Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTEL JURISDICTION ISSUES, INCLUDING THE EFFECTS DOCTRINE

-- Brazil --

21 October 2008

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 21 October 2008.

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1. **Introduction: General Aspects of Anti-Cartel Enforcement In Brazil**

1. In recent years many antitrust authorities have intensified their efforts to uncover and impose severe penalties for violations of competition rules, especially hard-core cartels. Brazil is no exception to that: the prosecution of hard-core cartels is a top priority, including the prosecution of international cartels which may have affected the Brazilian territory. As of 2003, the SDE started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct.

2. The strategy of focusing the available resources on cracking cartels has proven successful and there are an increasing number of investigations of anticompetitive practices, leniency applications and dawn raids. There are a growing number of applicants for the Leniency Program, including members to international cartels. Approximately 10 leniency agreements were signed since 2003, and others are currently being negotiated. As a result, the number of search warrants served has significantly increased: from 2003 to 2005, 11 warrants were served and 2 people were detained without charges; in 2006, 19 warrants were served; and in 2007, 84 warrants were served and 30 people were detained without charges.

3. Cartels, as an administrative offence, can be sanctioned with fines imposed on companies by the CADE that may range from 1 to 30 per cent of a company’s pre-tax revenues in the year preceding the initiation of the proceedings. Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine. Associations and other entities that do not engage in commercial activities may be fined from approximately R$ 6 thousand to R$ 6 million. Fines for repeated violations are doubled. Apart from fines, the Brazilian Competition Law provides for other sanctions as well, such as publication of the decision in a major newspaper at the wrongdoer’s expense; the prohibition of the wrongdoer from participating in public procurement procedures and obtaining funding from public banks for up to five years; and recommendation to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in installments or obtain tax benefits.

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

5. Apart from being an administrative infringement, cartel is also a crime in Brazil, punishable by a criminal fine or imprisonment from two to five years. Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Since 2003, the SDE, as the chief investigative antitrust authority, with the support of the SEAE, is increasing cooperation with the Federal Police and Public Prosecutors to ensure that managers and directors of companies that do not come forward and take part in the Leniency Program will face full criminal liability. In December 2007, the SDE and the Federal Police executed a cooperation agreement and an “Intelligence Centre for Cartel. There are a number of joint cartel investigations that resulted in criminal proceedings against key executives of companies involved in cartel conduct. Up to date, the criminal proceedings were settled with the payment of criminal fines and, in two recent cases, resulted in the condemnation of ten executives to serve jail terms of up to five years (under appeal).

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1 This paper was prepared by the Secretariat of Economic Law of the Ministry of Justice (SDE)
2. **Legal Provisions related to extraterritorial jurisdiction**

7. The legal basis for the extraterritorial application of the anticartel provisions of the Brazilian Competition Law is provided by Article 2:

   Article 2. This Law applies to all conducts wholly or partially performed in the Brazilian territory, and to foreign acts that affect or may affect the Brazilian territory, and does not exclude the application of conventions and treaties to which Brazil is a party.

8. This provision supports both the prosecution of international cartels with effects in Brazil and the review of foreign-to-foreign mergers affecting the Brazilian territory by the Brazilian competition agencies.

9. Additionally, for the purpose of initiating the procedures of investigation of a foreign company and the enforcement of the CADE’s decision, service of process should be properly made on such foreign company. Article 2 of the Brazilian Competition Law provides that service of process on a foreign company may be made through an office or subsidiary based in Brazil:

   § 1º For the purposes of this law, it shall be considered as located in Brazil the foreign company with sales in Brazil or that has office, subsidiary, agent or representative in Brazil.

   § 2º The foreign company will be served, regardless of the existence of a power of attorney or contractual or statutory provisions, through the responsible for the office or subsidiary based in Brazil.

3. **Experience of the BCPS with cases involving international cartels**

10. Based on the above mentioned legal provisions, the SDE has investigated a number of international cartels affecting the Brazilian territory. The most important criteria applied by the Secretariat in order to define if it would investigate an alleged practice is whether its effects in Brazil can at least potentially be demonstrated.

11. There are two instances where this assessment is especially important to the SDE. The first one is while defining whether or not to initiate an investigation by its own means concerning an international cartel. The second, which is becoming increasingly relevant, is while negotiating a leniency agreement with a member to an international cartel. There may be situations in which either the leniency applicant or the SDE is not completely sure whether the Brazilian authorities have jurisdiction to prosecute a given case, since the effects of the cartel in the Brazilian territory are not so clear. In order to avoid uncertainties for potential leniency applicants, the Leniency Policy Interpretation Guidelines² issued by the SDE provide the following:

   “The Leniency Program applies to international cartels that affect Brazil in the same way as it will apply to purely domestic cartels. Potential leniency applicants involved in an international cartel with effects in Brazil should have regard to the following matters:

   i. A leniency application made to a foreign competition enforcement agency will not be considered an application in Brazil under the Leniency Program;"

² Available at http://www.mj.gov.br/sde.
ii. The SDE is actively investigating and taking enforcement action against many international cartels with effects in Brazil, particularly those which are made public by enforcement actions by antitrust agencies of other countries;

iii. A conduct may be deemed to have effects in Brazil even if none of the companies involved in the cartel have subsidiaries, offices or representatives based in Brazil; and

iv. Leniency applicants should contact the SDE at the earliest possible stage. The SDE will accept applications even when there is uncertainty as to liability in Brazil as a result of jurisdictional issues."

12. There have been examples of investigations by the SDE initiated both by means of leniency applications and by its own means (ex officio), particularly when enforcement actions involving an international cartel are made public by other competition agencies abroad. In order to indicate how jurisdictional issues have actually been dealt with both by SDE to start the proceedings and by CADE while judging such cases, two examples are presented below: the Vitamins Cartel and the alleged Marine Hose cartel.

3.1 The vitamins cartel

13. The “Vitamins Cartel” (Administrative Proceeding Nº 08012.004599/1999-18) was the first Brazilian antitrust case adjudicated by the CADE involving an international cartel. The investigation was initiated in 1999, based on the publication of the US investigation. The Brazilian investigation could not benefit from the current investigative tools available - dawn raids, and leniency agreements, as they were introduced in the Competition Law in 2000, and was strongly based on the findings and condemnations in other jurisdictions. The SDE sent the case with its findings to the CADE in 2005 and a final decision was taken by the CADE in 2007 against Roche, Aventis and Basf (approximately R$ 16 million in fines).

14. The case can be considered as an important precedent. The first aspect to be stressed is the economic evidence supporting the finding of the effects of the international cartel in Brazil. The SDE and the SEAE compiled information on volume of vitamins A, E and Beta Carotene exported to Brazil during the years of the cartel. Furthermore, during its investigation, the SDE summoned a number of executives with key roles in Brazil. The SEAE and SDE uncovered that the managerial team of the firms responsible for the vitamin market in Latin America met in Sao Paulo two to four times a year to exchange information about prices and quantities sold of these products. These meetings had the purpose of monitoring the international cartel’s activities within the Latin American and Brazilian markets, so that the sales and prices were kept in accordance with the international agreement among these firms. Finally, it is worth mentioning that Canada informally cooperated with Brazil in this case, offering leads on what exactly to investigate. This was an exchange based mostly on the professional relationships already developed between the staffs of the two agencies, since Canada and Brazil do not had at that time a cooperation agreement on this subject.

15. The punishment of the cartel by foreign jurisdictions, as the U.S. and the European Commission, and the recognition that its scope was worldwide convinced the CADE that the cartel, or at least its effects, was extended to Brazil. The Brazilian demand for vitamins has always been filled, almost entirely, by imports from those companies. Having this in regard, it was possible to support with reasonable certainty that the Brazilian market was strongly affected by the cartel, though the extent of the damage is difficult to measure.
16. The same decision that convicted the companies’ European headquarters considered that there was not enough proof of the participation of the Brazilian subsidiaries in the illegal arrangement, as well as of local managers who were initially involved in the proceedings.

3.2 The alleged marine hose cartel

17. Similarly to some of its counterparts in other countries, the SDE has opened in 2007 formal proceedings to investigate an alleged international cartel to rig bids, fix prices and allocate markets for sales of marine hose (Administrative Proceeding nº 08012.010932/2007-18). Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys. It is estimated that from 2000 to 2005 the sales of marine hoses in Brazil by the investigated companies amounted to approximately US$48 million.

18. The investigation is based upon information provided to the SDE by a leniency applicant and a dawn raid carried out by the agency earlier that year. The leniency beneficiary agreed to fully cooperate with the Brazilian authorities in exchange of full criminal and administrative immunity.

19. The proceedings were opened against Bridgestone, Dunlop; Kleber (Trelleborg Industrie S.A.); ITR Oil and Gas Division/Pirelli (Grupo Parker Hannifin); The Yokohama Rubber Co., Ltd.; Manuli Rubber Industries SpA; Sumitomo Rubber Industries; Hewitt-Robins; Goodyear do Brasil; Pagé Indústria de Artefatos de Borracha Ltda.; Flexomarine; and some individuals working for these companies.

20. Although a final decision on this alleged cartel was not yet issued by the CADE (since SDE’s proceedings are not yet over), the Council acknowledged its jurisdiction over the case when it executed a direct settlement with Bridgestone in August 2008. In such settlement, the CADE required Bridgestone’s admission of guilt concerning its participation in the alleged cartel since the administrative proceedings were initiated by means of a leniency program.

4. Criminal aspects

21. The general rules for the application of criminal legislation are set in the Brazilian Criminal Code. Article 5 provides that the Criminal Code is applicable to “crimes committed in the Brazilian territory”. However, the place where a crime is considered to be committed is both the actual place where the illegal conduct occurs and the location “whose effects take place or should have taken place” (art. 6). Thus, members to international cartels whose effects occur in Brazil can be prosecuted by the Brazilian criminal authorities, even though none of the actions to implement such cartel (such as meetings or phone calls) actually took place in the Brazilian territory.

22. Foreign executives alleged members to international cartels already faced criminal proceedings in Brazil and settled the criminal case, subject to the payment of a settlement sum and other conditions, such as appearing every two months in a Brazilian Embassy during a two-year period to acknowledge that he or she was not part to a cartel anymore. In case the Brazilian authorities later discover that the executive was not telling the truth, the criminal proceeding will be reopened.

23. The SDE is increasing cooperation efforts with the Federal Police and State and Federal Prosecutors in order to make sure foreign executives members to international cartels with effects in Brazil will face full criminal liability. In order to achieve that goal, the authorities will use any available tool, including the use of Interpol’s Red Notice.

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More information about this settlement is available in the submission to WP3 by the Brazilian delegation about “Cartel Settlements”.

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