

Recent aspects of hard core cartel prosecution in Brazil¹

Roberto Augusto Castellanos Pfeiffer ²

The present report shows some challenges on Brazilian anti-cartel enforcement, regarding aspects asked by the OECD's paper called "fighting hard core cartels in Latin America and The Caribbean". In this context, the report treats the following issues: increasing focus on hard core cartels; burden of proof on judgments of hard core cartels and tools to investigate cartels.

I- Increasing focus on hard core cartels

Some statistics show that the Brazilian competition authorities have increased the focus on prosecution of hard core cartels. Until 1999 only one case related to cartel had been judged by CADE³. But in the period between March 2002 and June 2005 fifteen cases have been judged.

CADE also has increased the value of fines imposed on cartel convictions. For example, in the first case judged by CADE, the fine imposed was the minimal established by law: 1% of the pretax revenue of the defendants in the year before the beginning of the investigation procedure⁴. The reason that CADE opted to impose the minimal fine was the fact that Brazil had ended price control in the steel market just one year before. So at this time the main function of the condemnation was to educate the firms.

Notwithstanding, in others cases CADE has imposed much higher fines, because it realized that the fine must be sufficiently high to prevent the practice of forbidden conduct. So, this new pattern of fine imposition was used in the second case judged by CADE: a cartel on fuel retailer market. CADE imposed the following pecuniary fines: a) to gas station retailers: 10% of the pretax revenue of the FY of 1999; b) to the class association that coordinate the cartel: R\$ 400.000,00 (US\$ 166,000.00); c) to the managers: 10% of the fine imposed to the gas stations. CADE also imposed other kinds of penalties, as showed below:

¹ Report to section I of the third meeting of the Latin American Competition Forum: fighting hard core cartels in Latin America and The Caribbean.

² Commissioner of CADE. Former Chief of Legal Counsel to the Brazilian Justice Department. Former Law Clerk of the Brazilian Supreme Court. State Attorney of the State of São Paulo. LLM for the University of São Paulo (USP). Professor of Economic Law.

³ CADE is a federal independent competition agency with authority throughout the Brazilian territory and is the decision maker competition authority in the Brazilian Administrative System.

⁴ But the value, in absolute term, is not so insignificant: US\$ 22,000,000.00; US\$ 16,000,000.00 and US\$ 13.150,000.00 for each defendant.

1) At the violator's expense, half-page publication of the CADE abridged findings in a court-appointed newspaper for two consecutive days, during three consecutive weeks.

2) ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with public administration, for a period equal to five years.

3) Annotation of the violator on the Brazilian Consumer Protection List.

4) The violator was prohibited to enter into installmental overdue debt payment with the federal government and had previously granted tax incentives or public subsidies canceled.

5) If the CADE order to cease the practice is disregarded, a daily fine of R\$ 6.000,00 (US\$ 2,500.00) shall be imposed.

Finally, it is important to clarify that recently a law was enacted, which forbids the regulatory agency of oil (ANP) to cancel the working authorization of gas station retailers that were convicted by CADE.

In further cases CADE has maintained this pattern of high fines. In three recent cases, two of them involving the domestic gas market and another involving a bid rigging case, CADE imposed a fine of 15% of the pretax revenue of the defendants in the year before the start of investigation procedure and also imposed personal fines to the managers of the firms involved (10% of the fine imposed to the firms).

II- Burden of proof on judgments of hard core cartels

Cartels are forbidden in Brazil: article 20 of Brazilian competition law states what kind of misconduct could be considered as a competition offense: "Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order: I. - to limit, restrain or in any way injure open competition or free enterprise; II. - to control a relevant market of a certain product or service; III. - to increase profits on a discretionary basis; and IV. - to abuse one's market control".

So, the effects of the conduct (concrete or potential) are very important to the analysis of whether a conduct is a violation of competition law or not. So, the demonstration of the existence of market power is essential, because without it there is no potential production of effects.⁵

But, of course, in evaluating the market power what is relevant is the sum of the market shares of all the defendants involved in the cartel and not the isolated market shares of each agent⁶. Furthermore, in the cases in which there is participation of class associations, the market power must be considered given the representation of the respective association, measured from the dimension of the percentage of participants of the economic category that are affiliated to the association⁷.

CADE's experience shows that in cartel cases the existence of an agreement must also be proved. In other words, the sole existence of parallel prices is not sufficient to convict companies in a cartel case.

⁵ Existence of market power has been analyzed in all cases judged by CADE.

⁶ It was specifically dealt with in the Administrative Procedure of the gas stations of the Federal District.

⁷ This assertive was emphasized in all the cartel cases that were led by associations. For more details, see Pfeiffer, Roberto. Trade associations and cartel leadership: The Brazilian Competition Defense System experience.

In most of the cases the proof was evidentiary. For example, in the gas station retail Cartel in Florianópolis,⁸ CADE used the following proofs: telephone recording, (oral) testimony and economic evidences. By means of judicial authorization, phone calls were intercepted; they evidenced talks that demonstrated in detail the cartel organization, shedding lights on the coordinating role the stationers association's president had – a fact that enabled the authorities to disclosure various aspects of the cartel's modus operandi. These proofs showed that in a meeting among the owners of the gas stations convoked by the President of the Union, it was decided that, in 21/06/2000, all the gas stations would set the price of R\$ 1,34 per liter of gasoline, which meant an increase above 20% of the price that was practiced before.

The management of cartel by its leader was very “classic”. The President of the class association personally visited the gas stations or got information from third parties. The class association staff prepared a daily mapping of practiced prices, compelling those who disregarded the agreement to keep the prices uniform.

Even though the law does not require the evidence of effects, an economic study was conducted, analyzing the evolution of the prices in the second semester of 2001, indicating that the effects were achieved. The mainly function of this study was to show how cartels could harm consumer welfare.

On the other hand, in two cases CADE adopted the “parallelism plus doctrine” to proof the occurrence of cartel⁹. The first one was the case in which it could be proved that the three biggest Brazilian steel companies colluded in order to raise plain steel prices to the same level at the same time.¹⁰

CSN readjusted its prices in August 1st 1996 (3,63% for hot plated steel sheets and 4,34% for cold plated steel sheets), Cosipa readjusted its prices in August 5th 1996 (3,59% for hot plated steel sheets and 4,31% for cold plated steel sheets) and Usiminas readjusted its prices in August 8th 1996 (4,09% for hot plated steel sheets and 4,48% for cold plated steel sheets).

The new prices were preceded by communiqués sent to buyers in July 17th, 1996 (CSN) and July 22nd, 1996 (Cosipa and Usiminas); besides, a meeting was held in the Ministry of Finances' Secretariat for Economic Monitoring (SEAE) in July 30th, 1996. Representatives of the three companies and one of the steel producers Association (IBS – Brazilian Institute of Metallurgy) informed the government body that they would raise their prices. The Secretary replied that the practice would be eligible for cartel.

This case was decided under the parallelism plus theory. So, the plus factors found as sufficient to conclude that there was a collusion were: a) the fact that the first company to raise the price was the company with the lowest market share; b) there wasn't an increase in costs that could explain the joint raise of prices; c) the companies used the same way at almost the same time to communicate the price raising; d) the joint meeting at SEAE¹¹.

⁸ Administrative Procedure nº 08012.002299/2000-18.

⁹ See, among others, Kovacic, William “The Identification and Proof of Horizontal Agreements under the Antitrust Laws” – Antitrust Bulletin 5. 1993: “Courts generally have held that a pattern of ‘conscious parallelism’ or oligopolistic interdependence, without more, does not permit an inference of conspiracy on the whole, courts require plaintiffs who emphasize parallel conduct to introduce additional facts, often termed ‘plus factors’, to justify an inference of collective actions”.

¹⁰ Administrative Proceedings nº 08000.015337/94-48, Respondentes Companhia Siderúrgica Nacional – CSN; Companhia Siderúrgica Paulista – Cosipa e Usinas Siderúrgicas de Minas Gerais – Usiminas. Reporting Board Member Ruy Santacruz.

¹¹ Concerning this aspect, the following understanding was adopted: if the companies asked for a joint meeting to communicate the price raising, they must have to know that each one will raise their prices. So, this fact was an evidence of the collusion.

Defendants sued an injury against the condemnation. The Federal Court Decision of first degree, however, found that the CADE's decision was correct. The Judge highlighted that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel.¹²

This decision is also important because the judge explained the damages of cartel behavior, affirming that Cartel limits the consumer's choice¹³. This kind of consideration is important to build a competition culture.

III- Investigation tools in the Brazilian law

I will analyze some tools that Brazilian law gives to competition administrative authorities to investigate violations. First of all, authorities could request data and documents from individuals, agencies, authorities and other public or private entities. The disrespect of the administrative requisition is subject of fines¹⁴. So, often all requests are obeyed.

SDE¹⁵ could make inspection in defendants' facilities, without judicial order, but conditioned to a prior 24-hour notice. However, this tool is not frequently used, on account of the prior notice. Indeed, SDE has often requested from the Judiciary a "dawn raid" to search warrant for several items¹⁶.

In Brazil some agreements between competition authorities and federal police and criminal prosecutors have been brought important results. Under this joint operation "dawn raids" are requested to address criminal and administrative purposes. In general judges have provided authorization to "dawn raids" in the cases that the necessary evidences of an injury have been demonstrated. So, it is possible to affirm that federal police and federal and estate public prosecutors are willing to assist the administrative competition authorities in "dawn raids".

Furthermore, when police or criminal prosecutors open a criminal investigation they can ask a judge to authorize wire-tapping or a disclosure of data banking. These two

¹² The following affirmation is relevant to the understanding of the decision: "In this case, there is the following situation: the only three firms that produce common steel sheet in the national market, after more than a year without an alteration in the price of the product, decide to increase the prices in similar levels in close dates. In the time of the conduct, there was no determinant cause for the continuity of the exercise of the economic activity developed by the firms that kept them from maintaining the prices that were being practiced by them for a longer time, such as the increase of productive inputs or the costs of production".

¹³ "Thus, the conduct of the firms causes damages to free competition because it keeps the consumer from choosing to buy the product from another supplier that did not participate in the price readjustment". "(...) On the other hand, for example, if the opposite situation occurred, in which there was an increase in prices in the steel sector by the three firms, but practiced in distinct times, the market forces would be acting towards the stimulation of free competition and offering the consumer choices of suppliers, which generates dynamism in the market and it can even cause the reduction of the prices of the competitor that readjusted its prices first to avoid a loss in market share".

¹⁴ Article 26 of Brazilian Competition Law states that: "In the event any data or documents requested by CADE, SDE, SPE or other public entity acting under this Law are unreasonably denied, concealed, tampered with or delayed, this shall constitute a violation subject to a daily fine of 5,000 (five thousand) UFIR, which fine may be increased up to twenty fold in keeping with the violator's economic status".

¹⁵ Economic Law Office of the Ministry of Justice – SDE commences administrative proceedings intended to investigate and restrain violations of the economic order. CADE will judge these proceedings.

¹⁶ Article 35-A. of Brazilian Competition Law states that: "The Federal Attorney-General's Office upon request of SDE may order the Judicial Branch to issue a search and seizure warrant for papers of any kind, as well as accounting books, computers and magnetic files pertaining to the company or to an individual for the purpose of discovery in this procedure, preliminary investigation or administrative proceeding. In this case the provisions of article 839 et seq. of the Code of Civil Procedure, when suitable, shall apply, and filing of a main action is not required.

tools can only be used in criminal investigation but the results of the criminal investigation (for example, documents, transcription of talks, monetary transferences between competitors, etc.) can be used also in the administrative proceedings, as “borrowed proofs”. In this context, formal cooperation between competition authorities and police and criminal prosecutors is very important, because it brings fundamental proofs.

It is also very important to mention the existence of a leniency program in Brazil that was recently implemented. It brings the following benefits to the violator: 1) extinction of punitive action imposed by the public administration in favor of the violator, in cases when the proposal had been presented, SDE has not been previously informed of the notified anticompetitive practice or SDE does not have sufficient evidence to ensure the sentencing of the company or the individual at the time the covenant is proposed; or 2) reduction of applicable penalty by one to two thirds considering the graduation of the fine the actual collaboration rendered and the good faith of the violator in complying with the leniency covenant. In any case, the fine applied shall not exceed the lowest fine applicable to the other co-authors of the anticompetitive practice (relative to the percentages of gross revenue).

The effects of the leniency covenant shall be extended to the directors and officers of the qualified company, who are involved in the anticompetitive practice.

With respect to the crimes against the economic order set forth by Law 8.137/90, the execution of the leniency covenant implies the suspension of the statement of limitations and impedes the filing of the accusation. If the leniency covenant is complied with by the undertaking, punishment for the crimes is extinguished.

Only the first violator to qualify could participate of the leniency agreement. The covenant may only be executed if the following requirements have cumulatively been observed: 2.2.) the company or individual ceases all involvement in the anticompetitive practice notified or under investigation; 2.3. There isn't sufficient evidence to ensure the sentencing of company or the individual at the time the covenant is proposed; 2.4. The company or individual confesses its participation in the unlawful practice and cooperates fully and permanently with the investigations and the administrative procedures.