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ANTITRUST: *DUMPING* AND CARTEL IN BRAZIL

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I) INTRODUCTION

The competition defense in Brazil gained relevance from the 1990s when there was the commercial opening and ingress of the Country in the international markets in a more effective manner.

We present herein two manners of competition violation and possible damage to consumers which are prohibited by the Brazilian legal system.

At the end we present the so called “leniency agreements” and their conditions.

II) *DUMPING*

Dumping is comprised of a praxis used in the international commerce, by which during a certain period of time, one or more companies from a determined country sell their products to another country with prices much lower than those in place in the country of origin.

The aim of these exporting companies is to eliminate or reduce drastically the local competition, dominating the market and imposing high prices. When proven, *dumping* is normally severely punished by countries.

Dumping was defined as a disloyal practice in the international commerce by GATT (*General Agreement on Tariffs and Trade*), executed in 1947. Although severely repudiated at the time of referred agreement, its effects were minimized at the current *Antidumping* Code of WTO (World Trade Organization), approved in Uruguay in 1994.

The *antidumping* rules approved by WTO were adopted by Brazil by means of Law No. 9019, dated March 30, 1995.

Although Decree No. 1602, dated August 23, 1995 (which regulates Law No. 9019 of 1995) defines "normal value", "similar product", "domestic market”, among other needed concepts to a more precise establishing of the *dumping*[1], and many doubts remain about its definition.

To develop the commercial defense in Brazil, in 1995 the Department of Commercial Defense – DECOM, was created attached to SECEX (External Commerce Secretariat), which performs the duties related to this area, such as analysis of the facts, petitions, proposal and conduction of the antidumping investigation, etc.

The investigation to verify the existence of *dumping* may begin by means of request from the domestic industry (national) or on its name. In the petition, aside from the details of the petitioner, it shall be shown

[1] Articles 5 and 6 of Decree No. 1602, dated August 23, 1995.

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the reasons for belief on existence of dumping and the damages cause.

In the petition there shall also be the following data: (i) volume and amount of domestic industry; (ii) estimate of volume and amount of the total production of similar product; (iii) list of some domestic producers which produce similar products and are not represented in the petition; (iv) full description of the imported good and dumping prices; (v) identity of producer or foreign exporter and country of origin of the imported good; among others.

For solution of disputes about dumping between countries before the WTO, there is the Annex 2 to the Constitutive Agreement called "Understanding related to Rules and Procedures for Dispute Resolution" which brings the rules and procedures applicable to the disputes arising from the multilateral agreements, diversely from what occurred under GATT, which binds all members of WTO.

III) CARTEL

The practice of cartel is translated into the agreement among competing companies to, among others: (i) fix prices or production quotas; (ii) divide clients and markets; (iii) coordinated action by the participants to eliminate the competition and increase prices of products, obtaining larger profits in detriment of the well being of consumers.

The formation of a cartel – or cartelization – is considered one of the gravest damages to competition.

This is because aside from the immediate effects arising from the artificial limitation on competition, as well as the weakening or disloyal elimination of competing companies, the cartel also prohibits the development of new products and production processes, damaging the innovative process, so fundamental to the modern capitalist society – going as far as cancelling the competition of the economy as a whole.

The most common types of cartel are: a) fixing prices; b) bidding frauds; c) division of clients or territories; and d) restriction on production.

In criminal sphere, Law No. 8137, dated December 27, 1990, established that forming a cartel is a crime[2], with 5 years in prison penalty. In the administrative area the cartel is also defined as illicit[3], and has as the most severe penalty a fine of up to 30% of the gross revenue that the companies which participated in the cartel had in the year prior to the beginning of the administrative procedure to verify such practice.

Also in the administrative area the administrators of companies direct or indirectly involved with the cartel practice may be held liable for a fine of up to 50% of the fine applied to the company.

IV) LENIENCY AGREEMENTS

Law No. 10149, dated December 21, 2000, which introduced novelties to Law No. 8884 of 1994, authorized the possibility of inspection by Secretariat of Economic Law (SDE) in the facilities of investigated companies.

2 Article 4 of Law No. 8137, dated December 27, 1990.
3 Articles 20 and 21 of Law No. 8884, dated June 11, 1994.

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However, the largest innovation by far introduced by Law No. 10149 of 2000 in Law No. 8884 of 1994 was the possibility of the execution of the so called "leniency agreement" among the Federal Union (by means of SDE) and the persons and companies which are authors to the infraction to the economic order (such as dumping and cartel which were analyzing herein).

The leniency agreement is comprised of the possibility of the Federal Union to grant the non applicability of penalty to the infracting party because such party assisted in the verification of the facts.

To allow the infracting parties to execute the leniency agreement, however, the Law[4] determined that a series of information be rendered.

The benefits from this agreement to the infracting parties are relevant: (i) possibility of closing of the case by the administration or the reduction by one or two thirds of the applicable penalty; and (ii) the prohibition of opening of criminal case by the Prosecutor.

However, only after the result is obtained from the information provided by the infracting party, such information provided to the leniency agreement the authorities will define which of the above referred to benefits will be granted to the infracting party.

The Corporate Department of Almeida Advogados has a highly qualified team and is at your disposal to provide any additional information or possible clarification in relation to the matter dealt herein.

[4] See article 35-B of Law No. 8884 of 1994.