a primeira questão. A segunda questão, de novo sobre a questão da

forma – e eu já havia exposto essa minha preocupação – é que soa muito mal para a indústria saber em qualquer assunto, e notadamente em concorrência, que uma boa causa possa ser perdida por uma questão de forma. Logo, a pergunta que eu faço é absolutamente provocativa à autoridade brasileira, à autoridade de investigação, e é a seguinte: sabendo dos poucos recursos à disposição, o que é lamentável, o que é melhor para a autoridade: analisar e recomendar três casos (esse número é absolutamente irrelevante, é só para ilustrar a pequena quantidade), ou seja, pouquíssimos casos com um cuidado tal a ponto de eliminar ou mitigar quase a zero as questões formais, e poder ser acusado pela mídia ou setores do governo, ou quem quer que seja, de ser ineficaz, ou analisar o maior número de casos possível em relação ao mérito, não tomando assim tal grau de cuidado em relação à forma, e depois correr o risco de judicialização das decisões, e aí sim com uma anulação eventual de um caso por questão de forma? A última questão é absolutamente pontual. Eu percebo da leitura do projeto de lei que pretende reformar o sistema que está lá presente um requisito de notório saber jurídico de cunho econômico para determinados cargos no sistema. Eu queria perguntar diretamente e sem maiores rodeios ao Conselheiro Prado e à Dra. Barbara, se quando se fala em notório saber se isso não deveria ser um pouco mais específico para falar em "notório saber nas matérias afetas ao sistema", caso contrário nós vamos ter pessoas com notório saber em direito ambiental só porque atendem a um determinado requisito político lá no sistema.

Mauro Grinberg: Eu só pediria mais uma vez que fossem todos breves.

Barbara Rosenberg: Eu vou ser bastante breve. Um comentário inicial é que a preocupação com a efetividade que o Dr. Reinaldo diz que a indústria tem com certeza o Sistema tem também, porque senão, afinal de contas, não teria utilidade. Se essa preocupação é comum, tanto melhor que seja assim. Com relação ao segredo de indústria, um procedimento que a SDE tem utilizado é, nos casos em que são feitas – não apreendidos servidores, porque isso nunca aconteceu – mas quando são feitas cópias de documentos eletrônicos, ou são levados HDs, ainda que cópias sejam deixadas, é sempre aberta a possibilidade para que a empresa se manifeste sobre a confidencialidade dos documentos. Isso é um trabalho que toma um tempo enorme da autoridade, e se nós formos pensar em custo-benefício, talvez o custo seja maior do que o benefício, mas até com vistas a proteger a empresa e evitar qualquer vazamento de informação confidencial pertinente ou não à inves-

tigação, a SDE prefere se proteger e gastar muito tempo fazendo esse tipo de análise. Os técnicos da SDE têm feito isso de forma muito cuidadosa. Eu acho que é um cuidado que tem sido tomado sim nas diferentes investigações. Especialistas em Informática estão sendo formados sim. A autoridade esse ano já mandou duas pessoas, um técnico de Informática da Polícia Federal e outro técnico da Secretaria que também tem formação na área para fazerem cursos no exterior. Eles estão habilitados para trabalhar com esse tipo de prática, e nós estamos agora negociando um convênio com a Polícia Federal no qual haverá uma questão específica também relativa a essa questão. Então, isso é um ponto de preocupação. E o que é curioso é que, do ponto de vista da autoridade, se por um lado há a preocupação de não ficar com documentos impertinentes, há um receio enorme de perder provas, já que hoje sabemos que as provas estão em meio magnético. Então, o receio da autoridade também é muito grande, na medida em que nós, por não podermos ter acesso a algum tipo de informação, poderíamos perder isso. E, se me perguntassem como autoridade o que eu acho melhor: ter poucos e bons casos ou muitos casos que possam pecar pela forma, eu não teria dúvida nenhuma em dizer que eu prefiro ter poucos casos que serão levados adiante, seguirão todo o devido processo legal e ampla defesa com a garantia dos administrado e com a certeza de que esses casos sendo levados adiante, ainda que poucos, sejam exemplificativos, porque ter muitos casos que serão revertidos daqui a 5 ou 10 anos no Judiciário é o mesmo que não ter caso algum. Então, eu prefiro ser acusada, no limite, de ser ineficiente porque nós só mandamos esse ano para o Cade 18 processos administrativos do que por não ter mandado talvez 100 processos que pudessem todos ser anulados. Eu acho que a alocação de recursos públicos significa também sinalização para a sociedade sobre a preocupação da implementação de políticas públicas. E o que eu gostaria é que o Brasil deixasse de ser ouvido fora não só pelo problema da notificação, que é algo que já mudou também recentemente, mas que passasse a ser ouvido também pela atuação em combate aos cartéis.

Mauro Grinberg: Luc, depois Dr. Prado.

Luc Gyselen: A few points. I think the most important point, at first I think it sounds shocking to propose to prioritize cartel cases because, except in Canada, apparently, but cartels are everywhere in the world seen as so pernicious and so bad for consumers that they operate as unlawful, so, to say, you have to prioritize your policy enforcement, that it sounds like... like, sounds shocking. However, as can be seen from recent speeches by the

current Commisioner in Europe, she is actually proposing exactly that: she is saying "I have too many of my people, I have too many leniency applications to process, there is only one way forward and it's to target those cases which seem to have the strongest theory of harm and that is what she has been doing". So that is one comment I wanted to make. That also means that some leniency applications will inevitably be followed by a nice little letter from the European Commission saying "I will not undertake any action", the so called the no-action letter. So these things we will see. Then one other comment on the challenges that big companies face, I think there is false sympathy for that I remember the days that the European Commission would hold it against a big company that they had compliance program, because if you have a compliance program, you should know what you can do and what you cannot do. The Commission has abandoned that policy. So a compliance program, a little consolation: a compliance program will no longer be seen as an aggravating factor when it comes to settling the fines. Secondly, another challenge, is I said for leniency, you have to fully cooperate have to stop the infringement. Now, I know of a case cause I not gonna mention it, because it is one of our clients, where the client was most upset because it found out that in some remote part of the world some of its employees had just continued doing the wrong things. And they were facing a dilemma. We have to fully cooperate with the European Commission and we have to stop the infringement. Well, that means that we would have to inform the Commission that some of our employees have not done what they were supposed to do, because we have to fully cooperate. But we also have to stop the infringement. So, if we tell the Commission, we might lose the immunity. So those things happen, I think in the particular case the client has decided to take his chances and not to mention it to the enforcement authority on the grounds that this is just a miner mishap somewhere in a remote part of its company.

Mauro Grinberg: Robert, just a minute, please. Dr. Prado.

Luiz Prado: Vou começar pelo primeiro ponto, que é a questão das multas. Entendo que nós temos hoje não apenas na área de defesa da concorrência, mas no Sistema Jurídico Brasileiro, um problema em que o direito material está cada vez mais sendo afetado pelo direito processual, no sentido de que há tanta demora para se encontrar soluções, tantos métodos de se postergar soluções, que muitas vezes há denegação de Justiça. Isso não é um problema específico nosso, tanto que no próprio debate acadêmico da área de Economia fala-se de um problema no Brasil que é o risco jurisdicio-

nal, ou seja, o custo da demora de tomada de decisão no sistema judiciário brasileiro, que aliás foi tema de debate hoje de manhã. Esperamos que isso melhore. Nós defendemos a melhora dessas questões, mas isso não depende de nós, mas de reformas bastante complexas que esperamos que venham a ocorrer no País.

O segundo ponto é sobre a questão do tipo de conhecimento que é necessário: "notório saber", para ocupar cargos dentro desse setor. As pessoas que vêm ocupando cargos nesse setor vêm basicamente de três origens: academia; setor público, em especial; pessoas que atuaram com procuradores ou outros profissionais da área jurídica do setor público, ou que tiveram experiência como economistas na máquina pública, na estrutura da máquina pública. E, portanto, tradicionalmente, as pessoas que têm vindo são pessoas com conhecimento específico na área. Isso é o que é desejável. É claro que, em última instância, tudo depende da indicação presidencial e da sanção do Senado Federal, portanto é fundamental que a sociedade exija sempre, inclusive no futuro, que a natureza das indicações seja consistente com a independência que se espera das agências reguladoras, não apenas do Cade, mas de toda agência reguladora. Essa passa a ser uma questão importante.

E o terceiro ponto é a questão da informação. A minha apresentação foi muito centrada no custo da tomada de decisão. Se o que está em disputa tem conseqüências relativamente pequenas para a sociedade, é possível se tomar uma decisão rápida e com provas ou evidências mais frágeis. Por exemplo, em atos de concentração, o nosso chamado rito sumário tem sido um caminho para se resolver a maior parte dos casos de maneira muito rápida. Se houve um erro na caracterização do mercado relevante, o custo para a sociedade é muito pequeno. Nos casos mais complexos, claro, exige-se um tempo maior e a natureza de prova é diferente. Portanto, a escolha dos recursos tem que necessariamente recair, como já foi colocado aqui, naquilo que é uma maior ameaça à sociedade, aquilo que pode provocar o maior custo social. Perante a possibilidade da existência de um cartel de grande porte que afeta um número muito grande de consumidores, isso deve ser priorizado. Há eventualmente um problema localizado regionalmente que pode efetivamente ter alguma inflação de conduta, mas cujas conseqüências seriam relativamente reduzidas ou muito mais privadas do que para o conjunto da sociedade. Essa escolha é subjetiva e compete no caso de início à SDE, a autoridade que vai fazer essa investigação, tomar essas decisões, e também, dependendo da importância dada a cada caso, dos relatores e do Plenário do Cade.

Mauro Grinberg: Obrigado. Rob.

Robert Kwinter: Just a very brief point. I think that it's important that the authorities appreciate how devastating for a company it is to be subjected to a search and seizure. It infects the employees, it infects the company, it is extremely costly. I talked before about the section 11 orders in Canada. What the Canadian agency has done is they've actually put in a layer within the bureau of pure review for section 11 orders. Now one can question how effective it is to have an agency watching itself, but I think it is a constructive step, and I would encourage agencies to have someone senior, someone with experience to provide a second look at searches and any process that is so potentially damaging to a company to make sure that it is an appropriate case, to make sure that it is a case that warrants some kind of action, because it is important for the authorities to appreciate how devastating these orders can be.

Mauro Grinberg: Thank you. Bom agora, nós queremos ver quem de vocês tem algumas perguntas a fazer aos expositores, não à Mesa, porque não há Mesa, mas aos expositores. Dr. Laércio, tem alguma pergunta a fazer?

Laércio Farina: Tenho. Por que eu? Bom, eu não havia pensado em nenhuma pergunta. Vou ter que formular uma de improviso. Na verdade, eu gostaria de fazer essa pergunta ao Luc. If I may in English or you prefer the traslation? Probably they have a better English than mine.

Mauro Grinberg: Sure.

Laércio Farina: Bom então eu faço em português. So, in English. You choose.

Mauro Grinberg: Tudo isso para ele pensar a pergunta que ele vai fazer.

Laércio Farina: I don't know the question yet. That's right. Regarding the down raids, is that acceptable to be made in case of abuse of dominance or just in cartel cases?

Luc Gyselen: Indeed, a good question. And the answer is if it applies just as much…is this mike working? The dawn raids are used just as much in abuse cases as they are used in cartel cases. Let me just very briefly without

becoming anadoetal give you two examples from my most recent practices when I was in government (I no longer am), but let me refer you to those cases: the Coca-Cola case. The Coca-Cola case was basically the case that delayed my move to private practice by a year because I wanted to finish it, which was not easy, but this was a case that started with a series of dawn raids in three countries: Germany, Austria and Denmark. Following a complaint from Pepsi-cola, initially the Commission case was in before I landed in that senior commisions case, the commission had to send the complaintant back to square one, because the complaint was not good enough. In other words, did not have the minimum evidence that the Commission thought it needed to go and raid the Coca-cola bottlers in the three countries that I've mentioned. But then, six months later, when Pepsi had done its homework all over again, the Commission thought that the case was now strong enough to raid Coca-cola, so they did that. Much later in the process we even extended the geographic scope of the case, and added to our own misery by including two more countries, Belgium and UK, and we ended up with a file which was almost unmanageable. So that is one example. This case, as some of you may know, has been settled without a formal decision fining the company, in great contrast I would add to the Microsoft case, where the settlement talks failed at the very last minute and then Microsoft earned the record fine of almost half a billion Euros. That's one example. If I may say so, my other big big case was in the farma sector, where the Commission raided the premises of Atrasenica in Stockholm and in London on the allegation of at that time informal complainant of generic manufactured that Astrasenica had indulged in a number of practices that aimed at extending the pattern protection for its blockbuster called lousic, which is for ulcers or against ulcers. So there again that is a case that I remember very well because we discussed first informally a couple of times with the complainant and it was not initially, not at all clear to me why we had to intervene, because that looked a bit like in an electro property case and that's something had happened in front of the pattern offices, why should the competition authority intervene in this? But to go short, we thought in the end that it was a good case for raiding the company, and in that case I mean I'm in a very bad place of course to judge this in its all objectivity, but this was a case where smoking gun material was found at the companies that shed quite an interesting light on the practices that the complainant was aware of. But what the Commission was looking for was: has this been steered by an exclusionary strategy? Was the company plan really to key law and at least seriously delay market entry by a generic manufacturer. So, that is another case that the dawn raid material was abso-

lutely key to the case which was finally decided a couple of days ago. I could go on, but those are two examples of recent abuse cases that started off, that were triggered off by dawn raid material.

Mauro Grinberg: Dr. Prado.

Luiz Prado: Antes de outra pergunta, eu vou fazer uma pausa para comercial. Eu estou assumindo a edição da *Revista de Direito da Concorrência* do Cade, para a qual nós estamos querendo muito convidar todos vocês, em especial aquelas pessoas que acabaram recentemente o Doutorado, que estão desenvolvendo trabalhos de pesquisa, e professores a enviar artigos para a revista. Nós estamos mudando o perfil, fazendo com todos os passos necessários para a inscrição nas referências internacionais e nacionais e temos uma preocupação de transformar nosssa revista que tem um carater interno em uma revista acadêmica pra debater economia de direito da concorrência. (...)

Mauro Grinberg: Lembro que após o encerramento deste painel teremos a cerimônia de entrega do Prêmio IBRAC – ESSO. Eu quero aqui em nome do Pedro, em meu nome e em nome do IBRAC agradecer a presença de todos os convidados. Muito obrigado a todos. Está encerrado este painel.