



## **The Antitrust Review of the Americas 2006** **A global competition review special report**

### **Cartels and abuse of dominant position – potential monetary consequences to offenders**

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On 12 July 2005, an article was published in The Wall Street Journal, with the following headline: ‘Trustbusters Take Aim in Brazil—Illegal Cartels Feel the Heat From Newly Aggressive Regulators’. The author made a concise but accurate description of the current trends in cartel investigation in Brazil: “With the blessing of Brazil’s leftist, pragmatic government, this country’s antitrust authorities are moving aggressively to try to break up anti-competitive behaviour. Although the antitrust drive started to pick up steam in the 1990s, it never had focused on cartels as much as it does now. Previously, regulators primarily concentrated on whether mergers and takeovers would harm competition.”

This is surely the current state of affairs in Brazil: the local antitrust authorities are striving to pose a credible threat to cartels and other actions in restraint of trade, and corporations should be increasingly aware (and concerned) about the potential risks of adopting ‘schemes’ to limit or injure competition in the Brazilian market.

And the local authorities are clearly succeeding in their efforts to discourage purportedly anti-competitive practices, for several reasons. Firstly, there has been a significant improvement in the legal and regulatory tools available for cartel investigations, starting back in 2000 with issuance of Provisional Measure No. 2055, which was passed into Law 10149/00, amending and adding new provisions to Law 8884/94 (the Brazilian Competition Act). The local antitrust authorities were given broader and more efficient investigative powers. Among other issues, Law 10149/00 allowed the antitrust officials to break into corporate premises to search for and seize documents pertaining to the investigated company; it also established

finer for the obstruction of investigations and instituted the leniency programme. Following the enactment of said law, other statutes brought new additions to the Brazilian antitrust crusade, such as the participation of the federal police department in any probes into possible cartels with interstate or transnational repercussions.<sup>1</sup>

The second factor contributing to the success of the Brazilian antitrust initiative and its efforts to fight anti-competitive practices was the imposition of fines on companies breaching antitrust regulations. This is one of the most important factors considered by companies in a risk assessment: what would be the financial consequences of a commercial practice that could, even potentially, harm competition and injure the market and consumers?

This Article examines how the Brazilian authorities have penalised companies found guilty of antitrust behaviour; it is written in light of our duties as legal advisers to several corporations that are increasingly willing to better understand the rules, procedures and consequences of antitrust laws in Brazil.

The Brazilian Competition Act sets forth the general rules for calculating the fines to be imposed for violation of the antitrust law in Brazil. Primarily, these rules are set out in Article 23 of the Competition Act, as follows:

“Article 23: The following penalties shall apply to the person liable for an anti-competitive practice:

- for companies: a fine from one to thirty per cent of the gross pre-tax revenue thereof as of the latest financial year, which shall by no means be lower than the advantage obtained from the underlying violation, if assessable;
- for senior managers directly or indirectly liable for their company’s violation: a fine from ten to fifty per cent of the fine imposed on said company, which shall be personally and exclusively imposed on the senior manager; and
- in the case of other individuals and other public or private legal entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without separate legal identity, that do not engage in business activities, when it is not feasible to use the gross pre-tax revenue value, the fine will be six thousand (6,000) to six million (6,000,000) UFIR or any other index replacing it. [Added by Law 9069/1995]

Sole Paragraph - Fines imposed on recurring violations shall be doubled.”

In addition to these monetary fines, other penalties can be imposed, such as: at the offender’s expense, publication of the decision in a court-appointed newspaper for two consecutive days, over one to three consecutive weeks; ineligibility for

government funding or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the federal district authorities and related entities, for a period equal to or exceeding five years; annotation of the offender on the Brazilian Consumer Protection Register, among others.<sup>2</sup>

It should only be noted that individuals involved in cartels are also subject to criminal sanctions, including imprisonment (Law 8137/90). So far, there have been no precedents of businessmen being arrested, although there are already criminal proceedings under way regarding the involvement of senior managers in cartel formation. Therefore, given the pace of local antitrust authorities, this possibility is perhaps not too far off.

Regarding the monetary penalties set forth in Article 23, the Competition Act also establishes that in their calculation<sup>3</sup> the authorities should take into consideration: (i) the severity of the offence, (ii) the offender's good faith, (iii) the advantages obtained or envisaged by the offender, (iv) actual or threatened occurrence of the offence, (v) the extent of actual or threatened damages to open competition, the Brazilian economy, consumers, or third parties, (vi) the adverse economic effects on the market, (vii) the offender's economic status, and (viii) recurrences.

These provisions are sufficiently broad to grant the authorities a significant discretionary power when calculating the monetary penalty to be imposed on an antitrust offender. Also, some questions arise from the wording of the law. According to Article 23, the fines should be based on a percentage of the company's "gross pre-tax revenue thereof as of the latest financial year". The questions that arise from this wording are: (i) which is the year to be considered as the basis for calculation of the fine? The year preceding the opening of official investigations? The year preceding that in which the offence occurred or began? and (ii) should the fine be calculated over the total pre-tax revenues of the company or only over the revenues generated in the relevant market in which the violation occurred?

Although a law issued after the enactment of the Competition Act (Law 9021/95) established that the year to be considered for the calculation of the fines set forth in Article 23 should be the one preceding the opening of official investigations (meaning the administrative proceeding), still there are no clear answers to these questions, because CADE (Conselho Administrativo de Defesa Econômica)—the Brazilian antitrust agency with powers to decide on antitrust cases—has not always accepted this rule. In any case, the analysis of some precedents issued by the local antitrust agency points to some trends that may shed some light on these questions,

and will also show the extent of fines that have been recently imposed in Brazil on companies for cartels and abuses of dominant position. In this sense, we will provide brief descriptions of cartel and abuse of dominant position cases judged by CADE, as to better illustrate the matter.<sup>4</sup>

### Cartel cases

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In the landmark CSN/Usiminas/Cosipa<sup>5</sup> case, judged on 27 October 1999, CADE imposed fines of 1 per cent calculated over the total gross revenues of each company for the year of 1996 (which was the year preceding the opening of administrative proceedings). Fines were imposed on the three investigated companies, as follows: (i) CSN—Companhia Siderúrgica Nacional: BRL22,180,000 (roughly e7.7 million), (ii) Usiminas SA: BRL16,180,000 (roughly e5.6 million), and (iii) Cosipa SA: BRL13,150,000 (roughly e4.6 million).

On 27 June 2001, in the Estaleiros Ilha/Marítima<sup>6</sup> case, the CADE board fined Estaleiros Ilha SA and Marítima Petróleo e Engenharia Ltda for alleged unlawful bid rigging. CADE held there was sufficient evidence that the agreement entered into between the two companies participating in a bidding process in 1997 was detrimental to competition. The fine imposed by CADE amounted to 1 per cent of the companies' total gross revenues in the year preceding the performance of the anti-competitive practice.

In the Florianópolis Gas Stations<sup>7</sup> case judged on 27 March 2002, the CADE board concluded that some gas stations in the city of Florianópolis (and their managers), together with the Gas Stations Association of Florianópolis and its leader, violated the Brazilian Competition Act by restraining free competition in the fuel market in the Florianópolis region. As a result of the alleged hard-core cartel behaviour, the CADE board imposed a fine of 10 per cent of the gas stations' yearly gross revenues for the year preceding the commencement of administrative proceedings.

In the Sindipetro/SC<sup>8</sup> case, judged on 2 July 2003, CADE found that nine gas stations in the city of Lages, their managers and the Gas Stations Association of the State of Santa Catarina — Sindipetro/SC violated the Brazilian Competition Act by restraining free competition in the fuel market in the Lages region. As a result of the alleged hard-core cartel behaviour, CADE imposed a fine of 15 per cent of the gas stations' yearly gross revenues obtained in the year preceding the commencement of administrative proceedings.

In the Sinpetro/DF9 case, judged on 3 March 2004, CADE found that some gas stations and the Gas Stations Association of the federal district—SINPETRO/DF violated the Competition Act by restraining free competition in the fuel market in the federal district region. As a result of the alleged hard-core cartel behaviour, CADE imposed a fine of 5 per cent of the investigated parties' yearly gross revenues obtained in the year preceding the commencement of administrative proceedings.

In all of these three cases, CADE used similar criteria to calculate the fines to be imposed on the parties: (i) the advantage obtained by the parties, (ii) the duration of the anti-competitive practice, and (iii) the aggravating and extenuating circumstances set forth in Article 27 of the Brazilian Competition Act. In addition, CADE expressly stated that the fine value was intended to deter recurrence of those anti-competitive practices.

In the Varig/TAM/Transbrasil/VASP10 cartel case (judged by CADE on 15 September 2004), CADE applied, by majority vote, a fine of 1 per cent of the investigated companies' gross revenues obtained in the relevant market affected by the anti-competitive practice (a shuttle service between the cities of Rio de Janeiro and São Paulo) in 1999 (when the practice was performed).

Finally, in the most recent cartel case judged by CADE, the Sindipedras11 case, adjudicated on 13 July 2005, CADE found that 17 quarry companies and the São Paulo State Crushed Rock Mining Industry Association—Sindipedras—violated the Brazilian Competition Act by restraining free competition in the crushed rock market in the São Paulo metropolitan region.

The purported cartel initiated its activities in the mid-1990s (somewhere between 1994 and 1996), became fully-fledged in 1999, and ceased its activities in 2003, after a dawn raid by the Economic Law Office of the Ministry of Justice (SDE) with the cooperation of the Federal Public Prosecutor Office and the federal police on the premises of Sindipedras, resulting in the search and seizure of documents relating to the cartel. Also in 2003, the SDE opened administrative proceedings to further investigate the alleged anti-competitive practices of the quarry companies and Sindipedras.

According to the report prepared by the CADE reporting commissioner in charge of the case, the alleged hard-core cartel was highly organised, using various computer programs to monitor prices, conduct market studies, prepare guides for cartelists, etc.

As a result of the alleged hard-core cartel behaviour, CADE imposed the following

finer: (i) 20 per cent of the yearly gross revenues of the companies that participated in the steering committee of the cartel, registered in the year preceding commencement of administrative proceedings, (ii) 15 per cent of the yearly gross revenues of the companies that participated in the cartel but were not part of the steering committee, registered in the year preceding commencement of administrative proceedings, and (iii) 300,000 UFIRs<sup>12</sup> (roughly e105,000) on Sindipedras because of its role as the coordinator of cartel activities.

In calculating the fine imposed on the quarry companies, CADE considered the following aggravating circumstances set forth in Article 27 of the Brazilian Competition Act: (i) the severity of the violation, (ii) the offender's good faith, and (iii) the extent of actual or threatened damages to open competition, the Brazilian economy, consumers, or third parties.

#### Abuse of dominant position cases

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In the White Martins<sup>13</sup> case, judged on 26 June 2002, CADE held SA White Martins liable for monopolising a relevant market and impeding the development of competitors. CADE imposed a fine of 5 per cent of the total gross pre-tax revenues of White Martins in the year preceding the opening of administrative proceedings. The BRL24 million fine (roughly e8.4 million) was based on the revenues White Martins obtained in 1997 (the investigated practice occurred between 1 July 1996 and 12 December 1997). CADE's calculation of the fine took into consideration the effects of the White Martins practice on consumers, the aggravating circumstances, the advantage obtained by White Martins, and the duration of the anti-competitive conduct, concluding that the 5 per cent fine was enough to meet its indemnification purpose and punitive nature.

In the Power-Tech/Matel<sup>14</sup> case (a refusal to deal case in which Matel Tecnologia de Informática Ltda was the investigated company), decided on 26 March 2003, CADE applied, by majority vote, a fine of BRL620,000 (roughly e216,000) based on the same method of calculation used in the White Martins case (calculation of the purported advantage obtained increased by a multiplier factor applied over such value). Initially, the reporting commissioner held that Matel should be penalised by the minimum amount set forth in Article 23, I of the Brazilian Antitrust Act, given that none of the aggravating circumstances set out in Article 27 of the Brazilian

Antitrust Act were verified.

Following the reporting commissioner's vote, two other commissioners also argued that the fine should be 1 per cent of the gross revenues recorded by Matel in the year preceding the opening of administrative proceedings.

After the votes of these two commissioners, a third commissioner expressed his vote, suggesting the adoption of a different criterion to calculate the fine for Matel. The criterion used by this commissioner considered the purported advantage gained by Matel from the anti-competitive practices as the minimum basis for calculation of the fine and, based on the principle of proportionality and the rule of reason, the commissioner stated that the fine should not be equal to the minimum value, but rather increased by a multiplier factor applied over such minimum value as to reach the final value of the fine, which, in this case, amounted to BRL620,000.00 (roughly e216,000). His arguments were accepted by the CADE board in the final decision rendered on the case.<sup>15</sup>

## Conclusion

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An analysis of these decisions allows us to conclude that, in calculating the fine set forth in the Brazilian Competition Act for acts in restraint of trade (especially cartels and abuse of dominant position), CADE has used its discretionary power, and has not applied strict and clear rules that could be viewed as precedents. The antitrust authorities generally base the fine on the gross revenues obtained in the year preceding the administrative investigations. However, there are a few cases in which CADE has used the year in which the investigated practice was performed, applying a fine based on the gross revenues recorded in such year. In other, more recent cases, CADE has based the fine on the gross pre-tax revenues from the relevant market in which the anti-competitive practice occurred.

Although a clear methodology for calculating fines has yet to be adopted, these precedents indicate that CADE is enforcing the provisions of the Brazilian Competition Act, not only with respect to investigations, but also in regard to the imposition of penalties that hit enterprises the hardest: the ones that affect their finances and expose them negatively in the media. These costs should certainly be taken into account when designing business strategies for the Brazilian market and when defining the level of control granted to commercial departments, which are sometimes unaware of antitrust or compliance rules.

Notes

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[1] According to information recently released by the Economic Law Office of the Ministry of Justice (SDE—the primary antitrust authority responsible for antitrust investigations in Brazil), since 2003, when SDE carried out its first dawn raid, over 15 search warrants have been executed and almost all of them have resulted in administrative and/or criminal proceedings against companies. SDE states that it is currently investigating over 200 cases of cartel behaviour and related practices.

[2] As per Article 24 of Law 8884/94.

[3] In fact, when calculating all penalties set out in the Competition Act, as per Article 27 of Law 8884/94.

[4] Case law research relied upon the assistance of associate Ricardo Pastore.

[5] Administrative Proceeding No. 08000.015337/97-48.

[6] Administrative Proceeding No. 08012.009118/98-26.

[7] Administrative Proceeding No. 08012.002299/2000-18.

[8] Administrative Proceeding No. 08012.004036/2001-24.

[9] Administrative Proceeding No. 08000.024581/94-77.

[10] Administrative Proceeding No. 08012.000677/1999-70.

[11] Administrative Proceeding No. 08012.002127/02-14.

[12] UFIR=tax reference unit.

[13] Administrative Proceeding No. 08000.022579/97-05.

[14] Administrative Proceeding No. 08012.000172/98-42.

[15] It is worth noting that some of these decisions issued by CADE are being challenged by the parties at the judiciary branch.

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Pinheiro Neto Advogados was founded in 1942, and has steadily grown in size and importance ever since. It currently has over 1100 members, comprising 350 lawyers (60 of whom are partners), 180 trainees and 150 paralegal workers, backed up by other professionals and administrative staff. The firm provides full legal services in all fields of law. The firm has offices in São Paulo, Rio de Janeiro and Brasília, and works with local correspondents throughout Brazil.

The practice of Pinheiro Neto Advogados in the competition law area dates back to the sixties, when Law 4137/62 created the Conselho Administrativo de Defesa Econômica—CADE—to act as Brazil's primary competition authority. At that time, CADE did not deal with merger control.

Pinheiro Neto Advogados participated in the development of congressional work that led to the enactment of revised competition legislation in 1994. From that time onward, a team of lawyers in the São Paulo, Rio de Janeiro and Brasília offices has offered clients broad assistance in this area, including training programmes for professionals in Brazil and abroad and ongoing participation in seminars, publication of papers on the matter, and follow-up of the proceedings and techniques adopted by other competition authorities, especially the Federal Trade Commission, the Antitrust Division of the Department of Justice in the United States, and the DG Competition of the European Commission, in addition to exchanges with various other foreign law firms working in this area.

Competition law is a major area of practice at Pinheiro Neto Advogados. The Competition Law Practice Group handles many competition cases, involving various aspects of business conduct as well as mergers carried out in Brazil or abroad, that have an impact on the Brazilian market.