

# **Some Lessons on the Antitrust Procedures in the USA for the Brazilian Competition Defense System<sup>1</sup>**

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**Dezembro 2002.**

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## RESUMO

Este trabalho contrasta procedimentos antitrustes no Brasil e nos Estados Unidos e, a partir dessa comparação, apresenta algumas sugestões para o Sistema Brasileiro de Defesa da Concorrência (SBDC), particularmente no que se refere à análise da prática de cartel. O texto é estruturado em três partes: primeiro, uma análise dos procedimentos americanos é realizada, tanto no que concerne à competência de cada órgão envolvido quanto na forma da análise - se baseada na regra da razão ou na interpretação da ilegalidade *per se* - e depois o mesmo é feito para o Brasil. Após, são apresentadas algumas considerações finais relacionadas à realidade brasileira atual.

## ABSTRACT

This paper contrasts antitrust procedures in Brazil and in the USA and, from this comparison, presents some suggestions to the Brazilian Competition Defense System (SBDC), particularly in cartel analysis scope. The text is structured in three parts: first, an analysis of the USA procedures is carried out, regarding the competence of each body and the form of analysis - whether by the rule of reason or *per se* interpretation - and then the same is done for Brazil. Finally, some final remarks are presented concerning Brazilian actual reality.

## 1. INTRODUCTION

This article contrasts antitrust procedures in Brazil and in the USA and, from this comparison, presents some insight and suggestions on the Brazilian Competition Defense System, hereinafter SBDC, particularly in cartel analysis scope. The text is structured in three parts: first, an analysis of the USA procedures is carried out, regarding the competence of each body and the form of analysis – whether by the rule of reason<sup>3</sup> or *per se* interpretation – and then does the same for Brazil. Finally, some final remarks are presented concerning Brazilian actual reality.

## 2. PROCEDURES IN THE USA

In the USA, mergers, acquisitions, and *joint ventures* – the so-called “concentration acts” – are analyzed by the rule of reason criterion and dealt with administratively. These are reviewed either by the *Federal Trade Commission* (FTC), an independent antitrust agency, or by the Antitrust Division of the Department of Justice (DOJ). The decision on which of the two institutions should be responsible for a specific case is taken when these cases are presented to the North-American Antitrust System, so that there should be no double analysis undertaken the two bodies. However, the rule adopted for this decision is not clear. Usually the DOJ analyses the merger acts in certain economic sectors defined by the North-American jurisprudence (sectors which, historically, have been analyzed by the DOJ).

On what concerns anticompetitive practices, the decisions about not only the analysis criterion to be adopted (rule of reason or *per se* interpretation), but also the body responsible for instructing the lawsuit (DOJ or FTC) and the legal environment in which the issue should be dealt with (criminal or administrative) will depend on which is the practice type, whether: (i) intrinsically harmful cartels, also known as *hard-core cartels*, (ii) *soft cartels*, or (iii) “other anticompetitive practices”<sup>4</sup>, such as, tied sales, retail price maintenance, vertical restrictions, and predatory pricing.

The hard core cartels are analyzed by the *per se* criterion, dealt with only in the criminal environment, and classified within three categories<sup>5</sup>: price maintenance or output restriction, market division and *bid rigging*. As these comprise criminal acts (which is informally called “*smoking gun evidences*”), these cases require intense investigation to prove illegality, through factual proofs (or irrefutable, or conclusive), not through economic evidence. In this way, whether it brought or not loss to the consumers of the product in issue (loss of consumer welfare), a sanction is applied if the crime is proven. Moreover, these cases can only be reviewed by the DOJ, which receives the assistance from the Federal Police of the USA (the *Federal Bureau of Investigation* – FBI) if it needs. The FTC, in general, does not take knowledge of those cases and the penalties may be imposed both to the companies and to their executives, and that the latter may be condemned to prison terms.

<sup>3</sup> When need arises for an analysis on the damage caused to consumers, in the case of an anticompetitive practice. In the case of a merger and acquisition, a balance should be made between damages and benefits. Thus, the analysis by the rule of reason is set against the “*per se*” interpretation, as there is no need, in the latter case, to analyze the damages.

<sup>4</sup> The most frequent practices are pointed out in the USA Analysis Guide, in the SEAE / SDE Analysis Guide and in article 21 of Law 8884/94.

<sup>5</sup> Even though there are other classifications of hard core cartel, I am using what OECD had agreed as being hard core cartel.

The *soft cartels* do not have a precise definition. These are cartels which do not fit neither in the *hard-core cartels* nor in classic anticompetitive cases. An enlightening example of a *soft cartel*, occurred in the USA, is the *Airline Tariff Publishing Company* (also known as the ATPCO case). In this case, in short, despite the airlines not having explicitly negotiated price maintenance at a certain level, between themselves, one of these signaled to the others, by a computer system, which price would be fixed for a given moment<sup>6</sup>. Even before this information reached the final consumer, the others airlines observed and reacted until a price was “agreed upon”, which was the price shown to the consumer. Thus, in this case, the investigation could not be carried out on the search for factual criminal proof (which comprises proof searched for in the case of hard core cartel), but only on circumstantial (or indirect) evidences.

According to a Chicago-based DOJ antitrust division expert, these cases are few in number, and when they do arise, they are previously discussed between the DOJ and the FTC to agree on which criterion will be adopted, whether the rule of reason or the *per se* interpretation, and on which agency will be responsible for the case. If the case is dealt with according to the first criterion mentioned, the environment is administrative and so may be reviewed by either of the agencies. If it is dealt with according to the *per se* interpretation, the environment is criminal and is necessarily reviewed by the DOJ.

The “other anticompetitive practices” may be reviewed either by the FTC or by the DOJ, always by the rule of reason criterion and, therefore, always in the administrative environment. The decision on which of the two institutions will be in charge of a specific case is made when it is presented to the North-American Antitrust System, in the same way as it is done with the economic concentration acts.

### 3. PROCEDURES IN BRAZIL AND SOME COMPARISONS WITH THE ONES IN USA

Regarding merger control and the so-called “other anticompetitive practices” (all, except for cartels, which will be approached further ahead in this text), as it happens in the USA, they are reviewed by the rule of reason criterion and are dealt with administratively, according to Law 8884/94. The Secretariat for Economic Monitoring of the Ministry of Finance (SEAE-MF) and the Secretariat for Economic Defense of the Ministry of Justice (SDE-MJ) prepare the lawsuit, and the Administrative Council for the Economic Defense (CADE), a federal autharchy linked to the Ministry of Justice, judges it. The preparation of the lawsuit follows the analysis criteria exposed in the Joint Analysis Guide by the SEAE and the SDE, quite similar to the North-American criteria.

The administrative penalties, if necessary, are imposed by the CADE, according to Title V (“on infringements of economic order”), chapter III (“on the penalties”), article 23, Law 8884/94, the arguing on the decision being assigned to the Public Attorney, thereby respecting the due process of law, the full defense and free access to the Judiciary Branch, as expressed in Sections LIV<sup>7</sup>, LV<sup>8</sup> e XXXV<sup>9</sup>, respectively, of article 5 of the Federal Constitution of Brazil.

<sup>6</sup> A detailed analysis of this case may be found on SEAE homepage, Opinion # 363/2001/MF/Seae/COGDC-DF, from September 11, 2001. <http://www.fazenda.gov.br/seae/>.

<sup>7</sup> “[N]obody shall be deprived of his or her liberty, or of his or her assets without due legal process.”

<sup>8</sup> “[T]o the litigants, in a judicial or administrative process, and to the defendants in general, are assured the right to contradictory and to full defense, with their inherent means and resources”. Full defense = the right to produce proof, independently of whether there has been a change. Contradictory = right to deny what the other party has stated, whether by producing proof or not.

Regarding cartels, there are both procedural differences and similarities between Brazil and the USA. These are the cases in which there are some questions which need to be explored.

In Brazil, as well as in the USA, cartels may be understood as both *hard-core* and *soft cartels*. The first is classified in the same way as in the USA (that is, price maintenance, or output restriction market division and *bid rigging*), whereas the *soft cartel*, just like in the USA, does not have a precise definition. This last type, in Brazil, could comprise, among other situations, price maintenance encouraged by trade union or by association, because these are situations which usually refer to scattered sectors (several companies) and, therefore, of difficult coordination for maintaining a cartel. In this situation, if there is no “organizer”, the cartel would have little chance to be formed and, if constituted, low probability of success (that is, to be kept up), as the market would render its survival unfeasible. Therefore, as this cartel would not be comprised by the companies, but by a sole economic agent (trade union or association), the latter would not be fitted either into any of the three classic definitions of cartels or in the classic cases of anticompetitive practices. Thus, it is admitted as a *soft cartel* case. In fact, among the three cartel cases judged by CADE until now, two of these refer to a cartel made by the association of oil retailers relevant markets (gasoline and GLP).

There is another similarity with USA procedures in addition to those listed above. In Brazil, according to Law 8137/90<sup>10</sup>, article 4, a cartel comprises a crime, with the penalties being envisaged in article 4 itself (at the end)<sup>11</sup>. Therefore, on what concerns criminal environment, irrefutable or conclusive proof should be raised to demonstrate that illegality has been committed for sanction to exist, independently of the fact that there may be, have been or shall be harm to the consumer. That is, an analysis *per se* must be carried out. However, differently from the USA, a cartel can also be prosecuted in the administrative scope, as per Law 8884/94. Even in the criminal scope, there are important peculiarities to be pointed out. These are the points approached next.

According to a criminal point of view, there is a substantive difference between proceedings in Brazil and in the USA. While in the latter country the criminal investigation, which demands all procedural formalism, is carried out by the antitrust division of the DOJ, in Brazil this is not carried out by the SBDC (SEAE, SDE and CADE), but by the Public Attorney (Federal or State) which, in case they deem necessary, may request help from the Police (Federal or State). There is, therefore, complete non-involvement of the SBDC on what concerns criminal scope and the possibility of the non-inclusion of the Police in the investigation. Thus, a possible searches and seizures (henceforth dawn-raid), in this scope, may only be carried out by the Public Attorney<sup>12</sup> (through a criminal lawsuit) or by the Police through a police inquiry (allowing for a dawn-raid) without need for a criminal lawsuit). Besides, only on executives may be imposed penalties, who may even be condemned to prison. The companies are not prosecuted, and thus, no punishment is inflicted on them, as it occurs in the USA. That is out of the reasons it is important for the administrative process to exist in Brazil, from the point of view of anticompetitive sanctions. That is, although corporations are not condemned in the criminal

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Usually, the contradictory and the full defense operate jointly, that is the individual uses proof to defend himself or herself from a charge.

<sup>9</sup> “[The] law shall not exclude a grievance or a threat to rights from appreciation by the Judiciary Branch”.

<sup>10</sup> Defines crimes against tax and economic order, and against consumption relationships and provides other measures – chapter II (on crimes against economic order and consumption relationships), article 4, items II (set up agreements, covenants, adjustments or alliances among offers, aiming at a), b) and c)) and V.

<sup>11</sup> The criteria which a judge should use to establish the penalty are found in articles 9 (section I makes reference to article 4) and 10, in the same Law.

<sup>12</sup> Some Judicial Authorities (the “Ministério Público”) have already prosecuted cartels by using even telephone taps. These cases are still few, although the numbers of investigations is growing.

scope, if condemned in the administrative scope, they would have to pay for the infringement committed.

In cartel investigations in the USA, the DOJ acts preparing the lawsuit, playing the role of investigation intelligence, as it knows what (desired documents) and where (site in corporation) to look for evidence, when it is carrying out a dawn-raid. If comparing with Brazil, it act as the Public Attorney. The FBI would then be the police agent, trained and prepared to perform this search. As in Brazil the Public Attorney may also play the role of police agents, we cannot compare the FBI with the Brazilian police.

Concerning a more sophisticated procedure in detecting and prosecuting cartels, as the North America entrepreneurial knows already the procedures by the DOJ doing dawn-raids, the Leniency Program in the USA is becoming important day-by-day. According to James M. Griffin speech<sup>13</sup>, DOJ is applying one leniency program each month in the USA. Usually it is a success, therefore, the tendency is to enhance this number, per month, what could result in more cartel cases being “solved” by this program than by dawn-raid.

Unfortunately, in Brazil, although it has a Leniency Program, there is an legal uncertainty that makes this program useful yet. This means that Brazil has a need to solve this issue as soon as possible and meanwhile this problem is not solved that dawn-raid, instead becoming less important, it is the only way to reach easier factual evidences from a cartel.

### **3.1. Problems faced by the SBDC and some possible suggestions – criminal field**

Excepting the legal problem of the leniency program already said, conclusion reached from the Brazil’s reality is there are at least four problems for the operation of the System in Brazil.

Firstly, the SBDC members have no competence to do dawn-raid, which renders it difficult to prove a cartel in the administrative field. The SDE and the SEAE do not have the judicial branch (in the administrative sense) to carry out a dawn-raid act. In theory, they may request the “General Union Attorney (AGU)” to postulate on their behalf so that they may make use of the dawn-raid (which is essentially what the Secretariats desire in order to facilitate proof of cartel formation in an administration lawsuit). However, in addition to the fact that this procedure adds up one more bureaucratic step to the process and compromises the discretion under which the investigations need to be moved, the AGU may (or may not) require an injunction from the Judiciary Branch. Thus, a problem which would technically bear a solution may, in practice, not have one, as the AGU may not postulate on behalf of the Secretariats and, consequently, these may not have a way to carry out an dawn-raid.

Secondly, there being a criminal investigation, the Public Attorney do not have a team of antitrust specialists. Thirdly, in case of a criminal investigation, it is not always that the Police may be part of an dawn-raid (as the Public Attorney may not call for its help). Fourthly, even if the Public Attorney summon the Police to partake in the criminal investigation, the roles of these two agencies are not well defined, as it happens in the USA; therefore, there could be overlapping of attributions.

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<sup>13</sup> “Criminal Practice and Procedure Committee”, American Bar Association, section of antitrust law, 49<sup>th</sup> annual spring meeting – [www.usdoj.gov](http://www.usdoj.gov).

One question could arise, regarding problem “1”, mentioned above: why do the Secretariats wish to use the dawn-raid measure, if it is not necessary, in an administrative process, to prove a crime (independently of whether or not damage must be shown)? The answer is simple: if there is no factual (irrefutable or conclusive) proof, it is much harder to demonstrate by economic evidence that there has been the formation of a cartel. Thus, the lawsuit becomes more vulnerable, if CADE judges “as guilty” and the participants appeals on the Judiciary. That is the reason it is convenient for the SBDC members to have access to documents, for example, which show the existence of illegality – the proof would be stronger in this case. This does not mean, on the other hand, that economic evidences are not necessary for a possible demonstration of damage<sup>14</sup>. Besides, it is worthwhile remarking that the SBDC do not aim doing the investigation of the case criminally, only to have access to the factual proof of illegality (found in investigations with dawn-raid, by the Public Attorney or by the Police, for example).

Therefore concerning the “problems” just mentioned, three suggestions are advanced as answers. In short, the first two place the SBDC aside from criminal investigations, whereas the third includes it.

The first suggestion refers to a criminal investigation with an dawn-raid, and contains four points: a) include the Police, as the latter possesses the know-how to carry out an dawn-raid (this would provide more credibility to the dawn-raid, as trained and prepared police agents would be involved); b) define and distinguish the roles of the Public Attorney and of the Federal Police as it occurs in the USA (the practices of this country could be used as an example); c) qualify the Public Attorney professionals to act in antitrust investigations and d) create, in some way, an interdependence between the two environment (administrative and criminal) so that they may help each other.

The second suggestion refers to a police inquest with a dawn-raid. In this case, it would only be necessary to create, in a certain way, an interdependence between SBDC and the Police, so that the antitrust bodies may obtain the results from the dawn-raid.

The third suggestion refers to a criminal investigation and should include point “a”, exclude points “c” and “d”, and point “b” could be altered in the following manner: instead of the Public Attorney acting alone, they would be forced to include the SEAE and the SDE in the cartel investigations in the criminal scope (nowadays the Public Attorney may request the participation of the Secretariats, but they are not obliged to do so), as these are the competent bodies on the theme in question.

From the SBDC viewpoint, the two first proposals seem to be the most appropriate, as they would keep the administrative and criminal spheres separate<sup>15</sup>. In these two cases, either the Police or the Public Attorney would carry out the dawn-raid – according to Law 8137 – and would send the results of the investigations to the Secretariats, so that they could use them in the preparation of the lawsuit in the administrative scope. In the case of the second proposal, the Police could, if it wishes so, forward to the Public Attorney, the inquest carried out so that a judicial action could be started (as the Public Attorney is the prosecution in the penal lawsuit), concomitant with the administrative process.

<sup>14</sup> It is worthwhile commenting that finding illegality proof (of the formation of the cartel) is distinct from finding evidences of the damage. At times, this proof may coincide, albeit this is not a general rule.

<sup>15</sup> As an observation, my view does not reflect the Canadian reality for an example. There, the antitrust authorities do dawn-raids. Therefore, even though I am suggesting the opposite for Brazil, this does not mean neither I am saying that my opinion is the best direction for all jurisdictions nor that there is a consensus among the Brazilians, concerning this subject.

In fact, attempts have been made to implement the second proposal, through a decree, but this was not carried forward for several reasons, that I will not refer as it is not the main subject of this article. Therefore, a practical problem remains.

However, fortunately, also because the second proposal did not succeed, in October of 2002, the SBDC started to do the most difficult part of my first proposal mentioned, item d, which is to make a relationship with the 27 State Public Attorneys. All of them signed a cooperation agreement with the SBDC. Which we hope will help the SBDC to find quicker the cartels. Therefore, is convenient that the new government, in January 2003, carry forward the whole first proposal.

### 3.2. Problems faced by the SBDC and some possible suggestions – administrative field

Still, on the procedures in Brazil regarding cartels, another issue deserving comments deals with the Administrative Procedure, which does not exist in the USA.

The legal basis to prosecute a cartel is found on article 20 of Law 8884/94, which is the same serving as a basis for administrative process relating concentration acts and other anticompetitive practice, and article 21, I, II, III e VIII. For the specific case of cartels, article 20 gives rise to some issues as to the analysis criterion to be used<sup>16</sup>. If, for some, it is interpreted as *per se*, for others the interpretation by the rule of reason seems unquestionable. In fact, the two interpretations may be possible, for the following reasons:

If, on one hand, article 20<sup>17</sup> mentions “that have as object (I to IV), even though they may not be reached”, the *per se* interpretation seems plausible as, independently of the effect (damage), there would be illegality and, on this account, punishment. On the other hand, article 20 also mentions “which may produce the following effects (from I to IV), even though they may not be reached” which leads to interpretation by the rule of reason, for, even if the cartel may not be causing damage at the moment or not having caused damage in the past, may cause damage in the future (threat of damage)<sup>18</sup>. The doubt arises as, between one interpretation and the other there is, in article 20, the word “or”. Mathematically, the word “or” means the union of sets (*per se* or rule of reason). Even with these sets being disjointed, one may choose the set to be used, whether by the rule of reason or by the *per se* interpretation.

What could be done to improve the interpretation of article 20 is replace the “or” by “either one or the other”, followed by an explanation on when to use each one of them<sup>19</sup>. This is what the Government proposed in the review of those articles of Law 8884/94. The consequence is that, in its new proposal, article 20 becomes the legal basis for the analyses of the concentration acts and the “other anticompetitive practice”, following the criterion of the rule of

<sup>16</sup> As article 20 is the legal basis, in addition to article 54 for concentration acts and for the “other anticompetitive practices”, presented in article 21, the interpretation by the rule of reason has to be present in article 20. However, it is questioned whether the *per se* interpretation could not also be made (which becomes relevant only in *hard core cartel* cases).

<sup>17</sup> “The acts manifested in any manner, which have as purpose or may produce the effects as follows even though they may not be reached comprise an infringement of the economic order independently of guilt: I – limit, misrepresent or harm, in any way, free competition or free initiative; II – dominate a relevant market of goods or services; III – arbitrarily increase profits; and IV – exert a dominant position in an abusive way”.

<sup>18</sup> Under this latter viewpoint, an analysis of damages should be performed, which may be referred to the time over the past (there was damage), the present (the damage is current) or the future (there may be the damage).

<sup>19</sup> This is because, mathematically, “either A or B” means choosing one of the sets.

reason. And the new article 21 is left only for cartels, according to the *per se* criterion, the old article 21 could become article 21. However, as this proposal “is under study”, there still stands the confused version which we have at the moment.

However, this dubious interpretation (the problem) does not generate relevant problems for the SBDC in the specific case of cartels. It is enough that the System interpret article 20 of the current Law as being according to the rule of reason, even though it does not agree that it should be done in this manner. If the System, in particular the CADE, prosecutes a cartel according to the *per se* manner, the defense attorneys for the defendants may appeal in the Judiciary by alleging there have been no evidences of damage. As the interpretation by the rule of reason is a fact (as shown previously), the allegations by these attorneys will be pertinent, which may only lead the judge to demand that evidences of damage be presented. To this end, he does not need to appeal to CADE. He may appoint an expert who, in his turn, may analyze the entire case again (and not only demonstrate the damage) and, if he wishes, not even use SEAE’s and SDE’s opinions. An expert is called to present an opinion on the case, when the lawsuit reaches the Judiciary Branch, even if he or she is not an antitrust specialist; his or her opinion will serve as a basis for the judges to decide whether the cartel should be prosecuted or not. The risk of a mistaken analysis is great, as this is the opinion of a single person, even though this person may be a renowned antitrust specialist; he or she may or may not use the opinion drawn up by the two Secretariats, as well as CADE’s judgement, and may not agree with the latter institutions’ investigative tools. Thus, for diminish the probability that the case goes to the Judiciary and the judge appoint an expert, it would be more effective if the System analyze and prosecute the cartel according to the rule of reason. In this way, the SBDC would be “erring by excess” that is; between not showing damage (*per se* analysis) and running the risk of the case moving on to the judiciary with greater ease or showing evidences of damage (analysis by the rule of reason); it would be better if the System chose the second option.

With this, one concludes that the dubious interpretation does not cause serious problems, except for the fact that the SBDC, in particular the CADE (as this is the judging body), has to interpret the Law by the rule of reason, even though it is not in full agreement with it. This would be the practical solution for a question which would have its structural solution in the approval of the new Law 8884.

In fact, the new Law would put an end to this problem of merit regarding the current Law. Firstly because, according to the microeconomic theory, most of the cartel cases bring damage to the society<sup>20</sup>, thus there would be no need to prove this damage in most of the cases (95% perhaps). This is the way, inclusive, that the USA understand this issue. Secondly, because, according to the rule of reason criterion, in which the assessment of the damage, or threat of damage, to the Brazilian society should be clearly demonstrated, a question arises: what does *being duly demonstrated* mean? As the answer is subjective, this fact may become the reason for an *ad infinitum* dispute in the Judiciary. What would be sufficient indications in the Judiciary, so that State could impose monetary fines, aiming at avoiding continuity of the anticompetitive practice, or with the aim of charging for an anticompetitive practice carried out (in the past) or with the purpose of rendering it unfeasible in the future? As there is not one answer, in the limit, the companies prosecuted (administratively) may be punished by the CADE

<sup>20</sup> Can be demonstrated that if competitive sellers face a buyer with monopsony power, a cartel among sellers can act as “countervailing power” to the buyer power and, therefore, may improve consumer welfare. Moreover, a cartel among only a few sellers in a market with many sellers may be completely unsuccessful in trying to influence price and thus have zero impact in consumer welfare. This is the rationale behind the “de minimis” rule for very small cartels in the EU, for instance. Therefore, as the vast of cartels are harmful and as there are real benefits in economizing on judicial and prosecutorial resources to having a *per se* rule, all of these benefits outweigh any benefits that society might lose by outlawing the very rare beneficial cartel.

but, when the case is taken to the Judiciary, they remain free from suffering the penalty. Consequently, society may not be able to punish companies for the formation of cartels. And, moreover, if the case is not criminally brought, not even the company executives will be punished. Thus, the solution to avoid these inconveniences is by replacing the old Law by the new proposal of the Law, in which a cartel is prosecuted in the *per se* form. Besides, the adoption of one of the previously made suggestions would be mandatory, for the cartel to be proven in a more expeditious manner.

#### **4 – FINAL REMARKS**

In summary, the consequence of following the rule of reason criterion and for the SBDC not being able to carry out a dawn-raid is as follows: if the preparation bodies (SEAE and SDE) know that the probability of a fine not being paid by the companies is high (the fine is not credible), when prosecuted by the CADE and moved on to the Judiciary; why should these bodies invest (in personnel, in efforts, in time, etc) on the search of evidences that there have been unfair practices and that these practices have brought damage to the consumers? The whole issue is costly, there is great scarcity of resources, and it is frustrating for the three bodies not to see the condemnation executed. May it be, as some argue, that the fact that CADE has started to prosecute certain firms for cartel formation be, by itself, a believable sign for the market to avoid cartel formation even though the fines may not be paid? That is, will it be that the entrepreneurs cost, in terms of image, upon being prosecuted (albeit knowing that payment of fine shall not happen) is so high that it overlaps the financial benefit of forming cartels, within the Brazilian culture (in which there was, until a short time ago, the “CIP – Interministerial Price Council”)? These are questions on which it is necessary to ponder, as there is not a single answer.

Thus, in view of the problems approached, one concludes that, from the administrative point of view, the approval of a new proposal for Law 8884/94 would be important for the better operation of the SBDC. This would be the best structural solution to the problem caused by the dubious interpretation of this Law. Moreover, the importance of cartel cases being administratively prosecuted has been seen, on what concern anticompetitive sanctions in Brazil, as the companies are not condemned under the criminal point of view, unlike what happens with the entrepreneurs. On what concerns the criminal scope, the inclusion of the SBDC in the investigations is not appropriate. The aim of the System members is to secure factual proofs (which are usually obtained through dawn-raid), which, even not being necessary in an administrative process to prove the existence of a cartel, comprises the easiest and most striking way to demonstrate it. In this way, I believe it would be interesting to create an interdependence between the two spheres, despite maintaining them separated. Finally, it seems pertinent for me to mention that one way for these problems to be solved would be through the creation of a competition defense agency, which could bring together the three SBDC members or at least the SEAE and the SDE. This agency, on account of its structure and tools, would certainly enjoy greater prestige, credibility and efficiency to solve cases, both of acts of concentration and of practice, with greater expeditiousness.