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International Cooperation in Anti-Cartel Enforcement

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Brazilian anti-cartel enforcement has taken a quantum leap forward in recent years. Since the early 21st century, the Economic Law Office (SDE) – the Ministry of Justice body in charge of conducting administrative cases against cartel behavior – has gained clout. This burgeoning power is mostly due to the strengthening of legal mechanisms available to investigate and prosecute such anticompetitive practice, such as the adoption of leniency programs or the possibility of resorting to search and seizure (dawn raids) to obtain evidence against cartel behavior. These measures date back to the beginning of this decade, and the possibility of executing cease-and-desist commitments with regard to concerted action has been recently added up to them. As a result, the number of cartel cases has grown dramatically.¹

Such measures have taken Brazil to a leading role in the international community, to the point of becoming a role model for new antitrust bodies/agencies the world over. For instance, US Department of Justice Representative Scott Hammond underscored, during the International Competition Network Conference held in Brasília last year, that the Brazilian leniency program was a model to follow.²

SDE's most recent initiative against cartel behavior was announced in mid-April 2009, upon its adhesion to the *Rede Global Anticartéis* (Global anti-cartel enforcement network –

¹ In 2008 alone, 50 persons were arrested on cartel behavior charges. The sand cartel in the State of Rio Grande do Sul was fined R\$ 2.9 million-plus in December 2008, the highest fine applied to date on relative terms, since it was in the vicinity of 17.5% to 22.5% of the gross turnover of sentenced companies. Presently, over 300 investigations are underway at SDE.

² US-DOJ Representative Hammond also pointed out, during the 57th Meeting of the American Bar Association – Spring Meeting, that Brazil's evolution in anti-cartel enforcement action over the last years was the most striking among its peers, having even suggested that "companies involved in cartel behavior should seek to execute a leniency agreement with the Economic Law Office (SDE)."

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“RGA”). This will enable SDE to interface with other similar bodies worldwide, which will in turn facilitate the interchange of information and give greater efficiency to anti-cartel enforcement actions. This network will allow the Brazilian competition authorities to improve their knowledge about cases underway in other jurisdictions, and will streamline the access to information and documents that will eventually serve as evidence for cases in progress in Brazil.

According to ICN’s guide to best practices for anti-cartel enforcement,³ such cooperation may occur at all stages during investigations. At the pre-investigatory phase, such assistance could take shape as discussions between investigators about the collection of information, definition of relevant markets, selection of target companies, and definition of evidence preservation measures. As investigations progressed, these anti-cartel enforcement bodies could coordinate joint investigative actions, such as the simultaneous occurrence of raids in several countries, or even the multi-jurisdictional subpoena or deposition of executives suspected of cartel behavior. At the post-investigatory phase, these authorities could cooperate by exchanging documents obtained during investigations or by promoting discussions among investigators.

Cartel-related information eligible for sharing could fall into four categories: (i) *public information*, which is disclosed by the companies themselves to the market; (ii) *agency information*, comprising information generated within the competition agency/body itself not necessarily based on information in the public domain, also containing the status of investigations and the further steps in that country; (iii) *information from the parties involved already in the possession of one agency*, possibly obtained from an immunity/amnesty applicant, answers to official notices, raids, and the like, whether voluntarily or under compulsion; and (iv) *information obtained from the parties at the request of another agency*. Once in possession of such information, SDE will be better equipped to prosecute cartel cases in Brazil (especially international cartels with repercussions in Brazil) while also enabling other ICN member countries to access the information generated here.

Such strengthening of inter-agency cooperation has raised some doubts concerning (i) procedural divergences deriving from the complexity, duration and interaction of government bodies from distinct jurisdictions, whether directly related to competition aspects or those involving other bodies whose action is required by operation of law (*e.g.*,

³ *International Competition Network: Cartels Working Group - Subgroup 1 – General framework: Co-operation between Competition agencies in Cartel investigations. Sixth Annual ICN Conference, Moscow, Russia (May 30 – June 1, 2007). Available at http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCo-operationbetweencompetitionagenciesincartelinvestigations.pdf (accessed on May 5, 2009).*



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court, police or even diplomatic authorities in the countries affected by cartel behavior); (ii) lack of confidentiality safeguards for the parties under investigation, which should authorize the other antitrust bodies to receive information disclosed by such parties in the country of origin; (iii) lack of uniformity in cooperation between the several agencies, due to the existence of distinct international cooperation agreements covering this issue; (iv) legal hindrances to release of confidential matter as imposed in each of the jurisdictions concerned; (v) restriction on admissibility of evidence deriving from cooperation efforts, putting into risk the integrity of investigations in “recipient” nations; and (vii) impairment to exchange of information from a given antitrust agency in some cases.

There are three major pitfalls stemming from such concerns: (i) the accused cannot be compelled to produce evidence against himself; (ii) evidence produced in a manner not acceptable under Brazilian law will be held illegal, even if originating from foreign sources; and (iii) coordinating distinct cases involving agencies with distinct levels of complexity and institutional maturity is difficult.

The first pitfall refers to the potential disclosure of confidential information in leniency cases and its use in other countries where the applicant is not assured of immunity/amnesty. Even if the applicant has proven in a cartel case in Europe (or in the United States) that such anticompetitive practice has also existed in Brazil, doubts may arise about the use of such evidence by SDE in investigations underway in Brazil. This is because the documentary evidence in a foreign case originating from a leniency program may even prove cartel behavior in Brazil, but could be viewed as privileged and, as such, ineligible for its valid use without the applicant’s consent.

The second pitfall is the observance of due process when it comes to admissibility into evidence so that the documents gathered in foreign cases may be validly used in Brazil. For example, some countries may accept wiretapping without a court order as a legal means to raise evidence of cartel behavior within that specific jurisdiction. Even if the resulting material makes direct reference to concerted action in Brazil and SDE has had access to transcriptions, the validity of such evidence for criminal and administrative sentencing of the parties in Brazil is highly disputable.

As for the third pitfall, the myriad levels of institutional maturity and complexity involved could stand as roadblocks to effective communication between competition bodies/agencies. Scrutinizing the information vis-à-vis the legal requirements in each country is a complex and costly task, the more so for countries lacking in sturdy administrative structures. Unrestricted disclosure may entail risks not only for the disclosing investigator (if the underlying document is rated as privileged or confidential), but also for the recipient investigator (since the use of such document may impair the credibility of its investigations and, perhaps, ultimately lead to impossibility of characterizing cartel behavior).



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Whereas it is expected from investigators to make sure that such an important anti-cartel tool meets the admissibility requirements so that the ensuing evidence is eventually held legally valid in Brazil, the companies should take due care. In fact, companies will need to rethink the content of information being disclosed to investigators, and how that will take place. By so doing, investigated companies will be able to benefit from the leniency policy offered in a country without running the risk of being sentenced by the administrative and/or criminal authorities in another jurisdiction that is also given access to supporting documents.

From whatever perspective, it is clear that companies and economic groups must increasingly pay close attention to the actions and requirements on the part of Brazilian competition authorities, thus keeping consistent compliance programs as a means of ensuring proper fulfillment of competition rules and regulations by managers and employees. In fact, after nearly fifteen years on the road, the Brazilian competition law has finally reached maturity, and investigation bodies have gained enough sophistication to detect anticompetitive practices and prosecute them. And SDE's adherence to the RGA is yet another step on this evolutionary path.

São Paulo, May 7, 2009.