

Unclassified

DAF/COMP/GF/WD(2006)37



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

03-Feb-2006

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2006)37
Unclassified

Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Brazil

-- Session II --

This contribution is submitted by Brazil under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.

JT00200547

Document complet disponible sur OLIS dans son format d'origine
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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. This paper discusses the legal aspects of prosecuting a cartel in Brazil without direct evidence of collusion, as well as which are the steps taken by the Secretariat of Economic Law when a complaint is filed in such situation. Further on, some cartel cases where the Administrative Council for Economic Defense (CADE) found the parties guilty based on indirect evidence of collusion will also be analysed.
2. In Brazil, cartels can be prosecuted both criminally and administratively and in neither spheres there are legal restrictions about prosecuting and/or condemning a case only with circumstantial evidence. Specifically regarding the administrative jurisdiction, Law 8.884/94 does not award any discretion for the authority to decide whether or not to investigate a case. Therefore, whenever a complaint of a cartel is filed, there is a legal obligation to investigate the case, regardless of the value of the evidence presented. Nevertheless, the competition authority can decide which procedure it will adopt in order to investigate the complaint.
3. More generally, every case submitted to the competition authority is filed as an Administrative Procedure (*Procedimento Administrativo*) and, depending on the strength of the evidence and the circumstances of the case, the competition authority will have the following options: i) initiate a preliminary investigation (*Averiguação Preliminar*); ii) initiate an Administrative Process (*Processo Administrativo*); or iii) dismiss the claim without further investigation, if the complaint is unrelated to competition matters or if the practice clearly does not pose any anticompetitive harm. The competition authority can adopt any of such decisions, provided that it includes relevant justification.
4. It is also worth mentioning that, aside from the decision to dismiss the case while it is still an Administrative Procedure; all the other decisions of the Secretariat of Economic Law are submitted for the approval of CADE. If CADE disagrees with the decision of the Secretariat of Economic Law to close a case, it can send that case back to the Secretariat and demand that further investigations are conducted.
5. Specifically regarding cartels, complaints will always be investigated, even if filed only with circumstantial evidence, regardless of its strength. Depending on the findings derived from this investigation, SDE will decide which procedure to take. It is important to reiterate that our system has no formal restrictions about prosecuting and/or punishing a cartel case based only on circumstantial evidence.
6. In the criminal jurisdiction (Law 8.137/90), the situation is alike, with few procedural differences. Within this jurisdiction, the case is submitted to the Public Attorney's Office, which evaluates the given evidence. If the evidence is considered insufficient, the "Public Attorney's Office" can close the case, provided that a formal justification for the dismissal is presented. It can also send the case to the Police Department so that it conducts further investigations, where a technical report will be prepared at the end of the procedure, in which it can recommend whether or not the case should be closed. The Public Attorney's Office, then, can accept or reject the content of the technical report, but always justifying why.
7. So, as a matter of fact, there are several possibilities to deal with cases that are based on circumstantial and/or economic evidence, but in all of them, there is the obligation to, at least, conduct some preliminary investigations in order to decide whether the case should be summarily closed or not.

1. Special criteria to evaluate complaints on gasoline retail market

8. Complaints must always be investigated, however, since this is a time consuming endeavour and the Brazilian Competition System faces human resource limitations, it's important to have some criteria to evaluate them.

9. In practice, some complaints can be dismissed based merely on economic grounds, when there is no direct evidence associated to it. For instance, cartel complaints involving the gasoline retail market are no longer pursued whenever there is no market indication of collusion. The use of economic methods in the evaluation of complaints has reduced the time spent in the analysis. This is a major step, considering the large number of complaints in this sector, and the fact that in most of these complaints the only cartel evidence presented is the homogeneity of prices (or similar price raise).

10. In order to avoid time-consuming procedures, the Secretariat for Economic Monitoring developed a method to analyze those complaints taking into consideration pricing behaviours and profit margins. Such method – which is a first attempt to reach a filter and is still under discussion – is three pronged. Complaints are only prosecuted if cumulative conditions based on economic analysis are met.

11. First, the profit margin tendency is verified. If the profit margin should decrease, the market is considered to be under a competitive behaviour, in which case the complaint is dismissed. Second, we analyze whether the margin increase is linked to the reduction of price dispersion. If not, the case is dismissed. Third, if there is such a margin increase, then we verify whether the margin and price dispersion behaviours follow the same pattern within a State geographical area (we consider that the monitoring costs of a cartel in a State – as opposed to a City - would be much too high). If they do, the case is dismissed. Therefore, we prosecute cases only if there is a margin increase linked to the reduction of price dispersion not following the State pattern. In these cases, we continue with the investigation, trying to gather more evidence through the investigative methods allowed by Brazilian law, such as inspections, dawn raids and wiretapping.

12. It is very difficult to reach a conviction in the gasoline retail market based solely on economic evidence, nonetheless, this methodology might enable Seae and SDE to eliminate cases that do not deserve to be thoroughly investigated and concentrate resources on those where there is a preliminary indication of collusion and thus, of potential harm to consumers.

2. Summary of relevant cartel cases based on circumstantial evidence

2.1 *The Steel Cartel Case*

13. In Brazil, the steel cartel is the leading case where CADE found the parties guilty based on indirect evidence of collusion.

14. The case involved an agreement to increase the prices of flat rolled steel products. There were only three domestic producers in the market, two of which were linked by a 50% cross-ownership. *“In July of 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers*

*each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute”.*¹

15. Aside from the information the parties themselves presented to the competition authority during the meeting, there was no direct proof that the firms had coordinated the price increase; therefore the investigation was based on the economic evidence of collusion. Two interesting points the Respondents raised in their defense were that the steel market is an example of market with “price leadership”, which would explain the “apparent” concerted behavior of the Respondents; and that whenever a case deals only with indirect evidence, a condemnation would only be acceptable if no rational explanation for the fact were available.

16. In the steel case, CADE expressly stated that it was possible to condemn a cartel based exclusively on economic evidence, if all the other possible rational explanations for the practice were excluded. It should be noted, however, that CADE did not only consider the economic evidence in this case. In fact, CADE’s decision that the parties were guilty was based on the “parallelism plus” theory: the first issue taken into account was the fact that the price increase of the companies, at similar rates and dates, could not be explained just by referring to it as oligopoly’s interdependence.

17. In addition to that, although CADE did not consider the meeting as direct evidence of collusion, the commissioners understood that it constituted a strong indication that there had been previous meetings among the companies to discuss matters before actually taking them to the government. According to CADE, the circumstantial evidence indicated that the steel companies had already reached a decision regarding the price increase when they asked for a meeting at SEAE.

18. In two other cartel cases, a strong weight was also given to circumstantial evidence in CADE’s decision: the Rio de Janeiro – São Paulo airline case and the investigation involving the four largest newspapers in Rio de Janeiro .

2.2 The Rio de Janeiro – São Paulo Airline Case

19. This case was initiated after some of the major newspapers in the country reported that the presidents of Brazil’s four major airlines had met at a hotel and five days later, the prices of the plane ticket for the Rio de Janeiro- São Paulo route had simultaneously increased by 10%. *“SEAE’s investigation concluded that the price move was not merely a case of conscious parallelism. In addition to the meeting of the companies’ executives, evidence revealed that price data were exchanged among the companies through postings on ATPCO, the computerised airline price data system maintained by the Airline Tariff Publishing Company. A company could configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit. This feature of the ATPCO system had earlier been attacked by the U.S. Department of Justice, but system modifications arising from that case had been implemented only in North America. In September 2004, CADE determined that the four airlines had colluded to raise prices. Each carrier was fined 1% of the revenue earned on the affected route during 1999 and was enjoined from fixing prices and from posting price adjustments in advance. In March 2005, in a separate action, CADE accepted a settlement agreement negotiated between SDE and ATPCO under which ATPCO terminated the three-day notice feature of its system with respect to Brazilian airlines.”*².

1. From “Brazil OECD 2000 Report”, elaborated by John Clark.

2. Peer Review of Brazil’s Competition Law and Policy DAF/COMP(2005/8)

20. Apart from the chairmen's meeting, the investigation showed that the companies had a very efficient tool for coordinating their prices, which was the ATPCO system.

21. Based on the association of three factors (the price parallelism, the chairmen's meeting and the tool for coordinating prices), CADE decided that there was a strong indication that the firms were colluding to fix prices. It should also be noted that CADE, in its decision to punish the firms, made a point of justifying why the "price leadership" theory could not be applied in the case.

2.3 *The Newspaper Cartel Case*

22. The case involved the four largest newspapers in Rio de Janeiro. Here, there was also a price increase at the same time and same percentage rates. In addition to the price parallelism, the indirect evidence consisted in the fact that the newspapers published simultaneously an editorial note informing readers of their price increase on the same day and with very similar content.

23. In addition to this aspect, during the investigation, executives of the companies gave testimonies to the authorities and CADE identified numerous contradictions in their statements, specially referring to the explanation for the price increase. For example, one of the newspaper's executives stated that they simply waited for the leading newspaper company to raise their price so as to do the same. However, this newspaper was unable to explain why the price rise happened exactly on the same day of their competitor, considering that on the same day of the price rise the other newspapers were out with the modified price.

24. CADE found the firms guilty of cartel because of the association of price parallelism with the publication of the editorial note to explain the price increase, together with the lack of a plausible explanation for the price increase at the same time and at the same percentage rates.

25. In short, the jurisprudence shows that CADE admits indirect evidence as proof to punish a cartel. Nonetheless, some qualifications are appropriate: First, in all previous cases, CADE has indicated that it is important to exclude the "price leadership" explanation for the price parallelism; and second, although the indirect evidence available in the cases were important to indicate the existence of illegal behaviour, CADE did not punish the firms exclusively based on that. In the cases referred above, in addition to the economic evidence, some circumstantial event was associated to the price parallelism. Thus, CADE applies the "parallelism plus" theory to condemn cartel based on indirect evidence.