

Unclassified

DAF/COMP/LACF(2009)7

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

21-Aug-2009

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/LACF(2009)7
Unclassified

LATIN AMERICAN COMPETITION FORUM

-- Session I: Using Leniency to Fight Hard Core Cartels --

Contribution from Brazil

9-10 September 2009, Santiago, Chile

The attached document from Brazil is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Chile on 9-10 September 2009.

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JT03268740

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**LATIN AMERICAN COMPETITION FORUM
-- 9-10 September 2009, Santiago (Chile) --**

Session I: Using Leniency to Fight Hard Core Cartels

FIGHTING CARTELS: BRAZIL'S LENIENCY PROGRAM

1. This paper aims at briefly explaining the legal framework applicable for leniency in Brazil, including a general overview of recent developments concerning Brazil's Anti-Cartel Program.

1. Introduction to Brazil's Competition Law & Policy

2. The Competition law and policy in Brazil is governed primarily by Law n. 8,884, of 1994, known as the "Brazilian Competition Law". All agents – individuals, public and private companies, business associations, and all economic sectors – are subject to the full application of the law.

3. Three agencies are in charge for the enforcement of the Brazilian Competition Law at the administrative level – namely the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Council for Economic Defense (CADE).

4. SDE, through its Antitrust Division, is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal which makes the final rulings in connection with anticompetitive practices and merger review, after reviewing the opinions issued by the Secretariats.

5. Furthermore, the police and the Public Prosecutors – at the Federal and State levels – are in charge of the criminal cartel prosecution, pursuant to Law n. 8,137 of 1990.

2. Cartels as the most egregious antitrust violation and General Aspects of Brazil's Anti-Cartel Program

6. The investigation and punishment of anticompetitive conduct is one of the priorities of the Brazilian antitrust authorities. Examples of conducts that may be considered anticompetitive are price-fixing or exchange of any other commercial sensitive information among competitors, exclusivity clauses, price discrimination, bundling, refusal to deal and predatory prices.

7. Among all anticompetitive conducts, cartel *is the most egregious violation of competition law*. Cartel is an agreement among competitors primarily directed at price-fixing, customer and market allocation, and production output restrictions. Cartels severely harm consumers by raising prices and restricting supply, thus making goods and services unavailable to some consumers and unnecessarily expensive for others.

8. By artificially limiting competition, cartel participants also avoid those pressures that lead them to innovate. Cartels lead to a loss of consumer welfare and, in the long term, a loss of overall competitiveness. The Organisation for Economic Cooperation and Development (OECD, 2002) estimates that prices in a cartelised industry are 10 to 20 per cent higher than they would be if no cartel existed. It follows that profits will also be substantially higher, harming consumers annually in billions of Reais.

9. In recent years a number of antitrust authorities have intensified their efforts to identify and impose hefty administrative and / or criminal penalties for cartel infringements. Brazil is no exception to that: the prosecution of hard-core cartels has been considered a top priority since 2003. Beginning that year, SDE started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (dawn raids and leniency), and CADE began imposing record fines on companies and executives found liable for cartel conduct. SDE is increasingly cooperating with foreign antitrust authorities and as a result of that in February 2009 SDE and Brazil's Federal Police launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the United States and the European Commission.

10. Furthermore, a 2008 Presidential Decree created the Anti-Cartel Enforcement Day in Brazil. The establishment of this official day – October 8th, day in which the first leniency agreement was executed back in 2003 – is a recognition of the importance of the fight against cartels by the Executive Power.

11. The recent developments of Brazil's Anti-Cartel Program are internationally recognised. In March 2009, a representative of the Antitrust Division of the U.S. Department of Justice stated that the Brazilian Program should be taken as example by other jurisdictions. The 2008 Rating Enforcement Report released by the Global Competition Review stated that Brazil has the "*the fastest-growing cartel enforcers in the world*".

Administrative Prosecution

12. At the administrative level, cartels may be sanctioned by CADE with fines that range from 1 to 30 % of its pre-tax total turnover in the year prior to the beginning of the investigation. The imposed fine may never be inferior to the supra-competitive profits of the cartel, whenever possible to quantify these results. Managers and other executives that took part in the conduct may be sanctioned with fines that may vary from 10 to 50 % of the fine imposed to the firm. Other individuals, associations, and non-profit organisations may be punished with fines that may vary from approximately R\$ 6 thousand to R\$ 6 million. Fines may be doubled for repeated offenders.

13. In addition to fines, Brazil's Competition Law provides that other sanctions may be imposed to parties that are found guilty to participating in anticompetitive conduct, such as the publication of CADE's decision in a newspaper with nationwide coverage; the prohibition of the defendant to participate in public

bids or to obtain credit with official banks for up to five years; and the recommendation that tax authorities to not allow the payments of federal taxes in installments and that fiscal incentives or subsidies to the defendant be cancelled. For example, in the private security cartel matter, the CADE prohibited the individuals and the firms involved to receive public financing and to participate in public bids, and also imposed a heavy fine.

14. SDE's strategy to concentrate its available resources in the fight against cartels has resulted in the dismantling of cartels with great impact in the Brazilian economy. Some facts point to that direction: approximately 15 leniency agreements were signed since 2003, and others are currently being negotiated, including with members of international cartels. As a consequence of that, the number of search and seizure warrants to obtain evidence of cartels has significantly increased: from 2003 to 2006, 30 warrants were served, in 2007, 84 warrants were served, and in 2008, 93 warrants were served.

15. CADE has also demonstrated, in many opportunities, its commitment to severely punishing cartels. One important example was the crushed rock cartel, in which the Council imposed fines to the firms that ranged from 15 e 20 % of their respective total turnover of the year prior to the beginning of the investigation. It is important to note the increase in the amount of fines imposed for participating in a cartel – from 1% of the total turnover imposed in 1999 to firms in the steel cartel (the first cartel case adjudicated by CADE) to 22.5% of the total turnover of firms involved in the sand extraction cartel, a decision issued by CADE in 2008.

16. Other cartels were also punished by CADE, such as the airline companies cartel (2004), the steel bars cartel (2005), the cartel against generic drugs (2005), the newspaper cartel (2005), the international vitamins cartel (2007), the private security firms cartel (2007), the meat-packing cartel (2007) and the sand extraction cartel (2008). CADE has imposed fines for cartel in excess of R\$340 million for one single case involving three firms.

17. Firms and individuals have also settled with CADE in cartel cases. For example, in 2007, the firm Lafarge agreed to pay a pecuniary contribution of R\$ 43 million in order to suspend the investigation of its participation in the cement market. Similar agreements were executed with respect to the investigation of the plastic bags cartel and the marine hose cartel.

Criminal Prosecution

18. In Brazil, cartels are an administrative infringement and also a crime, punishable with criminal fines or prison terms that may range from 2 to 5 years. According to the Law against Economic Crimes (Law n. 8,137/90), such sanction may be increased in one third to 50 % if the crime causes serious harm to society, if committed by a public servant or if related to services that are essential to life or health. Criminal prosecution is conducted by State and Federal Prosecutors.

19. Since 2003, the SDE, as the chief administrative investigative authority, has steadfastly emphasised the importance of securing conviction and jail sentences to optimise deterrence of cartel conduct. Therefore, it is increasing its cooperation with the Federal and State Polices and with the Prosecutors to ensure that executives that do not apply to Brazil's Leniency Program – as detailed below – face full prosecution and severe sanctions at the criminal level as well.

20. With this in mind, in December 2007, SDE and the Federal Police executed a cooperation agreement and created a *Cartel Investigation Center*, where both parties cooperate and exchange relevant information and documents related to ongoing criminal and administrative cartel investigations. It should be noted that Law No. 10,446/2002 establishes the Federal Police's jurisdiction to investigate cartel crimes

whenever there are interstate or international repercussions, and does not exclude the jurisdiction of other criminal authorities that may be responsible for the investigation of the same conduct.

21. Still in 2008, the Prosecutors from the State of São Paulo were the first in the country to create a specialised unit in charge of investigating cartels – (*Grupo de Atuação Especial de Repressão à Formação de Cartel e à Lavagem de Dinheiro e de Recuperação de Ativos – GEDEC*) -, and SDE fully supported its implementation.

22. There are more than 100 executives – both Brazilian and foreign - facing criminal proceedings in Brazil suspected of cartel activity which affected the Brazilian territory. In the past years, at least 29 executives were found guilty by criminal courts for cartel involvement, and one of the prison sentences was superior to the 5 year maximum term provided by the law, due to the imposition of aggravating circumstances under the Criminal Code of Justice.

23. Along the same line, in 2005, 2 individuals were temporarily arrested due to strong suspicion of their participation in a cartel. In 2007, 30 individuals and, in 2008, 53 executives were temporarily arrested on the same grounds. In Brazil, temporary prison for cartel crimes may be authorised for 5 days and be extended for an equal period of time with the purpose to prevent the tampering with and / or the destruction of evidence considered essential to prove the existence of such conduct.

Civil Prosecution

24. Cartel members are also subject to civil prosecution in Brazil. The Competition Law provides that consumers may sue directly or through associations, Prosecutors or Consumer Protection Units (“Procons”) for damages related to a cartel. Damage suits are common in other countries and some consumers have already sued for damages in Brazil as well.

3. Brazil’s Leniency Program

Overview

25. Cartels are hard to detect and investigate without the cooperation of one of the participants to the cartel, in view of its confidential nature. For this reason, a significant number of jurisdictions have adopted leniency programs to uncover such conducts. Those jurisdictions include South Africa, Germany, Australia, Canada, France, the United States, Ireland, Israel, Portugal, Spain and the European Union.

26. Brazil is no exception to this rule: Law n. 8,884/94 recognises that is in the interest of Brazilian consumers to grant benefits to a giving cartel member who wishes to put an end in its illegal conduct and fully cooperate with the antitrust authorities, ensuring the condemnation of the other cartel participants. The interest of Brazilians in uncovering and punishing cartels exceeds the interest of punishing one giving company or individual who enabled the identification and condemnation of the whole cartel.

27. The Brazilian leniency program was launched in 2000, and the SDE is the antitrust agency with power to negotiate the leniency agreement. Article 35-B of the Brazilian Competition Law authorises SDE to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or *all* of the penalties for cartel conduct under Law n. 8,884/94. The leniency provision is supplemented by Article 35-C, which provides that successful fulfillment of a leniency agreement *also protects cooperating parties from criminal prosecution* under Brazil’s economic crimes law (Law n. 8,137/90).

28. The Leniency Agreement is not subject to CADE review or approval; however, the council must verify whether the beneficiary complied with the terms and conditions provided thereof and, if this is the case, recognise the full or partial immunity granted by SDE.

29. The first leniency applicant came before SDE in 2003 after two dawn raids had taken place during that year and the Secretariat had already amassed some positive reputation on its ability to uncover anticompetitive behavior. At that point, in addition to search and seizure procedures, the agency had intensified its cooperation with the criminal authorities. Since that year, SDE has been developing the leniency program, in order to provide more transparency and certainty to the program. Approximately 15 agreements have been signed up to July 2009 and others are currently being negotiated.

30. CADE in various occasions has clearly recognised that the Leniency Program is one of the most effective investigative instruments to prevent and punish cartels. In 2007, CADE granted full immunity to the Beneficiary of a Leniency Agreement executed in connection with a cartel in the security services in Rio Grande do Sul – one of the Brazilian Federal States (see below).

The First Leniency Agreement Executed in Brazil

Leniency Application: In October 2003, one of the members of a bid-rigging cartel involving security service provider companies with activities in Rio Grande do Sul applied to the Brazilian Leniency Program. The target of the cartel was a number of public tenders organised primarily by the *Superintendência Regional da Receita Federal* in Rio Grande do Sul and *Secretaria Municipal de Saúde* of Porto Alegre. In order to obtain full immunity from administrative fines and criminal sanctions, the beneficiary of the Leniency Program submitted direct evidence of the bid-rigging, including employees' testimonies and audio records of telephone conversation held between the beneficiary's employees and the other cartel participants.

Dawn Raids: The beneficiary of the leniency agreement provided sufficient information to enable SDE and the Public Prosecutors to run simultaneous dawn raids in four companies and two trade associations allegedly involved in the bid-rigging. Approximately 80 people were involved in the dawn raids, including officials from the Federal Police. Seized evidence showed that the defendants held weekly meetings to organise the outcomes of bids for public tenders.

Criminal Prosecution: There was an intense cooperation with the Public Prosecutor Office throughout the case and, as a result, criminal proceedings were also opened before the Judiciary against the individuals allegedly involved in the conspiracy, with exception to the beneficiary of the leniency agreement.

CADE's Condemnation: After reviewing SDE's investigation and conclusion for the existence of a hard-core cartel, CADE issued its decision in 2007. It imposed a fine on 16 companies ranging from 15 to 20 per cent of their 2002 gross turnover for cartel conduct. Executives of the condemned companies and three industry associations were also found guilty of cartel offense and fined by CADE. The total amount of fines imposed is in excess of R\$40 million. At the same occasion, CADE recognised that the beneficiary of the leniency agreement fulfilled all the conditions imposed in the agreement with SDE and, therefore, no sanctions were imposed.

Requirements

31. Pursuant to Brazilian Competition Law, the following requirements have to be fulfilled to benefit from the Leniency Agreement:

- The applicant (a company or an individual) **is the first to come forward** and confesses his participation in the unlawful practice. If a company qualifies for leniency, all directors, officers and employees of the company who admit their involvement in the cartel as part of the corporate admission will receive leniency in the same form as the corporation. In order to benefit from the Leniency Program, directors, officers and employees have to sign the agreement along with the

company, and agree to cooperate with the SDE in the same manner as the company during the investigations. On the other hand, if the company is not willing to come forward, any current or former employee may individually apply to the Leniency Agreement, case in which the company is not protected;

- The applicant **ceases its involvement** in the anticompetitive practice;
- The applicant **was not the leader** of the activity being reported;
- The applicant agrees to **fully cooperate** with the investigation;
- The cooperation results in the **identification of other members of the conspiracy**, and in the obtaining of documents that evidence the anticompetitive practice;
- At the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

Benefits

32. Full or partial administrative immunity for companies and individuals depending on whether the SDE was previously aware of the illegal conduct at issue. If the SDE was unaware, the party may be entitled to a waiver from any penalties. If the SDE was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the “good faith” of the party in complying with the leniency agreement. In the leniency agreement, SDE states whether it was previously aware of the conduct and makes a recommendation to CADE, which will recognise the benefits while adjudicating the case.

33. A leniency agreement shelters administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement along with the company and fulfill the requirements provided in the law. Pursuant to the Competition Law, by signing a leniency agreement, the limitation period is suspended and the Public Prosecutor’s Office can not file a criminal suit against the mentioned individuals. Once CADE, while adjudicating the case, verifies that the leniency agreement was fully performed by the individual, she or he receives full immunity from criminal sanctions.

34. Although it is not a law requirement, the SDE involves the Public Prosecutor Offices (both at the Federal and State levels, when applicable) in the execution of the Leniency Agreement. Brazilian Public Prosecutors recognise the Leniency Program as a crucial component of the National Anti-Cartel Program and no beneficiary of a leniency agreement has ever faced criminal proceedings for the reported cartel conduct.

Marker system

35. The SDE may issue a marker in the benefit of a potential applicant to guarantee its position in the queue for the Leniency Program (“*marker system*”). In order to benefit from it, the applicant has to provide additional information or documents within an agreed time period of no more than 30 days of the first meeting. To obtain a marker, the individual or company has to identify itself and provide information on the other cartel participants, what is the market affected, when the cartel might have taken place (who, what, when, and where). The applicant has also to inform whether it is applying to Leniency Programs of other jurisdictions about the same cartel.

Proposal

36. The application for the Leniency Program has to be done by means of a proposal of Leniency Agreement. Such proposal can be submitted in writing or orally.

37. If submitted *orally*, the procedure is the following:

- The interested party has to contact the Chief of Staff of SDE to arrange a meeting to present the case;
- In the meeting, the interested party has to present a brief description of the anticompetitive practice (“what”, “when” & “where”), including its participation and the identification of others involved in such practice (“who”), and a description of the evidence that can be provided to SDE; no such evidence has to be brought to SDE at this first meeting;
- If required, the Secretary of Economic Law or its Chief of Staff should prepare a short minute of the meeting to be kept by the applicant;
- At each meeting before the agreement is finally celebrated, a new minute should be prepared and given to the applicant.

38. If submitted in *writing*, the procedure is the following:

- The proposal has to be submitted to SDE’s Chief of Staff, in a sealed envelope, indicating that it contains a proposal for a Leniency Agreement (in Portuguese, “Proposta de Acordo de Leniência”);
- The proposal will receive confidential treatment and will only be read by the Secretary of Economic Law and his Chief of Staff;
- The proposal has to contain (a) the full qualification of the company; and (b) a brief description of the anticompetitive practice, including its participation and the identification of others involved in such practice (“who”, “what”, “when” & “where”).

Confidential application process

39. The application phase should be concluded in six months, but it could be extended for additional periods, never in excess of six-month in total, at the convenience of the SDE, as long as there is no other candidate for leniency regarding the same cartel case. After every meeting during the application process, the SDE will indicate the date at which the proposal has no longer effect.

40. Only the Secretary of Economic Law and her Chief of Staff participate in the application process and in case no agreement is reached, all related documents should be returned to the party.

Leniency Agreement

41. Should the application be accepted, a Leniency Agreement is executed between the SDE and the applicant. Please find below the main elements contained in a Leniency Agreement: (A model Leniency Agreement is available at www.mj.gov.br/sde, both English and Portuguese versions)

- Complete identification of the applicant and its representatives, including contact information;
- Complete description of the anticompetitive practice, including the identification of the other participants and the respective individual roles;
- Admission of participation in the anticompetitive practice by the beneficiary;
- Statement of the applicant that it was not the ring-leader of the anticompetitive practice;
- Statement of the applicant that it has already ceased its participation in the anticompetitive practice;
- List with all the documents provided or to be provided by the applicant in order to support the existence of the anticompetitive practices;
- Obligation of the beneficiary to fully cooperate with the SDE in all aspects of the investigation;
- Provision that the non-performance of the obligations set forth in the Leniency Agreement by the beneficiary will result in the loss of the immunity from fines and other sanctions;
- Certification by the SDE that the applicant was the first to apply for leniency;
- Statement by the SDE that it had not enough evidence to guarantee the condemnation of the applicant.

Leniency Plus

42. The Brazilian Leniency Program adopts a “winner-takes-all” approach and only rewards the first eligible person to come forward to the SDE. The main objective is to generate a race among cartel members, which may also contribute to increase the inherent instability of the cartel.

43. However, as in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (either by being the second to come forward, or by clearly being the cartel leader), but discloses a second cartel, and meets the other Leniency Program requirements, will receive full administrative and criminal immunity for the second offence and a one-third reduction in fine with respect to the first offence.

44. To receive such benefits, the applicant has to disclose the second cartel before the first case is sent by SDE to CADE for final judgment.

Confidentiality

45. An undertaking coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The SDE will therefore keep the identity of such undertakings confidential throughout the course of its investigation up to the final judgment of the case by CADE. With respect to the other defendants, they have the right to access all the relevant documents used in the proceedings against them – but they can only use the documents for their defense within the proceedings being conducted by the SDE and they may not use the documents in any other national or foreign proceedings without the authorisation of the SDE. Whenever consistent with due process principles, the SDE will grant confidential status to extracts of the documents submitted by the leniency applicant in order to protect its sensitive commercial information.

Other Penalties

46. A leniency agreement does not protect its beneficiary from the possibility that third parties who consider themselves as having been harmed by the cartel may have a claim under a private right of action.

47. Leniency also does not provide immunity from any penalty that may be imposed on the undertaking by other competition authorities outside of Brazil.

4. Conclusion

48. Continued vigorous anti-cartel enforcement against harmful cartels that target Brazilian businesses and consumers can be expected, and it is likely that Brazil's Leniency Program will continue to attract members to both national and international cartels. Recently issued publications aimed to clarify various aspects of the Leniency Program and remove any possible ambiguity for potential applicants are part of SDE's continuing effort to maintain the transparency of Brazil's Leniency Program.