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The International Comparative Legal Guide to: Cartels & Leniency 2011

A practical cross-border insight
into cartels and leniency

Published by Global Legal Group, in association with CDR,
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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The term cartel is not defined in the Brazilian Antitrust Law. However, the same law establishes as a competitive violation the collusion between competitors to determine prices and conditions or divide markets and clients regarding the commerce of products or services (see question 1.2 below). In Brazil, cartels can be prosecuted criminally and administratively. Concerning criminal procedures, cartels are punishable with two to five years' imprisonment and fines; in administrative procedures only fines can be imposed.

1.2 What are the specific substantive provisions for the cartel prohibition?

Brazil's Antitrust Law (Law 8.884/94) establishes (and prohibits) the following practices (article 21) as illegal agreements (cartels):

- (i) setting or offering in any way – in collusion with competitors – prices and conditions for the sale of specific products or services;
- (ii) obtaining or otherwise procuring the adoption of uniform or concerted business practices among competitors; and
- (iii) apportioning markets for finished or semi-finished products or services, or for supplying sources of raw materials or intermediary products.

Cartels are also considered a crime prosecuted in the Federal Courts. The prohibition in this case is provided by Law 8.137/90, article 4, II.

Cartels can also be considered a civil violation – allowing the recovery of damages – as any other anticompetitive conduct established under the Brazilian Antitrust Law.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by Brazilian antitrust authorities, which are the *Secretariat of Economic Law of the Ministry of Justice* (*Secretaria de Direito Econômico – SDE*), the *Secretariat of Economic Monitoring of the Ministry of Finance* (*Secretaria de Acompanhamento Econômico – SEAE*), and the *Administrative Council of Economic Defense* (*Conselho Administrativo de Defesa Econômica – CADE*).

In the criminal field, the cartel prohibition is enforced by the Federal and State Attorney-General Offices.

Criminal and administrative authorities act jointly in many cartel investigations.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

According to the Brazilian Antitrust Law, the SDE may conduct preliminary investigations *ex officio* or upon reasonable request in writing of interested parties. After the conclusion of preliminary investigations within sixty days, the SDE's secretary orders the inception of the corresponding administrative proceeding or its dismissal, subject to *ex officio* appeal to the CADE in this latter case (articles 30 and 31, Law 8.884/94).

Administrative proceedings shall be instituted within eight days after cognisance of the underlying fact, formal complaint or end of the preliminary investigations, as per an order issued by the SDE's secretary regarding the facts verified thereunder (article 32, Law 8.884/94). Defendants shall be summoned to file a defence within fifteen days and produce any evidence within forty-five days after the submission of their defence, and may introduce new documents any time during discovery (articles 33 and 35, Law 8.884/94). Upon conclusion of discovery, defendants will be summoned to present their final arguments within five days, after which the SDE's secretary will issue an opinion about the forwarding the case to the CADE for review or dismissal, subject to *ex officio* appeal to the CADE in this latter case (articles 39 and 40, Law 8.884/94).

Once the case is admitted, the CADE's president will randomly distribute it to a councillor who will act as a reporter, and will send it to the Attorney General to issue an opinion within twenty days (article 42, Law 8.884/94). The CADE has no deadline to adjudge the case, although Brazilian procedural rules establish a prescriptive period after three years without any relevant diligence related to the investigation, and, after that term, the CADE is prevented from rendering judgment (article 1(1) Law 9.873/99).

No specific criminal prosecution is provided by law, but according to general Criminal Procedure rules the main steps are: (i) inception of a criminal investigation; (ii) indictment by the Public Prosecutor; (iii) inception of the legal procedure; and (iv) conviction of the companies involved in such illegal practice.

1.5 Are there any sector-specific offences or exemptions?

There are no formal sector-specific offences or exemptions in Brazil. The CADE's past decisions can be used as guidance on which types of behaviour are allowed according to the specific sector of activities.

1.6 Is cartel conduct outside Brazil covered by the prohibition?

Yes, but only if it affects the Brazilian market (*article 22, Law 8.884/94*).

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes*	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The investigatory powers always depend on the specific terms of the Warrant that authorises such investigation.

2.3 Are there general surveillance powers (e.g. bugging)?

Both antitrust authorities and the Attorney-General's Office may record telephone conversations or telecommunications, but only under judicial authorisation.

2.4 Are there any other significant powers of investigation?

According to Law 8.884/94, the SDE has a very wide range of investigatory powers, including the right to:

- Request information, documents and data from respondents and third parties.
- Carry out inspections at the companies' premises.
- Request judicial authorisation for the Federal Police to: record telephone conversations or telecommunications, and seize objects, documents and electronic files from respondents' offices and plants (*article 35-A, Law 8.884/94*).

The investigatory powers concerning criminal procedures are similar to those above-mentioned.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business or residential premises are carried out by the SDE officials, court officials and the Federal Police. Those searches shall be limited to the terms of the Search and Seizure Warrant.

2.6 Is in-house legal advice protected by the rules of privilege?

No. In-house counsel does not have any privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The most important limitation is the mandatory authorisation from the Judiciary to allow the Federal Police to record telephone conversations or telecommunications and seize objects, documents and electronic files from respondents' offices and plants. Otherwise, antitrust authorities are free to hear witnesses, or request documents or any information.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes. Obstruction or non-cooperation with the authorities regarding questions or the exhibition of documents is punishable with daily fines from BRL 5,320.50 (about US\$3,130) to BRL 106,410 (about US\$62,594). The SDE and the CADE have already imposed fines on companies that did not cooperate with administrative procedures.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to the Antitrust Law, the sanction is an administrative fine from 1% to 30% of the gross domestic revenue in the last financial year. The fine must not be less than the advantage obtained with the underlying violation, if assessable. In the event of default, the administrative decision is judicially enforceable.

For each manager directly or indirectly liable for a company violation, the sanction is an additional personal administrative fine from 10% to 50% of the corporate fine. In the event of default, the administrative decision is judicially enforceable.

For any other third parties (whether individuals or public and private legal entities and their associates, including independent contractors with or without legal identity that do not engage in business activities), administrative fines vary from BRL 6,384.60 (about US\$3,756) to BRL 6.384 million (about US\$3.7 million) (if it is not feasible to use a revenue fine). In the event of default, the administrative decision is judicially enforceable.

Moreover, CADE can impose the following penalties:

- An order to publish a summary of the decision in a newspaper.
- A prohibition to participate in public bids.
- A restriction on public entities' funding.
- Divestment orders, such as orders to sell assets and dissolve the undertaking.

- The continuity of prohibited practices is punishable with daily fines from BRL 5,320.50 (about US\$3,130) to BRL 106,410 (about US\$62,594).

According to Criminal Law, cartel practices are punishable with imprisonment of two to five years or fines (*article* 4, Law 8.137/90).

3.2 What are the sanctions for individuals?

The Antitrust Law establishes for individuals who take part in cartels, whether directly or indirectly liable for the company's violation, a fine from 10% to 50% of the amount applicable to the company under their personal and exclusive liability (*article* 23, I, Law 8.884/94).

Individuals who participate in cartels are also punishable by a specific criminal procedure with two to five years' imprisonment or fines (*article* 4, Law 8.137/90).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The financial capacity of the companies is considered by authorities when a fine is applied. This is because fines are a percentage imposed over the last year's gross revenue of the company (without taxes). There is no specific provision establishing the possibility of reducing a fine on the basis of financial hardship or an inability to pay grounds.

3.4 What are the applicable limitation periods?

If an investigation is carried out with regard to illegal conducts, there is no term for the authorities to conclude it. Although, Brazilian rules establish a prescriptive term that lapses after three years without any relevant diligence related to the investigation, and, after that term, the CADE cannot render any judgment.

The prescriptive term for the imposition of sanctions for cartel conducts when no procedure has been installed to investigate the illegal practice is twelve years. This is due to amendments to Brazilian Antitrust Law enacted in 1998 (Provisional Measure 1708/1998), and since then the prescriptive term to investigate an illegal conduct that is also considered a crime is the same as provided by the Criminal Law.

In the event of continuity of such illegal practices, which effects extend on the market for a long time, there is no term for the investigation and related imposition of sanctions.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The Brazilian Law is silent about this subject.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Labour case law in Brazil recognises the possibility of reimbursement of the employer when he is held liable for a damage caused to a third party by a malicious act of an employee. However, in Brazilian antitrust case law there are no relevant precedents yet in this sense.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

- It is possible to obtain a leniency agreement from the antitrust authorities. A leniency agreement gives immunity regarding administrative fines and prevents the inception of a criminal action (*article* 35-C, Law 8.884/94).

The SDE may enter into leniency agreements that extinguish the administrative action or reduce from one to two-thirds the applicable penalty against individuals and corporations that violate the economic order insofar as they effectively cooperate with the investigations and the administrative procedure, and that such cooperation results (*article* 35-B, Law 8.884/94) in the identification of other co-offenders and the gathering of information and documents that evidence the notified or investigated violation.

Leniency is not granted to individuals or corporations that are cartel leaders.

The Brazilian Antitrust Law establishes the following requirements for the execution of leniency agreements (*article* 35-B(2), Law 8.884/94): (i) the individual or corporation has to be the first to qualify with regard to the notified or investigated violation; (ii) the individual or corporation has to completely cease and desist being involved in the notified or investigated violation as from the date of proposal of the agreement; (iii) the SDE does not have sufficient evidence to warrant a judgment against the individual or corporation upon the proposal of the agreement; and (iv) the individual or corporation acknowledges having participated in the violation, offers full and permanent cooperation with the investigations and the administrative procedure, and appears, at its own expenses, to all procedural acts until their end, whenever summoned.

- The leniency agreement will determine the necessary conditions to warrant effective cooperation and useful results to the procedure. The execution of the leniency agreement is not subject to the CADE's approval; nonetheless, upon rendering its administrative decision and ascertaining the compliance with the terms of the agreement, the Council shall: (i) determine the extinction of the administrative action on behalf of the offender in the event that the proposal was presented to the SDE before such agency had any previous knowledge of the notified violation; or (ii) in all other situations, reduce from one to two-thirds the applicable sanctions and grade such sanctions, taking into account the offender's effective cooperation and good-faith in the compliance with the leniency agreement.

The effects of the leniency agreement are extendible to corporate officers and managers involved in the violation as long as they execute the respective agreement jointly with the company.

In the criminal area there is the so-called "rewarded cooperation", whereby one of the criminal offenders may have its sentence reduced from one to two-thirds whenever such voluntary cooperation leads to the clarification of facts and the authorship of unlawful practices (*article* 6, Law 9.034/95).

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. The Administrative Rule 04/2006 of the Ministry of Justice provides a "marker system". According to such system, a Leniency Agreement may be proposed orally or in writing. The proposal shall be made to the SDE's secretary that will transcribe the Term in one single instrument, as witnessed by an official of the

Secretariat of Economic Law, which shall contain, among other things, the Proponent's full qualification, a summary of the facts known by the Proponent regarding the investigation (including its involvement and co-authors' identities), and the date, place and time to present documents, information or oral explanations. The Term duly dated and executed will remain with the Proponent until a further decision of the Secretariat of Economic Law about the application (*articles* 62 and 63 of MJ Administrative Rule 04/2006), and guarantees its position of First Proponent. The SDE's secretary may, however, refuse the oral proposal and condition its acceptance to the written form (*article* 63(6), MJ Administrative Rule 04/2006).

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The proposal may be presented orally or in writing. However, to conclude a leniency agreement the execution of a formal and confidential document with the SDE is required to establish the necessary conditions under which the agreement will be made and guarantee the cooperation of the company with the investigation. The application must be in writing and be presented to the SDE in a sealed envelope. The rejection of the application by the SDE neither shall imply admission of guilt regarding the findings of fact, nor shall acknowledgment of the unlawful conduct under examination be disclosed.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The application is always confidential. An exception is made when it is important for the investigation that the leniency agreement is not kept confidential.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

This decision is submitted with a subjective criterion. The Brazilian Antitrust Law provides that a leniency agreement is possible only if the lenient company can provide sufficient information to conclude the cartel investigation. When authorities already have enough proof of the illegal conduct, the leniency is not applicable.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, there is a 'leniency plus' policy. An applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel, and meets the leniency programme requirements, will receive leniency for the second offence and a one-third reduction in fine with respect to the first offence.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. Individuals can report cartel conducts independently of their employer. Brazilian law also establishes a leniency programme for individuals. For requirements of the agreement, see question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no equivalent to the plea bargaining in Brazil. However the CADE may, in any administrative procedure and at any step of the investigation, enter into a *cease and desist commitment* with the investigated company regarding the investigated practices whenever, upon a judgment of convenience and opportunity, it decides such commitment addresses the interests protected by law (*article* 53, Law 8.884/94). The commitment constitutes solely a judgment debt.

The administrative procedure is suspended while the commitment is being complied with and it is dismissed at the end of the established term if all the conditions were met. The suspension of the procedure regards solely the party that executed the commitment, and follows its regular course for all the other parties under investigation (*article* 53(4), (5), and (6) Law 8.884/94).

The *cease and desist agreement* must be approved by the CADE to be effective. Since May 2007, parties under a cartel investigation are allowed to have the administrative process suspended by executing a *cease and desist agreement* and paying a monetary contribution to a Fund for Diffuse Right Defence (*article* 53(2), Law 8.884/94).

Since 2007, the CADE requires the assumption of fault by the party in order to sign a cease and desist agreement. The number of cease and desist agreements settled with the CADE has increased substantially in the last two years.

7 Appeal Process

7.1 What is the appeal process?

According to Law 8.884/94, the CADE's decisions are subject to full judicial review by the federal courts (*article* 5, *Federal Constitution*). There is no deadline to request judicial review, but appeals can only be filed by the main parties to the original decision.

In the criminal field, the appeal is similar to any other judicial procedures.

7.2 Does an appeal suspend a company's requirement to pay the fine?

An appeal may suspend with an injunction a company's requirement to pay the fine until a final decision is reached about the case. According to the Brazilian antitrust law, however, it is necessary to present a guarantee for the debt in order to avoid an execution suit by the CADE (*article* 65, Law 8.884/94).

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, according to the Civil Procedure Code, the judge, on its own initiative or when requested by the parties, can determine the cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

It is possible to claim indemnification related to damages resulting from any illegal conduct. Third parties can file indemnity claims for losses suffered as a result of a prohibited agreement or practice (article 29, Law 8.884/94). The Civil Procedure Code and the Civil Law Code provide specific procedures and rules for the inception of a lawsuit. The evidence of anti-competitive agreements or practices established in the administrative procedure can be used in private litigation. However in every civil damages action it is necessary to demonstrate the fact (despite the previous administrative decision) and the chain of causation. It is important to stress that civil damages actions for loss suffered as a result of cartel conduct are not yet very common in Brazil.

In fact there is no substantial Brazilian case law in such actions regarding antitrust infringements. However, we cannot affirm that there are differences regarding a follow on or a stand alone action.

8.2 Do your procedural rules allow for class-action or representative claims?

Class actions are not possible. Public class actions are possible and must be started under Consumer Protection and Criminal laws by the Federal Attorney-General's Office.

8.3 What are the applicable limitation periods?

The limitation period is one of 10 (ten) years prescribed in the Civil Code, if not suspended or tolled.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Brazilian law of public civil action is very comprehensive regarding who is entitled to claim for damages, but very restrictive regarding the direct chain of causation that would allow the payment of damages.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no specific rules for civil damages follow-on claims in cartel cases. The cost rules applicable are the ones prescribed in the Civil Procedure Code.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

In Brazil, indemnity claims related to losses suffered as a result of cartel conduct are not usual. Notwithstanding, there has been noticeable interest in the subject and an increased number of indemnity claims in the latter years. However, the number of civil damages actions in Brazil is not substantial yet and there is no definitive decision about actions of this type.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Since May 2007, the execution of a *cease and desist agreement* and payment of a monetary contribution to a Fund for Diffuse Right Defence has allowed the suspension of the administrative procedure against the parties under investigation. Regulators can now accept formal commitments from the parties during the administrative process to suspend the restrictive agreement or practice without a judgment against it and the parties can apply to sign a *cease and desist agreement* at any stage of the investigation. The *cease and desist agreement* must, however, be approved by the CADE to be effective.

9.2 Please mention any other issues of particular interest in Brazil not covered by the above.

Although the most important issues about Cartels and Leniency were addressed above, it is worth mentioning that, in November 2007, the first *cease and desist agreement* in a cartel case was concluded; and it was conducted by Magalhães, Nery e Dias – Advocacia. Our law firm was responsible for the defence of a company accused of a cartel in the cement manufacturing industry. It was an important case involving major cement producers, and our client entered into Brazil's first *cease and desist agreement* with antitrust authorities under Article 53 of Law 8.884/94, and so the investigation has been suspended during next year. After that time, if the agreement is fully complied with, the administrative procedure against our client will be dismissed. As agreed, the company paid BRL 43 million (about US\$25.3 million) to the Brazilian Fund for Diffuse Right Defence.

Regarding Antitrust Issues, our law firm also led the following cartel cases:

- Defence of one of the major Brazilian meatpackers in a cartel investigation concerning meat sales. This was an important case involving the most important Brazilian Meatpackers.
- Defence of an important Brazilian company in a cartel investigation concerning orange juice sales. This was an important case involving one of Brazil's major orange juice producers.

To prevent antitrust issues, we also provide regular and full assistance to several companies. Another important area of our work is the creation of compliance programmes for our clients to prevent the practice of anticompetitive activities.

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Carlos Francisco de Magalhães, the Founding Partner of the firm, is a pioneer in competition law in Brazil. He became involved in the field soon after the first Brazilian competition law was enacted (1964). Because of his reputation in the subject and great intellectual skills, he has been appointed to take part in all relevant governmental commissions in the last 20 years related to the improvement of competition statutory laws. Since then he has been considered an authority in the area and has been asked to advise many national and foreign companies on a variety of antitrust matters, including the most notorious cases.

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MAGALHÃES, NERY E DIAS - ADVOCACIA is the largest and most traditional Brazilian law firm specialising in Economic Law. Since its establishment in 1980 it has been Brazil's leading law office specialising in economic Law. The firm has Brazil's largest Antitrust expert group and provides its clients with expert advisory services in the majority of the most important competition defence cases in recent years, being responsible for the first cease and desist agreement related to a cartel entered into in Brazil and for the first appeal to reverse a negative decision issued by CADE in a merger case. The firm has its headquarters in the city of São Paulo and a subsidiary office in Brasilia (DF). Its organisation comprises 22 professionals including attorneys and economist, of which 13 are dedicated to Economic Law matters. Its clients are large Brazilian and multinational conglomerates. The firm also has extensive experience in Consumer Law, Unfair Competition Law and Intellectual Property Law.

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