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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Brazil

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Brazil --

1. Existing tools for international co-operation

1.1 Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?

1. When it comes to cooperation between competition authorities, we have established cooperation agreements and protocols with Argentina, Canada, Chile, DG-Comp, France (signed in December 2011), Mercosur, Portugal, Russia, and the U.S. Most of these agreements allow for the cooperation between agencies on the form of notifications with respect to enforcement activities which may affect the other agency's interests, consultations, technical cooperation, exchange of information (subject to the laws of each jurisdiction protecting confidential information), regular meetings and the granting of negative or positive comities.

2. On a broader cooperation level (i.e., cooperation between countries), MLATs signed with Canada, China, Colombia, Cuba, Italy, France, Mercosur, Peru, Portugal, Spain, South Korea, Suriname, Switzerland, Ukraine, the U.S., and Uruguay are also in force. Pursuant to a MLAT it is possible to execute a request, for example, for providing confidential and non-confidential information, searches, as well as lifting of (banking, fiscal, telecom and communication) secrecies, and seizure, confiscation, and repatriation of assets.

3. We are also part of the Inter-American Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention against Corruption, The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the OECD Anti-Bribery Convention, United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.

4. Finally, it is possible to execute a Letter Rogatory. Based on our domestic law, it is possible to execute a Letter Rogatory, for example, aiming at providing service of process, as well as providing an *exequatur* to a foreign order.

1.2 Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?

5. Besides the formal cooperation mechanisms listed above, the BCPS sometimes maintains informal contacts with agencies during investigations of international cartel cases. This informal cooperation takes place by e-mails and phone calls in which we exchange experiences and general views

with regards to case investigations and also on how to try to solve practical problems in the course of the these investigations, such as the service of process of foreign companies and individuals. In recent years, we also have conducted a joint inspection with the EC and the DOJ in a cartel case.

1.3 To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?

6. The international best practices on cooperation between agencies have been taken into account in the drafting of our formal cooperation mechanisms.

2. Types of co-operation

2.1 What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?

7. In principle, cooperation may happen at any stage during the proceedings and this has been the case in practice. Our cooperation usually relates to the exchange of non-confidential information and general views on the case. Sometimes we also hold informal discussions about practical aspects of the investigation such as the difficulties with the service of process abroad and how to overcome bureaucratic hurdles.

2.1 How does the co-operation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?

8. This cooperation takes place usually by e-mail or telephone (face to face meetings are less frequent because of the long distances usually implicated). The rate of success has varied a lot depending not only of the agency involved but also the particular circumstances of the case. Some cases favor more intense cooperation than others. One successful example of cooperation with the DoJ and DGComp happened in the course of the investigations of a case relating to the compressors market, in which the three agencies managed to conduct a joint dawn raid.

3. International vs. regional co-operation

3.1 Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?

9. The geographic location of the foreign agency has not been a determinant factor when it comes to the cooperation within cartel investigations. We have contacts with agencies all over the world (via networks and also bilateral understandings) and the cooperation is defined on the basis of the needs of each particular case.

10. In recent years, most of all cooperation involving cartel investigations has involved the DoJ and the EC, because of the particular cases we have been dealing with. We have also been in close contact with the Fiscalía Nacional Económica do Chile when they entered their first leniency agreement.

3.2 If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?

11. The cooperation agreements currently in place give evidence to BCPS' efforts to develop and maintain a close and positive interaction with some major foreign competition authorities. Our cooperation with neighboring and young agencies usually focuses on the development of joint projects for capacity building and exchange of experiences.

12. BCPS has a particular leading role in Latin America, organizing and participating in conferences and traineeship programs. As an example, Cade has an international internship program ("PinCADE Internacional") that takes place twice a year and provides representatives from other Latin American competition authorities with a unique, first-hand experience of the workings of the BCPS. In 2010, this Program gave rise to great interest among competition authorities in Latin America, as evidenced by the increase in the number of interested authorities (from four in 2009 to eight in 2010). In December 2011, CADE executed an agreement with the Brazilian Cooperation Agency (ABC) from the Ministry of Foreign Affairs to foster better conditions to this program, including funding.

4. Identifying gaps and improving the current frameworks

4.1 What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?

13. One of our greatest challenges has been serving foreign people abroad. Obtaining such a measure usually involves a lengthy procedure, with many bureaucratic hurdles.

14. The development of the culture of cooperation between agencies could help overcoming this challenge. International cooperation could, for instance, enable the creation of agency-to-agency special procedures for granting service of process on behalf of foreign agencies.

4.2 How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?

15. To this date we have not had to deal with problems arising from the use of information exchanged with other agencies. The Brazilian legal framework provides for criminal, civil and administrative enforcement on cartel cases.

4.3 How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?

16. We believe that liaising with competition authorities in other jurisdictions could be improved by deepening direct formal and informal cooperation channels.

17. In Brazil, our main efforts to improve international cooperation have been focused on reducing the bureaucratic hurdles that sometimes make cooperation inefficient and burdensome. We have also been conducting internal discussions so as to bring cooperative practices in the international arena closer to the day to day activities of the case handlers.

18. More recently we have set up a group that is starting discussions with other government entities in order to assess the need of legislative reforms allowing for more direct cooperation between agencies and the establishment of broader commitments through cooperation agreements.

4.4 Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?

19. Yes, namely regarding assistance for service of process. Sometimes serving companies and executives encompasses hardships, such as locating them and obtaining their address. Based on our experience, some foreign authorities may not feel comfortable in providing such information because they are regarded as private data.

5. Information Sharing

5.1 What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?

20. Confidentiality issues have been the main barriers to information sharing we have faced. Each jurisdiction has its own rules in relation to confidentiality. Please see example mentioned above concerning information regarded as private data in some jurisdictions.

5.2 Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?

21. The Brazilian legal framework provides for confidentiality of commercially sensitive information and of information whose disclosure may jeopardize ongoing investigation efforts. This means that, in the absence of a waiver from the party concerned, access to this information is limited to the BCPS and to the party providing this information.

5.3 To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?

22. Information obtained through public vehicles, such as agencies' websites, is regarded as information of public domain and may serve as evidence in the Brazilian proceeding.

23. Confidential information obtained from a foreign agency or the defendant, may also serve as evidence within Brazilian proceedings but must be kept confidential also in Brazil. Confidential information is treated as confidential until a final decision is rendered or, depending of its content, may be kept confidential even after a final decision is rendered.

24. It is important to clarify that, pursuant to the principle of free motivated convincement, the Brazilian Courts and the antitrust agency is free to weight evidence and reach a final judgment based on its motivated convincement. Therefore, the decision as to the extent in which both the Courts and the BCPS

will rely on information produced in another jurisdiction falls entirely on them and is made on a case-by-case basis.

5.4 Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?

25. There is no specific legislation regulating the protection of confidential information exchanged with an agency in another jurisdiction. The safeguards in place for the protection of confidential information obtained through cooperation with foreign government agencies are the same applicable for the protection of confidential information in general – i.e. separate files with no access granted to third parties and limitation of access to the information also to a limited number of people within the BCPS itself.

5.5 What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?

26. As part of the leniency application, we request that the applicant report all the jurisdictions in which it has already entered into a leniency agreement, as well as on which jurisdictions it has already issued a waiver. This is a means not only to facilitate our exchange of information and coordination with foreign authorities, but also to prevent foreign jurisdictions from disclosing information whose disclosure may risk ongoing investigations in Brazil. Although this is not a part of the leniency application itself, in the recent past we have requested and received waivers in the cases in which they were needed.

5.6 Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?

27. The leniency agreement receives confidential treatment in Brazil. The agreement itself, in tandem with information commercially sensitive pertaining to the lenient and information whose disclosure may jeopardize ongoing investigations is kept confidential. This means that this information is filed separately, with no access granted to third parties.

6. International co-operation within other policy areas

6.1 Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?

28. Yes. As part of our efforts to improve our cooperation mechanisms, we have been liaising with the Internal Revenue Service and the Securities and Exchange Commission to talk about challenges faced in international cooperation. We have chosen these entities because they have managed to implement successful cooperation mechanisms that allow them to exchange information efficiently (i.e. overcoming bureaucratic hurdles) with foreign entities.