

Competition Law and Policy in Latin America

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P U B L I S H I N G

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Chapter VIII

Leniency Program in Brazil

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I. Introduction

This chapter focuses on the problems of the Brazilian leniency program and its legal aspects that lead some authors to assert that it is not constitutional. The chapter also highlights practical issues concerning amnesty programs that may relate not only to Brazil but also to many other jurisdictions. One of the main thrusts of competition policy is to ensure a continuing fight against collusion and price fixing. Antitrust authorities are motivated by the maximization of social welfare by minimizing the occurrence of collusion among firms.

Antitrust agencies need to determine how best to address and combat cartels. In the design of cartel policy we find richer and more complex mechanisms than those based simply on increasing fines.¹ Accordingly, Brazilian legislation provides for some alternatives to reward undertakings (referred to as 'firms' in the United States) and individuals that cooperate with the enforcement authorities, helping them to detect and punish certain crimes. In this context, leniency programs play an important role in fighting cartels effectively without wasting public resources.

Leniency has changed the landscape of cartel enforcement. The clearest and most complete form of leniency is amnesty from prosecution, but it can also mean a reduction in the penalty compared with what would be sought in the absence of full, voluntary cooperation. Since 1978, the US Antitrust Division of the Department of Justice has allowed for the possibility for guilty parties to avoid criminal sanctions if they meet specific conditions. In 1993, the policy was redesigned and issued as the *Corporate Leniency Policy*.² This has proven to be an amazing success and has resulted in a number of leniency applications, which have led to dozens of convictions and to billions of dollars in fines. Many

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¹ Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution', 21 *International Journal of Industrial Organization* 347-79 (2003).

² US Dept of Justice, *Corporate Leniency Policy* 1 (Aug 10, 1993), <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

European countries introduced similar policies following the leniency program introduced by the European Union in 1996.

Because cartels are, by their very nature, secret as a practical matter, it is very difficult to detect and investigate them without the cooperation of firms or individuals connected to the illicit activity. Consequently, it is in the social interest to reward firms involved in these types of illegal practices that are willing to put an end to their participation and cooperate in administrative or criminal investigations, independently of the rest of the undertakings involved in the cartel.

A decisive contribution to the opening of an investigation or to the detection of an infringement may justify the granting of immunity from any fine to the undertaking in question. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements, and they should not be discouraged.³

II. Brief Introduction to Antitrust in Brazil

The Brazilian competition system comprises:

- a) Secretariat for Economic Monitoring (SEAE/MF): SEAE is responsible for the analysis of economic aspects of transactions (mergers) and administrative procedures (conduct cases).
- b) Secretariat of Economic Law (SDE): SDE is in charge of the analysis of legal aspects of transactions, monitoring legal entities with significant market power in order to prevent violations, filing administrative procedures involving anti-competitive actions, and producing and analyzing evidence.
- c) Administrative Council for Economic Defense (CADE): CADE is responsible for the analysis of the cases and opinions issued by SEAE and SDE, and for the final decisions in all cases related to antitrust law.

Article 35-B of the Brazilian Antitrust Law (Law No 8.884/94) provides for the possibility of granting leniency to corporations and individuals reporting illegal activity, provided that the parties cooperate with the SDE:

The Federal Government, through SDE, will be able to enter into leniency agreements, extinguishing the punitive action which could be taken by the government or reducing the applicable penalty by one- to two-thirds pursuant to the terms hereof, for individuals and legal entities that engage in anti-competitive practices, provided that such individuals and legal entities effectively cooperate with investigations and administrative proceedings.

³ These conclusions, which we share, are found in the EU's *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (2006/C298/11). http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html

III. Brazilian Leniency Program

An amendment to the Brazilian Antitrust Law (Law 8.884/94) introduced leniency in 2000. Since then, there have been a number of leniency applications. As of the time of writing, 12 leniency agreements have been executed.⁴ Due to the lack of experience of the Brazilian authorities in executing this kind of agreement, many doubts have arisen with regard to the legal provisions concerning leniency.

A. Requirements for Leniency Applications

According to the Brazilian Antitrust Law, leniency agreements may be executed only by individuals or legal entities that meet certain requirements. First, the applicant must be the first applicant to apply under the program and cannot be the cartel leader or manager. Secondly, SDE must not have amassed enough evidence already, ie at the time of the leniency application, to convict the companies or individuals involved in the cartel. In addition, the company or the individual must have ceased its involvement in the illegal activity as of the date it applies for the program.

After executing the agreement, the party must provide full, continuous and complete cooperation to SDE at his or her own expense. The leniency policy requires full and frank disclosure as a condition precedent to an applicant receiving final leniency. Cooperation with SDE is a continuing obligation, requiring the applicant to provide SDE with expeditious access to individuals and information. Although the execution of the leniency agreement is not subject to CADE's approval, if an applicant does not provide the degree of cooperation expected, CADE may not grant amnesty when judging the respective administrative proceeding.

The amnesty accorded to the applicant may be total or partial, depending on SDE's level of awareness of the underlying anti-competitive behavior. Amnesty will be total if SDE was unaware of the cartel at the time the applicant applied for the program. The requirement that SDE does not know of the existence of a cartel is quite flexible. SDE may not wish to deny an applicant immunity from prosecution and penalty in circumstances where SDE has only very general information pointing to the existence of a cartel. On the other hand, the immunity will be partial where the government already has some substantial knowledge.

Leniency policies generally provide two levels of protection:

- a) immunity from prosecution; and
- b) immunity from administrative penalty.

⁴ Information available at <http://www.terra.com.br/istoedinheiro/edicoes/595/cerco-aos-carteisgoverno-intensifica-combate-aos-esquemas-que-prejudicam-a-127060-1.htm>.

Brazilian antitrust law, however, does not expressly mention these two kinds of protection. The law merely states that CADE, when judging the respective administrative proceeding and verifying that the leniency agreement was abided by, will:

- a) extinguish the administration's power to convict the offender if SDE was unaware of the cartel at the time the applicant applied for the program; or
- b) in the remaining cases, reduce the applicable penalties by one- to two-thirds.

B. Leniency for Directors, Officers and Employees

Leniency has become an important part of anti-cartel policy around the world. Part C of the US Amnesty Program states that:

Directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.⁵

Likewise, Brazilian Law 8.884/94 states that the leniency agreement will be extended to managers and directors of the company who qualify for the amnesty program, as long as they execute the agreement collectively with the company. Although the law does not expressly mention officers and other company employees, CADE tends to include in the agreement all individuals who confess their involvement in the illicit conduct. By doing so, CADE provides full protection for those who cooperate effectively, and this makes its corporate leniency policy more effective, transparent and predictable. All employees and corporate executives who execute the agreement will be afforded leniency.

Individuals who approach SDE on their own behalf, not as part of a corporate offer or confession, to seek leniency for reporting illegal antitrust activity of which SDE has not previously been aware, will also be granted leniency, as long as they meet the following conditions:

- a) At the time the individual comes forward to report the illegal activity, SDE has not received the information about the activity being reported from any other source;
- b) SDE did not have sufficient evidence to convict the corporation or the individual at the time the agreement is proposed;
- c) The individual confesses his or her involvement in the illegal activity and provides full, continuing, and complete cooperation to SDE at his or her own expense; and
- d) The individual was not the leader of the activity.

⁵ Dept of Justice, *Corporate Leniency Policy* (also called 'Amnesty Program'), Part C, 'Leniency for Corporate Directors, Officers, and Employees', <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

Note that the Brazilian conditions are very similar to those required in the Department of Justice's Amnesty Program. In Brazil, most of the leniency granted to individuals who have come forward to report illegal activity involves individuals who were dismissed from firms undertaking illegal behavior. Brazilian anti-trust authorities do not give any degree of leniency to firms or individuals that cooperate with a certain investigation if they are not the first to request amnesty.

A question that may arise when an individual applies for a leniency program on his or her own behalf is whether there are circumstances in which leniency should be granted to a corporation after an individual (the Brazilian legal term is a 'natural person') has applied for leniency for the same conduct. Under the current legislation, this is not permitted. It would require an amendment to Law 8.884/94. As a matter of policy, there is good justification for granting amnesty in these types of cases. For instance, there may be circumstances in which a natural person qualifies for leniency but has limited knowledge of the cartel and no access to relevant documents, when it will be beneficial to grant amnesty to a firm. In order to gather a sufficient amount of evidence, SDE should allow firms to apply for leniency after a natural person has also applied. This would provide firms with an incentive to turn over information, while simultaneously providing with SDE a cost-effective mechanism by which to find and collect evidence.

C. Amnesty Plus Program

One important element of Law 8.884/94 is that it states that a company which fails to meet the requirements for full amnesty will be able to enter into a leniency agreement related to *another illegal activity*, so long as SDE is unaware of such other anti-competitive activity. This provision of the amnesty program is an incentive to attract applicants to the program because information on other matters will still be rewarded. Thus, even though a firm may not qualify for amnesty in the initial matter under investigation because someone else has beaten it in filing for amnesty, the value of the firm's assistance in disclosing a second cartel will lead to amnesty for a second offense. This, in turn, could translate into a substantial additional reduction (the 'plus') in the calculation of the fine for its participation in the first offense.⁶ The plus program creates an attractive inducement to encourage companies who are already under investigation to report the full extent of their antitrust violations.

However, there are limitations to the amnesty plus program. It is very difficult to persuade parties to enroll in it because while SDE is in charge of granting amnesty, CADE is in charge of deciding whether any violations have occurred and the amount of fines to be imposed. Thus, while an application to the amnesty plus program will lead to a discount of a certain percentage of the fine, the amount of

⁶ Law # 8.884/94, *Official Gazette of the Federal Executive*, 13 June 1994.

the fine cannot be gauged in advance. This is a major problem, because fines range from 1 per cent to 30 per cent of the annual turnover.

D. Leniency Program v Juridical Security

According to article 35-B of Law 8.884/94, the leniency agreement is entered into between the whistleblower, which can be a firm or an individual and SDE. The problem, however, is that SDE is bound by the Ministry of Justice and therefore is subject to political influence. In addition, SDE members do not have the stability arising out of a term of office. In this sense, it is controverse whether it would have the necessary impartiality to grant amnesty to the whistleblowers as well as to reduce their penalty.⁷

Besides, par. 9 of article 35-B establishes that the terms and conditions of the leniency agreement will be deemed confidential, except if in the interest of the investigations and the administrative proceeding. However, it is difficult to believe that this confidentiality will be kept, considering that SDE members do not have a term of office and that, when they leave SDE, they are hired by law firms which represent companies which may be interested in the content of such an agreement.⁸

In this context, the political influence that SDE is subject to and the lack of a term of office contribute to increase the juridical insecurity of the Brazilian leniency program.

E. Brazilian Antitrust Bill

A new bill (Bill no. 3937/2004) that aims at substituting the current Brazilian Antitrust Law has been recently approved by the the House of Representatives. If approved, the bill will introduce some important changes in the Leniency Program.

The first significant change will refer to the requirements for applying for the program. The condition that established that the whistleblower could not be the leader or the manager of the cartel will not exist anymore. This will certainly increase the number of applicants and will enable a more efficient combat against cartels.

In addition, the leniency agreement will not be executed by SDE anymore. CADE will enter into the agreement. This will reduce the problems arising out of the suspicious neutrality associated to SDE.

⁷ João Bosco Leopoldino da Fonseca (coordinator), *O Cartel. Doutrina e estudo de casos*, Belo Horizonte, Editions Mandamentos, 2008, p 76.

⁸ *Ibid*, p 77.

IV. Immunity from Prosecution v Brazilian Single Jurisdiction and Federal System

The main point of the leniency program, immunity from criminal prosecution, has been challenged as unconstitutional. The first problem the leniency program raises in Brazil relates to the fact that, pursuant to the Brazilian Constitution, only court judges are competent to decide criminal questions. Consequently, SDE would not be authorized to exempt the offender from punishment. Secondly, although leniency proceedings include representatives of the Federal or State Public Prosecutor as one of the parties, other Public Prosecutors may not feel bound to honor the agreement for two reasons:

- a) another prosecutor may belong to a different jurisdiction and may not feel bound by such an agreement;
- b) Public Prosecutors are independent according to constitutional principles and are not bound by agreements made by other prosecutors.

As of the time of writing, CADE had decided only one case involving a leniency agreement. Yet it is most likely that some (if not all) of the parties will, at some point, try to challenge this decision in the courts. This raises an even more important concern—Brazilian judges are usually unprepared for such cases.

A. Public Prosecutors

The Public Prosecutor's Office wants to be seen as the fourth power of the Brazilian Government (along with the legislature, executive and judiciary), given that it is a self-governing body independent from those other branches. There are Public Prosecutors at both the Federal and State levels (the Federal Public Prosecutor and the State Public Prosecutor).

The Brazilian Constitution sets forth two main principles that are applicable to the Public Prosecutors:

- a) unity/indivisibility; and
- b) institutional independence.

According to the principle of unity, the Prosecutors may be seen as constituting one single body, given that their views are unbiased and represent the institution of the office of the Attorney-General. The principle of institutional independence, in turn, relates to the independence of each Public Prosecutor, which insures his or her personal and professional dignity.⁹ Each Prosecutor may act according to

⁹ Cândido Dinamarco, *Instituições de Direito Processual Civil I*, São Paulo, Editions Malheiros, 2001), vol 1, 683–84.

his or her own conscience without the intervention of any of the three branches (legislative, executive and judicial) or of the organs of government superior to the office of Public Prosecutor. Independence also refers to self-administration.

These principles seem to be contradictory sometimes given that the Public Prosecutor, despite the institutional independence, should act in conformity with the Public Prosecutor Office as a whole, following the principle of unity. However, this is not what often happens, as Public Prosecutors are allowed to act according to their own mind and do not need to follow the policy adopted by another Public Prosecutor or the Public Prosecutor Office of their own jurisdiction.

In this context, these two principles have direct impact in the Brazilian antitrust policy, especially in the way the antitrust authorities execute leniency agreements.

If one follows an interpretation that outweighs the principle of institutional independence, then it may consider that although SDE, regardless of any legal requirement, usually include a Public Prosecutor (a Federal one, for example) as a party in the leniency agreement, this Prosecutor is not empowered to represent the entire class of Public Prosecutors. Thus, Public Prosecutors representing other jurisdictions (State Public Prosecutors, for instance) may accuse applicants based on their confessions. As a consequence, even Prosecutors from the same jurisdiction would be able to file a lawsuit against a leniency applicant if they believed the leniency agreement executed was not valid or constitutional. A judge would also be able to convict the leniency applicant, if one strictly considered the principle that only judges can exempt individuals from prosecution. This problem may take quite a long time to be solved, due to the lethargic pace at which the Brazilian judiciary operates.

In order to reduce the risks arising out of that interpretation, SDE usually has both Federal and local Public Prosecutors enter into the leniency agreement.¹⁰ Note, however, that besides the Federal District, Brazil has 26 States. Each State has its own Public Prosecutor Office that is independent from the offices of other States. Each such office has several Prosecutors, with each one theoretically acting independently. Even if a local Prosecutor executes a leniency agreement, one would not represent the other State offices.

Another approach is also possible, following an interpretation that gives more importance to the principle of unity in detriment of the principle of institutional independence. The *unity* and *indivisibility* provisions mean that the Public Prosecutor represents a single body. The plaintiffs or defendants in a lawsuit, or the parties in a leniency agreement, will not be bound by one particular Prosecutor but by the Public Prosecutor Office itself. Hence, when a Prosecutor executes a leniency agreement, he or she represents the entire Office of the Public Prosecutor. In competition matters, it is a little unclear if we have State or Federal cases. As to *institutional independence*, each Prosecutor must act in accordance

¹⁰ In Brazil, there is some controversy in the case law so as to which jurisdiction, Federal or State, is to prosecute cartels criminally. For this reason, even though transaction costs are very high, SDE has always included both Federal and State Prosecutors in the leniency agreement.

with his or her own conscience. Yet this also means that the Prosecutor must act according to the applicable law and not at his or her own discretion. Because the law includes the principle of *unity*, the Prosecutor must respect that, when he or she signs an agreement or represents one of the parties in a lawsuit, he or she is doing so as a representative office of the Public Prosecutor and not on his or her own behalf. Therefore, if a certain individual Prosecutor decides to file a lawsuit, another Prosecutor cannot intervene in the decision, revoke the power of the first, and file another lawsuit or declare the filing null. Similarly, when a Prosecutor executes an agreement, he or she does so as the Public Prosecutor itself, and another Prosecutor cannot just breach the agreement; neither shall the judges accept such a breach.

The inclusion of a Public Prosecutor in the leniency agreement is not mandatory. SDE takes this action merely as a precaution based on legal formality. It is only symbolic, indicating that the Public Prosecutor will not charge the whistleblower. Should an individual Prosecutor take such action, the judge will most likely decide not to convict the leniency applicant. To date, there have been no such actions, and this situation is merely hypothetical.

B. Single Jurisdiction

According to the Brazilian Constitution, 'the law will not exclude the judicial branch from judging injury or threat to right' (Article 5, XXXV).¹¹ Therefore, any conflict, injury, or threat to right is susceptible to judicial review. Only judges are able to impose final decisions. Only the judicial branch is able to decide certain questions, particularly as they relate to criminal issues. Brazilian administrative agencies lack criminal jurisdiction. For this reason, all decisions made by administrative authorities can be reviewed by the courts. Consequently, it is argued that SDE, which is an administrative body, is not authorized to decide issues that involve the granting of criminal immunity or the reduction of penalties. It is argued that the legal provision relating to leniency agreements should be deemed unconstitutional. Under such an interpretation, it would be necessary to apply the 'legal divisibility theory', according to which it is possible to deem unconstitutional only part of a law, so long as the remaining part can subsist independently and in accordance with its legal scope.

This theory misinterprets the law. According to Article 35-B, § 4th, section I of Law 8.884/94:

The execution of the leniency agreement is not subject to CADE's approval. However, if it verifies such agreement was complied with, when judging the administrative proceeding, it shall: I—decree the extinction of the public administration punitive action in favor of the whistleblower if, by the time it applied for the program, SDE had no previous knowledge of the infraction.

¹¹ Brazilian Constitution—<<http://www.vbrazil.com/government/laws.constitution.html>>

The fact that CADE can decide in favor of the whistleblower does not mean it is deciding a criminal issue. As we can see by reading the legal provision above, CADE's power is merely to verify whether the parties duly abided by the agreement, ie whether they provided the authorities with full, continuing and complete cooperation, and whether they complied with other accessory obligations. Once the applicant executes the terms of leniency agreement, the granting of immunity is automatic. It will be terminated only if the whistleblower breaches the obligations stated in the leniency agreement.

The Brazilian Criminal Code sets forth some factors that extinguish the administrative power to punish offenders: statutes of limitations, retroactivity of a law that does not consider the action an offense, and judicial pardon. The situations indicated by the Criminal Code do not represent an exhaustive list. A variety of other Brazilian laws list different factors that can trigger the termination of the public administration punitive action, and can also shield a particular individual from conviction. It is important to highlight that if one of these factors is present, the judge is obliged to grant immunity to the offender, or free him or her from culpability. Accordingly, Law 8.884 is one of those laws that enable an offender to escape from criminal liability. The granting of amnesty is automatic and is a legal provision, not a product of CADE's decision. CADE merely examines whether the applicant abided by all of the contractual obligations; and if there was a breach, CADE may revoke the amnesty. In this context, article 35-C, single paragraph establishes that 'upon the fulfillment of the leniency agreement by the applicant, amnesty will be automatically granted'.

V. Conclusion

This chapter addresses the legal problems raised by the new leniency program under Brazilian Antitrust Law. It also challenges the theory that the leniency program is unconstitutional. Overall, as the Brazilian legal system works through the implications of the leniency program, Brazilian anti-cartel enforcement will continue to operate with a certain degree of unpredictability.