REGULATION 2004 - BRAZIL

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Legistation and jurisdiction

1. What is the relevant legislation and who enforces it?

Law 4137 of 10 September 1962 was the first Brazilian legislation specifically dealing with competition issues, providing general restraints on anti-competitive practices and very broad provisions aimed at controlling acts and contracts that could harm competition on the Brazilian market. This law created the Administrative Council for Economic Defence (the CADE), the Brazilian agency charged with enforcing competition laws.

Other specific laws and decrees were subsequently enacted. Laws 4137/62 and 8158/91 provided the basic framework for Brazilian competition legislation until enactment of the current Brazilian Competition Law (Law 8884/94).

Law 8884/94 transformed the CADE into a federal independent agency linked to the Ministry of Justice, deciding cases on a definitive basis in the administrative sphere.

The Brazilian competition structure comprises two other entities: the Economic Policy Bureau of the Ministry of Finance (the SEAE), which reviews cases from an economic viewpoint; and the Economic Law Office of the Ministry of Justice (the SDE), which reviews the cases from a legal standpoint.

The CADE board is composed of a president and six commissioners chosen from among citizens between 30 and 65 years of age renowned for their legal or economic knowledge and unblemished reputation. They are duly appointed by the President of the Republic after approval by the Senate.

The CADE president and commissioners serve for a two-year term on a full commitment basis (unless otherwise stated in the Brazilian Constitution). One re-election is permitted.

Recent amendments to Law 8884/94 have increased the CADE's investigative powers and instituted leniency agreements, intensifying the fight against major anti-competitive practices (including cartels). Also, the fines currently imputable to anticompetitive practices have also contributed to actual enforcement of the Brazilian Competition Law.

2. What is the substantive law on cartels in the jurisdiction?

The substantive law on cartels is Law 8884/94, Article 20 of which states that, irrespective of intent, any act that actually or potentially: (i) limits, restrains or in any way harms open competition or free enterprise; (ii) results in relevant market dominance for a certain product or service; (iii) arbitrarily increases profits; or (iv) abuses a dominant position, is viewed as an anticompetitive practice. Examples are provided in Article 21. Cartels are defined in Article 21,1 as the setting or offer in any way (in collusion with competitors) of prices and conditions for the sale of a certain product or service.

CADE Resolution No. 20 of 9-June 1999 defines cartels as horizontal restrictive trade practices that are “express or implied agreements between competitors in the same market, involving a substantial part of the relevant market, regarding prices, production and distribution quotas and territorial division, in a concerted attempt to increase prices and profits to levels that are closer to monopolistic levels.”

A cartel is punishable only if ir can actually or potentially have harmful effects on the relevant market. Harmful effects are the limitation, misrepresentation, or hindrance to open competition or freedom of enterprise; dominance of a relevant market for goods or services; profiteering; or the abusive exercise of a dominant position (Law 8884/94, Article 20). The Brazilian legal system does not acknowledge the existence of an anti-competitive practice per se.

If a conduct generates none of the effects (even potentially) that would injure a free market structure, no unlawfulness is held to have occurred, and there is no collective interest to protect. In these cases, Law 8884/94 does not apply; a position which the CADE has consolidated.

Cartels are considered both illegal administrative acts punishable under Law 8884/94, and crimes against economic policy as prescribed in Law 8137 of 27 December 1990 (Law 8137/90), which punishes the same acts as Law 8884/94. However, it is the judiciary (not the Brazilian competition authorities) which has jurisdiction over crimes under Law 8137/90, on the initiative of the Public Prosecutor Office.

3. Are there any industry-specific offences/defences?

No. There are no statutory exemptions or defences for cartels under Brazilian legislation.

4. Does the law apply to individuals or corporations or both?

Law 8884/94 applies to individuals, public or private companies, and any individual or corporate associations established de facto and de jure, even on a provisional basis, irrespective of separate legal identity, and despite the exercise of activities regarded as a legal monopoly.

5. Does the regime extend to conduct that takes place outside the jurisdiction?

Yes. Without prejudice to any agreements and treaties to which Brazil is a party, the Law applies to the acts that have actual or potential effects within the Brazilian territory.

6. Are there any current proposals for the change to the regime?

Currently, there are four bills in progress at the House of Representatives proposing amendments to Law 8884/94: Bill 834/1999; Bill 2130/1996; Bill 3565/1997; and Bill 834/1999.

The most important is Bill 834/1999 which is primarily intended to expedite investigations. It proposes that preliminary investigations be completed within 90 days (instead of 60 days), and that the evidentiary phase be completed within 180 days (currently, there is no fixed time limit). It also proposes that CADE decisions be rendered within 90 days. Finally, it suggests that the term of office of commissioners lasts six years, in lieu of two years.

However, as the development of bills is bureaucratic and time-consuming, it is uncertain when these bills will pass into law.

Investigation

7. What are the typical steps in an investigation?

First, the SDE conducts preliminary investigations on its own initiative or upon a written and substantiated formal complaint. Upon completion of 60-day preliminary investigations, the head of the SDE orders the start of administrative proceedings or shelving of the case.

Administrative proceedings are instituted at an order of the head of the SDE for investigation into the facts. The defendant is summoned to file a defence within 15 days.

Then the SDE orders that some actions be taken and pieces of evidence be presented, at its discretion. The defendant produces any evidence after submission of defence, as well as presenting new documents at any time before the discovery phase lapses.

Upon completion of the discovery phase, the defendant is summoned to make its final statements, and the head of the SDE then issues a report suggesting that the case records be sent for the CADE's review or shelved.

In most cases, investigation takes at least one year and administrative proceedings another year, or longer (depending on the complexities of the markets involved, and on the conduct dealt with in the formal complaint).

8. What investigative powers do the authorities have?

Law 10149/00, which amended certain provisions of Law 8884/94, has increased the investigative powers of the SDE and the SEAE, which now have powerful instruments to curb anticompetitive practices.

The head of the SDE may authorise an inspection at the principal place of business, establishment, office, branch or subsidiary of the suspected company (known as a dawn raid). The federal police, acting in compliance with the law and by court order, may carry out dawn raids. In this case, inventories, items, working papers of any kind, accounting books, computers and magnetic files may be inspected, and copies of any documents or electronic data may be extracted or requested. The Federal Attorney-General's Office, upon request of the SDE, may ask the judiciary Branch for a search and-seizure warrant.

As regards the evidence of witnesses, the general rules of the Code of Civil Procedure will apply (since there are no specific provisions in Law 8884/94).

Under Article 406 of the Code of Civil Procedure, a witness is not required to testify about: (i) facts that are detrimental to the witness, spouse, blood relatives or in-laws; and (ii) confidential facts, on account of status or profession.

However, after deciding to testify, the witness does not have the right to remain silent. Deposition is taken under oath and, in case of perjury, criminal charges will apply. No defendant is in turn required to tell the truth upon testifying, as he need not produce proof against himself.

Therefore, testimonial evidence may be used against the witness himself or third parties; even an employer in a different proceeding (for example, if the testimony serves as proof of any breach).

International cooperation

9. Is there inter-agency cooperation? If so, what is the legal basis for an extent of cooperation?

Brazil and the United States of America entered into an agreement for technical cooperation between their competition authorities in 1999, which carne into force on 25 March 2003. On 16 October 2003, Brazil and Argentina also signed a technical cooperation agreement in the competition area, allowing all merger reviews and investigations that may affect the Brazilian and Argentine markets to be conducted simultaneously (in a similar way to the agreement with the United States). However; this agreement still needs to be ratified in both countries.

As for national agreements, a cooperation agreement was recently signed between the federal police and the SDE, providing for intervention by the law enforcement authorities in any investigations into a possible cartel with interstate or international repercussions, thus calling for uniform control.

Additionally, the Ministry of justice (through the CADE and the SDE) has also entered into technical cooperation agreements with other regulatory agencies for the prevention and punishment of anti-competitive practices, eg with the National Telecommunications Agency (ANATEL),

the National Petroleum Agency (ANP), the National Electricity Agency (ANEEL), the National Land Transportation Agency (ANTT), and the National Public Health Agency (A1"SA). The CADE also entered into a cooperation agreement with the Central Bank of Brazil.

10. How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

The CADE, the Agency in charge of final review and judgment of administrative cases, acts jointly with the SEAE and the SDE. The SDE conducts preliminary investigations and starts administrative proceedings. Finally, during the course of administrative evidentiary proceedings for the formal complaint to be forwarded to the SDE, the SEAE may determine the performance of certain acts and the production of evidence, if applicable. Please note that Brazil has only one competition jurisdiction.

Adjudication

11. How is a arte matter adjudicate?

Cartel matters are adjudicated before specialised agencies: the SDE and the CADE, as explained below. The SEAE is always informed of the filing of administrative proceedings and then joins investigations to express its non-binding opinion on the matters under its authority, if necessary.

12. What is the appeal process, if any?

The parties may appeal a CADE decision to the CADE itself. Another reporting commissioner will be assigned to the appeal, but the voting commissioners will be the same as in the first decision. To the best of our knowledge, the CADE has never reversed any of its decisions so far.

It should be noted that CADE decisions do not qualify for executive branch (administrative) review. However, according to the constitutional principle of full access to the judiciary, anyone dissatisfied with the final decision of the CADE may challenge it in court.

13. With which party is the onus of proof?

There is no express provision about the burden of proof under the Brazilian Competition Law. According to its Article 83, the Code of Civil Procedure applies to these cases, and the burden of proof thus rests with the plaintiff (the Brazilian competition authorities). However, the defendant must challenge each charge, otherwise the plaintiff's allegations are held to be true.

Sanctions

14. What criminal sanctions are there for cartel activity?

Law 8137/90 establishes confinement from two to five years, detention from one to five years, or a fine.

15. What civil or administrative sanctions are these for cartel activity?

The penalties prescribed by the Brazilian Competition Law are: (i) for companies: a fine from 1 to 30 per cent of their gross pretax revenue in the latest financial year; and (ii) for managers directly or indirectly liable for the company's breach: a fine from 10 to 50 per cent of the fine imposed on the said company.

Possible sanctions, which can be individually or cumulatively imposed whenever the severity of the facts or the public interest so requires, are: (i) publication of the summary sentence in a court-appointed newspaper at the offender's expense; (ii) ineligibility for official financing or participation in bidding procedures; (iii) annotation of the offender's name on the Brazilian Consumer Protection List; (iv) recommendation that government agencies (a) grant compulsory licenses for patents held by the offender and (b) deny the offender's access to instalment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies; and (v) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

The penalties stipulated in the Brazilian Competition Law will vary according to: (i) the severity of the offence; (ii) the offender's good faith; (iii) the advantages obtained or envisaged by the offender; (iv) actual or

threatened occurrence of the offence; (v) the extent of actual or threatened damage to open competition, the Brazilian economy, consumers, or third parties; (vi) the adverse economic effects on the market; (vii) the offender's economic status; and (viii) recidivism.

16. Are private damage claims or class actions possible?

The Brazilian Competition Law establishes that an injured party may defend its interests in court by way of antitrust measures, and seek an award for losses and damages, irrespective of administrative proceedings (which are not stayed by the said court action).

Both actions for damages and class actions are filed before the courts. No such cases are heard by competition authorities (the CADE, the SDE, and the SEAE).

In cases of violation of individual interests, only the aggrieved person has standing to bring a civil action. The bodies which have standing to sue only when an anti-competitive practice has injured trans-individual interests are: the Public Attorneys Office; the federal government; the status; the municipalities; the federal district; the entities and agencies of the direct or indirect administration; and the associations lawfully created at least one year in advance and whose corporate purposes include Consumer protection rights.

17. What recent fines or other penalties are noteworthy?

The history of the battle against cartels in Brazil is very recent. The first decision against a cartel in Brazil was rendered in 1999, and although it is still being disputed in court, the fines imposed on companies in the steel segment reached 1 per cent of their gross sales in the previous year (ranging from approximately US$ 4 million to US$ 7 million).

On 27 June 2001, the CADE fined Estaleiros Ilha SA (EISA) and Marítima Petróleo e Engenharia Ltda (Marítima) for an alleged bid-rigging practice. The fine amounted to 1 per cent of the companies' gross sales in 1996. The CADE also ordered that its decision be published in leading Brazilian newspapers. Marítima and EISA are appealing against these penalties at the courts.

In 2002, the CADE issued two rulings against petrol (gas) stations in Florianopólis, State of Santa Catarina, and in Goiânia, State of Goiás, both also being appealed in court. Fines imposed carne to 10 per cent of their gross sales in the previous year. In addition, individuals were also fined at 10 per cent of the fines imposed on the corresponding companies. The CADE's decision also included other penalties, such as prohibition against instalment payment of federal tax liabilities, a five-year ban on borrowings from official financial institutions and on the participation in public tenders, and a half-page publication of this unfavourable decision in leading Brazilian newspapers. In both cases, the CADE's decision is being challenged in court.

On 2 July 2003, the CADE held that nine petrol stations in the city of Lages, their senior managers, and the Gas Stations Association of the State of Santa Catarina (Sindipetro/SC) breached the Competition Act by restraining free competition in the fuel market in the Lages region. As a result of this alleged hard-core cartel behaviour, the CADE fined the petrol stations 15 per cent of their annual gross sales, whereas their senior managers were fined 15 per cent of the amount imposed on each company.

Sentencing

18. Do Sentencing guidelines exist?

There are no Sentencing guidelines in the Brazilian legislation.

19. Are they binding on the adjudicator?

Not applicable.

Leniency/immunity programmes

20. Is there a leniency/immunity programme?

The leniency agreement was introduced by Law 8884/94 as a kind of plea-bargaining mechanism.

21. What are the basic elements of a leniency/immunity programme, if one exists?

The federal government (through the SDE) may offer leniency extinguishing the punitive action or reducing the applicable penalty by one- to two-thirds, for individuals and legal entities involved in anti-competitive practices, provided that they effectively cooperate with investigations and administrative proceedings In these cases the cooperation must result in: (i) identification of co-offenders; and (ii), the obtaining of information and documents that evidence the anti-competitive practice notified or under investigation. These provisions do not apply to companies or individuals that have prompted the conduct considered an anti-competitive practice.

The leniency agreement may only be executed if, cumulatively: (i) the company or individual is the first to qualify with regard to the anti-competitive practice notified or under investigation; (ii) the company or individual ceases all involvement in the anti-competitive practice notified or under investigation as from the date on which the covenant is proposed; (iii) the SDE does not have sufficient evidence to ensure the sentencing of the company or individual at the time the covenant is proposed; and (iv) the company or individual confesses its participation in the unlawful practice and cooperates fully and permanently with investigations and administrative proceedings, taking part (on its or his own expense, whenever requested) in all procedural acts until they have been completed.

22. What is the importance of being 'first in' to cooperate?

Only the company or individual that is the first to qualify with regard to an anti-competitive practice notified or under investigation can execute the leniency agreement.

23. What is t e importance of going second? Is t ere an 'immunity plus' or 'amnesty plus' option?

Going second does not give an 'immunity plus' or 'amnesty plus' option, as only the first-in to cooperate can qualify for the leniency agreement

and, consequently, is excused punishment or gains the one to two-third mitigation of the penalty.

24. What is the best time to approach the authorities when seeking leniency/immunity?

There is no right time to approach the authorities when seeking leniency/immunity, but it should happen before the SDE has sufficient evidence to ensure the sanctioning of the company or individual. Otherwise, the Brazilian competition authorities cannot implement a leniency covenant.

25. What confidentiality is afforded to (a) the leniency/immunity applicant and (b) any other cooperating party?

The proposal for a leniency covenant is treated as confidential, except in the interest of investigations and administrative proceedings.

However, if a proposal for a leniency covenant is denied by the SDE, it will not be viewed as an admission of any facts at issue, nor an acknowledgment of the unlawfulness of the conduct under investigation. In addition, the SDE cannot make any disclosure in this regard.

26. What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

There are no specific requirements for the leniency/immunity applicant other than those mentioned in 21 above.

27. What is the effect of leniency/Immunity granted to corporate defendant on employees of the defendant?

As mentioned above, individuals and legal-entities that have participated in an anti-competitive practice may cooperate with antitrust authorities in investigations, in exchange for immunity from punishment or a one to two-third mitigation in the penalty, as the case may be.

28. What guarantee of leniency/immunity exists if a party cooperates?

The problem of the leniency programme in Brazil was that ir was brought from a foreign legal system into the Brazilian legal framework without being adapted. Therefore, the CADE and the Public Prosecutor Office could not agree on the feasibility of releasing an offender from punishment upon compliance with a leniency agreement. In view of this impasse, an offender that was willing to cooperate with the administrative authority would receive pardon from the CADE for the administrative offence and from the resulting fine, but there was no assurance that they would be given immunity from prosecution and punishment within the criminal sphere.

However, in October 2003 the first leniency agreement was signed by the Brazilian competition authorities, the Federal and State Attorneys Office, and a security company, located in the State of Rio Grande do Sul, in which several companies were accused of running a cartel (bid-rigging) in relation to public bids for the provision of private security services. Execution of this leniency agreement with the Federal and State Attorneys Office made it possible to exempt the denouncing company from criminal liability.

29. What are the practical steps in dealing with the enforcement agency?

The Brazilian Competition Law offers no practical steps in dealing with the enforcement agency. Considering that the first leniency covenant in Brazil was carried out in October 2003, practical steps are yet to be determined.

Basically, the accuser must contact the authorities to make the denunciation and to present some evidence. In the landmark leniency case in Brazil (see 28 above), the statements of the accusing businessman and his employee were accompanied by documents, video and audio tapes.

Please note that only one company can execute the leniency covenant. However, legal counsel is not prohibited by law from acting on behalf of cooperate defendants that executed a leniency covenant as well as of its directors, officers, and employees, provided that the ethical principles of the profession are observed.

Defending a case

30. Can counsel represent employees under investigation as well the corporation?

As mentioned above, legal counsel can represent both employees and the company under investigation, provided that there is no conflict of interest between them.

However, in case of conflict of interest between clients (eg between current and past employees), counsel must choose one of there clients and renounce the other powers of attorney, in accordance with attorney-client privilege under Article 18 of the Code of Professional Ethics.

31. Can counsel represent multiple corporate defendants?

As mentioned, legal counsel can represent multiple corporate defendants, provided that there is no conflict of interest between them.

32. Can a corporation pay the legal costs of and/or penalties imposed on its employees?

The Brazilian Competition Law establishes that penalties are personal and exclusive (that is, employees must pay the penalties imposed on them). Law 8137/90, in turn, makes no reference to this matter.

There is no express legal provision on legal costs, but the company and employees may enter into an agreement in this respect.

Getting the fine down

33. What is the optimal way in which to get the fine down?

If the company has performed an anti-competitive act, the only way to get the fine down is to execute a leniency covenant, allowing the company to benefit from exemption from or mitigation of the penalty.

However, prevention is of the essence. As many actions taken by company employees may be construed by Brazilian competition authorities as a cartel, employees must be instructed accordingly. It is advisable that the company implement a compliance programme.

Update and trends

The latest landmark development in cartel enforcement is the implementation, last October, of the first leniency agreement between the Brazilian competition authorities and a security company, located in the State of Rio Grande do Sul (RS), which accused several companies of cartel practice (bid-rigging) in public bids for private security services.

Implementation of this leniency agreement can be seen as a sign that the risk of engaging in anti-competitive behaviour is increasing. In addition, the increased participation of law enforcement authorities and public prosecutors in investigations helps to overcome the difficulties faced by the lack of resources of competition authorities.