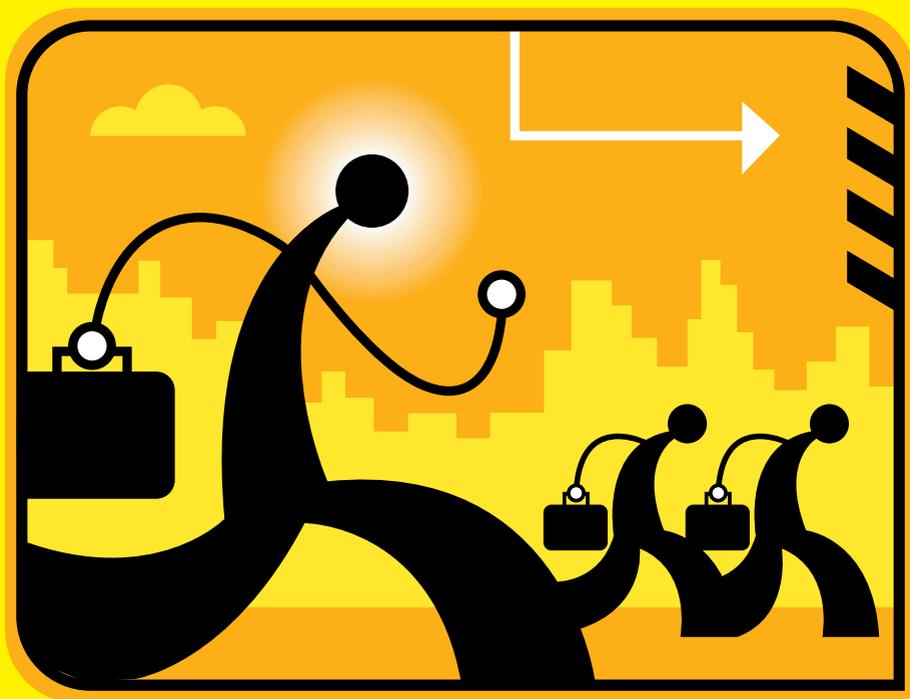


FIGHTING CARTELS: BRAZIL'S LENIENCY PROGRAM



Secretariat of
Economic Law

Council for
Economic Defense

Ministry
of Justice



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Notice: This brochure is not a substitute to Brazil’s Competition Law (Law n. 8.884/94) and may be revised if necessary. The examples hereby included are not exhaustive and do not limit in any way the activities of the Brazilian antitrust authorities.

1. INTRODUCTION TO BRAZIL'S COMPETITION LAW & POLICY

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.

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).

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.

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.

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



The investigation and punishment of real or potentially 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.

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.

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 Organization for Economic Cooperation and Development (OECD, 2002) estimates that prices in a cartelized 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.

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. For example, from 1990 to 2008, the European Commission imposed cartel fines in excess of € 13 billion. The United States imposed severe sanctions as well, such as US\$ 3 billion in criminal fines from 1997 to 2008, and securing convictions and jail sentences against culpable U.S. and foreign executives.

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.

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.

Apart from being an administrative infringement, cartel may also be prosecuted at the criminal and civil levels.

The recent developments of Brazil's Anti-Cartel Program are internationally recognized. 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"*.

Box 1: Example of An Internationally Punished Cartel – The Vitamins Cartel



Between 1990 and 1999, the nine greatest worldwide vitamin producers (including BASF AG, F. Hoffman-La Roche AG, Aventis S.A., Merck KgaA and Solvay Pharmaceuticals) divided the market in separate regions that were allocated to each of them. As a consequence, competition was eliminated and consumers paid artificially higher prices for vitamins A, B2, B5, C, E, and beta-carotene.

The cartel was detected because one of its participants, Rhone-Poulenc (currently Aventis), reported its conduct to the U.S. and the European antitrust authorities and cooperated with the investigation in exchange for immunity. As a result of the investigation, F. Hoffman-La Roche and BASF, also part to the cartel, plead guilty and the U.S. Department of Justice imposed fines of, respectively, US\$ 500 million and US\$ 225 million. In addition, some executives involved were sent to jail. Similarly, in 2001, the European Commission imposed fines in excess of € 850 million, which was, at the time, the highest fine ever imposed.

In Brazil, after the SDE's investigation, CADE imposed fines in excess of R\$15 million against BASF, F. Hoffman-La Roche and Aventis for having taken part in a cartel that affected the Brazilian market. According to CADE, these firms had restricted the output and raised the prices of vitamins in Brazil, during the second half of the nineties. The cartel also prevented the entry of Chinese vitamins that would have been sold at lower prices in Brazil.

1.1.1 Administrative Prosecution

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 organizations may be punished with fines that may vary from approximately R\$ 6 thousand to R\$ 6 million. Fines may be doubled for repeated offenders.



In addition to fines, Brazil's Competition Law provides that other sanctions may be imposed to parties that are found guilty of 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, CADE prohibited the individuals and the firms involved to receive public financing and to participate in public bids, and also imposed a heavy fine.

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.

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.

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.

Firms and individuals have also settled with CADE in connection with cartel investigations. 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 an alleged cement cartel. Similar agreements were executed with respect to the investigation of the plastic bags cartel and the marine hose cartel.

Box 2: The Crushed Rock Cartel

Introduction: In 2002, SDE received an anonymous tip of an alleged cartel involving crushed rock companies in São Paulo. The companies took part in a cartel to fix prices, allocate customers, restrict production and rig public auctions in the market for crushed rock, an essential raw material in the civil construction industry. The companies also used a sophisticated software in order to steer sales and check compliance with the agreement. In July 2003, an administrative proceeding was initiated against 21 companies and one trade association in order to investigate the alleged cartel violations.



Price evolution of crushed rock in São Paulo 1995 - 2003



Dawn Raids: The anonymous tip provided the authorities with plenty of information which enabled SDE and the Public Prosecutors to run the first antitrust dawn raid in Brazil's history. The procedure was conducted at the offices of the industry association *Sindipedras*. Seized evidence showed that there was in fact an illegal and sophisticated cartel in place.

Criminal Prosecution: There was an intense cooperation between SDE and the Public Prosecutor's Office of the State of São Paulo throughout the case and, as a result, criminal proceedings were also filed before the Judiciary. The proceedings led to joint interviews of witnesses by SDE and the police and ultimately to criminal indictments. The criminal proceedings were all settled with the payment of fines.

CADE's Decision: SDE completed its investigation in November 2004 and concluded that 18 companies and the trade association should be held liable for cartel offenses. SDE submitted its opinion to CADE, which issued its decision in July 2005, fining the defendant companies in amounts ranging from 15 to 20 per cent of their 2001 gross revenues, depending on the degree of their involvement in the cartel conduct. Some of the parties challenged CADE's final decision before the Judiciary, and so far all the judicial decisions unanimously considered that CADE's decision is valid.

Harms caused by the cartel: Conservative estimates indicate that the crushed rock cartel caused at least R\$ 80 million in direct harm to society from 2000 to 2003.

1.1.2 Criminal Prosecution

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 fifty per cent 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.



Since 2003, the SDE, as the chief administrative investigative authority, has steadfastly emphasized the importance of securing conviction and jail sentences to optimize deterrence of cartel conduct. Therefore, it is increasing its cooperation with the Federal and State Polices and with 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.

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 n. 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.

Still in 2008, the Prosecutors from the State of São Paulo were the first in the country to create a specialized 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.

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.

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 authorized 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.

Other countries also recognize the importance of criminal prosecution for an effective Anti-Cartel Program. In the United States, for example, an executive may be sentenced to prison terms up to 10 years and to the payment of fines of up to US\$ 1 million. The average sanction imposed for cartels are of 31 months prison term, and since 2000, over 150 executives have served time in the country for such conduct, including foreign individuals. The United Kingdom and France are other examples of countries that, together with Brazil and the United States, also impose criminal sanctions for cartel activity.

1.1.3 Civil prosecution

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.

Box 3: “Pact 274”

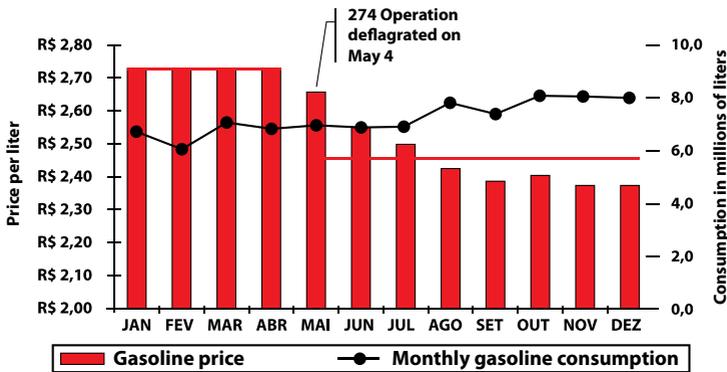
Cartel in the fuel retailer sector: The fuel retailer sector is one where there is a likelihood of cartel behavior due to characteristics such as homogeneous product, similar costs, regulatory barriers and a strong role performed by trade associations that assist in the harmonization of prices and / or the commercial conduct of its associates. Equal prices across different retailers are not enough to punish the conduct. As in other markets, additional evidence is necessary, preferably direct evidence of cartel conduct, such as minutes of meetings where the parties fixed prices and wire-taps with judicial authorization.



“Pact 274”: In May 2007, SDE, together with SEAE, the Federal Police and the State Prosecutors of the State of Paraíba launched a dawn raid in João Pessoa and Recife to obtain evidence of a cartel in the fuel retailer sector. The operation involved 190 agents that searched 26 different places and served 16 prison warrants. The dawn raid exercises were called “Pact 274”, named after the price allegedly agreed for the liter of gasoline (R\$ 2,74).

Savings of R\$ 32 million a year for consumers: The positive impact to the economy due to the activity of competition agencies sometimes are felt immediately when the dawn raid takes place and not at the end of an investigation. In the case of “Pact 274”, the average price of the type C gasoline in João Pessoa went from R\$ 2,74/litre in April 2007 to R\$ 2,37/litro, in December the same year. The direct impact of the dawn raid exercises to the fuel consumers from Joao Pessoa, considering the price reduction and the increase in demand, can be estimated in around R\$ 500 thousand in May 2007. All things equal, consumers gained per year up to R\$ 32 million due to “Pact 274”.

Price and demand evolution for type C gasoline in João Pessoa



Box 4: Consulting Firm Punished for Cartel Conduct: The Sand Extraction Cartel Case

All firms and individuals that contribute in any way to the implementation of a cartel agreement may be found liable by the Brazilian antitrust authorities.

In 2008, CADE imposed a record fine to the “Sand Extraction Cartel”. The cartel involved the firms Sociedade dos Mineradores do Rio Jacuí – SMARJA, Sociedade Mineradora Arroio dos Ratos – SOMAR and Aro Mineração, with activities in the sand extraction industry in the South Region of Brazil. The firms fixed the prices for their services and allocated clients. The firms involved were fined in 22,5% of their turnover in the year prior to the beginning of the investigation. In addition, CADE sanctioned the consulting firm *Comprove Consultoria e Perícia Contábil Civil* for having assisted in the implementation of the agreement through the elaboration of a study to harmonize prices among the firms.

Other authorities have also imposed sanctions against consulting firms for cartel involvement. The marine hose cartel is a recent example in which a cartel consultant confessed its participation in the conduct in the United States, pleaded guilty, paid a criminal fine and agreed to serve 30 months of prison. The consultant was also found guilty of that crime in the United Kingdom and ended up being extradited to serve prison time in such country.

2. BRAZIL'S LENIENCY PROGRAM

2.1 Importance

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.

Brazil is no exception to this rule: Law n. 8,884/94 recognizes 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.

2.2 Introduction

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 authorizes 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).

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, recognize the full or partial immunity granted by SDE.

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.

CADE in various occasions has clearly recognized 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.

Box 5: 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 organized 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 organize 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 recognized that the beneficiary of the leniency agreement fulfilled all the conditions imposed in the agreement with SDE and, therefore, no sanctions were imposed.

2.3 Requirements

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

(I) 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.

(II) The applicant ceases its involvement in the anticompetitive practice.

(III) The applicant **was not the leader** of the activity being reported.

(IV) The applicant agrees to **fully cooperate** with the investigation.

(V) The cooperation results in the **identification of other members of the conspiracy**, and in the obtaining of documents that evidence the anticompetitive practice.

(VI) 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.



2.4 Benefits

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 recognize the benefits while adjudicating the case.

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.

Although it is not a law requirement, the may SDE involve the Public Prosecutor Offices (both at the Federal and State levels, when applicable) in the execution of the Leniency Agreement. Brazilian Public Prosecutors recognize 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.

2.5 Marker system

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.

2.6 Proposal

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.

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

(I) The interested party has to contact the Chief of Staff of SDE to arrange a meeting to present the case.

(II) 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.

(III) 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.

(IV) At each meeting before the agreement is finally executed, a new minute should be prepared and given to the applicant.

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

(I) 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*”).

(II) The proposal will receive confidential treatment and will only be read by the Secretary of Economic Law and his Chief of Staff.

(III) The proposal has to necessarily 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”).

2.7 Confidential Application Process

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 in which the proposal is no longer valid.

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.

2.8 Leniency Agreement

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)



- (I) Complete identification of the applicant and its representatives, including contact information.
- (II) Complete description of the anticompetitive practice, including the identification of the other participants and the respective individual roles.
- (III) Admission of participation in the anticompetitive practice by the beneficiary.
- (IV) Statement of the applicant that it was not the ring-leader of the anticompetitive practice.
- (V) Statement of the applicant that it has already ceased its participation in the anticompetitive practice.
- (VI) List with all the documents provided or to be provided by the applicant in order to support the existence of the anticompetitive practices.
- (VII) Obligation of the beneficiary to fully cooperate with the SDE in all aspects of the investigation.
- (VIII) 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.

(IX) Certification by the SDE that the applicant was the first to apply for leniency.

(X) Statement by the SDE that it had not enough evidence to guarantee the condemnation of the applicant.

2.9 Leniency *plus*

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.

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.

2.10 Confidentiality



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. 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.

2.11 Other penalties

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.

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

3. FREQUENTLY ASKED QUESTIONS

3.1 What is a “cartel”?

Under Articles 20 and 21 of the Brazilian Competition Law, any act that has as its object or effect the restriction or distortion of competition with effects in the Brazilian territory may be considered illegal.



Cartel activities include the following: (I) price-fixing: e.g. where parties agree, directly or indirectly, on the prices; (II) establishment of restrictions / quotas on output: e.g. agreements which restrict output or production; (III) bid-rigging: e.g. arrangements where parties collude when submitting their tenders; and (IV) market sharing /allocation agreements.

Cartels usually require the elements of secrecy and deception. The secret cooperation often enables the existence of arrangements or understandings with little documentary evidence or third party awareness. In these circumstances, the uncovering and the proof of the existence of cartels can be more difficult than other forms of corporate misconduct. The leniency program enables the authorities to penetrate the cloak of secrecy of the cartel.

3.2 What was the first cartel sanctioned after 1994?

The first cartel sanctioned by the Brazilian antitrust authorities under the Law n. 8,884/94 was the “steel cartel”. In 1999, CSN, Cosipa and Usiminas were found guilty of having taken part of a cartel in the steel sector and CADE imposed a fine in excess of R\$ 50 million. A parallel price increase and a meeting among competitors held prior to that were considered enough evidence to ensure their punishment. After CADE’s ruling a criminal suit was filed, and a final decision is still pending.

After this ruling, a number of others followed, such as the “shipping companies cartel” (2001), “fuel retailers’ cartels in Goiania and Florianopolis” (2002), “airline companies cartel” (2004), “crushed rock cartel” (2005), “newspaper publishers of Rio de Janeiro cartel” (2005), “steel bars cartel” (2005), “driving schools of Santos cartel” (2006), “vitamin cartel” (2007), “cartel against the generic drugs” (2007), “security companies of Rio Grande do Sul cartel” (2007), “meatpackers cartel” (2007) and “sand extraction cartel” (2008). Other 300 cartels are currently under investigation by criminal and administrative authorities in Brazil. Fines in excess of R\$ 340 million were imposed against one single cartel formed by three firms and 29 executives have already been sanctioned by a criminal court judge or by a criminal appellate court for their involvement in a cartel.

3.3 How should a firm or an individual behave if coerced by its competitors to take part in a cartel?

The firm or the individual that suffers coercion should report the cartel to the SDE. If the firm or the individual did take part in the cartel, it may still be possible to join our Leniency Program and, in exchange for total or partial immunity at the administrative level and total immunity at the criminal level, the party must effectively cooperate with the investigations and follow the other Program requirements.

3.4 Which information may be exchanged within trade associations?

Trade and business associations may become meeting points for cartel members, and this is why it is important to ensure that it performs its role within legal boundaries. Information

related to common concerns regarding environmental issues, or to the safety of certain product or service are examples of information that may be exchanged without arising antitrust issues. Recent and disaggregated information related to price, sales conditions and clients are commercially sensitive information, which may not be exchanged as it may harm competition.

If the association annually consolidates sector data, it is important that the information is received by an independent agent, that does not work for any of the associates, so to ensure the confidentiality of the disaggregated information. More information on this may be found in another brochures prepared by SDE's Antitrust Division: "*Combate a Cartéis em Sindicatos e Associações: Como atuar em conformidade com a Lei de Defesa da Concorrência*", available at www.mj.gov.br/sde. Available only in Portuguese.

3.5 Can the second to come forward benefit in any way?

The Brazilian Leniency Program adopts a "*winner-takes-all*" approach and only rewards the first eligible person to come forward to the SDE, generating a race among cartel members.

However, an applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel, and meets the leniency program requirements, may receive full administrative and criminal immunity for the second offence and a one-third reduction in fine with respect to the first offence ("*Leniency plus*", see item 2.9).

3.6 When can the SDE be considered aware of a cartel?

The SDE will consider itself aware of an alleged conduct if, at the time of the initial application, it has initiated formal proceedings to investigate a cartel as described by the applicant. Please note that this does not require the proceedings to be public.

3.7 How is the "full cooperation" obligation met?

Leniency is conditional upon full and frank disclosure by the applicant. In order to take advantage of the Leniency Program, applicants must provide the SDE with all evidence and information in their possession or available to them relating to the anticompetitive conduct.

They must cooperate fully and continuously with the SDE throughout the investigation and any ensuing proceedings.

After an application for leniency is made, the SDE will advise the applicant of steps it must reasonably take to comply with this condition and the timeframe in which the steps should be taken. The SDE will always try to ensure that the matter is moved forward in the most efficient and timely manner possible.

If an applicant of the Leniency Program deliberately misleads the SDE, provides false evidence, deliberately withholds or destroys important evidence or otherwise behaves in a manner deemed inconsistent with full cooperation, SDE will inform CADE that the beneficiary did not abide by its obligations under the Leniency Agreement and recommend that immunity should not be granted.

3.8 What about former employees and uncooperative employees?

Former employees involved in a cartel can benefit from the Leniency Program if they execute the Leniency Agreement together with their former employer company.

A situation could arise where an applicant company is unable to secure the cooperation of one or more of its directors, officers or employees. This circumstance will not prevent the SDE from granting leniency to the company. The SDE encourages the company to explain to such uncooperative directors, officers or employees that they can only benefit from immunity of criminal and administrative liability if they execute the leniency agreement together with the company.

3.9 What about the “cease involvement” requirement?

If a cartel is ongoing, the SDE encourages leniency applicants to approach the SDE before making it known that it has ceased its involvement in the conduct.

Upon celebration of a Leniency Agreement, the SDE may request the leniency applicant to act in a manner which



does not disclose the SDE awareness of the cartel to the other members of the practice. This might allow the SDE an opportunity to obtain important evidence against other cartel participants by a dawn raid.

3.10 Who is a “cartel ring-leader”?

The Leniency Program disqualifies a leniency applicant only if it is the “clear ring-leader” of the cartel activity. In determining it, the SDE will have due regard to the roles played by each respective cartel participant.

The SDE recognizes that in many cartels there is no clear ring-leader. The mere fact that one party has arranged a meeting or maintained records will not necessarily exclude the application of the leniency to it. Furthermore, there will be no clear leader if two or more parties are properly considered equals in the conduct. For example, if in a two-firm conspiracy each firm played an equal role in the operation of the cartel, both firms are potentially eligible for leniency.



Finally, the fact that an undertaking is a market leader does not necessarily entail that it is the ring-leader of the cartel.

3.11 What if a Leniency Agreement is not signed?

Proposals for a leniency agreement refused by the Head of the SDE do not entail confession as to matters of fact or acknowledgment of illegal conduct, and such refusal cannot be disclosed in any way. In case no agreement is reached, all related documents should be returned to the party.

Furthermore, there is a *Chinese Wall* between the Head of the SDE and its Antitrust Division: the Antitrust Division does not participate in any way in the negotiation process. In case no agreement is reached and the Antitrust Division starts, by its own means, to investigate the conduct, the Secretary of Economic Law will be conflicted and will not be involved in any way in that investigation.

If during the negotiation of the Leniency Agreement, the Antitrust Division recommends to the Secretary of Economic Law the initiation of formal proceedings regarding the same conduct reported by the applicant, the Secretary may, for the sake of the investigation, inform the Director of the Antitrust Division that there is an agreement under negotiation, without disclosing the identity of the applicant or any other information. In case no agreement is reached, the Director of the Antitrust Division would be free to investigate the case and the Secretary of Economic Law would be conflicted and would not be involved in any way in that investigation.

3.12 What if I am unsure whether or not the Leniency Program applies?

Interested parties wishing to make a leniency application but are uncertain as to whether the Leniency Program would apply to them may approach the SDE for a clarification specific to their situation. This clarification may be done on a “hypothetical” basis.

However, such inquiries or clarifications will not be considered an application under the Leniency Program and does not guarantee a marker, i.e. the position of the applicant in the queue for leniency.

3.13 How does the Program apply to international cartels?

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.

- (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.

(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.

It should be noted the increasing cooperation between the Brazilian and foreign antitrust authorities, including joint dawn raids and exchange of information with respect to a conduct that may affect different jurisdictions.

3.14 Does the Leniency Agreement prevent damage claims from third parties in civil courts?

No. The Leniency Agreement does not protect the beneficiary from being sued in civil courts for damages by third parties that consider themselves as having been injured by a cartel agreement.

4. HOW TO REPORT A CARTEL

Information of the existence of a cartel may be reported electronically through www.mj.gov.br/sde, by clicking on the icon “*Clique Denúncia*”:



The complaint may also be sent to:

Secretaria de Direito Econômico
Departamento de Proteção e Defesa Econômica
Ministério da Justiça
Esplanada dos Ministérios, Bloco T, 5^o andar, sala 552
Brasília-DF
CEP 70064-900

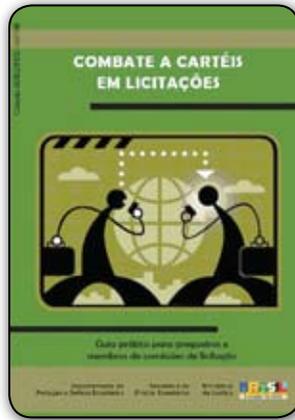
Although it is preferable that the informant identify himself or herself, this is not mandatory. The informant should nonetheless provide the SDE with as much information as possible about the reported conduct, such as where the meetings take place, any available evidence, and names of the firms and individuals involved.

5. MAKING AN APPLICATION UNDER THE LENIENCY PROGRAM

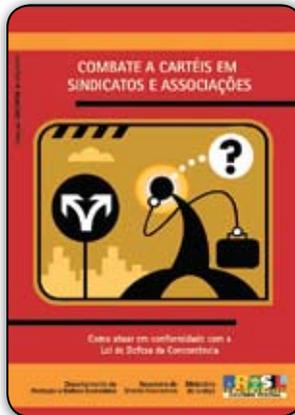
To make an application under the Leniency Program, please contact the Chief of Staff of the SDE at + 55 61 2025 3112.

OTHER BROCHURES

(The following brochures are available only in Portuguese and may be requested through the email address: dpde@mj.gov.br)



**Brochure SDE n. 02/2008:
Fighting Bid Rigging**



**Brochure SDE n. 03/2009:
Fighting Cartels in Trade Associations**

FIGHTING CARTELS: BRAZIL'S LENIENCY PROGRAM

Cartels are the most egregious violation of competition law and harm consumers by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others. The Organization for Economic Cooperation and Development (OECD, 2002) estimates that prices in a cartelized 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.

For that reason, Brazil considers the fight against cartels as a top priority. Since 2003, the Secretariat of Economic Law (SDE) has been using enhanced investigative tools such as dawn raids and leniency, and the Council for Economic Defense (CADE) has been imposing record fines on companies and executives found liable for cartel conduct. Criminal prosecution has also been intensified, with the increasing cooperation between the SDE and the Prosecutors and with the Civil and Federal Police.

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. Brazil is no exception to this rule: Law n. 8,884/94 recognizes that it is in the interest of Brazilian consumers to grant benefits to a giving cartel member who wishes to put an end to its illegal conduct and fully cooperate with the antitrust authorities, ensuring the condemnation of the other cartel participants.

This brochure presents recent developments in the fight against cartels in Brazil and an overview of Brazil's Leniency Program.

**Secretariat of
Economic Law**

**Council for
Economic Defense**

**Ministry
of Justice**

