

# *Leniency Program and Dawn Raids: The Turning Point in Brazilian Competition Law & Policy*

Día de la Competencia, Chile  
October 25, 2007

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# 1. Brazilian Antitrust Law & Policy

- Antitrust law and practice in Brazil is governed primarily by Law No. 8.884, of 1994, as amended in 2000 and 2007
- **3 Antitrust Agencies:**
  - **SEAE -- Secretariat of Economic Monitoring of the Ministry of Finance:** issues non-binding opinion in merger reviews and has more general powers to monitor prices in the various sectors of the economy
  - **SDE -- Secretariat of Economic Law of the Ministry of Justice:** chief investigative body in matters related to anticompetitive practices, and it issues non-binding opinions in merger reviews
  - **CADE -- Administrative Council of Economic Defense:** Administrative Tribunal composed of seven Commissioners, which makes the final rulings in connection with merger reviews and anticompetitive practices





## **2. From Merger Review to Cracking Cartels**

- **During the first eight years of enforcement of the 1994 law, the Brazilian antitrust authorities focused primarily on merger review**
  - **Substantial resources devoted to the review of competitively innocuous mergers**
  
- **Since 2003, the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as a top priority**
  - **300 cartel investigations being handled by SDE**
  - **75% of the SDE's resources are currently devoted to cartel investigations**
  - **Use of aggressive investigative tools**



### **3. The Turning Point: The New Statutory Powers**

➤ **In 2000, the Brazilian Congress, following an OECD recommendation, amended the 1994 Antitrust Law to provide enhanced enforcement tools to the antitrust authorities:**

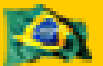
- **The establishment of a Leniency Program**
- **The authority for SDE to conduct Dawn Raids, with a judicial warrant**
- **The authority for SDE to conduct examinations at business premises with 24 hours advance notice**



## 4. 2003: A Landmark Year

- **SDE efforts to exploit the statutory powers created by the 2000 amendments did not get underway until 2003**
- **Beginning in that year, SDE restructured itself to focus increased attention on anti-cartel enforcement**
  - **Creation of a department of quantitative and econometric techniques to undertake analyses in conduct investigations**
  - **Creation of an Intelligence Center**
  - **First dawn raid conducted**
  - **First leniency agreement signed**



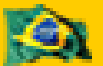


## **5. The Brazilian Leniency Program: SDE's most effective investigative tool**

➤ **It turned out to be a revolution in our Anti-Cartel Program:**

- **8 out of the 10 main cartel cases being handled by SDE were initiated with the signing of a leniency agreement**
- **Provide critical cooperation of cartel participants, access to documents, access to witnesses**
- **Approximately 10 agreements signed since 2003**
- **Many of these cartels would have remained undetected to this day without the lure of leniency**
- **Growing number of candidates to the program, including members to international cartels**



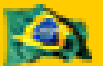


## 6. The Brazilian Leniency Program: Stick and Carrot Approach

- Carrot: (i) no administrative penalties for the first company to self report; (ii) no criminal or administrative penalties for cooperating directors and managers
- Stick: The other companies (and their executives) face severe sanctions:
  - Fine of 1 to 30% of the gross revenues of the company in the year before the initiation of the proceedings; Additional corporate penalties
  - Jail term of 2 to 5 years, plus criminal fines
- “*Winner-take-all approach*” severally destabilizes the cartel, creating a race to SDE



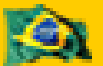




## **7. The Brazilian Leniency Program: Requirements**

- **The applicant is the first to come forward and confesses his participation in the unlawful practice**
- **The applicant ceases its involvement in the anticompetitive practice**
- **The applicant was not the leader of the cartel**
- **The applicant agrees to fully cooperate with the investigation**
- **The cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice**
- **At the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the cartel**

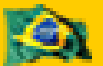




## **8. The Brazilian Leniency Program:** **Benefits**

- **Full or partial immunity depending on whether the SDE was previously aware of the illegal conduct at issue**
  - **If the SDE was unaware, the party may be entitled to a waiver from any penalties**
  - **If the SDE was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the “good faith” of the party in complying with the leniency agreement**
- **A leniency agreement shelters administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requirements provided in the law**
- **SDE has been successfully able to protect all the leniency beneficiaries from criminal liability**





## 9. “Leniency Plus”

- **An applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel, and meets the leniency program requirements, will receive leniency for the second offence and a one-third reduction in fine with respect to the first offence**

## **10. Additional comments: Increased Transparency**

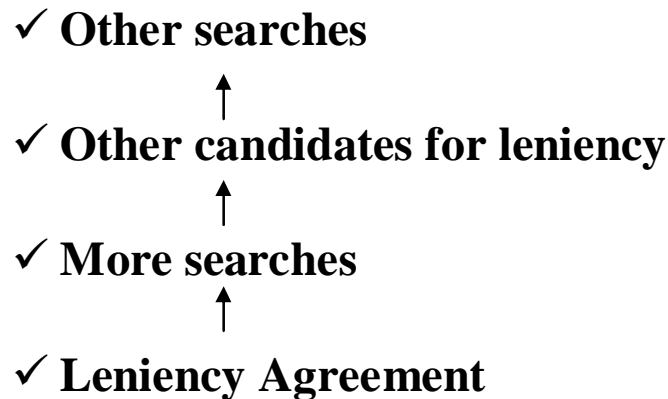
- **Marker System:** Applicant's position is reserved in the queue on the condition that it provides further information within an agreed time period (max. 30 days)
- **Oral Application:** The applicant may present an oral proposal before the SDE
- **Confidential Negotiation Phase:** The negotiation phase should be concluded in six months, renewable for an additional six-month period at SDE's convenience, as long as there is no other candidate for leniency. In case no agreement is reached, all related documents should be returned to the party

# **11. The First Agreement: Security Companies Case**

- **First leniency was signed in 2003 -- only when effective enforcement had been implemented and SDE already had some positive reputation on ability to uncover cartels**
- **16-year bid-rigging cartel involving security companies with activities in the South Region of Brazil**
- **Applicant submitted direct evidence of the bid-rigging, including employees' testimonies and audio records of telephone conversation held among cartel participants**
- **Information provided enabled SDE to run simultaneous dawn raids in four companies and two trade associations**
- **Seized evidence showed that the defendants held weekly meetings to organize the outcomes of bids for public tenders**
- **In September 2007, the Brazilian Antitrust Tribunal adopted SDE's opinion and condemned the cartel with record fines**

## 12. The Upward Spiral

- **Leniency and Dawn Raids walk hand in hand**
- **Upward Spiral**

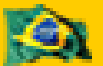


- **Great advantage of leniency:**
  - **Commitment of one of the parties to present detailed insider information of the cartel**
  - **Which in turn will be used to convince judge to authorize raid**
  - **Raids with greater chances of success due to higher precision of information available**
  - **Success stories of previous dawn raids help to convince the judge to authorize future dawn raids**



## **13. Success of Leniency Reflects in the number of search warrants served**

- **2003, 2004 and 2005**: 11 warrants were served, 2 people temporarily arrested
- **2006**: 19 warrants were served
- **from January to October 2007**: 84 warrants were served, 30 people temporarily arrested

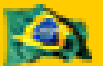


## **14. The First Dawn Raid: The Crushed Rock Cartel Case (2003)**

- **The dawn raid was conducted at the offices of the industry association Sindipedras (State of São Paulo Flintstone Industries Association)**
- **SDE seized five computers, a laptop, and twenty-seven boxes of documents, including minutes of meetings, manuals, flip charts, receipts, etc.**
- **Seized evidence showed that there was in fact an illegal agreement in place and that the defendants:**
  - **Maintained pricing data and daily sales figures in a central computer software at Sindipedras**
  - **Met at the association's premises to set cartel policies**
  - **Divided customers and allocated sales quotas (including sales arising from bids tendered in public competitions)**







## **15. Conclusion**

- **Increased statutory investigative powers were fundamental in the process of re-deployment of resources to cartel investigations**
- **Leniency and dawn raids have not only greatly increased the profile of competition law enforcement in Brazil, but also generated direct evidence (i) that public prosecutors have used to support criminal applications; (ii) that supports the antitrust rulings before the Judiciary**



**Muchas gracias!**

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