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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from Brazil

3-4 September 2013, Lima, Peru

The attached document from Brazil is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM BRAZIL

1. Introduction

1. The new Brazilian Competition Law was adopted on 30 November 2011 and entered into effect on 29 May 2012 (Law n° 12.529/11). It brought substantial changes the landscape of the Brazilian Competition Policy System with the aim of rationalizing its operations. In particular, all competition enforcement functions were centralized on CADE, in order to avoid any overlapping and, thereby, promoting the Authority's efficiency. For this purpose, the "new CADE" was divided into three main bodies: the Administrative Tribunal; the General Superintendence; and the Department of Economic Studies.

2. With the new legislation, the General Superintendence became CADE's main investigation body and, for this reason, the one responsible for carrying out unannounced inspections in antitrust investigations:

"Art. 13. The General Superintendence shall:

VI – in order to instruct the procedural types mentioned in this Law:

(...) d) request to the Judiciary, by means of the Attorney-General's Office associated to Cade, search and seizure warrant of objects, papers of any kind, as well as business books, computers and magnetic files of a company or natural person, in the interest of administrative investigation or administrative proceeding to impose administrative sanctions for violations to the economic order, applying, where applicable, the provisions of Article 839 and following ones of Law no. 5869 of January 11th, 1973 - Code of Civil Procedure, being unenforceable the bringing of the main action;"

3. CADE must ask the Judiciary, with the support of CADE's Attorney-General Office, for a search and seizure warrant for objects, papers of any kind, as well as business registration books, computers and

magnetic files from companies or individuals relevant to the commercial activities being investigated by the administrative proceeding for violations against economic order. Under the previous law, this attribution was given to the former Secretariat of Economic Law of the Ministry of Justice.

2. Anticompetitive investigation techniques

4. In Brazil, the use of new techniques in the investigation of anticompetitive conducts has progressed, due to the development of a leniency program (the first agreement was signed in 2003) and to the use of dawn raids.

5. The dawn raids in the Brazilian legal system are performed based on the granting of an injunction (either civil or criminal) by a Federal judge and its execution is conducted by the antitrust authority in joint actions with bailiffs and, depending on the case, the police authority and prosecutors. Note that, so far, all dawn raid authorizations requested by CADE to the Judiciary were endorsed.

6. The authorized dawn raids begin in the morning, usually at the company's opening hours, and are limited by the scope of the warrant. In general, there are no restrictions for withdrawal of original documents, computers and electronic copies of servers. Issues regarding attorney-client secrecy and documents protected by legal/contractual confidentiality are usually discussed and evaluated after the dawn raid is held. At the end of the raid, a detailed search and seizure statement containing all seized material is drafted.

7. The investigated companies and individuals are requested to go to CADE's headquarters where copies of the documents are taken - both electronic and material copies - and the original documents are returned to the parties. Documents and other objects that are not related to the anticompetitive investigation are returned to the parties.

3. A few numbers on unannounced inspections

8. CADE has performed eight dawn raids in the past two and a half years: two operations in 2011, four in 2012 (all of which occurred in accordance to the new Law) and, until now, two in 2013.

9. The 2012 operations took place in different regions of the country and were related to investigations in various sectors, including fuels (in the State of Rio Grande do Norte), salt producers (in the states of Rio Grande do Norte and Rio de Janeiro), parking, material and school uniform (in the State of São Paulo) and silicate (also in Sao Paulo, and the states of Pernambuco, Santa Catarina and Rio de Janeiro).

10. The most recent dawn raid occurred in July. CADE organized the dawn raid in order to determine the existence of an alleged cartel in bids for the purchase of trains and construction of subway lines. The operation was triggered, simultaneously, in 13 companies located in 4 different cities across the country. 139 public servants worked on the raid among which: bailiffs, CADE's case handlers, and Federal Police representatives and agents¹.

11. The investigation, conducted by the General Superintendence of CADE, began with the signing of a leniency agreement. The Judiciary authorized the operation based on the existence of consistent evidence of cartel. The seized documents will be analyzed by CADE's General Superintendence and, if

¹ Besides the Federal Police, CADE also holds important collaboration with the Federal and State prosecutors to investigate illegal conduct and implement joint data analysis labs.

there is enough evidence of a possible anticompetitive practice, a due administrative proceeding will be initiated.

12. This last dawn raid is an illustrative example of the current standard of this type of operation in Brazil: the operation had the support of several public bodies and occurred entirely as a confidential matter (the “surprise element” is extremely important for the success of such operations, so that the judicial request for the warrant is taken under secrecy proceedings).

13. Although the last mentioned case began with the signature of a leniency agreement, a number of other dawn raids occurred based on the Authority’s preliminary investigations and on information/documents extracted from the *Parquet*’s investigations.

4. Management efforts to foster effectiveness

14. In order to foster effectiveness in the investigation of anticompetitive practices, the General Superintendence created an “Intelligence Unit”, which is separate from the procedural follow-up areas. This Unit is responsible for preparing administrative investigations, composing intelligence reports, maintaining contacts with the *Parquet*, especially in criminal matters, organizing preparatory procedures, and coordinating the dawn raids. This unit is also responsible for coordinating the *triage* of all potential evidences collected during the inspections.

15. The unannounced inspections play an important role in the fight against cartels. For instance, it enables a better use of the Cease and Desist Agreements (“TCC” for its acronym in Portuguese). CADE has reviewed its policy concerning TCCs and, after conducting a public consultation, it amended its internal regulations on this regard. Both the TCCs and the leniency agreements are within CADE’s priorities and are important investigative tools that can be decisive for the effective resolution of cartel cases. Given this scenario, CADE’s General Superintendence has designated three internal units to work specifically with the investigation of cartels, one of which is dedicated especially to international cartels.

16. Concerning leniency policy and efforts, since the new Competition Law was enacted, 10 leniency agreements were signed and 50 “markers” were granted. These numbers underscore the need for constant improvement of investigative techniques and tools, among which are the unannounced inspections.

5. International cooperation

17. At this stage, improving relations between antitrust authorities for exchange of experiences and international cooperation is of utmost importance for the success of anticompetitive investigations. For instance: in 2009, CADE held a joint and simultaneous dawn raid with European and North American competition authorities in an investigation concerning the compressors market

18. The above-mentioned case was initiated as the result of a leniency agreement with former SDE. Thereafter there were simultaneous dawn raids conducted in Brazil, the United States and Europe of suspected cartel participants. More than 60 officers from former SDE, the federal police, and federal prosecutors conducted the operation in Brazil. Observers considered the case a milestone in the Brazilian anti-cartel effort. Three Brazilian subsidiaries of the U.S. appliance maker Whirlpool reached a settlement agreement with CADE under which the company paid a fine of BRL 100 million (about USD 58.7 million) and six executives paid fines totaling BRL 3 million (USD 1.8 million). These were the largest fines assessed and paid at that time in a cartel case.