CONDUCTS ENFORCEMENT IN BRAZIL

FREQUENTLY ASKED QUESTIONS

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FOREWORD

In 2018, IBRAC launched "Merger control in Brazil – frequently asked questions", aiming at exploring the main topics of merger control since the Law No. 12,529/2011 came into force in 2012. This year, we are focusing on conducts enforcement, another field of competition law and practice with impressive development and improvement over the last years.

The objective of this book is to describe and discuss the related achievements, with practical information and lessons from case law and practice.

Contributors for this work include IBRAC associates, both lawyers and economists, with experience in antitrust law in Brazil, and some officials from the Administrative Council for Economic Defense - CADE, who have kindly shared their personal and high valued views on important aspects of the conducts investigation and enforcement work.

We hope that you enjoy this journey. For further information on IBRAC, please visit our website at www.ibrac.org.br, or write to ibrac@ ibrac.org.br.

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TABLE OF CONTENTS

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WHAT ARE THE CRITERIA FOR THE CHARACTERIZATION OF SHAM LITIGATION?

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1. Introduction

This article presents an overview of the criteria for the characterization of sham litigation as an antitrust infringement in Brazil. Sham litigation is considered illegal under the Brazilian Antitrust Law (Law N. 12,529/2011) and subject to administrative sanctions. The scope of this article is to introduce the current of the Administrative Council for Economic Defense (CADE) on the topic and the criteria for sanctioning companies for this conduct in Brazil. For this purpose, this article is divided into three sections besides his introduction. The next section summarizes what CADE considers sham litigation and its types. Section three develops on CADE's caselaw and provides examples of a case of conviction and a case of acquittal. The last part presents a conclusion on the topic and some thoughts.

2. Sham litigation

According to CADE's caselaw, the abuse of the right to petition with anticompetitive effects is considered illegal. Similarly to what happens in other jurisdictions, this abusive conduct is known as "sham litigation" in Brazil. The conduct relates to situations in which the right of petition, addressed to judicial or administrative authorities, does not meet the purpose expressed in the request, and instead serves the undeclared goal of restricting the competition in a certain market. CADE considers that the existence of the lawsuit itself may pose a threat to competitors or be a way to force them to bear the costs resulted by the

filing of the lawsuit itself. Anticompetitive effects may thus be established regardless of the existence of a decision on the matter disputed – preliminary or final.

In light of CADE's precedents, the following elements can be considered requirements to the characterization of sham litigation: 1) abuse of litigation; 2) anticompetitive strategy and; 3) damage caused by the conduct.

The **abuse of litigation** may occur in several situations, such as when a company files: (i) a completely unfounded and unjustified legal action, from which no success can be expected; (ii) legal action anchored in false information, misleading the State decision (fraudulent litigation**)**; or (iii) various and renewed actions, all based on the same argument and that have a low probability of success. CADE understands, however, that it is not up to CADE neither to investigate facts discussed in the lawsuits nor substitute the competent authority in the resolution of the private conflict.[1]

Once the abuse of litigation is established, in order for it to be considered an antitrust offense, CADE understands that it is necessary to demonstrate that the filing of the abusive action was also part of an **anticompetitive strategy.** This means that more than just an abuse of litigation, sham litigation must be connected to a simulation to hide a spurious anticompetitive interest. Due to the fact that the Brazilian Antitrust Law does not require proof of intent to punish the conduct and the fact that it is hard to prove intent, the anticompetitive rationality behind the conduct is usually assumed from the context of each specific case. To this date, the absence of other possible justifications for the lawsuit, and the parties behavior during the dispute have been considered relevant factors in the identification of an anticompetitive strategy.

Last but not least, the **damage** caused by the conduct is also a relevant factor in the analyses**.** Since sham litigation is not illegal *per se*,

[1] Technical Note n. 34/2018/CGAA1/SGA1/SG/CADE (SEI document 0510295).

there is no presumption of damage. Therefore, the authority needs to demonstrate the anticompetitive effects – even potential ones – of the litigation in order to consider it an anticompetitive conduct.

2.1 Sham litigation tests

It is possible to identify a few guidelines when it comes to the tests used by CADE to investigate sham litigation cases:[2]

- PRE Test3: This test holds two main aspects: objectively, the lack of legitimate legal basis for the lawsuit, and subjectively, the fact that a lawsuit is filed against a competitor. It is generally applicable to cases in which the part files a lawsuit with unfounded claims and potentially anticompetitive scope, not engaging in the use of false facts though. The American standard for establishing lack of "probable cause" in Brazil translates as the absence of what the Brazilian Civil Procedure Code refers as "action conditions" (cause of action; interest in the subject of the action; and standing to suit). Other indicators used in this test include relevant omissions or contradictory positions, which may cause confusion within the Judiciary4. CADE used this test, for example, to analyze the cases "ECT"5, "Uber"6 and "Eli Lilly"7. In the first case,

[2] Technical Note n. 34/2018/CGAA1/SGA1/SG/CADE in Preparatory Procedure n. 08700.000015/18-20.

[3] This acronym stems from the case *Professional Real Estate Investors Inc. versus Columbia Pictures.*

[4] It is worth noting that, generally, CADE does not accept the "coherence argument" usually seen in US cases, to refer to cases in which parties present conflicting arguments before distinct courts.

[5] Administrative Process no. 08700.009588/2013-04, decided on January 31, 2019. Reporting Commissioner Polyanna Vilanova. Complainant: Sindicato das Empresas de Transporte de Carga de São Paulo - SETCESP. Defendant: Empresa Brasileira de Correios e Telégrafos - ECT.

CADE reached a settlement agreement with the company and, in the second, it dismissed the charges of sham litigation. The third case resulted in the imposition of fines and is briefly analyzed in the next section.

- **Posco Test**[8]**:** This test is generally applicable to cases in which the part files several lawsuits against competitors, with low probability of success and with the potential to cause collateral damage. This damage includes cost increases or direct market exclusion, even if for a short period of time. The main goal of the Posco Test is identifying whether a series of lawsuits may (together) illegitimately rise a rival's costs. Unlike the PRE Test, Posco Test does not require all lawsuits to be unfounded or dismissed (i.e., some actions may have positive outcomes). CADE used this test, for example, to analyze the cases "Box 3"[9], which ended with the imposition of fines, and "ECT" which resulted in a settlement agreement.

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[6] Administrative Process no. 08700.006964/2015-71, decided on July 9, 2018. Reporting Commissioner Mauricio Bandeira Maia. Complainant: Diretório Central dos Estudantes Honestino Guimarães; Uber do Brasil Tecnologia Ltda. Defendants: Associação Boa Vista de Táxi; and others.

[7] Administrative Proceeding N. 08012.011508/2007-91, decided on July 7, 2015. Reporting Commissioner: Ana Frazão. Complainant: Brazilian Association of Generic Medicines Industries. Defendants: Eli Lilly do Brasil Ltda. and Eli Lilly and Company.

[8] This acronym stems from the case *Ninth Circuit USS-POSCO Industries vs. Costa Bulding & Construction Trade Council* – US. Court of Appeals, AFL-CIO, 31 F.ed. 800, 810 (CA9 1994).

[9] Administrative Proceeding no. 08012.004283/2000-40, decided on December 15, 2010. Reporting Commissioner Vinicius Marques de Carvalho. Complainant: Comissão da Câmara dos Deputados. Defendants: Box 3 Vídeo e Publicidade Ltda. e Leó Produções e Publicidade.

- **Fraudulent litigation:** it happens when the lawsuit, addressed to Judicial or administrative authorities, is based on false arguments as well as with the intent of causing direct damages to competition, what is possible with a favorable decision from the State. CADE used this test, for example, to analyze the case "Eli Lilly"[10], which resulted in fines to the investigated company.

- **Judicial agreements and other actions:** judicial agreements that enable parties to consent to leaving certain markets or to changing competitive behavior in exchange for some sort of compensation. Usually involves markets with high entry barriers, creating monopolies or increasing market power. This situation might represent an illegal practice. CADE used this test in the case "Ediouro"[11], in which the antitrust authority reached a settlement agreement with the company.

3. CADE's caselaw

3.1 Case 1 – Eli Lilly

The Brazilian Association of Generic Medicines Industries accused Eli Lilly of imposing artificial barriers to competition through the filing of multiple lawsuits against different public institutions, in different places. These lawsuits requested the recognition of exclusivity rights to sell a medicine for the treatment of cancer. Such claim was made based on alleged patent rights to such medicine. According to the complaint filed with Cade, Eli Lilly unlawfully changed the scope of the patent application, omitted relevant data to certain demands and practiced forum shopping.

[10] Administrative Proceeding N. 08012.011508/2007-91, mentioned above.

[11] Administrative Proceeding N. 08012.005335/2002-67, decided on July 27, 2016. Reporting Commissioner: Paulo Burnier. Complainant: Editora Nova Atenas Lda. and other.

After almost eight years of investigation, in 2015, CADE punished Eli Lilly for the misuse of the alleged patent rights. According to CADE's decision, Eli Lilly managed to monopolize the market based on favorable judicial decisions which were granted thanks to the omission of relevant information (notably those relating to the fact that Brazilian authorities never granted the patent application).

The Reporting Commissioner considered that the misuse of patent protection in this case damaged significantly the competition, since it established an artificial monopoly without the rationale of intellectual property protection. CADE concluded that the lawsuits filed did not have legal basis, since they were based on false facts or omissions meticulously planned to mask their anticompetitive purpose. The authority also considered that there was concrete damage, despite the fact that the defendant did not have a high market share. CADE decided in this case that the existence of sham litigation is independent of the market share of the defendant, something unusual for antitrust infringements.

3.2 Case 2 – Uber

In 2015, a few student organizations (DCEs) alongside Uber do Brasil Tecnologia Ltda. ("Uber") presented a complaint against certain taxi driver associations alleging that such entities had engaged in anticompetitive practices, including sham litigation and coordinated serious threats to withdraw competitors from the market. In order to support their allegations, Uber and the DCEs indicated the existence of 25+ lawsuits filed against Uber by taxi drivers and/or associations before lower courts in Brasilia-DF and the public prosecutor's office, all very similar in content (including identical excerpts).

In its opinion, published in October 2017, CADE's General Superintendence, confirmed that the PRE-Test, the POSCO Test and the identification of fraudulent litigation, and judicial agreements and other actions stood as adequate means to identify whether there had been a sham litigation conduct. The statement recommended the dismissal of

the case, however, on the grounds that there was not enough evidence of sham litigation.

In July 2018, CADE`s Tribunal accepted the recommendation of the General Superintendence and dismissed the case. The main aspects considered in this decision were the fact that the lawsuits involved a new and controversial theme in Brazil and that there was a "plausible doubt" on whether companies like Uber and transportation apps were legal and could operate under the existing regulatory environment in Brazilian cities. Also, CADE understood that there was a legitimate doubt about the competent courts to rule on the cases (reason why multiple lawsuits were presented before distinct courts).

4. Conclusion

There is no doubt that the introduction of litigation can constitute an antitrust infringement in Brazil under certain circumstances. Despite the existence of relatively few cases on the matter, CADE's caselaw provides some guidelines on the workable standard for establishing the existence of sham litigation currently in place in the country. As mentioned above, CADE expressly resorts to tests developed in the United States of America to decide sham litigation cases such as the PRE Test and the POSCO Test. Also, the most decisive issues to the outcome of sham litigation cases in Brazil are: (i) the plausibility of the litigation itself; (ii) the specific context of the case (are there elements that indicate an anticompetitive strategy is in place?) and (iii) the existence of damage (even if only potential).

To this date, most sham litigation cases were dismissed and there are only a few cases which resulted in the impositions of fines (publicly available information show fines of 5% of the revenues in the year before the opening of the administrative proceeding). By means of reference, Brazilian Antitrust Laws allows for fines from 0,1 to 20% of the revenue. CADE usually imposes fines that range from 1% to 5% in cases involving unilateral conducts, whereas coordinated practices are subject to higher fines (usually 10-15% of said revenues).

WHAT ARE THE TAKEAWAYS ON STATE-OWNED ENTERPRISE RESPONSIBILITY AND CADE'S JURISDICTION IN THE FINANCIAL MARKET FROM THE PAYROLL LOANS CASE?

Vicente Bagnoli

1. Introduction

The payroll loans case[1] started in 2010 and was concluded in 2012. It is considered a milestone for CADE and the Competition Law. Two main questions can be answered by CADE's decision: (i) do state-owned enterprises have antitrust responsibility; and (ii) does CADE has jurisdiction in the financial market?

The present paper aims to show those answers addressed in CADE's decision.

2. Payroll loans case

In June 2010, a complaint[2] was filed by the civil servants' association – "Federação Interestadual dos Servidores Públicos Municipais e Estaduais dos Estados do Acre, Alagoas, Amapá, Amazonas, Bahia, Maranhão, Minas Gerias, Paraná, Piauí, Roraima, Sergipe e Tocantins" ("FESEMPRE") – against the state-owned Banco do Brasil ("BB"), the largest bank in the country. The complaint alleged that inter-brand competition among the financial institutions that offered

[1] BAGNOLI, V.; BASTOS, A.A.R.; NAVAS, A.R.E.; *Cláusula de Exclusividade: Análise concorrencial a partir do caso dos créditos consignados.* São Paulo: Almedina, 2014.

[2] Administrative Process No. 08700.003070/2010-14.

payroll loans[3] was eliminated due to contracts signed between BB and public institutions such as the City of Sao Paulo.

These contracts referred to services such as: centralization and processing of credits from 100% of the payroll generated by a State or Municipality; centralization and processing of the financial movement of all bank accounts, including the accounts of the State or Municipality; centralization and processing of all financial transactions of payments to creditors of the State or Municipality; centralization and processing of all financial transactions of the funds of the State or Municipality; centralization of receipt, control and payment of judicial deposits; among other services.

In Brazil, BB was the only bank through which those civil servants were paid, and the bank had exclusivity on offering the service of payroll loans to these servants. The servants associated to FESEMPRE wanted to be able to use other banks for the service at the time of the complaint.

CADE´s President decided to open an investigation due to the referral of FESEMPRE´s complaint documents. Reporting Commissioner sent the files to CADE's Attorney Office. The General Attorney's Office, in turn, suggested sending an official letter to the Brazilian Central Bank ("BACEN"), requesting information and possible decisions on the complaint.

BACEN reported that the absence of regulation on the matter, within the scope of the national financial system, prevented it from investigating the practice and launched possible punitive administrative proceeding against the BB. BACEN took six months to analyze the case.

At the CADE Hearing Session No. 498, held on August 31, 2011, the Reporting Commissioner considered the inaction of BACEN and decided to open an Administrative Proceeding to investigate the

[3] Payroll loans are granted by the bank to public workers, and the bank then takes the money directly from their salaries once the civil servants are paid by the government.

complaint made by FESEMPRE. He also granted a preventative injunction ordering BB to immediately suspend all contracts that held exclusivity clauses for the granting of payroll-deductible loans. A fine of one million Reais could be applied for every day that BB did not comply. The other Commissioners unanimously followed the decision.

In disagreement with the CADE's decision, BB filed a writ of mandamus in the Federal Court on November 11, 2011 intending to obtain an injunction to suspend the decision rendered in the Administrative Proceeding and the fine resulting from noncompliance with the decision as well as the administrative proceeding itself.[4] The decision of the Federal Court confirmed CADE's understanding of the matter and its jurisdiction.

CADE unanimously approved the end of the investigation on May 29, 2012. The final judgment and the end of the proceeding were near. BB submitted to CADE, on July 11, 2012, a settlement proposal, requesting the suspension and, subsequently, the withdrawal of the Administrative Proceeding. CADE decided to start negotiating a settlement with BB on July 18, 2012.

The negotiation period ended on October 2, 2012. Eight days after, the settlement was approved by CADE. This put an end to the exclusivity of BB in granting payroll deductible loans to civil servants. The execution of the settlement agreement did not imply in the judgment of the merits of the proceeding nor the acknowledgment of guilt, illegality or irregularity of the conduct by BB, its shareholders, managers and representatives.

3. Conclusion

BB agreed to end its exclusivity agreements and to inform the decision to all public entities that had contracts, within a month, as well as pay a R$ 99 million pecuniary contribution. The settlement re-

[4] Process nº 61339-91.2011.4.01.3400 (6ª Federal Court of Federal District) and Bill of Review Appeal nº 0072129-52.2011.4.01.0000/DF.

established competition in the payroll loan market and the civil servants benefited from the competition between financial institutions in the supply of credit. At that time, it was the largest agreement reached in the investigation of unilateral anticompetitive conduct.

This settlement, by which BB implicitly recognizes CADE's jurisdiction as an independent agency encouraged it to enforce competition law in the financial sector with no distinction with respect to other markets.

This decision intensified the long-run controversy as to whether CADE has investigative powers over financial institutions[5]. The payroll case was the first case that CADE opened an investigation of a bank for alleged violation of competition law.

CADE affirmed that the Law applies to individuals or legal entities of public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, even if engaged in business under a legal monopoly system, as established by Law No. 12,529/11, in Article 31.

The decision of CADE also confirmed the significant institutional independence of its commissioners and that Competition Law is applied to everyone, including state-owned enterprises.

[5] CADE and BACEN approved on December 5, 2018 the Joint Regulatory Act No. 1, which establishes procedures to harmonize and streamline their respective actions within the scope of the financial market. The act was foreseen in the Memorandum of Understanding (MoU) signed on February 28, 2018. Under the terms of the MoU, in the control of antitrust violation involving financial institutions, the analysis will be held by CADE, who will use information provided by BACEN to increase the technical consistency and the articulation of its decisions.

MAP: IS 'MINIMUM ADVERTISED PRICE' ALLOWED UNDER THE BRAZILIAN ANTITRUST LAW?

Luiza Kharmandayan
Priscila Brolio Gonçalves

1. Introduction

The discussion about the legality of vertical price-based restraints is not new to antitrust. However, much of the debate is focused on resale price maintenance (RPM), specially with a view to ascertaining its potential anticompetitive effects, justifications, efficiencies and, thus, determining which antitrust treatment is most appropriate for such behavior in several jurisdictions.

Minimum advertised price (MAP), on the other hand, has historically received far less attention, even where it is widely adopted by companies as part of their commercial policy[1]. The situation is not different in Brazil, where the antitrust analysis of MAP is still incipient. The Tribunal of the Brazilian competition authority, CADE, has recently issued its first decision on the subject, dated October 2018. Until then, the approach about the matter has been incidental in opinions and votes related to RPM and Suggested Resale Price (SRP).

This paper intends to examine MAP from an antitrust perspective and respond if it is safe to adopt such policy in Brazil. **Section 2** lays out the basic characteristics of MAP and explains how it relates to other types of vertical price-based restraints. **Section 3** examines MAP in light of the rules governing antitrust in Brazil, **Section**

[1] KALI, Raja (1998) Minimum Advertised Price, Journal of Economics and Management Strategy, 7(4), 647-668; ASKER, John; -ISAAC; Heski Bar (2016) Vertical information restraints: Pro- and anticompetitive impacts of minimum advertised price restrictions. NBER Working Paper No. 22771, at 1.

4 analyzes CADE's position on the matter. **Section 5** presents a brief conclusion.

2. What is MAP and why are antitrust authorities concerned about it?

MAP is usually defined as a policy by which manufactures impose a price floor below which retailers cannot advertise a product, although it does not set the price at which this product can be sold to consumers. Normally, MAP programs are structured with positive or negative advertising incentives, to induce resellers to stick to advertised resale price. Failure to comply with MAP can result in consequences ranging from threats of suspending a cooperative advertising subsidy to the termination of future dealership contracts[2].

Even though the object of MAP policies is not the actual price at which the retailer sells a product, there is little doubt about their indirect effects on such price. Therefore, in the same way as RPM and SRP, MAP is viewed as a type of vertical price-based restraint. This understanding is reinforced by the fact that, despite their differences, RPM, SRP and MAP are restrictions that, on the one hand, limit intra-brand competition and might facilitate collusive behaviors and, and yet, on the other hand, might promote inter-brand competition, mitigate service-related free-rider problems and stimulate dealer promotion and investment.

In light of these, MAP's legality is usually analyzed under a framework similar to the one applied to RPM and SRP. In jurisdictions where RPM is evaluated using a rule of reason approach, MAP tends to

[2] ASKER and ISAAC, supra, at 1. KALI supra, at 1 648-649. ALBERT, Julie Beth (2012), Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies, Fordham Law Review, 80(4), 1679-1719, at 1694, 1696. OECD (2018), Implications of E-commerce for Competition Policy, DAF/COMP(2018)3, available online at https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf, at 20.

be examined through the same lens (e.g., the United States after Leegin)[3]. Likewise, in jurisdictions where RPM constitutes a *per se* offense or an illicit by the object, the same treatment frequently applies to MAP (e.g., the European Union)[4]. This does not imply, however, that RPM, SRP and MAP are identical practices. On the contrary, since SRP and MAP do not prevent retailers from discounting and engaging in inter-brand-price competition, they are usually treated more favorably under competition law than fixed and minimum RPM[5].

3. Is MAP a per se violation under the Brazilian Antitrust Law?

When compared to the main references, the Brazilian Antitrust Law (Law n. 12,529/2011) is more like the European system than the US. Antitrust violations in Brazil are defined according to their object or net effects. CADE's precedents usually indicate which conducts should be analyzed under each approach, although precedents are not binding to the authorities and the standards applicable to particular conducts are sometimes modified.

Because of its potential to limit competition and result in higher prices, MAP programs might infringe the Brazilian Antitrust Law. If the imposition of resale prices or any other business conditions is able to restrain competition, it constitutes an antitrust violation (Article 36, §3,

[3] FTC Guide to Antitrust Laws. Dealings in the Supply Chain -Manufacturer-imposed Requirements, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed

[4] OECD (2018), supra, at 19. *See* ASKER and ISAAC, supra, at 4-5.

[5] The more favourable treatment accorded to MAP than to RPM can be illustrated by the fact that prior to the Leegin case, in which the Supreme Court determined that all manufacturer-imposed vertical price programs should be examined using a rule of reason, RPM was considered a per offense in the United States. MAP, on the other hand, was acknowledge by its pro-competitive potential in preserving service incentives and, thus, was judged according to a rule of reason approach (Kali, supra, at 648. ASKER and ISAAC, supra, at 4-5).

IX). The same logic applies to practices that "hinder or disrupt the continuity or development of business relationships of undetermined term, because the other party refuses to abide by unjustifiable or anticompetitive terms and conditions" (Article 36, §3, XII). The Law also prohibits vertical agreements that "promote, obtain or influence the adoption of uniform or agreed business practices among competitors" (Article 36, §3, XII).

In view of MAP's legitimate business justifications, it is our understanding that such policy should be assessed on a case-by-case basis, taking into account: (i) if the company imposing the restriction has market power (in the absence of it, the conduct would bear no harmful potential); (ii) MAP's potential impacts on competition in the concrete case; (iii) the existence of objective justifications; and (iv) net effects of the policy.

4. What is CADE's position on MAP?

CADE's case law specifically on MAP is very limited. In October 2018, the Tribunal has issued its first decision entirely on the subject. Until then, the approach about the matter has been incidental in opinions and votes related to RPM and SRP.

The Brazilian Antitrust authorities have always been cautious when examining minimum price policies, but they have usually conducted their analysis under the rule of reason. However, in 2013, a stricter approach has been adopted, in a trial that lasted 2 years before the Tribunal. In the investigation involving an auto parts manufacturer[6], the majority of the Commissioners voted for the conviction of the defendant for implementing a minimum margin policy for around one year. The decision considered that the behavior was illegal by the object and some votes suggested that even minimum SRP and minimum price advertisements might harm competition.

[6] Administrative Procedure n. 08012.001271/2001-44 (SKF do Brasil Ltda.). Decided by the Tribunal on January 20, 2013.

One year and a half later, in 2014, CADE and a manufacturer of fiscal printers settled an investigation related to minimum prices. In the agreement, the defendant committed to refrain not only from imposing, but also from suggesting and advertising resale prices to its customers for an indefinite period. CADE based this obligation on an alleged "anticompetitive risk", despite its findings that (i) the company merely suggested resale prices and did not sanction dealers who charged lower prices, (ii) the company was not vertically integrated, so that there were few incentives for it to favor a cartel in the downstream market, and (iii) there was no evidence that the practice aimed at or had the effect of coordinating behavior. The reasons for CADE's concerns were not indicated in the decision, but it is plausible to consider that they were because the company had a significant market share (58%) and on the abstract risk that the mere price suggestion might facilitate collusion (as some Commissioners declared in 2013).

Therefore, it has quite a surprise when, in 2018, CADE's Tribunal admitted that it was lawful for an auto parts supplier to impose MAP on its retailers of specific tires[7]. The decision was a formal response to a consultation provided under articles 9, §4, and 23 of Law 12,529/2011 and CADE's Regulation n. 12/2015. According to the undertaking, the purpose of this policy was to encourage investments and mitigate opportunistic behaviors among its dealers.

Contrary to the undertaking's argument, the Reporting Commissioner Paulo Burnier asserted that MAP, RPM and SRP strategies do bare significant similarities and, in the same way as the other vertical price-based restraints, MAP requires a case-by-case assessment of its net effects. However, after concluding that the company

[7] Case n. 08700.004594/ 2018-80 (Continental do Brasil Produtos Automotivos Ltda). Decided by the Tribunal on October 16, 2018.

lacked market power[8], the Reporting Commissioner decided that it was unnecessary to continue with the analysis of effects.

Mr. Burnier pointed out that there were three basic conditions of the policy in question, which, if modified, could rule out its lawfulness: (i) the absence of unilateral or coordinated market power in the markets affected by the policy; (ii) the unilaterality of the MAP policy, which would not have been deemed legal if resulting from an agreement among retailers in the downstream market or inducing collusive behavior among competitors; and (iii) the isonomic treatment of retailers subject to the MAP (no discrimination of retailers by sales channel or by geographic region).

The Reporting Commissioner's vote was followed by the majority of the Tribunal, but the decision was not unanimous. According to the dissenting opinion of Commissioner Cristiane Alkmin Junqueira Schmidt, even if there was room for bargaining and discounting in specialized brick and mortar retailers, one could not expect the same from large non-specialized stores, much less from online retailers. In these cases, with rare exceptions, the announced price would be the resale price, thus MAP would have the same effect of RPM, which should be considered a *per se* violation.

Though relatively straightforward, CADE's recent decision on MAP deserves a few considerations. While acknowledging the merits of the agency for analyzing the policy according to a rule of reason and for dismissing the competitive risk due to the absence of market power, some questions remain in respect to the legality conditions presented by the Reporting Commissioner. Although the first condition (lack of market power) is in line with the effects analysis carried out, the argument that the sole modification of any of the other conditions (unilaterality of the policy and non-discrimination among resellers) would suffice to

[8] Differently from what happened in the SKF decision, in this case the existence of market power was basically assessed by the company's individual market sharers, which were inferior to 20%.

challenge the MAP's legality raises doubts about the conclusion that such policies should be analyzed under the rule of reason and that, in the absence of market power, there is no risk of competitive harm.

Regarding the condition about the unilateral nature of the MAP policy, the agency's concern with practices that might signal collusive behavior is reasonable. After all, concerted practices are subject to a presumption of illegality, since they hardly ever engender any efficiency. On the other hand, by maintaining that the absence of discrimination is, in itself, a condition of MAP's legality, the Tribunal called into question the assertion that MAP's harmful potential presupposes the existence of market power. In other words, it remains unclear whether MAP policies that imply some form of differentiation between retailers can be considered anticompetitive even if the manufacturer holds no market power.

5. Conclusion

Having in mind the statements against minimum price policies in CADE's decisions in 2013 and 2014, the Tribunal's recent decision on MAP constitutes a real change of stance. It is possible to affirm that such decision represents a modification in CADE's tendency to treat vertical price restraints more rigorously – a tendency that led the authority to indicate not long ago that it would not tolerate even SRP. On the other hand, the decision on MAP is a single and very limited one, thus implying that this shift of position should be regarded with parsimony and vertical price-based restraints other than RPM should be applied with caution. Ambiguous aspects of the 2018 decision are sources of legal uncertainty that suggest that, even in the absence of market power (an aspect that is per se difficult to analyze), the adoption of MAP is only allowed in Brazil if it is genuinely unilateral and does not include any type of differentiated treatment among resellers.

ARE TERRITORIAL RESTRICTIONS A VIOLATION TO THE BRAZILIAN ANTITRUST LAW?

Murilo Machado Sampaio Ferraz

1. Introduction

The purpose of this article is to discuss if it is illegal that a company designates regional area for its distributors / resellers. In other words, this practice occurs when one producer establishes limitations with respect to the area of operation of distributors/resellers, restricting competition and entry in different regions.

A territorial restriction could be a regular commercial practice with economic reasonableness and efficiencies, but under certain circumstances this same conduct can be used as an instrument to form cartels and unilaterally increase the market power.

In this discussion, we should consider the premise that, pursuant to article 36 of the Law N. 12,529/2011 (Brazilian Antitrust Law), a conduct is considered as an infringement to the economic order when it aims at or even has the intent of causing the follow effects:

(i) limiting, falsifying or otherwise harming free competition or free initiative;

(ii) controlling a relevant market of goods and services;

(iii) arbitrarily increasing the economic agent´s profits; or

(iv) abusing a dominant position[1].

[1] The Brazilian Antitrust Law determines that a position occur when a company or group of companies controls a significant portion of the relevant market as supplier, intermediary, buyer or financing agent of product, service or technology in such a company or group of companies can, deliberately and unilaterally, alter market conditions. The Article 36 Paragraph 2º of said law

It is also important to highlight that, with few restrictions, there is no "per se" antitrust violation under Brazilian Antitrust Law. This means that any practice, including territorial restrictions, would, theoretically speaking, only be deemed unlawful if capable of producing any harmful effects to competition.

In practice, however, the case law of Administrative Council for Economic Defense – CADE, shows that the authority has been gradually moving to a more conservative approach regarding the assessment of the lawfulness of certain behaviors with high potential of producing harm to competition, mainly cartels and resale price maintenance – RPM.

2. Territorial restrictions: legal treatment

In effect, from a legal point of view, Article 36, Paragraph 3º, IX of the Law N. 12,529/2011 determines that:

> "§ 3 The following acts, among others, to the extent to which they conform to the principles set forth in the caput of this article and its clauses, shall characterize violations of the economic order:
> IX - to impose on the trade of goods or services to distributors, retailers and representatives, any resale prices, discounts, payment terms, minimum or maximum quantities, profit margin or any other market conditions related to their business with third parties;"[2]

As it turns out, the main concern addressed by the Brazilian Antitrust Law is the imposition of vertical restraints by the manufacturer to its distributors / resellers. In this sense, the mentioned article provides that, among other practices, the imposition by a dominant company of

indicates a presumed level dominant position at 20% (twenty percent) share of a relevant market.

[2] This article maintained the same wording of Article 21, XI of the former Brazilian Antitrust Law (Law N. 8,884/1994).

any commercial condition on distributors, retailers or sales representatives related to their business with third parties may bee deemed as an antitrust violation.

According to the Resolution CADE N. 20/q999 - edited with the objective of provide guidelines for routine examination by the competition authority, ensuring transparency of the procedures and criteria adopted by CADE – these restrictions could have different effects:

> These restrictions raise the costs of entry into geographical markets limited by agreements insofar as the extension of the market not covered by the agreement is not economically attractive to new distributors/dealers; or furthermore, restrict the access of actual competitors to prospective consumers, insofar as they create obstacles to the sale by competing distributors or dealers to consumers located within the exclusivity area. Monopolistic exploitation of the users of after-sales services may also occur if such services involve high costs relating to changes and lock-in situations, in which consumers have no feasible alternatives for consumption of these services. Similarly, possible benefits in terms of transactional cost savings should be taken into consideration when reviewing these cases."[3]

3. Territorial restrictions: case law

As the Organisation for Economic Co-Operation and Development - OECD itself has noted in its second peer review of the Brazilian Competition Policy System – BCPS, published in 2010,

[3] Available at < http://en.cade.gov.br/topics/legislation/resolutions/resolution20b.pdf/view >

historically "*The BCPS prosecutes very few vertical restraints that are not also considered abuses of dominance*"[4],

This trend has been confirmed in the following years and CADE has been focusing mainly on the analysis of cartel cases. In this way it is necessary to examine two cases tried during the mid 2000s.

According to CADE's decision in the case MICROSOFT/TBA (Administrative Process 08012.008024/98-49), the territorial restrictions imposed by Microsoft on its distributors on the market of the sale or licensing of software and information technologies services were illegal as the company has left one single supplier (TBA) in the Brazilian capital (Brasilia), therefore eliminating competition for the most government procurement bids[5].

As explained above in the case MICROSOFT/TBA CADE concluded that the territorial restriction imposed by Microsoft on its Brazilian distributors (TBA) was illegal. In that case the practices restricted the distribution of software and computer services linked to the sales to the federal government and concluded that the conduct of the two companies established (i) limitation to competition, (ii) abuse of dominant position, and (iii) in a way to obtain improper advantage in public procurement bids.

Other case to mention involving territorial restrictions was the case OASIS/BRAHMA (Administrative Process 08012.000146/96-55) where, after a structural analysis of the market, CADE verified that some vertical restrictions in the market for distribution of beer (including fixing

[4] COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW – 002010073 © OECD / IDB 2010. Available at < http://www.oecd.org/daf/competition/45154362.pdf >

[5] Microsoft was fined 10% of licensing sales of Microsoft's products to Brazilian government and TBA was fined 7% of its sales resulting from the governmental in relation to products and information technology services associated witch Microsoft. The correspondent amount of the pecuniary fine was of approximately US$ 2.5 million.

resale prices and territory restrictions) were justifiable as it prevented an improper "intra-band" competition among distributors and pushed the single distributor to improve its marketing and resale efficiencies. At the end, the case was dismissed by CADE as the agency concluded on the existence efficiencies and positive results deriving from the practice.

4. Conclusion

The territorial restriction is not a violation "*per se*" of the Brazilian Antitrust Law. The restrictions will be analyzed on a case-by-case basis under the rule of reason, balancing the economic reasons of the behavior and the company's market power.

Even though it may represent a common business practice, the competition authority may intervene if a dominant company uses this territorial restriction to unilaterally increase its market power.

WHAT ARE THE MAIN DIFFERENCES BETWEEN VERTICAL RESTRAINTS AND VERTICAL INTEGRATION?

Marcos Lima

1. Introduction

In Brazil vertical mergers are probably more common than horizontal mergers. And in the last five years some of the vertical mergers (or some mergers that generates horizontal concentrations and vertical integrations) were blocked or approved with the adoption of remedies by CADE, such as:

- Rumo / ALL (Concentration Act 08700.005719/2014-65);

- Ipiranga / Alesat (Concentration Act 08700.006444/2016-49);

- AT&T / Time Warner (Concentration Act 08700.001390/2017-14);

- Itaú Unibanco / XP Investimentos (Concentration Act 08700.004880/2017-64);

- Bayer / Monsanto (Concentration Act 08700.001097/2017-49).

It is notorious that CADE is taking vertical integration analysis very seriously. But, on the other hand, one can verify that it takes CADE too long to analyze vertical restriction cases. The tables just below shows that CADE has signed very few settlement agreements (TCCs) in unilateral conduct cases (most of them are vertical restraints cases) since 2014.

Figure 1: Number of TCCs signed by CADE

		Cartel	Uniform Practices	Unilateral Conduct
Number of TCCs by type of conduct	2014	23	11	5
	2015	40	14	8
	2016	53	2	6
	2017	65	6	4

Source: Cade

Those settlement agreements represent very low fines as compared to cartel cases.

Figure 2: % of Fines imposed by CADE

		Cartel	Uniform Practices	Unilateral Conduct
% of fines by type of conduct	2014	98%	1%	1%
	2015	60%	16%	24%
	2016	68%	31%	1%
	2017	96%	4%	0%

Source: Cade

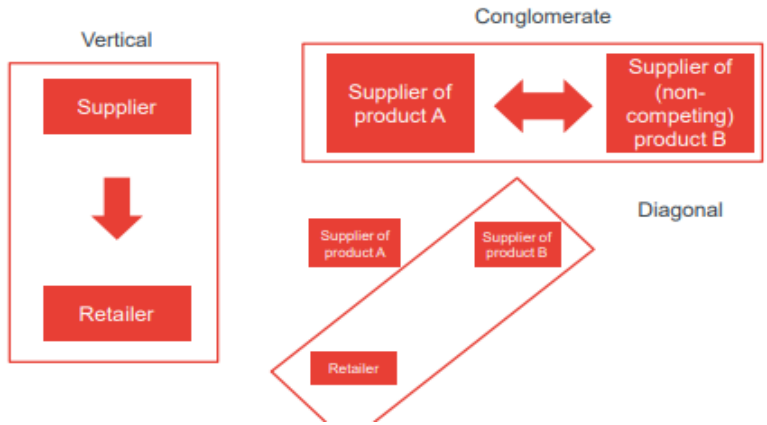
Vertical restraints cases should be analyzed by the rule of reason and in most cases there is a high probability that pro-competitive effects overcome the anticompetitive ones. But the problematic cases (anticompetitive effects prevail) should be decided more rapidly. The incentives for a quicker decision can be increased if CADE adopts preliminary injunctions in cases with the requirement of *fumus boni iuris* (the likelihood of the allegations).

This paper discusses the differences between vertical integration in mergers and vertical restraints. It is divided in more three sections. The first presents the vertical integration concept. The second is related to vertical restraints. The last one list the main conclusions.

2. Vertical Integration

The Office of Fair Trading (UK) classifies non-horizontal mergers as vertical, conglomerate and diagonal.

Figure 3: Non-horizontal Mergers



Source: OFT[1]

A vertical merger can generate non-coordinated and coordinated effects. This type of merger may impede effective competition through non-coordinated effects mainly when it gives rise to foreclosure.

Two forms of foreclosure can emerge. The first occurs where the merger is likely to raise costs of downstream firms by restricting their access to an important input. The other one is related to the cases where the merger can foreclose upstream rivals by restricting their access to the customer base.

The foreclosure analysis involve three steps that are closely intertwined:

(i) the ability of the postmerger entity to foreclose access to inputs or customers;

(ii) the incentives to adopt this practice; and

[1] http://competitionpolicy.ac.uk/documents/8158338/21648435/Session+8+-+Vertical+Restraints+-+David+Parker.pdf/2be7dc02-32f4-4e04-b12a-734d008223c0 - Access date 25 Feb. 2019.

(iii) the detrimental effect on competition.

In practice, those steps are often analyzed together.

Vertical mergers can also increase incentives for coordination. For coordinated effects to arise the short term profits (from deviating) has to be less attractive than the strategy to coordinate.

3. Vertical Restraints

According to Motta (2003)[2]:

> "Very often, firms at different stages of the vertical proccess do not simply rely on spot market transactions, but engage in contracts of various types that are signed in order to reduce transaction costs, guarantee stability of supplies, and better coordinate actions. These agreements and contractual provisions between vertically related firmms are called vertical restraints."

The main types of vertical restraints are:

(i) Single branding;

(ii) Exclusive distribution;

(iii) Exclusive customer allocation;

(iv) Selective distribution;

(v) Franchising;

(vi) Exclusive supply;

(vii) Category management;

(viii) Upfront access payments;

(ix) Tying and bundling;

(x) Resale price restrictions

[2] http://www.cea.fi/course/textbook/chapter_6.pdf Access date 28 Feb. 2019.

Vertical restraints can generate welfare gains and/or losses. For this reason those practices demand a rule of reason analysis. The potential concerns with vertical restraints are:

(i) Facilitate upstream or downstream collusion;

(ii) Foreclose upstream or downstream competition;

(iii) Soften upstream and/or downstream competition.

The analysis of the costs and benefits of vertical restrainsts should be made case by case and involve verifying intrabrand and interbrand effects. Some calculations should also be done in order to verify if there are incentives for those practices and also the net welfare effects.

In recent years there were lots of developments in vertical restraints cases, particularly driven by new forms of restraint in online markets. It is very important to be even more careful with those cases. In general, Authorities tend to be less rigid with anticompetitive conducts in online markets because of the notion that there are very low entry barriers in those markets. But this is not always true.

4. Conclusion

This paper discusses the differences between vertical integration in mergers and vertical restraints. This topic is especially important in Brazil, because of the long time that CADE usually takes to decide vertical restraints cases. On the other hand, vertical integrations in merger cases has been receiving all the attention from the Authority.

In this scenario, CADE should give more attention to vertical restraints cases, and also create, whenever possible, the correct incentives for the involved parties to collaborate for quicker decisions about those cases.

ANTITRUST DISCRIMINATION: WHERE ARE WE AND WHAT ARE THE ENVISIONED CHALLENGES FOR THE FUTURE?

Gabriela da Costa Carvalho Forsman
Lucas Griebeler da Motta

1. Introduction

Antitrust discrimination is analyzed by antitrust authorities, including the Administrative Council for Economic Defense - CADE, under the rule of reason (effects-based approach): they balance the alleged efficiencies against the potential harm to consumers that may arise from the conduct when determining its net outcomes and, therefore, whether it shall be deemed an antitrust violation. In this sense, discriminating *per se* does not necessarily translate into an antitrust violation: in fact, economic theory shows that, in general, the welfare consequences of discrimination are ambiguous[3]. For the purposes of legal certainty and predictability, for a certain act of discrimination to be considered illegal, it shall meet specific criteria. The aim of this article is to analyze how CADE has objectively addressed antitrust discrimination.

2. Antitrust discrimination

Even though the most well-known discriminatory conduct is price discrimination, it is worth mentioning that antitrust discrimination's scope and means may contain blurred lines and be diverse. For instance, preventing a certain undertaking from using an infrastructure facility; offering a lower quality broadcast of audiovisual content to non-integrated undertakings; and giving advantage in terms of visual positions

[3] CALCAGNO, Claudio; FUMAGALLI, Chiara; MOTTA, Massimo. Exclusionary practices: the economics of monopolization and abuse of dominance. Cambridge: Cambridge University Press, 2018, p. 129).

in the context of an upstream product/service to a downstream product/service of the same economic group configure discrimination[4].

Pursuant to Article 36, Paragraph 3, Section X, of Law N. 12,529/2011, CADE considers the offering of distinct commercial conditions and the practice of price discrimination as antitrust violations when their actual or potential goal is or they result in: (i) the imposition of a limitation, restraint or harm to competition; (ii) the control of a given relevant market; (iii) abusive increase of profits; or (iv) abuse of dominance[5]. Notwithstanding the fact that the aforementioned legal provision does not explicitly refer to alternative types of discrimination, it should be noted that the wording choice of Paragraph 3 allows for an interpretation that they are also covered by the law.

Discrimination as a whole (that is, encompassing both classic and alternative types) is a quite common practice, but it is only considered unlawful when a dominant player uses its market power to pursue the increase in costs of rivals or other non-vertically related undertakings, market foreclosure and harm to competition. Apart from such abstract provisions, for the purpose of providing market players with foreseeability and safe harbors, CADE has set some guidelines that can be drawn from the analysis of two cases that will be explained in this article, as follows: (i) the investigated undertaking should have a dominant position; (ii) the relevant conduct should actual or potentially harm competition; (iii) there should be incentives for the discrimination

[4] Such as setting attractive line-up for some channels to the detriment of others, as well as granting prominent placement to Google's comparison shopping service within the search engine also owned by Google (Case AT N. 39740, Google Search [Shopping]).

[5] "Dominance occurs when an undertaking relates to a position of economic strength by which it is enabled to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, clients and consumers" (BAILEY, David; WHISH, Richard. Competition Law. Oxford: Oxford University Press, 2015, p. 190).

(i.e. structural, contractual or business); and (iv) there should not be a legitimate rationale.

3. CADE's decisional practice

Based on publicly available information, there are only a few cases in which CADE thoroughly analyzed discrimination and its effects. The most complex and relevant cases involve vertical integrations and regulated markets, such as the dispute TCA v. Cosan and Rumo/ALL, as well as the Comgás v. Petrobras, White Martins and GNL Gemini case.

3.1 TCA v. Cosan and Rumo/ALL

CADE opened an Administrative Proceeding[6] against Cosan Indústria e Comércio ("Cosan") and Rumo Transporte Multimodal ("Rumo")[7] based on a complaint filed on December 13, 2013 by TCA Logística Transportes e Armazéns Gerais ("TCA")[8]. Cosan and Rumo pursue businesses along the production chain of ethanol and sugarcane (production, industrialization, transportation, distribution, etc.) and may be considered, to some extent, competitors to TCA. Furthermore, since both Cosan/Rumo and TCA demanded railroad transport services from

[6] Administrative Proceeding N. 08700.011102/2013-06.

[7] Cosan and Rumo are part of the same economic group. Cosan is the parent-company and focuses its investments on strategic industries, such as agribusiness, fuel and natural gas distribution, lubricants, and logistics. In its turn, Rumo is owned by Cosan and is the largest logistic operator in Latin America, managing an independent railroad network covering more than 7,500 miles in seven Brazilian states. Source: Investment Relations of Cosan, available at http://cosan.com.br/en/cosan/whowereare.

[8] TCA is a company with activities throughout the market for provision of multimodal transportation services (using roads, railways, and ports) and warehouses, specifically designed for the export of agricultural commodities (in particular, sugarcane and by-products).

the same independent supplier, América Latina Logística ("ALL")[9], they also compete for the usage of the same infrastructure.

The dispute was on the following main arguments and aspects: ALL and Rumo entered into an investment contract, according to which, the latter had undertaken to make investments in the expansion, modernization, and refurbishment of railroads[10], which concession for exploration and operation was granted to ALL by the Federal Government. On the other hand, as a compensation for those investments, ALL was required to give preference to Rumo, providing it with better commercial conditions and, at the request of Rumo, *de facto* exclusivity in the freight of sugarcane and related products, foreclosing the market to competitors, especially TCA. This also caused competitors to shift their transportation demands from railways to roadways (which are more expensive and less efficient). Besides this, whenever a competitor requested services from ALL, Rumo charged a fee for it and, in case Rumo's products were not delivered by railways, Rumo was entitled to be compensated for additional costs.

During the investigation, Rumo decided to acquire the share control of ALL and submitted to CADE, on July 21, 2014, a merger control filing for the clearance of the reinforcement of preexisting vertical integrations[11]. As expected, the transaction was challenged by third parties and by CADE's General Superintendence ("GS"), which concluded that, following the closing of the deal, there would be more incentives for ALL to benefit Rumo against its competitors.

The transaction was approved by CADE on February 11, 2015, conditioned to the execution of a Merger Control Agreement ("MCA")

[9] ALL was given the right to explore and operate railroads connecting the states of São Paulo, Paraná, Santa Catarina, Mato Grosso, Mato Grosso do Sul, apart from having some connection points with Argentina.

[10] Mainly situated in sugar producer regions in the state of São Paulo.

[11] Merger Case N. 08700.005719/2014-65.

by which the parties, among other commitments, agreed to: (i) terminate the provisions granting favorable treatment to Rumo; (ii) cause the railroad to be offered to any interested parties under the same commercial conditions offered to Rumo; (iii) set objective and transparent mechanisms for the pricing of each individual logistics services[12]; (iv) leave room for competitors of Cosan Group to have their products transported via the infrastructure, preventing Rumo from exploring the total capacity of it; and (iv) hire an independent auditor to serve as a monitoring trustee. As the main concerns were solved in the context of the MCA, Rumo entered into a cease and desist agreement with CADE and paid BRL 1.5 million to close the investigation.

This an interesting example to illustrate how CADE deals with antitrust discrimination, especially because the case involves several conflicts with a provider of logistics services, a merger, a merger control agreement and a cease and desist agreement.

3.2 Comgás v. Petrobras, White Martins and GNL Gemini

CADE opened an Administrative Proceeding[13] against Petróleo Brasileiro ("Petrobras"), White Martins Gases Industriais ("White Martins"), and GNL Gemini Comercialização e Logística de Gás ("Gás Local"), a resulting company from the formation of a joint venture ("JV") between Petrobras and White Martins[14], based on a complaint filed on

[12] This is a good example of "joint costs", which refer to an umbrella of different services charged as a single price. In connection with this aspect, please note that: "One of the problems with cross-subsidization is that many of the costs of operating in vertically related markets are 'joint costs', which means that there is no single correct way of allocating them as between the two markets". (HOVENKAMP, Herbert. Federal antitrust policy: the law of competition and its practice – 5th edition. Minnesota: West Academic Publishing, 2015, p. 521).

[13] Administrative Proceeding N. 08012.011881/2007-41.

[14] Under the scope of the JV: (i) Petrobras provided White Martins with natural gas; (ii) White Martins was responsible for the liquefaction of the gas at a plant established in the city of Paulínia/SP; and (iii) Gás Local was in charge of the

September 9, 2007, by Companhia de Gás de São Paulo ("Comgás")[15]. According to Comgás, Petrobras had been supplying White Martins with natural gas on a subsidized basis, pursuant to a supply agreement with more favorable commercial terms which, ultimately, enabled Gás Local to be more competitive and efficient than Comgás, including within the area of concession and operation of the latter[16].

The dispute was based on the following main arguments and aspects: (i) as Petrobras imposes on its supply agreements take-or-pay and/or ship-or-pay clauses, there would be a gas surplus, represented by the volumes contractually acquired by gas distributors, but not effectively consumed by them – that is, the volumes supplied by Petrobras to Gás Local were already paid by downstream competitors; (ii) the structure of the supply and the dynamics of the JV allowed Petrobras to offer the product to Gás Local with modest or even negative margins, leveraging the competitiveness of Gás Local to the detriment of downstream competitors, including Comgás; and (iii) by negotiating with its JV, Petrobras excluded standard commercial conditions applicable to supply agreements with other gas distributors, such as take-or-pay and/or ship-or pay clauses, base amount in US dollars, triggers for price readjustment, and the time period of the agreement[17].

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transportation of the product by trucks and cylinders and the distribution to clients (industries, concessionaires, gas stations which offer to its consumers compressed natural gas, etc.). White Martins and Petrobras hold, respectively, 60% and 40% of the equity interest of Gás Local.

[15] Comgás is one of the largest distributors of natural gas through pipelines in Brazil, providing supplies to commercial, industrial, and domestic clients within its concession area in the State of São Paulo.

[16] Pursuant to sectorial regulations, concession contracts involving the distribution of natural gas shall include limitations in the area of activity of each concession holder.

[17] According to the investigation, the supply agreement entered by and between Petrobras and Gás Local was set in Brazilian Reais, with IGP-M/FGV being the

Following years of litigation, the case's Reporting Commissioner, Paulo Burnier da Silveira, determined, among other provisions, that: (i) Petrobras shall apply the same contractual conditions offered to non-integrated entities, including Comgás to Gás Local; (ii) all beneficial clauses to Gás Local shall be removed; and (iii) Petrobras and Gás Local shall enter into a new agreement, which shall be audited by an independent monitoring trustee.

This investigation was one of the most complex and prominent cases analyzed by CADE, as it established benchmarks with respect to allegations of antitrust discrimination with a broad scope. In addition, CADE did not limit its review to price discrimination, but rather took into account the overall peculiarities of the relationship between Petrobras and its JV. Also, the case has other specific and interesting contours concerning allegations of market foreclosure and invasion of an area assigned to a competitor[18], which are not the object of the present article.

4. Where are we and what are the envisioned challenges for the future?

Although CADE has only ruled on a few discrimination cases, the Brazilian authority has already set the criteria for the assessment of antitrust discrimination. However, most cases analyzed so far are solely related to discrimination involving "traditional" markets, in which its practice and effects are clear and usually easy to detect and address.

CADE and its worldwide peers currently face new challenges related to the analysis of discrimination in the context of, for example,

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index for readjustment. Based on this, CADE found that Gás Local was given a better treatment than Comgás without objective grounds.

[18] As discussed throughout the case, since Gás Local had invaded the concession area destined for Comgás, by capturing strategic clients situated within the area of Comgás, Comgás would have its margins compressed, impairing its financial conditions to build and expand necessary infrastructure to the distribution of natural gas through pipelines in São Paulo.

dynamic, digital, and new markets. Antitrust authorities as a whole should prepare themselves to be able to examine subtle practices and their effects, which, depending on the circumstances, despite being practicably invisible may produce disastrous results and impair not only competition, but also the incentives to innovate, and contest preexistent dominant positions. Furthermore, as tech giants are global and they traditionally behave uniformly across jurisdictions, it is crucial to have consistent approaches in dealing with new types of discrimination – which is a great way to enhance international antitrust cooperation[19].

[19] "Consistent approaches to competition law, policy, and procedures across jurisdictions facilitate cooperation among competition agencies, and increase the effectiveness and predictability of enforcement, which benefits the Agencies, consumers, and the business community" (Antitrust Guidelines for International Enforcement and Cooperation. Available at: https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf).

REFUSAL TO DEAL: WHAT ARE THE NEGATIVE EFFECTS IN VERTICAL MARKETS?

Leonardo Vieira Arruda Achtschin

In general, refusal to deal (RTD)[20][21] is not an unlawful practice, characterized as a legitimate right of the economic agent to establish commercial agreements that are in accordance with the objectives of its business. However, once the economic agent holds a dominant position, combined with lack of any economic rationality for the exclusionary practice, unilateral conduct may be considered illegal under the terms of the antitrust legislation.

Refusal to deal may be vertical, horizontal or complementary.[22] It is a unilateral conduct that imposes difficulties for the antitrust authority's analysis, since anti-competitive RTDs may not be easily distinguishable from licit RTDs. In addition, some refusals to deal may generate short-term competitive harm to the market, but in the long run they may generate benefits.[23]

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[20] Also known as “refusal to supply”.

[21] Refusal to deal constitutes an unilateral conduct whereby an economic agent refuses to enter into a contractual relationship (refusal ex ante) or breaks an already existing relationship (refusal ex post), with another economic agent, whatever this agent acts in the horizontal or in the vertical market. Under Brazilian law, it is provided for in Article 36, paragraph 3, subsections XI and XI of Law 12,529/11.

[22] "Complementary RTD" occurs when a dominant agent on a particular product sells this jointly with other product, refusing to sell only one of the products to a rival.

[23] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). Refusals to Deal. DAF/COMP(2007)46. Avaiable at: <https://www.oecd.org/daf/43644518.pdf>. Search: Feb 26, 2019. p. 23

Despite the difficulty imposed on the antitrust authorities, Cade has already ruled on the elements that characterize a refusal to deal. The elements are: (i) a dominant position on the part of the agent refusing to supply the product, (ii) the possibility of the practice to eliminate effective competitors in the downstream market, and (iii) the lack of objective reason to justify the refusal.[24]

Although the conduct may occur in both horizontal and vertical markets, it is in vertical markets that the refusal to deal is more harmful to competitors. When faced with an integration, the economic agent holding a dominant position in the upstream market is able to impose its market power on rivals in the downstream market, what usually occurs with the aim of eliminating such competitors from this relevant market.

So, refusal to deal would assume greater damaging potential in vertically integrated markets due to the fact that the economic agent holding the dominant position in the upstream market has incentives to eliminate competitors in the downstream market that are not integrated with him.[25]

However, although the negative aspects of refusal to deal are more clearly perceived in the downstream market, it should be noticed that such conduct may generate negative externalities also in the upstream market, the relevant market in which the economic agent holding a dominant position develops its activities. Thus, it is important that the antitrust authority takes into account the effects on both the downstream market and the upstream market.[26]

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[24] See Processo Administrativo No 08012.010208/2005-22 (Empresa de Cimentos Liz S.A. x Intercement Brasil S.A.)

[25] See Averiguação Preliminar No 08012.006899/2003-06 (Instituto Radiológico Bento Gonçalves x Sociedade Dr. Bartholomeu Tacchini).

[26] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). Refusals to Deal. DAF/COMP(2007)46. Avaiable at: <https://www.oecd.org/daf/43644518.pdf>. Search: Feb 26, 2019. p. 24

Therefore, refusal to deal, when added to the elements of dominant position and integration, would have the potential to cause a double negative effect. Thereby, it may be inferred that refusal to deal in vertical markets may impose, at the same time, the closure of the downstream market and barriers to the entry of competitors in the upstream market.

On one hand, the most perceptible negative effect lies in the closure of the downstream market for those enterprises that are not integrated to the dominant agent.

In the Instituto Radiológico Bento Gonçalves x Sociedade Dr. Bartholomeu Tacchini Case[27], the Brazilian antitrust authority expressed its view on the harmful potential arising from unilateral conduct consisting on refusal to deal practiced by an economic agent holding a dominant position in the upstream market:

> "... one of the potentially unlawful forms of refusal to deal occurs when an upstream agent holding a dominant position refuses to supply inputs to a downstream competitor in order to eliminate competition in the downstream market."

Moreover, in Termo de Compromisso de Cessação (TCC), signed between Unimed Catanduva and Cade, the vote of Counselor Marcio de Oliveira Júnior recognized the existence of a dominant position of Unimed in that municipality, which would enable the health plan to exercise its market power to discredit economic agents in the downstream market not integrated to that enterprise. The Council took into account the fact that, although Unimed did not have formal participation in diagnostic imaging laboratories competing with the representative, it could be assumed that there were similar effects to those

[27] See Averiguação Preliminar No 08012.006899/2003-06 (Instituto Radiológico Bento Gonçalves x Sociedade Dr. Bartholomeu Tacchini).

of vertical integrations, since such laboratories would be controlled by directors of the cooperative.[28]

On the other hand, refusal to deal may also pose negative effects on the upstream market, since competitors of the economic agent holding a dominant position need to have access to a network of service providers in the downstream market, what remains impracticable due to the closure by the dominant agent.

In this way, refusal to deal would raise barriers to entry in the upstream market. Cade's book on unilateral conduct in the health market defines barriers to entry as market conditions, whether structural, institutional or behavioral, that prevent or delay the entry of new competitors into a market, giving those already established companies the advantages from market power.[29]

Health[30] and securitie/financial sectors[31] may be mentioned as markets subject to high barriers to entry, especially those related to strict regulation by their respective regulatory agencies, respectively, the National Supplementary Health Agency (ANS), and the Brazilian

[28] See Requerimento de TCC No 08700.010029/2015-17 (Unimed Catanduva).

[29] CADERNOS DO CADE. Mercado de Saúde Suplementar: Condutas. Avaiable at: < http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/copy_of_cadernos-do-cade-2013-mercado-de-saude-suplementar-condutas-2013-2015.pdf>. Search: Feb 28, 2019.

[30] See Ato de Concentração No 08012.002609/2007-71 (Medial Saúde S.A. e Grupo AMESP).

[31] See Ato de Concentração No **08700.004860/2016-11 (**BM&FBOVESPA S.A. – Bolsa de Valores, Mercados e Futuros (“BVMF”), CETIP S.A. – Mercados Organizados, (“CETIP”)).

Securities and Exchange Commission (CVM)[32] and the Brazilian Central Bank (BCB)[33].

Regarding the supplementary health market, besides regulatory barriers, with its norms provided by ANS, there are also other relevant barriers to entry, such as switching costs, sunk costs, establishment of accredited network and economies of scale.[34]

The excessive regulation of the securities and financial sector also imposes high barriers to the entry of potential competitors, a situation that is exacerbated by scenarios of refusal to deal in vertical markets. These legal and regulatory barriers are created by the State, particularly by sector regulators (CVM and BCB); for instance, CVM has broad regulatory power over the capital market to regulate the matters set forth in Law No. 6,385/76, as well as the sanctioning power to punish illegal acts.[35]

In summary, refusal to deal in vertical markets poses a great challenge to antitrust authorities, especially when faced with economic agents holding a dominant position, damaging the competitive environment not only in the downstream market, often more apparent for the antitrust authority, but also in the upstream market, resulting in a double negative effect.

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[32] In capital markets.

[33] In the banking market.

[34] CADERNOS DO CADE. Mercado de Saúde Suplementar: Condutas. Avaiable at: < http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/copy_of_cadernos-do-cade-2013-mercado-de-saude-suplementar-condutas-2013-2015.pdf>. Search: Feb 28, 2019.

[35] See Concentration Act No **08700.004860/2016-11 (**BM&FBOVESPA S.A. – Bolsa de Valores, Mercados e Futuros ("BVMF"), CETIP S.A. – Mercados Organizados, ("CETIP")).

IS SELECTIVE DISTRIBUTION LEGAL UNDER BRAZILIAN COMPETITION LAW?

José Carlos Berardo
Pedro H. R. Cini

1. Introduction

This paper aims to clarify under which circumstances so-called "selective distribution" programs are allowed under Brazilian competition law. We will (i) discuss the concept of selective distribution as set forth by CADE's precedents; (ii) review the few local precedents discussing this business practice; (iii) compare them to the experience; and (iv) highlight precautions seeking to mitigate challenges to selective distribution programs.

2. Concept of selective distribution

A selective distribution program is a type of vertical agreement used by manufacturers to have assure a higher level of control over the distribution of its products; in a typical selective distribution arrangement, the manufacturer sets forth criteria to select the distributors/retailers that are allowed to sell the manufacturers' product or service and the (non-price) circumstances under which this sale can occur.

This practice is normally employed in differentiated-product industries, exactly to ensure differentiation. The purpose of such a distribution system is usually related to product positioning: the interest of the manufacturer to associate its products with additional quality or luxury features, with a view to protect the manufacturer's reputation and the brand, by choosing distributors or retailers that meet certain criteria.

3. Precedents

Although CADE is generally very restrictive towards resale price maintenance practices, the implementation of a typical selective distribution program is not an infringement by its object, with the authority having the burden to prove that the conduct results in an unjustified lessening of competition.

Given this legal context, the authority must review selective distribution programs adopted by dominant companies under the light of a "rule of reason" approach, as the finding of an infringement depends on the effects of the conduct over competition, which requires a weighting of the negative competitive effects, efficiencies and consumer benefits. For such evaluation, several factors regarding the conduct context and market structure should be considered, such as the degree of concentration at the manufacturer and at the distributors levels, the number of distributors that may potentially suit the manufacturer's criteria and become its authorized distributor/reseller, entry barriers, justification for the restrictions adopted etc..

The main positive effects associated with a selective distribution program concern its purpose of building or maintain perception of the manufacturer's reputation as a provider of high quality products, increasing inter-brand competition. In addition, as well as other vertical agreements in general, selective distribution networks may serve the purpose of increasing economic efficiency in the supply chain, once it enables a better coordination between manufacturer and its reseller/distributors. This also avoids free-riding problems that could be practiced by competing distributors or manufacturers. For instance, a competing manufacturer could free ride in training initiatives for resellers/distributors (the former may thus benefit from the latter's strategy simply by having the same distributor in its supply chain, without incurring in any costs).

By contrast, the main negative effects associated with a selective distribution system are the softening of intra-brand competition, given that a dominant manufacturer reduces the number of distributors

that can market its product or service. Thus, the lawfulness depends on the degree of restriction on competition and the consequences for the price of the product at stake, what is related to certain aspects of the relevant industry, such as the efficiencies generated by the selective distribution system, the concentration degree at the manufacturer level and the extent to which intra-brand competition is softened by virtue of the selective distribution channel.

4. Cade's precedents

Although the authority has not recently reviewed a case involving selective distribution, there are a few cases decided by CADE that help to clarify its opinion regarding such practice. In a decision dating from 1999, the authority considered that the mere termination of a contract, in the context of a dominant company reviewing its distribution system, should not be seen as an anticompetitive conduct. Instead, the new selective distribution model adopted, despite the restriction on the entry of new distribution players, strengthened the competition among the ones already established, according to the decision. In addition, in that case CADE also pointed out that the distributors became more efficient and improved their services for the consumers by virtue of such arrangement[1].

With respect to the automotive industry, CADE reach a decision in the early 2000s that touches selective distribution systems adopted in connection to the laws that regulate auto sales in Brazil (so-called "Lei Ferrari") and in Europe ("Regulation 1400/2002", in force at the time). Under both laws, it is expressly set forth that a selective distribution in such industry is a legitimate practice, especially considering the quality

[1] Administrative Proceeding No. 137/93 (plaintiff: ERSIL - Comercial de Bebidas e Transporte Ltda.; defendant: Refrescos Bandeirantes Indústria e Comércio Ltda.).

standards that are operationally required within such industry[2]; CADE confirmed that this is compatible with the competition law.

Finally, CADE has condemned Microsoft's Brazilian subsidiary and one of its software distributors in Brazil on grounds that Microsoft imposed restrictions on competition through its selective distribution system, enabling the establishment of a contractual relationship on an exclusive basis. In a nutshell, Microsoft: (i) established ex post and discriminatorily the criteria to become an authorized distributor, thus knowing which company would meet or not these criteria; (ii) set forth an exclusivity section in an agreement with one of its distributors to avoid participating in public bids, and not passing through any benefits to the consumers; and (iii) had no business justification to sustain such business practice in an almost monopolistic market (more than 90%) with many entry barriers[3]. However, this was a rather an extreme case, different from the most typical selective distribution systems.

5. Foreign precedents

In the international scenario, cases of European Court of Justice ("ECJ") and German Federal Competition Court ("*Bundeskartellamt*") stand out and helps to clarify on which conditions the selective distribution system is allowed. The leading case is Metro precedent, which left an important three-criteria method to check the lawfulness of a selective distribution, as follows: (i) the product or service at stake must require such a network due to its properties; (ii) the resellers included in the distribution channel must be chosen on the basis of objective criteria

[2] Administrative Proceeding No. 08012.006518/2001-19 (plaintiff: National Federation of Automotive Vehicles Distribution – FENABRAVE; defendant: Ford Motor Company Ltda.).

[3] Administrative Proceeding No. 08012.010483/2011-94 (plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; defendant: Google Brasil Internet Ltda.).

of a qualitative nature applied non-discriminatorily to potential resellers; and (iii) restriction must not go beyond necessary[4].

In Pierre Fabre case, Pierre Fabre Dermo-Cosmétique included a contractual clause preventing any reseller from using online own or third-party-owned marketplaces to trade its products. By imposing an absolute ban on online sale of goods, the contractual clause considerably reduces the potential sales made by the authorized distributor, this was deemed a hardcore restriction not justifiable under European Competition Law. In other words, maintaining a prestigious image of those products is not a legitimate aim for imposing such a restrictive measure in detriment of competition[5].

The Asics case in Germany, which fallen within the competence of the German Federal Competition Court, concerned the market of sale of running shoes by resellers. The German branch of Asics, by means of a selective distribution system, imposed the following prohibitions considered unlawful under European Competition Law: (i) use of the brand name Asics for online advertising; (ii) sale via online marketplaces; (iii) use of price comparison engines. Such restrictions were not found justifiable by the German court under European Competition Law by reasons of the following: (a) the aim was to reduce the competition on price and price transparency by restricting online sales by distributors to end customers; (b) such selective distribution system contains a very intense restriction on the intra-market competition in the distribution of Asics products; (c) the reduced price transparency led to

[4] Case 26/76 (Metro vs. Commission), available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0026&from=EN, access on 28 February 2019.

[5] Case 439/09 (defendant: Pierre Fabre Dermo-Cosmétique SAS), available online at http://curia.europa.eu/juris/document/document.jsf?text=&docid=111223&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1525760, access on 28 February 2019.

higher prices for Asics products and a reduction in the competitive pressure on retailers who sell sports articles of other brand manufacturers in so-called inter-brand competition. Therefore, according the German Court, there was no legitimate interest behind the prohibition of using price comparison tools, thus convicting the defendant companies[6].

In the most recent case, decided on December 2017, the defendant was Coty Germany GmbH, a luxury cosmetics company that prohibited its resellers from marketing the products on third party online platforms (such as Amazon and e-Bay), but allowed the sale through distributors' own online shops. Besides, ECJ considered this restriction coherent with the purpose of guaranteeing that, in the electronic commerce, the goods will be associated solely with the authorized distributors. In addition, the prohibition at issue enables the manufacturer to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorized distributors. At last, given that those platforms constitute a distribution system for goods of all kinds, the fact that luxury product are not sold via such platforms and that their sale online is carried out solely in the online shops of authorized distributors contributes to that luxury image among consumers and, as a result, to the preservation of one of the main characteristics of the goods sought by consumers. Hence, this was considered a legitimate measure to highlight and promote the luxury character of Coty Prestige's brands.

6. Precautions measures

In light of the relevant precedents and the letter of Brazilian law, it seems that CADE's understanding of selective distribution is close to ECJ's and the German Court's. Therefore, the following precaution

[6] B2-98-11 (defendants: ASICS Deutschland GmbH, eBay International AG and others), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2, access on 28 February 2019.

measures should be taken for the implementation of a selective distribution program:

- Restrictions should neither be absolute nor concern the essential tiers of distribution (e.g., in the event online shops are more relevant than brick-and-mortar shops, a complete ban of online sales is very likely to be deemed overrestrictive and, by consequence, unlawful);
- Ensure that the company's business strategy does not objective market foreclosure, but rather the preservation of the company's good image/reputation; and
- Ensure that the criteria used to select the companies are objective and serve the purpose of the selective distribution.

HOW DOES THE BRAZILIAN ANTITRUST AUTHORITY UNDERSTAND THE STANDARD AND BURDEN OF PROOF ON UNILATERAL CONDUCTS INVESTIGATIONS?

João Ricardo Oliveira Munhoz
Renan Cruvinel de Oliveira
Victor Santos Rufino

1. What is the legal treatment of unilateral anticompetitive conducts?

Competition defense in Brazil is regulated by the Brazilian Antitrust Law (Law N. 12,529/2011) and provided in Article 173, Paragraph 4, of the Federal Constitution. Law N. 12,529/2011 confers on the Administrative Council for Economic Defense – CADE – the power to investigate, judge and punish practices that are harmful to competition, described as violations to the economic order, among them unilateral anticompetitive conduct.

The Article 36, Paragraph 3, of Law N. 12,529/2011, provides a nonexhaustive list of unilateral violations, and provides the possibility of repression of other conducts, which are not in the list since they produce - or can produce - harmful effects on competition.

The persecution of anticompetitive conducts by CADE usually starts with a report or an *ex officio* investigation. CADE's General Superintendence – GS - analyzes the report and decides to file it, establish a Preliminary Investigation, or to initiate an Administrative Process, in case of having enough evidences. GS is also responsible for proceeding's instruction. After the investigation stage by GS, the process is sent to CADE's Tribunal, where the antitrust authority's commissioners try defendants.

Law N. 12,529/2011 does not define specific and objective criteria to be applied in the judgement of economic agents accused of practicing unilateral anticompetitive conducts. Despite CADE's Resolution N. 20/1999 establishes the steps to be adopted in its

investigation, in practice, the Brazilian antitrust authority analysis is not limited to its application.

Firstly, authority verifies if the agent has market power. Second, it's potential to generate negative effects to competition and to consumers. Lastly, CADE analyzes conduct's economic rationality. If it this is not identified, it would be possible to conclude that there was, in fact, abuse of dominant position, and therefore an unilateral anticompetitive and illegal conduct. One could notice that unilateral conducts are not considered illegal *per se*; its lawfulness depends on effects and efficiencies evaluation.

These assessment steps can be found in CADE's decisions, as the example of Reporting Commissioner Paulo Burnier's vote in the Administrative Process 08012.011881/2007-41, which investigated discriminatory conducts involving Petrobras, White Martins and Consórcio Gemini, or at Proforte case (Administrative Process 08012.006272/2011-57) and Rodoban case (Administrative Process 08012.009757/ 2009-88).

Therefore, recent decisions of CADE points to the need of proving that the conduct was capable of causing damages to the competition. For instance, in Helibrás case (Administrative Process 08012.007505 / 2002-48), the proceeding was filed due to the lack of evidence of harmful effects to competition. On the other hand, in Tecon Rio Grande SA case (Administrative Process 08012.005422 / 2003-03) CADE convicted the defendant, under the allegation that the charge of excessive fees for the storage of containers could be injurious to competitors. In addition, there is not a requirement of concrete damages, but the possibility of damage is enough to support a conviction.

Regarding the assessment of economic rationality of an exclusionary conduct, Santos Brasil S.A. case (Administrative Process 08012.005967/2000-69), relative to the charge of abusive fees over the delayed delivery of containers and on the handling of irregular containers, is exemplary. The Reporting Comissioner understood, although it could harm competitors, the charge had economic rationale

because it referred to late or irregular loads, which generated additional costs for the operators. Consequently, CADE decided to file the case. Similar situation can be found at Commissioner João Paulo Resende's vote in Administrative Process 08012.007423/2006-27, involving Nestlé and Unilever or in Comissioner Mauricio Maia vote's at ACECOMVI case (Administrative Process 08012.007155/2008-13).

2. How does CADE define dominant position?

Holding dominant position means the capacity of an economic agent to exercise its market power in an effective and lasting way, i.e., act with reasonable independence in relation to the competitive pressure imposed by rivals. The Brazilian Antitrust Law brings some parameters to the definition of that concept, based on the dominant position presumption. According to the legal text, this is presumed when the economic agent "is able to unilaterally or jointly change market conditions or when it controls 20% (twenty percent) or more of the relevant market" (Law N. 12,529/2011, Article 36, Paragraph 2).

The main criterion used by CADE to presume the existence of a dominant position is the verification of market share, while the capacity of unilateral alterations of market conditions is used, in most cases, as an ancillary element to qualify dominant position and not to presume it.

The presumption of a dominant position is, however, relative. It means that contrary evidence is admitted, so, depending on the specific circumstances of the case and on the relevant market, CADE may consider that a company with less than 20% market share holds dominant position or that an agent with more than 20% have no market power.

At Rodrimar S/A case (Administrative Process 08012.001518/2006-37), despite the defendant claims a market share lower than 20%, the Reporting Commissioner stated that the although the agent controls less than 20% of a given market it does not prevent it from holding market power, considering the specific conditions of the sector. Similar understanding is found in the Petrobras, White Martins and Consórcio Gemini case (Administrative Process 08012.011881/2007-41)

and in the Shopping Iguatemi *et al.* case (Administrative Process 08012.012740/2007-46). Despite these cases, the presumption rule prevails in CADE judgments.

3. What are the criteria used to assess the abuse of dominant position?

The abuse can be identified when an agent uses its market power to produce anticompetitive effects. As seen before, the Brazilian Antitrust Law does not condemn the dominant position itself, but only its abuse. Abusive conduct must be (i) capable for being harmful and (ii) devoid of rationality in the market context in which it is inserted.

An example of this understanding is Reporting Commissioner Ana Frazão's vote in the ABNT/Target case (Administrative Process 08012.002917/2002-91). She did not consider an exclusivity clause "abusive" because it was, according to her, the "logical unfolding" of that contractual type, concluding that the clause had economic rationality.

Yet, in Telemar Norte S.A. judgement (Administrative Process 08012.003918/2005-04), the Reporting Commissioner concluded that it is not necessary to prove concrete damages, but only its possibility, reforcing the understanding that dominant position abuse does not mean effective damage to competition.

CADE also may require evidences of causality between the agent market power and the harmful effects in order to verify eventual abuse of dominant position, as seen at Reporting Commissioner's vote in Oi/Telemar case (Administrative Process 08700.010110/2012-46). The adopted understanding was that company's dominant position and conduct's anticompetitive effects were not enough to justify the conviction, but there should be evidences that allows the establishment of a causal link between the practice and the market power held by the agent.

4. What is the standard of evidence adopted by CADE in anticompetitive unilateral conducts?

Brazilian Antitrust Law did not define specific types of evidence in order to analyze the legality of unilateral conduct and there is no definition, either in law or in case law, of objective standards for the evaluation of evidence. In this way, both the investigator and the investigated agent can use any kind of evidence, whereas it is admitted in the Brazilian legal system. Thus, both direct and indirect evidence can be applied to demonstrate the unlawfulness of conduct.

CADE's conviction must be supported by sufficiently precise and consistent evidence that there is a dominant position and an illegal conduct directly related to the misuse of market power. The investigation seeks (i) the proof that the agent holds a dominant position, usually obtained from tests which measure market share; (ii) evidences of the materiality of the illicit conduct, bringing the evidence that the conduct effectively occurred as described - a step that tends to be simpler, considering that unilateral conduct usually is not secretive; (iii) evidences of the harmful effects to competition or of the possibility of causing them; and, lastly, (iv) the proof of conduct's eventual economic rationality which could justify and exempt it from sanctioning.

In Sincopetro case (Administrative Process 08700.009858/2015-49), the Reporting Commissioner stated that the standard of proof required for cases of unilateral conduct tends to be higher than that expected in cartel cases, as the secrecy usually marks the latter ones, while the former tends to be non-secretive. Since it is easier to obtain evidence regarding unilateral conducts, one must demand greater solidity of proof.

The evidence used can be both qualitative and quantitative, yet CADE's decision are hardly based on quantitative study. Thus, in CADE's decisions the evidence used is generally qualitative.

Moreover, in assessing the net effects and the legality of unilateral conducts, efficiencies alleged by defendants that are merely speculative are usually disregarded. To be admitted as economic

justification, efficiency has to necessarily depend on the restrictive effect of unilateral conduct, so that it cannot be achieved through a less restrictive practice. A similar view has been adopted on ABNT/Target case (Administrative Process 08012.002917/2002-91), in which the Reporting Commissioner presented a detailed analysis of the efficiencies resulting from the exclusivity clause adopted in the case.

5. How is the distribution of burden of proof at CADE proceedings?

Brazilian Antitrust Law does not prescribe the burden of proof distribution in unilateral anticompetitive conduct persecution. However, Brazilian antitrust authority's decisions reveal some trends regarding over whom relies the burden of proof.

For example, an anticompetitive conduct complaint involves the complainant interest in presenting conduct concreteness minimum evidence. That is because the complaint should convince GS that the charge deserves an in-depth investigation. At Ambev Case (Administrative Process 08012.008554/2008-93), CADE's commissioners understood that defendants also bears the charge of prove their allegations. Over GS relies the burden of proving that the presented facts have enough soundness to be object of an administrative investigation since only GS can decide to open an investigation or not.

In CADE's substantial analysis, the burden of proof is usually distributed in a more equitable way. The competition authority tends to assume the burden in two phases: the demonstration of (i) economic agent's dominant position and (ii) conduct's prejudicial effects to competition. Regarding the first one, the *onus probandi* relies over CADE due to the legal determination of prove that the economic agent must have a market share higher than 20% or the capacity of an unilateral influence over the market. However, considering that the dominant position presumption is relative, the burden of proof can be transferred to the defendant in order to prove that he does not have market power.

Once found dominant position and the production – or the ability to produce – anticompetitive effects, the antitrust analysis over

unilateral conducts comes to its last step, which is the examination of practice's legal and economic rationality. In this case, the burden of proof usually is beared by the defendant, who should prove that its conduct was justifiable and/or able to produce higher efficiencies than the restrictive effects to competition. An example of this understanding is the Shopping Iguatemi *et al.* case (Administrative Process 08012.012740/2007-46), concerning the lawfulness of radius clause provisions in shopping malls. The Reporting Commissioner stated that the burden of proving the legal-economic reasonableness of these clauses relies on the malls that applied them. In a similar way, at Embraforte case (Administrative Process 08012.009757/2009-88), relative to cash transportation market, the Reporting Comissioner Ricardo Ruiz convicted the defendant company because it did not present a justification for the raising of service's cost caused by its conduct.

HOW CAN ECONOMIC ANALYSIS HELP ASSESSING ISSUES RELATED TO FORECLOSE AND CONGLOMERATE EFFECTS?

Débora Mazetto
Fabiana Tito

1. Introduction

This article is concerned with the economic analysis of conglomerate effects in merger control. In particular, this short paper focuses on the economic assessment of the theory of harm, whereby the merged entity would leverage its position on one market to foreclose rivals on another one. The idea is to highlight how the economic analysis undertaken can be a central role to assess the any competitive concerns of a merger case.

The paper is divided into four main sections, including this short introduction. Section 2 presents an economic framework on conglomerate effects. In the Section 3, the discussion will be centred on whether the post-merger parties will have the **ability** and **incentive** to engage in a foreclose strategy, and the likely **effects** of such strategies (assuming the Parties would have the ability and incentive). Then, Section 4 states the conclusion summarizing the findings in each of these sections.

2. Economic Framework

According to OECD (2002): "Conglomerate mergers are mergers between firms that have no existing or potential competitive relationship either as competitors or as suppliers or customers. Under some circumstances, conglomerate mergers may raise competitive concerns where the merging firms are suppliers of complementary, non competing but closely related products requested by the same set of customers".

In general, **conglomerate mergers** do not remove a direct competitive constraint – general presumption is that these mergers do not lead to adverse effects on competition and, **in most cases, are considered to be pro-competitive.** This conglomerate effect is widely recognized – as the European Commission's Non-Horizontal Merger Guidelines clearly puts it, "the integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive" [7].

First, given the complementary nature of products of A and B, following the merger, the merged entity should be expected to have an unilateral incentive to reduce prices for both products. Specifically, there is a potential efficiency gain associated with conglomerate mergers which involve complements. The pricing of complementary products is typically inefficient when it is undertaken by separate firms, because they do not internalize positive external effects across markets (such as a fall in price for one product, what also increases the demand for the other product). A merger which brings these products under the control of a single entity may as a result lead to lower prices (to the benefit of consumers).

Second, tying and bundling practices are common and generally not anti-competitive. For instance, as quoted in the European Commission's Non-Horizontal Merger Guidelines para 93: "Tying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways."

Last, tying and bundling allows suppliers to serve customers in a more cost-effective manner. Specifically, mixed bundling normally provides price reductions to the final customers and is therefore, in most

[7] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, p. 5-18, paragraph 13.

cases, considered to be pro-competitive and encouraged, rather than prohibited, by competition authorities.

Conglomerate mergers may have anti-competitive effects if they permit post-merger behavior that is able to foreclose (raising rivals' costs or reduce rivals' revenues)[8] or exclude competitors. In such a case, it is necessary to assess whether: i) post-merger firm will have the ability and incentive to engage in tying/bundling; ii) rival suppliers are unable to respond; iii) rivals are marginalized and possibly exit the market; and iv) customer's interests are harmed.

In light with the above, only in a few **exceptional circumstances could these practices harm competition** – and even in such cases, the effect would **need to be weighed against the pro-competitive effects/efficiencies** that are normally brought about by conglomerate mergers, such as the elimination of double-mark-ups.

Importantly, conglomerate effects concerns could only be considered to arise if the new entity could be demonstrated to have **both the ability and incentive to engage in foreclosing strategies**. Furthermore, even then conglomerate effects may not result in negative **effects** to the final consumer.

One important issue to make is that any valid concern must involve products from both merging parties, otherwise it is not derived from the transaction. Concerns regarding commercial strategies involving only A's products (e.g. bundling of two different products from firm A) are not merger-specific.

Next section will focus on the three-step economic aspects necessary to assess on possible conglomerate merger concerns: ability, incentives and effects.

[8] Raising the costs at which competitors can operate on a downstream market (raising rivals' cost); typically associated with input foreclosure and/or lowering the expected revenue streams of upstream competitors (reducing rivals' revenues); typically associated with customer foreclosure.

3. Economic Assessment

Framework for the assessment of conglomerate effects concerns is based on three cumulative criteria: it assessed whether the merged entity would have both the **ability** and the **incentive** to engage in the foreclosure strategy, and whether such strategy would have negative **effects** on consumers.

3.1 Ability Assessment

First and foremost, the assessment of "ability" involves an **analysis of market power** in the leveraging or tying market, with an important **focus on market shares**. **Ability** requires market power on a relevant market. However, there are other considerations that can significantly impact the assessment.

It is relevant to assess if firms A or B face **fierce competition from several players** in the market, once there could be many players active in the market. Assessment of materials, regulatory, legal or other **barriers to entry in this market also help** to assist this issue. In this matter, existence of strong **international players** active, with a global presence and a **similar portfolio of products** can help to show that there is enough competitive pressure on the market which prevent it from behaving in a less competitive way.

An analysis of a **lack of brand awareness by end-consumers** also helps. If most of end-consumers are not aware of brands and differences between products, they are unlikely to oppose to buying from a different producer. The existence of private labels and unbranded can also assist on that matter. In sum, in cases of **brand is not a crucial** requirement for effectively competing in this market, the market power, even though the market share would be high, does not show ability to foreclose. Talking about brand is important to assess whether firm A's most important brand – which should be characterized as a **"must have" brand**. In this context, it is worth noting the definition of what a "must-have" is: a product that is indispensable for customers to be able to conduct their business profitably and compete effectively.

Another way to evaluate "ability" is through the existence of **plenty of alternative suppliers** of firm A's product and the absence of long-term and exclusivity contracts, which allow customers to **easily switch suppliers** even for considerable amounts of volume, based on the commercial conditions that are offered. If **multi-sourcing** is a common practice in this market, it will make it relatively easy, fast and inexpensive to move from one supplier to another. The possibility of switching makes the hypothetical ability of the merged company to successfully implement anti-competitive bundling or tying strategies implausible.

3.2 Incentive Assessment

Such **ability**, if existent, would be a **necessary but not sufficient condition to adopt market foreclose practices** in the attempt to foreclose related markets once it is necessary also to check the incentive.

In this subsection, we develop the economic arguments to assess whether such incentives exist or not and under which conditions it would be profitable to leverage firm A's position in the market to foreclose rivals of firm B market.

Based on past practices, it would be relevant to demonstrate that gains from foreclosing constraints would be higher than losses (cost-benefit analysis). In other words, **a hypothetical foreclosure strategy needs to be profitable to be likely.**

Any tying or bundling strategy entails costs and benefits. For example, when making the sale of Product A conditional on customers also purchasing Product B, the main costs are the foregone sales to those customers that would have purchased Product A if offered separately, but now do not accept the tie; and the gains are the incremental sales to those customers that accept the tie and now also purchase Product B where otherwise they would not have done it. For the merged entity **to have an incentive** to engage in a tying/bundling strategy, **the likely gains of the strategy need to outweigh its likely costs.**

The **cost-benefit analysis** requires simulating the likely costs and gains of the strategy by using **margin information** from the products involved and expected switching levels following the tie/bundle. **Past practices and internal documents**[9] can also help the assessment of "incentives".

Global rivals' ability to respond with similar offers means that any foreclosure strategy would be very costly for the merged entity. Furthermore, given fierce competition in the markets in question, customers could credibly **switch to alternative rivals leading to financial losses to the merged entity**. For that, strong competition from a number of rivals to which customers can credibly switch would banish the incentive to foreclose.

3.3 Effect Assessment

In cases where both the "ability" and "incentive" conditions are met, the economic analysis of "effects" is likely to be decisive. In that matter, it is **necessary that competitors**, which represent a significant part of the market, **are foreclosed** or marginalized from the market.

For a foreclose practice to be anti-competitive, two main conditions must be met. First, buyers need to accept the tie/bundle in question, thereby switching significant volumes away from rivals on the leveraged (or tied) good. Second, the decrease in volumes faced by rivals needs to affect their ability to compete, allowing the merged entity to raise prices for the leveraged (or tied) good.

[9] With respect to past practices, it could be assessed customer-level analyses of firm B's sales data, that showed that there was no relationship between the value of product B1 it sells to a client and the value of product B2 it sells to the same client. Regarding internal documents, the role that internal documents can play in the assessment of conglomerate effects is even more limited than for other concerns. That is because tying and bundling are universal business practices and are in the vast majority of cases pro-competitive. The assessment still needs to address the question of whether or not such practice is likely to generate anti-competitive effects.

For that, an analysis requires an evaluation of: i) the likely **customer responses** to the tie/bundle and the assessment of customer buyer power and preference; ii) **rivals' response and rivals' ability to compete** – in order to not accept, the rivals would be able to respond with competing bundled offers (e.g. by entering into partnerships) or lowering margins; and iii) a **potential loss of sales** of firm A product would not necessarily lead to rival exit or marginalization.

4. Final Remarks

The present article aimed to expose the main economic concepts of conglomerate effects and the framework to assess whether a conglomerate merger could raise concerns regarding foreclose. It was highlight that economic analysis played a key role in the assessment of those mergers, in which the "three-steep" analysis of ability, incentive and effects would be decisive in order to reach a final conclusion of whether such strategy would generate harmful effects or not.

WHAT ARE THE ANTITRUST CHALLENGES FACED BY THE PAYMENT INDUSTRY?

Denise Junqueira
Maria Eduarda Scott

1. Introduction

The recent exponential growth of digital payment together with the fintechs boom has expanded the interaction between the traditional payment market players and the new entrants, and has created a new competitive landscape in this industry. This article considers this background to delineate how Brazilian antitrust authorities are addressing current and potential antitrust issues related to the Brazilian payment industry. Thus, it presents an overview of the payment networks particular features and assesses some of Cade's precedents, in order to explore the main antitrust challenges faced by the payment industry.

2. Understanding the payment network

The payment network includes a number of players: the card issuers - institutions that issue cards to customers; the card brands - institutions in charge of payment processing activity, monitoring the settlement of transactions and clearing of sales; the card holder - the person or company using the payment card to purchase goods or services; the merchants - the sellers of such goods and services that receive payment through payment cards; the acquirer - institution that processes payment transactions on the merchants' behalf; and, finally, the payment facilitator -service provider for merchants that simplifies online transactions.

The payment network is often referred to as a "two-sided" market, as its success depends on both end users - i.e. card holders and merchants. To prosper in a two-sided market, a firm needs to appeal to both groups of consumers with optimally balanced prices and benefits for

each side.[1] This feature results in the so-called network effects, which means that each group, card holders and merchants, benefits from the other's growth. It also means that a price change in one side of the market affects the other chains of the payment network.

In addition to the complex price relationship, the relation between the various links of the network also encompasses several non-price relationships (e.g. exchange of sensitive information) that can generate efficiencies by creating a safer environment for a transaction (e.g. minimizing fraud), or can be "abusive" and have negative effects on the network, depending on the specific situation. The differentiation between the two possible effects is not clear, also because, in some cases, players simultaneously interact both on a client-supplier basis and on a competitor-competitor basis [2].

3. Cade's recent experience

Different competition issues can emerge from a player´s relationship with competitors, clients and suppliers, and they may lead to potential[3] competition restraints and risks of antitrust violations, such as the ones addressed below – exclusivity, discrimination, and exchange of sensitive information. When analyzing these conducts, as a general rule, Cade has followed the global best practices and applied the "rule of reason"[4].

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[1] SIDAK, Gregory; WILLIG, Robert D. *Two-Sided Market Definition and Competitive Effects for Credit Cards After United States vs. American Express*. The Criterion Journal on Innovation. Vol 1. 2016.

[2] E.g. acquirers and payment facilitators, as per the General Superintendence Technical Note No. 2120 1 6'CGAA2/SGA1 /SG.

[3] In Brazil the potential anticompetitive effect is enough to substantiate a violation.

[4] That is the legal approach where an assessment is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive

3.1 Exclusivity

As per Cade's case law, exclusive arrangements may give rise to competition concerns, and the payment network is no exception. In 2009, Cade opened an investigation on practices performed by card network Visa and acquirer Visanet (currently Cielo) that were supposedly restraining competition through a bi-directional exclusive agreement[5]. In its preliminary analysis of the exclusive clause, Cade acknowledged that the adopted sole acquisition model created many efficiencies, such as the increase of processing speed and network size, but it also found that the model could function as a barrier to entry. Although the Cade´s Reporting Commissioner did not reach a conclusion regarding the balance between the positive and negative effects, the investigated companies ultimately negotiated a Cease and Desist Agreement establishing the end of the exclusive arrangement.

Later, in 2015, after the card network interoperability regulation came into force, Cade's General Superintendence ("GS") opened a preparatory proceeding, which was later divided into three administrative investigations, to assess alleged illegal conducts and anticompetitive exclusivity. The first proceeding investigated the card networks Elo, Alelo, American Express, Hipercard and Ticket[6], and concerned potential advantages obtained from their exclusive relationship with acquirers Rede and Cielo. Elo and Hipercard negotiated a Cease and Desist Agreement committing to open the network (thus, ending any exclusivity), and agreed to not discriminate other acquirers; Alelo, American Express and Ticket transitioned their practices to models that are open to arrangements with other acquirers. Following that, Cade

effects, in order to decide whether or not the practice should be prohibited. *See* OECD definition at <https://stats.oecd.org/glossary/detail.asp?ID=3305>.

[5] Administrative Process No. 08012.005328/2009-31.

[6] It also investigated the Brazilian banks Banco do Brasil and Bradesco (both controllers of Cielo) and Itaú (controller of Hipercard). Preliminary Investigation No. 08700.000018/2015-11.

decided to terminate the investigation on the alleged potential anticompetitive exclusivity.

3.2 Discrimination and other practices

Cade has also investigated practices by payment network agents that could potentially prevent, hinder and/or discriminate the performance of other market players.

A recent example is the 2015 investigation against Rede and Cielo for alleged discrimination against other acquirers by employing encryption technology in their pinpad equipment[7]. Supposedly, Cielo and Rede inserted encryption keys to prevent Pinpad from processing smaller acquirers. Both companies signed Cease and Desist agreements with Cade and committed to cease the alleged discrimination against smaller acquirers.

3.3 Exchange of sensitive information

Cade has also identified antitrust issues concerning the exchange of information between the several players interconnected by the payment schemes. In 2017, Visa submitted a Consultation Request to Cade requesting clarification on the authority's position on certain commercial clauses Visa intended to include in its contracts regarding the collection of information from facilitators.[8] Cade concluded that such clauses, which requested facilitator´s to provide information on merchants names, merchant´s category codes, as well as merchants' location, were legal. Visa claimed the information would increase protection against data violation, guarantee safe payments and increase chargeback, and Cade understood that the benefits outweighed the negative effects.

[7] Preliminary Investigation No. 08700.001861/2016-03.

[8] Consultation No. 08700.000468/2017-75.

Another Consultation, concerning clauses established in agreements between card networks and acquirers, was submitted by Redecard in 2018.[9] Redecard inquired if it could seek potentially sensitive information from online payment facilitators, because the card networks Visa, Mastercard, Elo and American Express were requesting such information from Redecard, claiming that it was essential to ensure the viability of payment arrangements. Cade acknowledged that such clauses could potentially result in anticompetitive practices, and recommended the opening of an investigation against such card networks. This investigation is currently ongoing.[10]

4. What are the antitrust challenges faced by the payment industry?

It is possible to identify important aspects from Cade's approach to the payment network. Firstly, companies with market power are considerably susceptible to being held responsible for anticompetitive practices. This is because the potential anticompetitive effect is enough to substantiate a violation, and the identification of efficiencies is usually subjective and complex. Dominant players should pay attention to its commercial practices to avoid triggering Cade's attention.

Furthermore, the payment network is currently perceived as an innovative booming environment. Cade's main challenge is to balance both incumbent´s and entrant´s expectations, so that fintechs can develop in a competitive environment without significant barriers, while simultaneously acknowledging the efficiencies generated by the vertical structure of incumbent operators (previous cases did not confirm that the verticalization of the industry is necessarily harmful to competition).

Cade has raised scrutiny over the payment network in the past years, but it now faces the challenge of identifying and remedying not

[9] Consultations No. 08700.004009/2018-41, 08700.004010/2018-76, 08700.004011/2018-11 and 08700.004012/2018-65.

[10] Preliminary Investigation No. 08700.005986/2018-66.

evident market failures without undermining payment schemes efficiencies.

IS THERE A SPECIAL TREATMENT FOR UNILATERAL CONDUCTS' CASES IN REGULATED SECTORS?

André Santos Ferraz
Cristiane Landerdahl de Albuquerque

In our point of view, 'special treatment' means any distinct analysis, explicit antitrust immunity or a different procedure undertaken by the Brazilian Competition Authority in unilateral conducts' cases. Considering this, to answer the question above, it is important to highlight the legislation and some relevant unilateral conducts' cases analyzed by Cade in regulated sectors:

1. Law No. 12,529/2011 and other related laws

The Brazilian Antitrust Law (Law No. 12,529/2011) is widely applicable and does not establish prior antitrust immunity to any kind of anticompetitive conduct. In this way, all firms should be aware to what is established by the law, even if they offer products and services in a regulated sector or under a legal monopoly system.[1] Moreover, punishments by any anticompetitive conduct do not preclude punishments of any other illegal acts set forth by law.[2]

In regulated sectors, the Brazilian regulatory agencies are, as any person also is, legitimated to file complaints of anticompetitive conduct to the Administrative Council for Economic Defense (CADE), the Brazilian Competition Authority. Additionally, complaints filed by a regulatory agency should immediately start a preliminary investigation or

[1] "*Article 31, Law No 12,529/2011. This Law applies to individuals or legal entities of public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, even if engaged in business under the legal monopoly system.*"

[2] "*Article 35, Law No. 12,529/2011. Any enforcement against violations of the economic order will not preclude the punishment of other illegal acts set forth by law.*"

an administrative process at CADE, as established by Law No. 12,529/2011.[3]

In the Brazilian legal system, there are other laws that establish a coordination between regulatory agencies and CADE. In general, these laws: i. establish that the regulatory agencies should report to CADE any evidence of anticompetitive conducts; and ii. also reinforce CADE's legal competence on antitrust concerns.[4] Specifically in the financial sector, CADE's competence to analyze anticompetitive conducts was recently agreed upon a joint normative act between CADE and the Brazilian Central Bank (BC).[5]

Therefore, there isn't any legal prediction that provides special treatment for unilateral conducts in regulated sectors. This is exactly the reason why CADE has been actively analyzing and condemning anticompetitive practices in these sectors as is shown below.

2. CADE's cases in regulated sectors

As seen, CADE can start investigations against firms that operate in any market of the Brazilian economy, regardless whether there is a regulatory agency overseeing it.

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[3] "*Article 66, §6, Law No. 12,529/2011. Complaints presented by the National Congress Commission, or any of its houses, as well as Secretary for Economic Monitoring, regulatory agencies and the Attorney General's Office associated to Cade, do not depend on preparatory procedures, and the preliminary investigation or administrative process is immediately established.*"

[4] For example: Article 3, §1, Law No. 9,427/1996 (electric sector); Article 19, XIX, Law No. 9,472/1997 (telecommunications sector); Article 10, Law. No. 9,478/1997 (oil and natural gas sector); Article 31, Law No. 10,233/2001 (land and water transportation sector); Article 6, Law No. 11,182/2005 (air transportation sector); and Article 2, §1, Law No. 13,575/2017 (mining sector).

[5] Joint Normative Act No. 1/2018 between BC and CADE.

Since 1994, when the first modern antitrust law came into effect,[6] CADE has convicted 25 unilateral conduct cases, 8 of which were on regulated markets. In this period, CADE has also settled 38 unilateral cases, of which the majority – 22 cases – were on markets regulated by an independent agency.

Table 1 - Unilateral Cases Condemned and Settled from 1994 to 2018.

	Regulated Markets	**Non-Regulated Markets**	**TOTAL**
Cases Convicted	**8**	17	25
Cases Settled	**22**	16	38
TOTAL	**30**	33	63

Source: CADE.

Over half of the unilateral cases were decided in the last six years, the period in which Law No. 12,529/2011 has been in effect. Almost all cases settled also took place during this period, revealing CADE's clear tendency to settle cases in recent years.

Table 2 - Unilateral Cases Condemned and Settled from 2012 to 2018.

	Regulated Markets	**Non-Regulated Markets**	**TOTAL**
Cases Convicted	**7**	6	13
Cases Settled	**12**	10	22
TOTAL	**19**	16	35

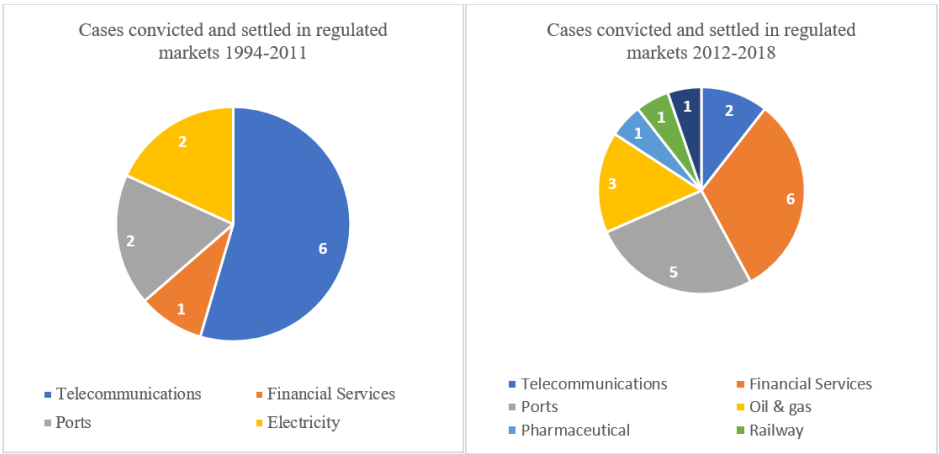
Source: CADE.

Those investigations took place in a variety of regulated markets, ranging from telecommunications to oil & gas.

[6] Law No. 8,884/1994, which established the first merger review system in Brazil and is very similar to Law No. 12,529/2011 concerning the definition of abuse of dominance.

Telecommunications was the economic sector with the most cases investigated, but most of them was settled. An important part of the cases investigated were in the financial services markets. These were recent cases in which the parties offered settlements usually early in the investigation and on which CADE cooperated in different degrees with the BC.

Graphic 1 – Cases by regulated sector.



Markets related to the water transportation sector also represented a substantial share of unilateral cases investigated by CADE in recent years, but in contrast with the financial services cases, most of them were convicted. The next section presents a specific case in this market where a regulation appeared to conflict with the Brazilian Antitrust Law.

3. Administrative Process No. 08012.001518/2006-37

In the Administrative Process No. 08012.001518/2006-37, CADE convicted a port operator for charging a discriminatory fee, the so-called Terminal Handling Charge 2 (THC2), on customs facilities in the Port of Santos area.

Since 2005, the THC2 charging had been interpreted as an anticompetitive practice by CADE and, until 2012, the National

Waters Transportation Agency (ANTAQ) had not regulated the fee. However, ANTAQ Resolution No. 2,389/2012 authorized the port operators to charge the fee, what motivated a more intense debate during the Administrative Process No**.** 08012.001518/2006-37 concerning the legality of THC2 from an antitrust point of view.

In the above-mentioned case, CADE based its analysis on the assumption that there is no incompatibility or prevalence between regulatory and competition competences in the Brazilian legal system. According to CADE, these competences are complementary, which is corroborated by the authority's jurisprudence. This complementarity, however, may give rise to undesirable conflicting rules and decisions between Brazilian regulatory agencies and CADE.

With respect to THC2, the Defendant in the Administrative Process No. 08012.001518/2006-37 claimed that ANTAQ Resolution No. 2,389/2012 would rule out the application of any antitrust sanction by CADE. Despite that, this argument was not accepted by the Brazilian Competition Authority.

In general terms, CADE understood that ANTAQ Resolution No. 2,389/2012 would have a mere nature of authorization so that there would not be any kind of imposition from the regulatory agency regarding the obligation of port operators to charge THC2. For that matter, ANTAQ Resolution No. 2,389/2012 would preserve the autonomy of these agents and they would be able to charge – or not – the THC2 fee. Precisely for not having a compulsory nature and for preserving the autonomy of port operators, CADE understood that ANTAQ Resolution No. 2,389/2012 would not establish any kind of antitrust immunity to agents that chose to charge the THC2 fee.

For these reasons, CADE followed its interpretation from precedent cases and convicted the port operator for the THC2 charging despite ANTAQ Resolution No. 2,389/2012. In the Brazilian Competition Authority's point of view, port operators should not be paying attention only to what had been authorized by the ANTAQ

Resolution, but also to all Brazilian legal system, especially to Law No. 12,529/2011.

4. Is there special treatment for unilateral conducts' cases in regulated sectors?

No. Both the Brazilian law and the jurisprudence point in the direction that unilateral conducts in regulated sectors are analyzed and convicted by CADE in the same way as in any other economic sector. The recent ruling of Administrative Process No. 08012.001518/2006-37 also suggests that the Brazilian Antitrust Authority does not believe to have its jurisdiction removed due to purely authorizing regulatory norms. Such norms maintain the autonomy of regulated economic agents and, acting in an autonomous and independent manner, such agents must also be attentive to what is established by Law No. 12,529/2011.

ARE THERE STANDARDS TO DETERMINE WHETHER INNOVATION IS PREDATORY?

Ademir Antonio Pereira Júnior

José Del Chiaro Ferreira da Rosa

Luiz Felipe Rosa Ramos

1. Introduction

There is increasing certainty in the United States, Europe and developing countries like Brazil, Chile and India about how to best evaluate mergers and cartels. This is reflected in more vigorous anti-cartel policies and more detailed merger investigations. However, considerable uncertainty remains on both sides of the Atlantic[1] – with global ramifications – concerning antitrust policy in single-firm monopolization (or abuse of dominance) cases. More than in other branches, single-firm monopolization cases require antitrust to continuously examine its "root motivations", as agencies are expected to ask in each case whether a practice actually injures competition (and not just a competitor)[2].

While the definition of monopoly power and how to measure it remains a central question, a very challenging issue in this line of cases relates to the difficulty to differentiate exclusionary behavior from "competition on the merits" [3]. Competition is at the core of what competition law is supposed to protect. At the same time, competition – being in the form of price discounting (static competition) or increased

[1] John Vickers, *Abuse of Market Power*, in Paolo Buccirossi (ed.), *Handbook of Antitrust Economics* 415 (2008).

[2] Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 Antitrust L.J. 751 (2011), 755.

[3] Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 Antitrust L.J. 371 (2003).

innovation (dynamic competition) – "inflicts a natural and lawful harm on competitors,"[4] and rivals often complain that such harm is "unfair." Defining clear standards to govern exclusionary practices is particularly challenging given the risks of over-enforcement and under-deterrence: *false positives* (erroneous convictions) could chill innovation or inhibit aggressive competition from which consumers benefit, while *false negatives* (erroneous acquittals) could lead to antitrust policy failing to protect competition and consumers[5].

There is an increasing economic consensus that "the gains to be had from innovation are larger than the gains from simple production and trading under constant technology"[6].On the other hand, the debate on whether market power or competition best promotes innovation (famously represented by Schumpeter's and Arrow's views) is still an open one. For this reason, enforcement of competition law is even more challenging in the context of allegations of predatory innovation. If standards are set too low, or are too vague, competition law may harm a fundamental part of the competition process it was supposed to protect in the first place: innovation and product improvement.

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[4] *Abbott Labs. v. Teva Pharmas. USA, Inc.*, 432 F. Supp. 2d 408, 421 (D. Del. 2006).

[5] The error cost analysis in the antitrust sphere was introduced by the work of Frank Easterbrook, *The Limits of Antitrust*, 63 Texas Law Review 10 (1984). For an application of such analysis in the topic of innovation, se Goeffrey Manne, Joshua Wright, *Innovation and the Limits of Antitrust*, Journal of Competition Law and Economics (2009) (arguing that innovation is closely related to antitrust error: "Because innovation involves new products and business practices, courts and economists' initial understanding of these practices will skew initial likelihoods that innovation is anticompetitive and the proper subject of antitrust scrutiny", 167).

[6] Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 Antitrust L.J. 751 (2011).

Under Brazilian Law, product innovation is lawful and considered an essential dimension of competition on the merits. It is well established that Competition Law protects not only price competition but also dynamic competition. Therefore, innovation is considered a core element of competition and should be fostered. Article 170 of the Federal Constitution states that free enterprise is a premise of the economic order and can only be limited under exceptional circumstances. In this same vein, Article 36, Paragraph 11, of Law N. 12,529/2011, provides that growth based solely on efficiency is not an antitrust violation, despite eventual harm to rivals. This provision has been interpreted as protecting business practices that have legitimate business justifications - if a company wins market share from others because it has better prices, products or unparalleled marketing, it will not be punished by Competition Law.

While Brazilian Case Law on product innovation is not extensive, two decisions by the Administrative Council for Economic Defense – CADE concerning product design of beer bottles[7] illustrate these principles and provide guidance as to CADE's approach towards predatory innovation claims.

2. Precedents Related to Product Design

In late 2007, AmBev, a manufacturer that CADE has repeatedly deem dominant in the beer market, introduced a new 630ml bottle marked with AmBev's logo[8]. The new bottle could not participate in the standard reusable bottle system of 600ml bottles that had been adopted in Brazil for decades due to its slightly larger size and AmBev's logo

[7] Antitrust discussion on product design of bottles has a long history in CADE's case law. CADE's first conviction (in 1974) resulted precisely from a denounce of Pepsi-Cola by Coca-Cola in the "bottle war". See Pedro Henrique Navarrete, *As Origens do Sistema Brasileiro de Defesa da Concorrência: o CADE (1962-1994)*, Master Dissertation, Federal University of Rio de Janeiro (2013).

[8] See Administrative Process N. 08700.002874/2008-81.

engraved into the glass (before that, players would only add a paper-based logo that could be washed and removed for reutilization of the bottle). Rivals complained that Ambev's 630 ml bottle (i) unfairly increased point-of-sale and consumer loyalty to Ambev due to costs involved in differentiating and storing the different bottles; and (ii) unfairly raised production and distribution costs for competitors[9].

The former Secretariat of Economic Law - SDE imposed a preliminary injunction against Ambev preventing the expansion of the use of the 630ml bottle. The injunction was upheld by CADE's Tribunal, but it allowed Ambev to sell such bottles in two specific states of Brazil where the launch had already occurred. A few years later, AmBev settled with CADE and withdrew the 630ml bottle.

Two critical aspects of the conduct were relevant in CADE's assessment to uphold the injunction. First, the redesign of Ambev´s bottles seemed to have an actual impact on rivals. The rupture of the long-standing standard reusable bottle system could generate important difficulties to rivals, raising production costs and increasing retailers' incentives to purchase only Ambev´s portfolio of brands. CADE's decision found that if Ambev had a separate network of bottles, retailers would have substantial incentives to sell only Ambev's brands to eliminate segregation and stock costs. Also, rivals would face higher manufacturing costs as they would need to adapt manufacturing facilities to segregate Ambev's bottles to avoid the use of a bottle with a rival's logo on it.

Second, the lack of credible business justifications for the redesign was central in CADE's decision. AmBev was unable to offer credible business justification for the new bottle size (a mere 30ml increase in comparison to the standard 600ml bottle), so the 630ml bottle

[9] Cervejarias Kaiser and Abrabe – Associação Brasileira de Bebidas objected to the practice and filed complaints. It should be noted that we represented Cervejarias Kaiser in this case. Any opinions and views expressed here are our own and do not represent our client's position in the case.

was not considered a significant product improvement, but actually a change with the sole purpose of increasing rivals' costs by (i) opting out of the generic bottle exchange and (ii) inserting bottles that could cause confusion at the manufacturing and retail levels, increasing rivals' costs and reducing retailers' ability to sell rival brands.

A few years later, in 2009, Ambev released a one liter (1L) beer bottle with AmBev's own label etched on the glass.[10] Rivals complained that they would be harmed by AmBev's new product design because (i) Ambev's dominant position would make the 1L bottle segment very relevant for competition in the beer market and rivalry in this new segment would be difficult without a standard recyclable bottle program similar to the one existent in the 600mL segment; and (ii) Ambev would gradually decrease its participation in the 600mL segment – in which bottles were standard and reusable – in favor of the 1L segment, diminishing rivals' ability to compete. While recognizing that the 1L beer bottle was an innovation, the complainants alleged that engraving the company name in the bottle was a tactic to prevent entry in the 1L segment and did not have legitimate justifications[11].

Even though complaints targeted a specific element of the design and asked for a narrowly defined remedy – prohibit Ambev from putting its own mark on the bottle -, CADE's Tribunal closed the investigation[12]. In this case – commonly known as the *Litrão* case –

[10] See Administrative Process N. 08012.006439/2009-65.

[11] Like in the 630ml case, Cervejarias Kaiser and Abrabe – Associação Brasileira de Bebidas objected to the practice and filed complaints. It should be noted that we represented Cervejarias Kaiser in this matter. Any opinions and views expressed here are our own and do not represent our client's position in the case.

[12] Confirming to some extent the historical pattern observed by Manne and Wright as to antitrust assessments of innovation: first, novel practices receive "monopoly explanations" from economics, which is then followed by hostility from the courts, and finally by a more nuanced understanding usually recognizing the practice's procompetitive virtues. See Goeffrey Manne, Joshua

CADE held that a dominant firm like AmBev was free to design its own products even if it imposed higher costs on its rivals, absent a finding that the product design (i) would render competition unviable, and (ii) is designed *solely* for the purpose of harming competition.

CADE considered that the Complainants were unable to show that a standard bottle system was essential to competition; to CADE, the 1L bottle would not generate confusion and unduly raise costs of segregation and storage by retailers or at the manufacturing level as the 1L bottle was quite different from the standard 600mL. On the contrary, CADE found evidence that rivals had started selling 1L bottles and had achieved relative success, so forcing Ambev to integrate a standard would not be essential for competition to flourish.

Furthermore, CADE held that, for the conduct to raise antitrust concerns, the product design should be a tool to harm competition and not a legitimate choice. In light of the facts under analysis, CADE concluded that the commercial success of the 1L bottle and the clear intent of rivals to enter this segment were sufficient evidence that the launch of a 1L bottle was legitimate.

As to the insertion of Ambev's logo etched on the glass, therefore avoiding the participation in a standard system, CADE held such design choice was legitimate to protect the investments in an entirely new design; in other words, AmBev was not required to work with its competitors to generate efficiencies by participating in a generic bottle exchange. The fact that the 1L bottle was a new design was relevant in the analysis as the decision suggests that the elimination of a previous cooperative system by the dominant player would be subject to more rigorous scrutiny. In other words, CADE's holding implies that changes in an ongoing strategy or relation with rivals are more likely to raise concerns than the establishment of a new strategy not directly related to a previous relation with rivals.

Wright, *Innovation and the Limits of Antitrust*, Journal of Competition Law and Economics (2009).

CADE emphasized that absent unequivocal evidence of lack of consumer benefit or business justifications, competition enforcers should refrain from second-guessing product design choices:

> "It should be once again reiterated that only in front of concrete evidence of irrationality or harm should a conduct like this be subject to CADE's scrutiny – but for such exceptional cases, it is beyond the reasonable sphere of enforcement of an antitrust authority to routinely scrutinize whether the commercial strategies of a firm are effective or not, to determine whether they are rational or not. One of the main aspects of free competition and of free enterprise is the recognition that economic undertakings should be free to decide for themselves the best commercial strategy for their businesses. The antitrust body cannot assume this role for every new product or strategy launched, as if the governmental authority was more capable to determine the effectiveness of a strategy than the private players."[13]

3. Conclusion

Based on these two precedents, we may conclude that the Law in Brazil only admits intervention against product innovation in very

[13] See Administrative Process N. 08012.006439/2009-65, at 15 ["Reforça-se, novamente, que somente diante de evidências concretas de irracionalidade ou prejudicialidade deve uma conduta como esta ser objeto de atenção do CADE – salvo em tais casos excepcionais, foge completamente ao âmbito razoável de atuação de uma autoridade antitruste escrutinar, diuturnamente, se as estratégias comerciais são ou não eficazes, a fim de que se verifique se são racionais ou não. Um dos elementos mais essenciais da livre concorrência e da livre iniciativa está no reconhecimento de que os agentes econômicos devem ser livres [ata decidir por si mesmos a melhor estratégia comercial para o seu negócio. Não pode o órgão antitruste se subsumir nesse papel a cada novo produto ou estratégia lançada, como se a autoridade pública fosse, sempre, mais capaz de perceber a eficácia de uma estratégia comercial do que os próprios agentes privados."].

narrow circumstances. There must be clear evidence of competitive harm and anticompetitive purpose of the design decisions for competition concerns to arise. While such standards are fact-specific, they offer sufficient guidance for CADE to assess product innovation in future matters - a challenge that CADE will surely face with the increasing development of sectors related to the New Economy where product innovation happens at a faster pace. The application of these standards seems to provide enough reassurance that competition enforcement in Brazil will not be used to unduly second-guess a consumer's well-informed choice or the entrepreneur's decision in designing the product.

HOW HAS CADE JUDGED CASES INVOLVING THE DIGITAL ECONOMY?

Anna Olimpia de Moura Leite
Bernardo Gouthier Macedo
Gabriel Silva Takahashi
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Introduction

The explosion of the digital economy has posed enormous challenges for antitrust policy. Relevant markets, whose delimitation is often controversial and imprecise, are more pliable and in practice harder to define. Dominant positions, once longlasting, have become fragile and transient given the advent of myriad new entrants with new products or business models.[1] These factors challenge antitrust enforcement agencies by hugely increasing the risk of overenforcement (or type 1 error), bringing with it a growing danger that interventions designed to curb or prevent anticompetitive abuses may also inhibit innovation incentives and market dynamism.

It is therefore evident that antitrust agencies need to adapt their analytical approach. CADE, Brazil's antitrust authority, has proved attentive to this, and in certain recent cases involving the digital economy has made flexible use of the traditional tools and methods of analysis. In this article we focus on recent cases that can be considered significant in this respect, revolving around alleged predatory pricing and attempts to influence uniform commercial conduct by Uber, use of price parity clauses by Booking, Expedia and Decolar, and exercise of market power

[1] Evans, D. S. & Schmalansee, R. (2001). Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries. NBER Working Paper N. 8268. Available at: http://www.nber.org/papers/w8268. Last visited Apr. 19, 2012.

by Google in presenting search results to bolster its price comparison service.[2]

Uber v. MP-SP

CADE was required to apply a new digital economy-related method of analysis in a case against Uber initiated in response to charges of predatory pricing ("dumping to the detriment of drivers") and attempts to bring about uniform commercial conduct brought against the ride-share platform by the Office of Public Prosecution in São Paulo (MP-SP).[3]

The analysis by CADE's Office of Investigation (Superintendência Geral, SG)[4] classified Uber as a transportation network company (TNC) that uses a two-sided platform[5] to facilitate driver-passenger interaction, and stressed the challenge posed for antitrust analysis given the innovative nature of this service, in that an imprecise decision could discourage the establishment of innovative ventures and annul potential benefits to consumers.[6] As noted below, the decision reached by the SG was based on an effects analysis. As a result, a precise definition of the relevant market was considered unnecessary.

On the predatory pricing charge, the SG concluded that such conduct would not be economically rational. In a hypothetical exercise it argued that if drivers constantly sustained financial losses in working for

[2] The authors are acting as economic consultants to Google and its representatives in this case, but the views expressed here are those of the authors alone.

[3] PROCEDIMENTO PREPARATÓRIO N. 08700.008318/2016-29.

[4] NOTA TÉCNICA N. 26/2018/CGAA4/SGA1/SG/CADE.

[5] For more information on two-sided platforms, see Rochet, J.C. & Tirole, J. Platform Competition in Two-Sided Markets. Journal of the European Economic Association, v. 1(4), pp. 990-1029, 2003.

[6] Para. 106, NOTA TÉCNICA Nº 26/2018/CGAA4/SGA1/SG/CADE.

Uber they would switch to a different platform and that this would entail negative effects for Uber. In light of this reasoning, the SG recommended dismissal of the complaint.

The charge of promoting uniform commercial conduct requires more careful analysis. According to the SG, TNCs set the prices paid by passengers, eliminating price competition among drivers, whom they consider partners. Thus in theory the business model operated by Uber and other TNCs could be deemed equivalent to the anticompetitive practice in question.

However, based on a report by CADE's Department of Economic Studies (DEE)[7] analyzing the effects of Uber's entry into 590 municipalities between 2014 and 2016, the SG concluded that users benefited from this type of business model insofar as taxi fares fell and demand for individual transportation rose. In addition, it argued, the business model in question entails multi-homing – users (drivers and passengers) can access several platforms simultaneously with low switching costs – and this favors competition.

Given the lack of anticompetitive effects, the SG recommended dismissal of the charges filed by MP-SP. The decision emphasized that while there was as yet no evidence of damage to competition, CADE could investigate this sector again if such evidence came to light in future. This shows that CADE did not classify the case as a matter of cartel formation but evaluated it on the basis of the rule of reason, concluding that there should be no anticompetitive concerns because no actual harm was done.

[7] Resende, G.M. & Lima, R. C. de A. Documento de Trabalho n. 001/2018 – Efeitos Concorrenciais da Economia do Compartilhamento no Brasil: A entrada da Uber afetou o mercado de aplicativos de táxi entre 2014 e 2016? Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoesanexos/ documento-de-trabalho-001-2018-uber.pdf.

Online travel aggregators v. FOHB

In response to a complaint filed by Fórum de Operadores Hoteleiros do Brasil (hotel chain operators), the SG initiated an administrative process to investigate the alleged inclusion of price parity clauses in agreements between hotel chains and travel aggregators Expedia, Decolar.com and Booking.com.[8] The alleged rationale for these clauses was to guarantee the best offerings in terms of pricing and room availability for the three aggregators compared with both the hotel chains' own online and offline offerings and those of competing platforms.

CADE identified two anticompetitive effects of the use of price parity clauses. One was that it reduced competition among travel aggregators by homogenizing the final price offered to consumers. The other was that it increased the barriers to entry because price homogenization limited the development of sales strategies.

CADE therefore required the respondents to sign consent orders (Termos de Compromisso de Cessação, TCCs) whereby they undertook to cease using clauses that required parity of prices and other commercial terms with competing platforms and the hotel chains' offline sales channels.[9] However, the SG argued that clauses requiring parity with hotel websites avoided free riding by hotel chains, which could leverage the aggregators' visibility to drive their own online sales. Over time this would tend to disrupt the aggregators' business, which benefits consumers.

Thus the SG again based its arguments on an effects analysis in a case involving digital markets. In addition, it took into consideration the rivalry between online and offline channels, despite limiting the scope of

[8] Inquérito Administrativo 08700.005679/2016-13.

[9] *Booking, Decolar e Expedia celebram acordo de cessação com o Cade*. Available at: http://www.cade.gov.br/noticias/booking-decolar-e-expedia-celebram-acordo-de-cessacao-com-o-cade. Last visited Dec. 20, 2019.

the consent orders to the most conservative situation for the online segment.

Google Shopping v. E-Commerce (Buscapé & Bondfaro)

The case involving Google's search engine[10] was one of several conducted worldwide. In the United States it was dismissed but the European Commission found against Google, imposing a fine of 2.42 billion euros and requiring changes to the platform. In the case brought before CADE, the SG recommended to close the investigations and the case is currently being analyzed by the Tribunal.

The case involves investigations in several jurisdictions and relates to product searches in which advertisements with images are displayed as Google search results. In Brazil a complaint was filed by E-Commerce, owner of price comparison sites Buscapé and Bondfaro, accusing Google of abusing its market power to boost traffic to its shopping vertical.

The SG's decision was based on an effects analysis conducted by the DEE.[11] No causal nexus was found between Google's practices and any damage to competition in the five-year period analyzed. In addition, CADE acknowledged that the innovations introduced by Google were justified as legitimate tools of its business designed to benefit and effectively benefiting consumers. These included a reduction in transaction costs for the consumer to complete a purchase, for example. In the absence of evidence of anticompetitive effects, the SG recommended to close the investigations.

It is important to note that the SG evaluated several different relevant market scenarios. Although its analysis focused on the most conservative scenario, which was restricted to price comparison sites, it also acknowledged the relevance of competitive pressure from retail

[10] Processo Administrativo nº 08012.010483/2011-94.

[11] Nota Técnica N. 34/2018/DEE/CADE.

websites and online marketplaces. Once again, therefore, the core of the analysis was not the relevant market but competitive conditions and the absence of actual harm.

Conclusions

Observing the three cases outlined above, it can be seen that CADE endeavored to tailor its methods of analysis to the characteristics of each case. It used different relevant market scenarios and this discussion was less decisive in the investigations. The analysis focused on the rule of reason and the real effects of the respondent's conduct. Generally speaking, therefore, CADE has sought to maintain the incentives to innovate, acknowledged possible efficiencies of the conduct analyzed, limited its intervention when it finds no evidence of negative effects on competition, and refrained from intervening only in order to prevent potential harm.

We therefore have indications that the challenges posed by the analysis of conduct in digital markets are being addressed by the Brazilian antitrust authority in line with practices recommended by the OECD, ICN, and other multilateral organizations. It is also pertinent to note that while CADE's analysis in such cases accords methodologically with international best practice, it rightly takes the specific conditions prevailing in the domestic market into account. In doctrinal terms, therefore, CADE does not align itself automatically with other jurisdictions, although it endeavors to keep in touch and exchange views with other antitrust authorities in cases involving aspects common to several jurisdictions. In the case of the travel aggregators, for example, CADE's decision was aligned with those reached in some European countries, while in that of Google Shopping the SG's position was similar to the position taken in the US (bearing in mind, of course, that CADE's Tribunal will be responsible for the final decision).

WHAT ARE THE RECENT DEVELOPMENTS REGARDING CRIMINAL INVESTIGATIONS OF CARTEL IN BRAZIL?

Rodrigo Dall'Acqua

1. Introduction

In Brazil, the cartel is punished autonomously in the administrative and criminal spheres. The criminal investigation is conducted by the Public Prosecutor's Office, individually or jointly with the Police. There is no pre-established deadline for the conclusion of the investigation and its ultimate purpose is to gather evidence to confirm the existence of cartel and the identification of its perpetrators, enabling the Public Prosecutor's Office to file criminal proceedings against individuals. As a rule, the crime of formation of cartels, when involving other States or countries, is investigated by the Public Prosecutor's Office acting in the Federal Court. In the investigative phase, Brazilian law grants to suspects the right to non-self-incrimination and silence, whereas only the witnesses have an obligation to speak the truth.

There are two separate crimes violating the anticompetitive agreement of competitors. The agreement between companies to eliminate competition or to control the market, by means of price adjustment, regional control of the market or distribution network or of suppliers, is a crime provided for in Law No. 8.137/1990, punished with a penalty of 2 to 5 years in prison. However, if the agreement between competitors aims at defrauding free competition specifically in a public bidding, another offense is identified, which is known as cartel in bidding, punished by Law No. 8.666/1993 with a penalty of 2 to 4 years in prison.

In recent years, these two types of cartel crime have the leniency agreement as the main investigative source. This agreement, entered into with the Administrative Council for Economic Defense – CADE, provides for the mitigation of administrative penalty and offers, as a benefit, immunity of criminals for individuals implicated in the offense.

The lenient company is required to submit evidence of the cartel, and such evidence is shared with the Public Prosecutor's Office, guiding the criminal investigation. Normally, during the investigation, the Public Prosecutor's Office carries out dawn raids on companies indicted by the lenient company to gather new evidence on the cartel, in addition to interrogating suspects and inquiring witnesses.

2. Progress in processing electronic evidence

Recently, the criminal investigation of cartels has benefited from the improvement of the digital evidence processing infrastructure of government agencies. For many years, there was enormous inefficiency at the technical agencies analyzing the electronic evidence gathered in dawn raids. Sometimes, the experts were unable to analyze, adequately or satisfactorily, the data collected from computers and other electronic media.

Nowadays, the Public Prosecutor's Office and the Police are supported by expert laboratories with high capacity in electronic data detection and analysis. The main criminal investigation in the history of Brazil, known as *Operação Lava Jato* (Operation Car Wash, in Portuguese), instituted in 2014 and still ongoing to this date, is responsible for successfully investigating several cartels in public bids. This investigation was conducted with the decisive support of the enormous improvement in the electronic evidence processing infrastructure. Immediately and efficiently, the Brazilian criminal investigations began to obtain results that were previously not possible or which took years to gather, quickly decrypting encrypted data, retrieving deleted data, crossing and analyzing information, tracking people's location by means of mobile phone records, among other analyses.

The use of technology as a proactive tool for identifying cartels is a novelty with low practical application for the time being. In a still developing manner, state agencies are using new data mining tools and applying economic filters to detect cartels in public bids. In 2018, a specific CADE sector known as "Brain Project", through screening filters and data mining techniques, detected companies with similar patterns of

involvement in bids, among other behaviors deemed suspicious. These data, together with other circumstantial evidence, led to a joint investigation with the federal police to examine alleged cartel in outsourcing contract bids. Although, nowadays, only a few cartels are discovered with the use of data processing technology, the tendency is to increase the use of this technique.

3. Extended use of agreements

Negotiating agreements are increasingly being used as methods for the investigation of cartels in Brazil. The leniency agreement, entered into with CADE and allowing criminal immunity only for the first individual to denounce and confess participation in the practice of anticompetitive conduct, remains the main agreement for the restraint of cartels. However, the Public Prosecutor's Office has expressed an increasing interest in entering into other types of agreements with the other cartel members, even in cases where the investigation was initiated by a leniency agreement.

Largely used in the Operation Car Wash, the plea bargain agreement, provided for in Law No. 12.850/2013 (Article 4), is accepted by the Public Prosecutor's Office in cartel cases, even in investigations for which a leniency agreement was already entered into with CADE. In this agreement, the defendant is granted a reduced sentence in exchange for his or her substantiated contribution to the investigation. In particular, plea bargaining allows the application of benefits to those who confess to the practice of the crime of government agent corruption, an offense that is often practiced concurrently with the cartel in the bidding process.

Finally, a third agreement that has recently been widely used is the confession qualified by the plea bargaining, under the terms of Law No. 8.137/90 (Article 16), a legal transaction that is not applicable to cartel crime in public bids. In this type of agreement, the suspect may be granted a reduced sentence in one to two thirds and there is no express obligation to present new evidence.

4. Conclusion

In recent years, there has been a significant increase in the investigative capacity of state agencies involved in the criminal prosecution of cartels in Brazil, leading to a huge leap in efficiency in investigations. Simultaneously, there was an increase in the use of negotiation agreements by the Public Prosecutor's Office, providing to the crime of cartel formation the possibility of entering into three different types of agreements. The greater investigative capacity of the State functions as a stimulus for the suspect to enter into negotiation agreements, creating an environment favorable to the improved evidence standard and increased number of Brazilian investigations on cartel crime.

WHAT RIGHTS DO DEFENDANTS HAVE IN ANTITRUST INVESTIGATIONS IN BRAZIL?

Mariana Villela
Rodrigo Santos
Vinícius Cardoso

1. Introduction

The Administrative Council for Economic Defense (CADE) is an adjudicatory administrative entity with jurisdiction to investigate, prosecute and judge anticompetitive conducts. While CADE's Tribunal is responsible for deciding the cases, CADE's General-Superintendence (GS) concentrates all tasks related to investigation and prosecution of anticompetitive conduct.

As these two tasks are carried out by two bodies within the same agency and as the line between them may sometimes be blurred, the Brazilian Antitrust Law provides for three types of administrative procedures that the GS may use to investigate possible anticompetitive conduct, with different levels of investigative and prosecution powers and different levels of rights granted to the investigated parties

Considering this peculiarity of the Brazilian Antitrust System, the following section provides an overview of the rights of defendants in each of the three types of administrative procedures provided by the Brazilian Antitrust Law: (i) the preparatory proceeding; (ii) the administrative inquiry; and (iii) administrative proceeding.

2. Types of administrative procedures and rights of defendants[1]

2.1 Preparatory proceeding

[1] As discussed in several articles in this book, defendants have the right to submit settlement agreement proposals to CADE even at late stages of the investigations. Given that this topic is the object of other chapters in the book, we will not describe these procedures in this chapter.

The GS may initiate a preparatory proceeding (*procedimento preparatório*) to verify if a certain conduct falls under the jurisdiction of the Brazilian Antitrust authorities and if it may qualify as a violation to the economic order (i.e., a violation to the Brazilian Antitrust Law). The GS must conclude this phase of the investigation in up to 30 days[2].

Preparatory proceedings are confidential, unless the GS orders otherwise[3]; therefore, during this phase, defendants do not have the right to know that they are being investigated. However, if a defendant finds out about the proceeding, it will have the right to request access to the records to the GS[4], even though the defendant may not necessarily have access to the case files.

Depending on its conclusions at the end of the preliminary proceeding, the GS may decide to close the investigation – if it finds that the conduct is not subject to the jurisdiction of the Brazilian Antitrust authorities-, may initiate an administrative inquiry or, if it has sufficient evidence that an antitrust violation took place, may initiate an administrative proceeding.

2.2 Administrative inquiry

The administrative inquiry (*inquérito administrativo*) is a preliminary investigatory procedure of inquisitorial nature initiated by the GS to investigate possible violations of the economic order when the evidence already gathered by the GS is not enough to initiate an in-depth investigation (which would take place in an administrative proceeding).

According to Article 66, Paragraph 9, of the Brazilian Antitrust Law, the administrative inquiry must be concluded within 180 days, but may be extended for 60 more days when the analyzed conducts are complex or when justified by the circumstances of the case. Although the

[2] Article 66, paragraph 3, of the Brazilian Antitrust Law.

[3] Article 179, Paragraph 1 of CADE's Internal Regulation.

[4] Article 5, XXXIV (b) and LV of the Brazilian Federal Constitution.

Law provides for a total duration of 240 days for the administrative inquiry, the GS usually extends the investigation for several 60-day periods, at times making the administrative inquiry last several years, which may be legally questioned.

As a rule, administrative inquiries are non-confidential, but the GS may order otherwise[5]; for this reason, defendants do not have the right to know that they are being investigated. It is usual, during the administrative inquiry, for the GS to request information to the parties under investigation; in these cases, defendants will be able to submit written statements to the GS, and even request meetings with case handlers. Defendants may also request access to the case files when the investigation is confidential, in which case the GS may decide whether or not to grant access. Should the GS reject the access of defendants to the case files, they may resort to lawsuits before Courts of Law.

The dawn raids carried out by the GS (with the assistance of the Federal Police and the Federal Prosecution Office) to gather evidence usually take place during the administrative inquiry proceedings. Since dawn raids need to be authorized by the courts, CADE will assume that they are legitimate and legal and, thus, a defendant will not be able to challenge the raid directly at CADE; however, defendants may challenge the raids at Courts of Law.

2.3 Administrative proceeding

The administrative proceeding is an in-depth investigation that may be initiated by the GS from the outset, if it concludes that there is sufficient evidence of an antitrust violation, or after the conclusion of an administrative inquiry which indicates sufficient indication of the existence of a violation.

The Brazilian Antitrust Law provides that the administrative proceeding is an adversary proceeding, which aims to guarantee full

[5] Article 181, Paragraph 1 of CADE's Internal Regulation.

rights of defense to the defendants[6]. This is the phase of antitrust investigations where defendants have the opportunity of exercising a broader range of their procedural and substantive defense rights.

To advance with an administrative proceeding, the GS must formally notify all defendants regarding the initiation of the proceeding[7]. The deadline to submit defenses usually starts when all defendants are properly served of process. Defendants who have been served of process may access the case files, review documents, and make submissions and/or meet with CADE officials to discuss the case.

The notice sent by the GS to serve the defendants of process must contain the entire contents of the decision that determined the initiation of the administrative proceeding[8], if it does not, it may be declared null and void[9], demanding that the GS issue a new notification to properly serve the defendants of process.

Defendants have the right to submit a written defense to CADE within thirty days after CADE concludes notifying all defendants[10]. In investigations involving more than one defendant and in which the defendants have different attorneys, this deadline is counted in double[11]. Additionally, all defendants may request an extension of ten days to the deadline[12], which the GS must grant, allowing up to forty days (or seventy days, in case of multiple defendants with different attorneys) to submit their defenses to CADE, counted from the date in which the GS confirms that the last defendant has been served of process.

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[6] *Idem.*

[7] Article 70 of the Brazilian Antitrust Law.

[8] Article 70, paragraph 1, of the Brazilian Antitrust Law.

[9] Article 26, paragraph 5, of Law N. 9,784/1999.

[10] Article 70 of the Brazilian Antitrust Law.

[11] Article 102, item IV, of CADE's Internal Regulation.

[12] Article 70, paragraph 5, of the Brazilian Antitrust Law.

In the written defense, defendants may raise all legal (procedural and substantive), factual and economic arguments they see fit. They may also submit legal or economic opinions, documents that help clarify the facts and appoint up to three witnesses. If the GS accepts the request for the hearing of witnesses, the GS must previously designate a date and time for the hearings, and all defendants will have the right to attend them and address questions to the witnesses.

If a defendant fails to submit its defense within the deadline, the defendant will be considered at default[13]. If the defendant remains at default throughout the investigation and does not submit any defense to CADE, all facts imputed against the defendant will be considered true. However, the defendant may submit written motions to CADE at any point during the investigation[14], which CADE will take into consideration in respect to the principle of the real truth (*princípio da verdade real*) and to the principle of full right of defense (*princípio da ampla defesa*).

Once the SG concludes its analysis in the administrative proceeding, it will issue its opinion on the merits and on the procedural matters of the case, and send its recommendation to CADE's Tribunal, where the investigation will be randomly distributed to a reporting Commissioner. At the Tribunal phase of the investigation, defendants will have the right to submit written statements at any time and will be granted a specific moment – before the judgement of the case – to submit their closing arguments. Defendants also have the right to meet with all Commissioners to discuss the case, and defendants may request to present oral closing arguments to the Tribunal during the judgement session, before the judgement of the case.

Defendants may not appeal against the Tribunal's decision at the Federal Administration level[15]; but they may submit motions for

[13] Article 71 of the Brazilian Antitrust Law.

[14] Article 71, sole paragraph, of the Brazilian Antitrust Law.

[15] Article 9, paragraph 2, of the Brazilian Antitrust Law.

clarification related to any obscurity, omissions or contradictions in the decision[16]. In these situations, defendants will have five days to submit their motions after the decision is published, and the deadline will be counted in double if they have different attorneys in the case.

Although the Brazilian Antitrust Law does not provide for any appeals, CADE's Internal Regulation states that defendants may request the reappreciation of the case in up to fifteen days following the publication of the decision if there are new facts or documents that are capable of altering the decision.[17] These requests, however, are rarely granted.

As set out by the Brazilian Constitution, defendants in antitrust investigations – and in investigations of any nature – may always resort to lawsuits in Courts of Law if they believe any of their rights have been violated and may also challenge CADE's decisions before Courts of Law.[18] This possibility is available to defendants during all phases of antitrust investigations.

3. Conclusion

The Brazilian legal system generally awards defendants wide defense rights related to administrative or criminal investigations, and this is also the case in antitrust investigations. In fact, the Brazilian Constitution states that defendants are entitled to wide defense, due process and adversary rights and must have access to all means necessary to exercise them.[19]

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[16] Article 259 of CADE's Internal Regulation.

[17] Article 263 of CADE's Internal Regulation.

[18] Article 5, item XXXV, of the Brazilian Constitution.

[19] See, in this regard, article 5, item LV, of the Brazilian Constitution, and article 115 of the Brazilian Antitrust Law.

Based on this provision, the Brazilian Antitrust Law and CADE's Internal Regulation provide for wide access to case files, accusation documents, case handlers, and CADE's practice has established the formidable tradition of accepting all written statements from defendants before a final decision is rendered, regardless of the phase of the investigation in which they are presented.

In any case, if defendants understand that their rights have been violated during an antitrust investigation, they have the right to challenge the harmful act in a Court of Law, whose decision will prevail over any act issued by CADE.

HOW THE GOVERNMENTS MAY INTERFERE TO PROMOTE THE UNFAIR COMPETITION AMONG COMPANIES THROUGH TAX INCENTIVES AND SPECIAL TAX REGIMES?

Fábio Nieves Barreira
Henrique Santos Raupp
Thiago Marini

1. Introduction

Governments of all nations have the function of acting as an incentive and development agent for their economies, with several countries being part international organizations such as the Organization for Economic Co-operation and Development (OECD).

The Brazilian state, specifically, internally, has as its mission to guarantee the well-being, the eradication of poverty and the reduction of inequalities, being also obliged to ensure an environment of free and fair competition among companies in its economic order. One of the instruments of economic development are the granting of tax incentives.

Therefore, the question that arises in the present work is to analyze how governments, through the granting of tax incentives and special tax regimes, can ending up interfering in the environment of free competition between companies and promoting harmful competition among them.

2. Free competition in the Brazilian economic order

The free competition is a constitutional principle in Brazil, based on the idea of equality[1], and it is set in article 173, paragraph 4 of

[1] SCAFF, Fernando Facury. Efeitos da coisa julgada em matéria tributária e livre concorrência. In: ROCHA. Valdir de Oliveira (coord.). Grandes questões atuais do direito tributário. Vol. 9. São Paulo: Dialética, 2005, p. 115.

The Constitution of Brazil, which provides that the law shall repress the abuse of economic power aimed at dominating markets, eliminating competition and arbitrarily increasing of profits.

This principle can be find in the competition law (Law No 12,529/2011), providing that constitutes an infringement of the economic order the acts of limiting, distorting or harming the free competition, the monopoly and the arbitrarily increasing of profits.

As market interventions that avoid the abuse of economic power available to the governments, one can point to antidumping measures, which are in line with the defense of the principle of free competition, through which the governments seeks to defend its internal market from the predatory intent of the foreign producers.

As occurs with dumping practices, taxation may also be improperly used to interfere in the country's economic market, generating an imbalance in competition, as set below.

3. Tax incentives as an instrument of investments attraction and development

For the purposes of this work, we will define tax incentives as any state aid granted by governments, in its most diverse forms, subsidies, tax exemptions, tax base reductions, presumed tax credits, installments, tax deferrals, which aim at specific purposes.

In Brazil, federal government, states and municipalities use tax incentives as a mean to attract investments. The Federal Union has a specific constitutional authorization for sets tax incentives aimed at balancing the socioeconomic development among the country’s regions. Examples of these incentives are those called SUDAM and SUDENE, with the specific scope of developing the North and Northeast regions.

In the federal level, yet, other incentives can be fund, such as (i) REPORTO and REPETRO, for the development of the port and oil and gas sector, (ii) "Lei do Bem", for the incentive in research and innovation in the technology sector, (iii) REIDI, for the development of

infrastructure, as well as (iv) RECAP and REINTEGRA, to the export incentive. The states, in the so-called "Tax War"[2], runs for investments usually granting incentives related to tax exemption, tax base reductions, tax deferrals and either through presumed tax credits.

The question under consideration, therefore, is the analysis of whether the granting of tax incentives may have the effect of limiting, distorting or harming the exercise of free competition, generating an unfair competition among companies[3].

4. Tax incentives and free competition: the limits of taxation

The Constitution of Brazil sets that the economic order based on the free initiative and free competition is a value that must be promoted and protected by the governments[4], being the government's role, as normative agent and the regulator of the economic activity, to exercise, according to the law, the functions of supervision, incentive and planning[5].

Among the instruments available to the governments to stimulate and planning activities in the economic order is taxation. Classified by the Science of Law in fiscal, extra-fiscal and parafiscal, to express the scope that the legislator puts in the tax law[6], the tax is a clear

[2] Tax war is the conflict experienced by the States in the context of tax incentives of ICMS, the states' VAT tax.

[3] SCAFF, Fernando Facury. Tributação, Livre-Concorrência e Incentivos Fiscais. In: NUSDEO, Fábio (Org.). O Direito Econômico na Atualidade. 1. ed. São Paulo: Revista dos Tribunais, 2015, v. 1, p. 309; CALIENDO, Paulo. Princípio da livre concorrência em matéria tributária - Conceito e aplicação. Direito Tributário em Questão, v. 7, p. 124, 2011.

[4] Art. 165, § 6º, Constituição da República.

[5] Art. 174, Constituição da República.

[6] CARVALHO, Paulo de Barros. *Curso de Direito Tributário*. 19. ed. rev. São Paulo: Saraiva, 2007, p. 252.

mean of intervention in the economic domain[7]. This intervention happens when, assuming extra-fiscal character, the taxation has the purposes of encourage or inhibiting behaviors, with a view to the realization of other values stated at The Constitution[8]. In this context, the public money collection with taxes is a secondary objective, since the real scope of the taxation becomes the economic-social reflection on behaviors[9].

The argument that taxes are instrument for intervention in the economic domain is reinforced by the fact that The Constitution[10] allows the granting of fiscal incentive in order to promote the balance of socioeconomic development among the different regions of the country[11].

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[7] BORGES, Souto Maior. Teoria da isenção tributária, 3ª ed. 2ª tir., São Paulo: Malheiros, p. 70.

[8] COSTA, Regina Helena. *Curso de direito tributário*: Constituição e Código Tributário Nacional. São Paulo: Saraiva, 2009, p. 48.

[9] BECKER, Alfredo Augusto. *Teoria Geral do Direito Tributário*. 4. ed. São Paulo: Noeses, 2007, p. 628.

[10] Artigo 151, I.

[11] Paulo de Barros Carvalho e Ives Gandra da Silva Martins, ensinam que: "Por esses fatores, as normas federais que instituem incentivos para a atração de investimentos, objetivando o crescimento econômico, admitem tratamento tributário diferenciado para determinadas regiões. Com esse suporte constitucional tem-se que a criação de benefícios fiscais para as atividades privadas que se instalem e se desenvolvam dentro de certos limites territoriais, considerados mais carentes de investimentos. (...) Essas disposições prestam-se à caracterização de um dos objetivos fundamentais da República Federativa do Brasil, enunciado no art. 3º, III, do Texto Constitucional, consistente em 'erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais. Nessa linha de raciocínio, entrevejo não apenas como possível, mas como efetivamente recomendável o emprego de normas instituidoras de impostos, como o ICMS, para o implemento das metas enfática e repetidamente prescritas pelo Texto Magno (arts. 3º, III; 151, I, e 170, VIII, da CRFB/88)." (*Guerra fiscal: reflexos sobre a concessão de benefícios no âmbito do ICMS.* São Paulo: Noeses, 2012, pp. 39-40).

Arises, thus, the question of whether the principle of federalism[12] and the consequential constitutional power of the governments to impose tax incentives for economic intervention may imply an imbalance of competition.

The answer is no. According to the vote of the Commissioner Marcelo Calliari in Consultation No. 0038/99[13], formulated to the Administrative Council for Economic Defense (CADE) by the Pensamento Nacional das Bases Empresarias, questioning the constitutionality of the so-called "Tax War", the granting of fiscal benefits by the States can not have the effect of unbalancing the competition, by the following arguments: 1) The concession of fiscal or financial-fiscal incentives has the same effect for the company and for the market. Both types will import in the artificial reduction of the amount of the tax payable, generating the same effects for both, the favored company and the competitors and the market. 2) Benefits granted in the context of the "Tax war", as seen numerically, confer a dramatic advantage to the affected companies, which can increase profits by several hundred-percentage points. 3) This brutal favoring uncovers the field in which the economic dynamics unfolds, generating diverse effects for the competition and the well-being of the collectivity, among which: a) It withdraws the stimulus to the constant increase of the general level of efficiency of the economy, allowing the less efficient use of resources and adversely affecting the country's capacity to generate wealth. b) It protects companies that are benefited with tax incentives from

[12] Artigo 1º, da Constituição da República.

[13] O Tratado que institui a Comunidade Econômica Europeia, Tratado de Roma, estabelece ser vedada a concessão de auxílios estatais que falseiem ou ameacem falsear a concorrência: “Art. 92. Salvo disposição em contrário do presente Tratado, são incompatíveis com o mercado comum, na medida em que afetem as trocas comerciais entre os Estados Membros, os subsídios concedidos pelos Estados ou provenientes de recursos estatais, independentemente da forma que assumam, que falseiem ou ameacem falsear a concorrência, favorecendo certas empresas ou certas produções”.

competition, masking their performance, allowing them to maintain inefficient practices and discouraging improvements in production or innovation. c) Allows benefited companies, even if they are profitable, to "predatorily" eliminate their unfavorable competitors from the market, even if these competitors are more efficient and innovative, due to the enormous protective mattress they have. d) It damages other companies that, regardless of their capacity, will have greater difficulties in the fight for the market, thus generating more disincentive to the improvement of efficiency and innovation. e) It generates uncertainty and insecurity for business planning and decision making, since any calculation can be drastically altered - and any investment made can be drastically impaired by the granting of a new incentive. f) Discourages, for all this, both the new investments and the expansion of activity in progress. It is more than evident, therefore, that the tax war has an effect that is highly harmful to competition and either to the welfare of the community. 4) The Constitution presents a diversity of objectives and principles that should be applied in the most harmonious way possible. Free competition and general well-being are some of them, to be reconciled with other equally legitimate. 5) The decision of granting tax incentives is provided for and accepted in The Constitution, since that it is determined in specific ways, which, at least formally, ensured that the grantor body (the Union or the states unanimously in CONFAZ) reflects the different interests and principles involved, define the incentives, the regions benefited and the appropriate amounts in order to maximize the principle of reducing regional inequalities and keeping the other minimum necessary. (...) ".

As indicated by the CADE in Consultation No 0038/99, the European experience with state aid as well as the US experience shows that the granting of tax incentives by governments may have the effect of affecting competition relations among companies and thereby reduce the effects naturally arising from the proper functioning of the market.

In the Brazilian experience, as seen, it does not occur in a different way, there are constitutional rules that defend the right of competition among companies, although the issue of incentives that result in violations of this right is not much discussed.

Therefore, in obedience to the rules of hermeneutics, according to which it is the duty of the interpreter to analyze the constitutional rules so that the interpretative process does not result in legal antinomies, it is concluded that the governments are allowed to grant tax incentives, provided that this benefits does not result in an imbalance to competition[14].

5. Conclusion

The Constitution of Brazil states that the economic order is based on the free initiative and free competition as a fundamental value that must be promoted and protected by the governments.

In the role of attract investments, the governments may end up affecting the right to free competition among companies through the granting of tax incentives, setting a company in a more favorable condition than the other players in the market. However, the granting of tax incentives are subject to limits imposed by legislation[15], such as respect for the principle of free competition[16].

The constitutional guarantee of free competition, therefore, corresponds to a limit for the granting of tax incentives, preventing harming effects to the economic order and the either the harmful and

[14] SCHOUERI, Luís Eduardo. Livre concorrência e tributação. In: ROCHA, Valdir de Oliveira (coord.). Grandes questões atuais do direito tributário. Vol. 11. São Paulo: Dialética, 2007, p. 241-271. CALIENDO, Paulo. Princípio da livre concorrência em matéria tributária - Conceito e aplicação. Direito Tributário em Questão, v. 7, p. 129, 2011.

[15] SCAFF, Fernando Facury. Tributação, Livre-Concorrência e Incentivos Fiscais. In: NUSDEO, Fábio (Org.). O Direito Econômico na Atualidade. 1. ed. São Paulo: Revista dos Tribunais, 2015, v. 1, p. 309.

[16] CALIENDO, Paulo. Princípio da livre concorrência em matéria tributária - Conceito e aplicação. Direito Tributário em Questão, v. 7, p. 124, 2011.

unfair competition, ensuring the environment of fair competition that must be guaranteed to the companies in the market[17].

[17] SCHOUERI, Luís Eduardo. Livre concorrência e tributação. In: ROCHA, Valdir de Oliveira (coord.). Grandes questões atuais do direito tributário. Vol. 11. São Paulo: Dialética, 2007, p. 241-271. CALIENDO, Paulo. Princípio da livre concorrência em matéria tributária - Conceito e aplicação. Direito Tributário em Questão, v. 7, p. 129, 2011.

WHAT IS THE STATUTE OF LIMITATIONS FOR ANTICOMPETITIVE CONDUCTS INVESTIGATIONS BY CADE?

Paulo Leonardo Casagrande
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Caroline Guyt França[1]

1. Recent developments in CADE's case law concerning cartels

Pursuant to Article 46, *caput*, of the Brazilian Antitrust Law, the Administrative Council for Economic Defense – CADE may start investigating anticompetitive practices within 5 years from the termination of the illegal activity. Paragraph 4 of the same Article states that if the fact being investigated also constitutes a crime, the limitation period will be the same as defined by criminal statutes.[2]

Based on these legal provisions, CADE applies the statute of limitations of 5 years for most types of anticompetitive offences. However, the authority has consistently adopted a 12-year limitation period in all cases involving alleged cartels.

Such approach derives from an interpretation that cartel arrangements are also defined as a criminal offense by Article 4 of Law

[1] The authors acknowledge the assistance of Danilo Zanichelli and Lucas Longhitano in the research for the present article. Any remaining errors are the sole responsibility of the authors.

[2] Law 12.529/11, Art. 46: "Punitive measures by the Federal Government, whether direct or indirect, to establish violations to the economic order, will occur within 5 (five) years as of the date the illegal act is committed or, in the case of a permanent or continuing violation, as of the day such unlawful practice has ceased.(…) § 4 When the fact object of the punitive action also constitutes a crime, the prescription shall be governed by the term set forth in the criminal law."

N. 8137/1990 – known as the "Economic Crimes Law". This is then coupled with Article 109 of the Brazilian Penal Code (Decree N. 2.848/1940), which determines that the limitation period for criminal offenses depends on the maximum penalty that could be applied for each offense. Pursuant to this provision, the limitation period is 12 years for a criminal persecution to be initiated when the maximum prison time provided for a crime is 5 years, as in the case of the crime defined in Article 4 of the Economic Crimes Law. Then, the same period has consistently been applied by CADE in administrative proceedings involving alleged cartel agreements.[3]

However, the understanding that an extended limitation period should be adopted in every case involving alleged cartels is currently not unanimous in CADE's Administrative Tribunal, composed of 6 Commissioners and the President. In two cases decided in August 2018, two Commissioners voted for the application of the 5-year limitation period for cartel investigations, if there is no parallel ongoing investigation by criminal authorities.[4] According to them, the statute of limitations protects the legitimate expectation of citizens, and any

[3] In this regard, please see: Administrative Proceeding No. 08012.005255/2010-11 (ruled by CADE on 28 November 2016) and Administrative Proceeding No. 08012.004674/2006-50 (ruled by CADE on 11 April 2018).

[4] Votes of Commissioners Paula Farani de Azevedo Silveira and Mauricio Oscar Bandeira Maia in the decision of the Tribunal at two Administrative Proceedings: **i)** Administrative Proceeding N. 08012.004674/2006-50. Complainant: Senador Eduardo Suplicy. Defendants: Senador Eduardo Matarazzo Suplicy, ABIEF - Associação Brasileira de Embalagens Flexíveis, ABRAFLEX - Associação Brasileira dos Fabricantes de Embalagens Laminadas and others. Reporting Commissioner: João Paulo de Resende. Decided by the Tribunal on April 7, 2018. **ii)** Administrative Proceeding N. 08700.001859/2010-31. Complainant: Associação Rádio Táxi Alternativa. Defendants: Associação das Centrais de Rádio Táxi de Curitiba – ACERT; Associação dos Cotistas de Rádio Táxi Sereia; Associação dos Cotistas de Rádio Táxi Curitiba; and others. Reporting Commissioner Paula Azevedo. Decided by the Tribunal on August 8, 2018.

exception to the general 5-year rule should be construed restrictively. Moreover, these dissenting votes took into consideration precedents from the Superior Court of Justice ("STJ") which only deem legally valid the application of criminal limitation periods by administrative authorities if: (i) the facts being investigated could configure a criminal offense; **and (**ii) the same facts are also being subject to criminal prosecution.[5]

Despite such considerations by these two dissenting commissioners, the majority of the Tribunal continued to support the application of the 12-year limitation period for cartels cases, even if no parallel criminal prosecution is in place. Essentially, Commissioners voting with the majority stated that the case law of the Superior Court of Justice about this issue is not yet conclusive. Moreover, these precedents from such Court involved mostly proceedings ruled by Law N. 8.112/1990 (known as the "Federal Civil Servants Law"), which has a provision similar to art. 46 of the Brazilian Antitrust Law. According to CADE's President[6], any understanding of the Tribunal that can change its own consistent decisional practice should be pondered in view of possible negative effects it may cause. According to this member of the Tribunal, there would be no justification– in terms of benefits to society at large – for a change in the authority's case law.

In our view, the position adopted by the current dissenting minority at CADE's Tribunal is more consistent with a systematic interpretation of the applicable legal rules. Indeed, CADE has no criminal enforcement powers, and only the Prosecutors Office (*Ministério Público*) and courts are legally able to qualify certain facts as possible criminal offenses. Moreover, a new approach requiring parallel criminal

[5] MS 15.036/DF, Reporting Minister Castro Meira, First Panel, decided on November 10, 2010, DLe 11.22.2010; REsp 1569655/SP, Reporting Minister Herman Benjamin, Second Panel, decided on March 12, 2016, DJe 06.30.2017.

[6] Vote presented by CADE's President Alexandre Barreto de Souza in Administrative Proceeding N. 08700.001859/2010-31. Decided by the Tribunal on August 8, 2018.

investigation for the application of the 12-year limitation period would only partially affect ongoing investigations, as many of them are conducted in cooperation with criminal authorities, and would actually foster this sort of coordinated action.

Finally, the 5-year limitation period is successfully adopted by several competition authorities around the world. According to our research[7], out of 23 foreign jurisdictions, 14 are subject to a limitation period of approximately 5 years, including the United States and the European Union.[8]

2. Approach for alleged information exchange falling short of cartel

Another development worth highlighting is that, in a recent important precedent, CADE's Tribunal has applied the 5-year limitation period for an alleged information exchange conduct falling short of a cartel agreement.

This involved the authority's final decision in the optical disk drive cartel investigation[9], in which CADE's Tribunal unanimously

[7] We have consulted the "Anti-Cartel Enforcement Templates", designed by the International Competition Network to highlight important features of members' anti-cartel systems (International Competition Network. *Anti-Cartel Enforcement Templates*, available at https://www.internationalcompetitionnetwork.org/working-groups/cartel/templates, last access on 13 March 2019); as well as the "Chambers Global Practice Guides – Cartels 2019", which contains information on a host of jurisdictions (Chambers & Partners. *Chambers Global Practice Guides - Cartels 2019*, available at https://practiceguides.chambers.com/practice-guides/cartels-2019, last access on 13 March 2019). By doing so, we were able to review the legislation pertaining to 24 different jurisdictions.

[8] Chile, China, Colombia, Czech Republic, France, Germany, Hungary, Japan, Holland, Portugal, South Africa, Spain, Sweden and United States of America.

[9] Administrative Proceeding No. 08012.001395/2011-00 (ruled by CADE on 21 November 2018).

dismissed the case against one of the companies under investigation, after concluding there has not been found sufficient proof of its involvement in a cartel agreement.

Pursuant to the Reporting Commissioner, the only evidence available in the case records against such company were some emails sent to it by a competitor more than 5 years before the beginning the investigation, providing information on a specific customer's perception about the quality performance of another competitor. In his vote, the Reporting Commissioner has expressly taken into account the lack of evidence of any involvement of such company in the exchange of sensitive information that could have had a direct impact on commercial decisions or that could support an inference about the existence of an illegal collusive arrangement among rivals.

In view of this, the Reporting Commissioner has concluded that the alleged conduct of such company could only be qualified as exchange of sensitive information among competitors, which is an anticompetitive practice under the Brazilian Antitrust Law without a corresponding criminal-law provision. Such approach was upheld by the other members of the Tribunal, what led to the dismissal of the case against such company based on the application of the statute of limitations.

3. Possible future developments in relation to bid rigging cases

When it comes to statute of limitations, it is also worth highlighting recent STJ's decisions on bid rigging,[10] which focused on the criminal qualification of cartel arrangements to rig public bids.

This is because there is an apparent conflict between Article 4 of the Economic Crimes Law, which establishes a maximum prison time of 5 years for cartel arrangements, and Article 90 of Law 8,666, of 1993

[10] In this regard, please see: Special Appeal No. 1.683.839, Reporting Justice Nefi Cordeiro, ruled by the STJ's Sixth Chamber on 19 December 2017; Special Appeal No. 1.623.985/SP, Reporting Justice Nefi Cordeiro, ruled by the STJ's Sixth Chamber on 17 May 2018.

(known as the "Public Procurement Law"), which provides a maximum prison time of 4 years for bid-rigging.

The STJ assessed this question and basically concluded that the Public Procurement Law is a special piece of legislation and, therefore, its rules shall prevail over the provisions of the Economic Crimes Law, whenever an arrangement among competitors aims at defrauding public bids.

This understanding affects the applicable criminal limitation period for bid rigging cases. As seen above, this is regulated by Article 109 of the Brazilian Penal Code, which states that the limitation period is 12 years for offenses to which the maximum prison time applicable is 5 years, while criminal persecution is time-barred after 8 years when the applicable maximum prison time is between 2 and 4 years. Based on that, the Superior Court of Justice understood that the criminal authorities have 8 years to start an investigation about collusive arrangements to fraud specific bids, while the 12 year limitation period would only be applicable for larger arrangements aiming at controlling a relevant market (what was not the case in the specific situation under analysis).

At the administrative level, CADE has never made such kind of distinction. Nevertheless, it is very likely that this issue will soon be taken to the Brazilian antitrust authority in the course of a bid rigging case, and we believe these two recent STJ's decisions may have some impact on the decision to be taken by the antitrust authority.

4. Conclusion

As seen above, CADE's current approach is that the general limitation period of 5 years applies for the valid start an investigation of any anticompetitive practice apart from cartels, including the alleged information exchange of sensitive information falling short of a cartel agreement. When it comes to cartel investigations, the current understanding of the majority at CADE's Administrative Tribunal is that an extended limitation period of 12 years should be adopted in all cases, based on an exception provided by law.

However, we believe CADE should review this approach in future cases, following the arguments recently submitted by two dissenting commissioners: the general rule of 5-year limitation period should be observed whenever there is no parallel ongoing investigation by criminal authorities, since the competition authority has no legal mandate to qualify conducts as criminal offenses.

Finally, as per the specific situation of bid rigging cases, CADE's Tribunal may soon be urged to take into account two recent decisions from the Superior Court of Justice where collusive arrangements aimed at defrauding public bids have been differentiated from other cartel cases. In such opportunity, CADE may follow the Court's approach and conclude that, at least in bid-rigging cases, the authorities have 8 years (instead of 12) to start an investigation.

IS "COMPLIANCE CREDIT" AVAILABLE TO COMPANIES FOUND LIABLE FOR ANTICOMPETITIVE BEHAVIOR IN BRAZIL?

Felipe Cardoso Pereira
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Lorena Leite Nisiyama

1. Introduction

"*Compliance credit*" is understood as the reduction in penalties for companies found involved in antitrust infringements if they prove the implementation of steps and processes to instill a genuine compliance culture in its day-to-day dealings. The idea was formally introduced in the Brazilian antitrust framework early in 2016, when the Administrative Council for Economic Defense ("CADE") issued the "*Guidelines on Competition Compliance Programs*" (or the "*Competition Compliance Guidelines*")[1]. Later that year, CADE also addressed this issue in its "*Guidelines for Cease and Desist Agreement for Cartel Cases*" (or the "*Settlement Guidelines*")[2].

This paper provides an overview on the criteria set forth both by the regulation currently in force and by soft-law tools for the effective

[1] BRAZIL. **Administrative Council for Economic Defense**. *Guidelines on Competition Compliance Programs* Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf. Access on: February 28, 2019.

[2] BRAZIL. **Administrative Council for Economic Defense**. *CADE's Guidelines on Cease and Desist Agreement for Cartel Cases.* Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf . Access on: February 28, 2019.

implementation of compliance programs capable of reducing fines. It also describes the methodology adopted by CADE to grant such discounts in the calculation of fines/settlement amounts.

2. Compliance programs eligible for credit

The *Competition Compliance Guidelines* clarify that only ***robust compliance programs*** resulting in material changes to the corporate culture – as opposed to "sham" compliance programs – could entitle companies to a reduction of fine levels imposed by CADE. Pursuant to these guidelines, the features of a robust compliance program encompass:

Table 1 - Features of a robust compliance program

Commitment from the top	• Code of conduct; • Impact on employee's salaries based on compliance initiatives; • Compliance matters in the agenda of the company's board meetings.
Appropriate resources	• Sufficient budget (i.e. a small company could adopt a program with lower expenditure); • Involve a number of employees proportional to the company's size.
Autonomy and independence	• Compliance leader: - Deep knowledge of technical aspects relating to competition law; - Influence in the company's decision-making process; - Sufficient autonomy and independence to take decisions with impact on the company as whole.
Risk analysis	• Individualized analysis of the risks associated with company's activities (in some cases with the need to consult outside experts, depending on the level of risks)
Risk mitigation	• Appropriate training to employees (including high profile employees) • Monitoring: constant analysis of program's effectiveness and efficiency (external auditor); hotline to compliance leader; capacity to process the complaints • Paper trail: proper documentation of compliance actions • Internal discipline: mechanisms for punishing non-compliance

Reviewing of the program	• Regular review of the adequacy of the program

3. How discounts are calculated?

The *Competition Compliance Guidelines* provide general directions on how compliance programs may affect the calculation of fines imposed by the authority when a company is found liable for anticompetitive behavior. Furthermore, both the *Competition Compliance* and the *Settlement Guidelines* indicate that the existence of such programs may also be taken into account when setting the amounts negotiated with companies to settle investigations (even though these documents apparently provide conflicting guidance on this regard, as will be further detailed below).

One should note that companies seeking for fine reductions or settlement discounts are the ones with the burden to prove that their compliance programs qualify as robust, pursuant to the *Competition Compliance Guidelines.*

3.1 Fine reduction

The *Competition Compliance Guidelines* assert that CADE could still grant a fine reduction even if the robust compliance program fails to prevent the anticompetitive behavior (e.g., when a company engages in anticompetitive practices despite the existence of the program).

This is because Article 45 of the Brazilian Antitrust Law establishes that the defendant's good faith is one of the elements to be accounted when calculating fines[3]. Therefore, pursuant to the *Competition Compliance Guidelines*, a robust compliance program

[3] See Article 45 of Law N. 12.529: "*Art. 45. In the application of the penalties set forth in this Law, the following shall be taken into consideration: […] II - the good faith of the transgressor*".

meeting the requirements explained above may be considered evidence of good faith of the company, and thus be used as a mitigating factor in fine calculations.

However, it is still uncertain how this discount would apply in practice. The *Competition Compliance Guidelines* provide no certainty or objective guidance on how a finding of good faith would ultimately affect fine levels. In other words, there is no clear percentage or methodology to anticipate the mitigating effect resulting from a finding of good faith, and no CADE precedent has detailed the impact of this element on fine calculations so far.

3.2 Discount in the settlement amount

Both the *Competition Compliance* and *Settlement Guidelines* comment on the possibility of granting benefits to settlement applicants based on the existence of compliance programs. The instructions provided in these documents, however, do not clarify the terms under which the benefit shall be granted, as detailed below.

According to the *Competition Compliance Guidelines*, a robust compliance program may justify CADE granting the maximum discount available to the company in a settlement negotiation. In this case, the compliance discount percentage corresponds to the gap between ***(i)*** the discount effectively secured by the company (which depends on the position of the applicant in the queue for settlement, the timing of the settlement application, the level of cooperation provided by the settling party, among others factors) and ***(ii)*** the maximum discount available for an applicant holding that specific place in the "settlement queue"[4].

[4] The payment of settlement amounts is a mandatory obligation for the execution of settlement agreements related to cartel investigations, pursuant to Article 85, §2 of the Brazilian Antitrust Law and to Article 224 of CADE's Internal Regulation. For those cases, the settlement amount shall correspond to the fine that would imposed on the settlement applicant in the event of a conviction by the CADE Tribunal (i.e., the expected fine) with a settlement discount. The

Conversely, the *Settlement Guidelines* indicate that the existence of a compliance program may be accounted as a mitigating circumstance when setting the expected fine percentage, with no comments on the adoption of a settlement discounts resulting from compliance credit.

CADE has granted compliance credit to a settlement applicant in a single case, in 2018[5]. On that occasion, the Tribunal leaned towards the guidance provided by the *Competition Compliance Guidelines* and granted a percentage discount to the company, but adopted a conservative approach in relation to the level of discount available.

Indeed, in that case the settling party received a 4% discount on the expected fine in exchange for the implementation of a compliance program. In its recommendation to the CADE Tribunal, the GS explained that it did not grant the maximum discount applicable in order to avoid inconsistencies with other incentives targeted by the Brazilian Settlement Program. The GS then recommended a discount based on the percentage range adopted by the Brazilian Comptroller General's Office ("CGU") for compliance credit in its own leniency negotiations (i.e., 1-4% of the base turnover)[6].

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discount will be calculated depending on the moment when the application was filed, the position of the applicant in the queue for settlement, the quality of the cooperation provided, among other factors – and can only amount to a maximum of 50% discount.

[5] Settlement Application N. 08700.008158/2016-18. Settlement Applicant: Construtora Norberto Odebrecht and Carlos José Vieira Machado da Cunha. Approved on November 22, 2018. Since the administrative proceeding related to this settlement agreement was still in the fact-finding phase at the time of the settlement application, CADE's General-Superintendence ("**GS**") was in charge of the negotiation. Once the negotiation period was over, the binding settlement offer was referred to the CADE Tribunal for approval along with a recommendation from the GS.

[6] See Article 18 of the Executive Order that regulates the Brazilian Anticorruption Law (Decree N. 8.420/2015): "*Article 18. The amounts corresponding to the following percentages of the gross turnovers of the legal*

Potential applicants must note that the commitments accepted by CADE in exchange for the compliance discount in that particular case were more stringent than what would be required to set up a robust compliance program pursuant to the *Competition Compliance Guidelines*. In this sense, the settling party also agreed with: ***(i)*** submitting annual reports indicating the status of the implementation of such program; ***(ii)*** reporting to CADE any other antitrust violation perpetrated by either the company or its employees, and; ***(iii)*** reporting to CADE the existence of criminal investigations, administrative/regulatory proceedings and private litigations related to the facts under investigation by CADE investigation.

4. Takeaways

Even though the Brazilian regulation currently provides for compliance credit to companies involved in antitrust investigations/held liable for antitrust violations, it stops short of detailing how any reduction in penalties will be calculated in practice. Conflicting guidance on the adoption of reductions in settlement agreements intensifies this uncertainty, hence making it harder for companies and individuals to anticipate the extent to which they could fully benefit from discounts due to the adoption of a robust compliance program .

In addition, the requirements for granting compliance credit in Brazil are yet to be settled by CADE's practice. In a recent precedent, CADE ultimately granted a lower reduction level in exchange for stricter conditions *vis-à-vis* those provided for by the *Competition Compliance Guidelines.*

Defendants interested in setting up a compliance program – and, consequently, in receiving the corresponding credit for it – will still face

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entity accrued in the year preceding the initiation of the Administrative Liability Proceeding (tax free) shall be deducted from the result of the sum of the factors listed in Article 17: [...] V – one to four percent for the proven existence and implementation of a compliance program by the legal entity, pursuant to the criteria set forth in Chapter IV".

some level of uncertainty due to the lack of detailed regulations. On the other hand, there seems to be room for defendants to engage in constructive discussions with enforcers as the parameters to grant compliance credit are gradually incorporated into settled case-law.

WHICH DIFFICULTIES (IF ANY) DOES CADE FACE TO CARRY OUT EXPERT OPINIONS AND ON-SITE INSPECTIONS?

Mauro Grinberg
Barbara Luvizotto

1. Introduction

Article 70 of the Brazilian Antitrust Law No. 12,529 of 2011 ("Antitrust Law") entitles the defendants to indicate the proofs they want to produce during a given punitive administrative proceeding on alleged anticompetitive practice. As the Antitrust Law does not specify which evidence can be produced by the parties, CADE has systematically relied on the provisions set forth by the Brazilian Code of Civil Procedure ("CPC").

The present article focuses on two types of proof: expert opinions and on-site inspection. Despite the possibility of producing these kind of evidence, CADE's General Superintendence only rarely grants the parties request. This paper aims at analyzing which difficulties (if any) CADE faces in producing these two kinds of evidence in cases involving alleged anticompetitive conducts.

Especially, the production of expert opinions and on-site inspections will be analyzed in light of the CPC that entered into force on early 2016, considering that (i) Article 115 of the Antitrust Law expressly mentions that the rules encompassed by the CPC are applied on a subsidiary manner to proceedings carried out before CADE[1]; and that (ii)

[1] It is important to point out that the Federal Law on Administrative Procedures (Law No. 9,784 of 1999) is also applicable on a subsidiary manner, according to Article 115 of Antitrust Law.

the enactment of the CPC simplified significantly the production of these types of proofs.

2. Which kinds of proof can be requested by defendants?

Both the antitrust authority and interested parties are entitled to produce proof in the course of the administrative proceeding. While Article 13, VI of the Antitrust Law expressly allows CADE's General Superintendence to require information and documents; to carry out inspections, and down raid; to require oral clarifications; to request copy of administrative inquiries and procedures before federal entities, as well as of criminal inquiries and lawsuits; the same law only broadly mentions that the defendants are allowed to specify the proofs they want to produce. The present article is mainly concerned with the second situation – i.e. the kinds of proof that can be requested and produced by the defendants.

In short, once launched an administrative procedure, the defendants have the right to present their respective defenses, as well as to indicate the evidence they want to produce. Then, CADE's General Superintendence analyzes the requested proof and elaborates a reasoned decision (launching the so-called 'discovery phase'), determining the production of the proof it deems relevant.

Even though the Brazilian Antitrust Law does not specify which evidence can be produced by the defendants, Article 115 left no doubt that the provisions contained in Chapter XII of the CPC are applicable to administrative proceedings on alleged breach of the antitrust law.[2] In this sense, Article 369 of the CPC provides that "*the parties shall have the right to employ all legal and morally legitimate means, even if not specified hereby, to prove the truth of the facts on which the claim or*

[2] GRINBERG, Mauro; CORDOVIL, Leonor; CRAVO, Beatriz. O Novo Código de Processo Civil e a Prova no Processo do CADE. **Revista Brasileira da Advocacia**, v. 4, 2017, p. 164.

defense is based on and to effectively influence the conviction of the judge".

In other words, the CPC contains a non-exhaustive list of evidence that can be produced by the parties, which implies that it is possible for the parties to request the production of any kind of proof, as long as it is legitimate and can contribute to the clarification of the alleged facts. Example of proof that can be requested by the interested parties are (i) technical proof (or expert opinion); and (ii) on-site inspections. The present article is mainly concerned with these two modalities of proof.

3. Expert Opinions: understanding the challenges faced by CADE

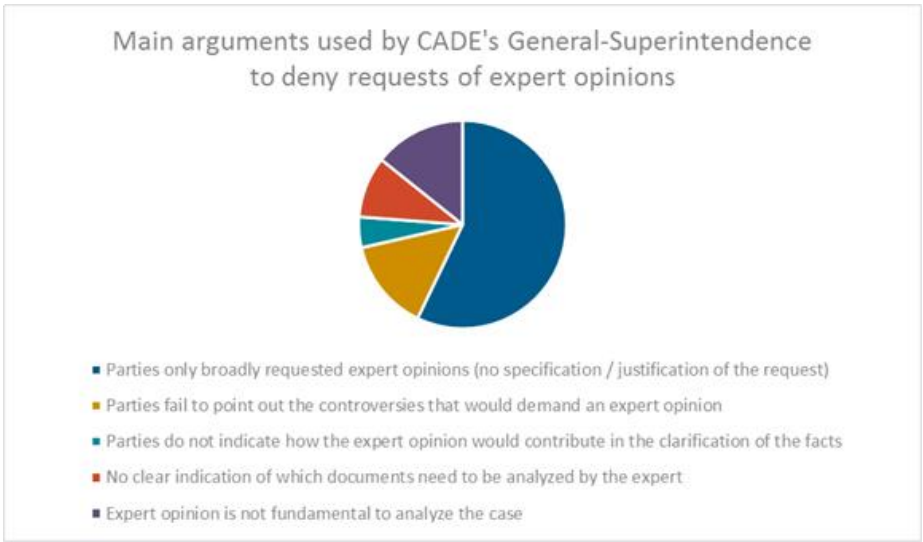
As already mentioned, the CPC introduced in Brazil a set of innovations with the aim of both granting greater certainty and speed to civil procedures. In short, while in the past regulation the production of an expert opinion was slow and complex, Article 471 of the CPC opened up the possibility for the opposing parties to jointly select the expert, as well as to carry out a simplified technical proof in less complex situations – something similar to the figure of 'expert witness' found in the United States.[3]

However, CADE still rejects most of the parties' requests on the matter. Considering that a total of 20 Technical Notes issued by CADE's General Superintendence decided on the production expert opinions, in 16 cases the antitrust authority decided to deny the parties' request; therefore, only in 4 decisions the request was granted. Here, it is important to note that only Technical Notes issued after March 2016 (i.e., after the entry into force of the CPC) were analyzed. This time limitation is useful, as it allows us to understand whether the simplification introduced by the CPC had any influence on CADE's ruling.

[3] GRINBERG, Mauro; CORDOVIL, Leonor; CRAVO, Beatriz. O Novo Código de Processo Civil e a Prova no Processo do CADE. **Revista Brasileira da Advocacia**, v. 4, 2017, p. 172.

The main arguments used by CADE's General Superintendence to reject the parties' requests on expert opinion can be summarized as follow: **(i)** the parties do not specify and justify which type of expert opinion they are requesting; **(ii)** the request on the production of an expert opinion is not accompanied by an appointment of the controversies that would demand such kind of proof; **(iii)** the parties do not point out how the expert opinion would contribute to clarify the facts; **(iv)** there is no clear indication of which documents need to be analyzed by the expert; **(v)** the requested expert opinion is not fundamental to analyze the case.

Please find below a chart summarizing the main findings of the research. It is important to bear in mind that one reasoned decision rendered by CADE's General Superintendence can use more than one of the arguments mentioned in the last paragraph to deny the request.



From the chart above it is possible to draw two main conclusions. First, the majority of the requests are denied by CADE's General Superintendence simply because the parties are not able to formulate the request accordingly. In this sense, the parties often broadly request the production of expert opinions, failing to specify the kind of expert that is needed and not demonstrating the controversy that the

expert is supposed to address. Second, CADE frequently deems the expert opinion as "*non-essential to analyze the case*", and argues that the interested party can "*carry out the requested opinion on its own expenses, and present it in the administrative proceeding as a documental proof, before the end of the discovery phase*".[4] Here, it is important to mention that expert opinions and technical studies differ notably. In this sense, while the former is produced by the authority, in the sense that it is invested with *technicity*, *objectivity* and *neutrality*[5], the latter are produced and submitted unilaterally by the interested party (i.e. the antitrust authority frequently considers that such proofs are biased in favor of the party that is presenting the study). In this way, CADE often pushes the parties to Catch-22 situations.

4. On-site Inspections: understanding the challenges faced by CADE

First of all, it is important to mention that – depending on the case – on-site inspections can be a crucial element of the parties' defense. For instance, in the Preliminary Investigation No. 08700.004336/2007-41 (ruled by CADE's Tribunal in 2014), the investigated party (Thyssenkrupp Elevadores S.A.) was charged for having allegedly imposed unlawful barriers to its competitors. Because of the on-site inspection, CADE's Counselors understood how elevators operate and decided to close the investigation, as the alleged anticompetitive conduct was nothing more than a reasonable safety measure imposed by the company.[6]

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[4] Administrative Procedure No. 08012.005882/2008-38. Parties: CADE *ex officio* vs. Associação Brasileira de Extratores de Sal *et al*. Technical Note No. 254/2014, issued on 09 October 2014.

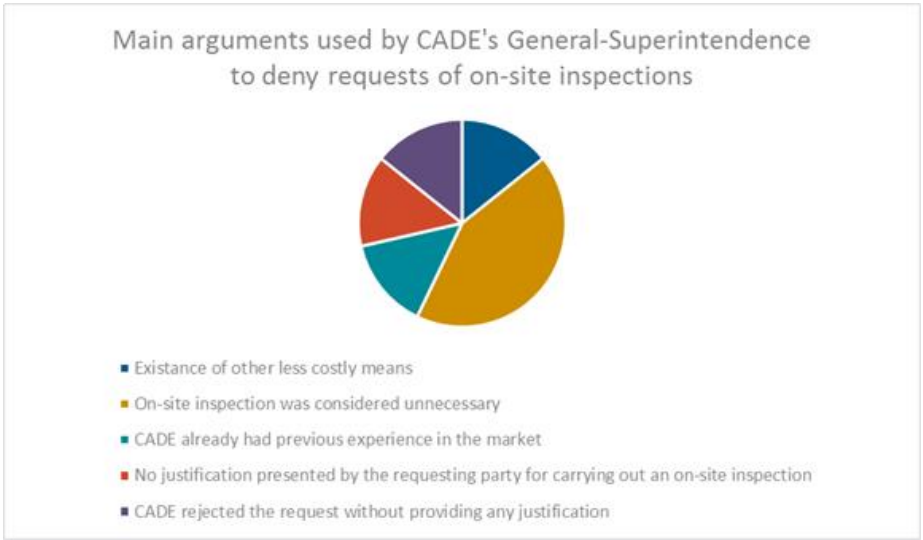
[5] MARRARA, Thiago, **Sistema brasileiro de Defesa da Concorrência**: Editora Atlas SA, 2015, p. 128.

[6] GRINBERG, Mauro; CORDOVIL, Leonor; CRAVO, Beatriz. O Novo Código de Processo Civil e a Prova no Processo do CADE. **Revista Brasileira da Advocacia**, v. 4, 2017, p. 173.

Despite its importance, it is very rare to see CADE's General Superintendence carrying out on-site inspections. To understand the reasons behind this apparent resistance, we carried out a research aiming at mapping all Technical Notes issued by CADE's General Superintendence that analyzed the parties' request to carry out on-site inspection. A time limitation was imposed, in the sense that only Technical Notes issued after the entry into force of the Antitrust Law were considered. Surprisingly, we found only 5 Technical Notes in which such request was analyzed. Here, in all 5 decisions, the parties' request was denied.

The main arguments used by CADE's General Superintendence to reject the requests can be summarized as follow: **(i)** the existence of other means which are less costly to the authority; **(ii)** on-site inspection was unnecessary because other documents presented by the parties could perfectly demonstrate the point made / because the argued point was not relevant; **(iii)** argument that CADE already had experience on the matter / market; **(iv)** parties failure to point out any argument that would justify the on-site inspection; **(v)** CADE rejected the request without any justification.

Please find below a chart summarizing the findings of the research. As already indicated, one reasoned decision rendered by CADE's General Superintendence can use more than one argument to deny the parties' request of carrying out on-site inspections.



From the chart above it is possible to draw two main conclusions. First, parties do not often request on-site inspection. At least two reasons can explain this apparent lack of interest in requesting on-site inspection: (i) defendants understand that this proof will not be useful in the clarification of the facts of the investigation; (ii) defendants are not familiar with this type of proof. Second, in the few cases where CADE's General Superintendence analyzed requests of on-site inspections, such proof was denied based on arguments such as "*existence of other less costly means*"[7], "*unnecessary proof*"[8], and "*CADE's previous experience in the market*"[9]. As it will be detailed, these are not reasonable arguments.

[7] Administrative Procedure No. 08700.005499/2015-51. Parties: Atlântico Terminais S/A vs. Tecon Suape S.A. Technical Note No. 37/2018, issued on 12 October 2018.

[8] Administrative Procedure 08012.006504/2005-29. Parties: Sindicato dos Estivadores nos Portos do Estado de Pernambuco *et al.* vs. Tecon Suape S.A. *et al*. Technical Note No. 20/2015, issued on 29 July 2015.

[9] Administrative Procedure 08012.001518/2006-37. Parties: Marimex Despachos Transportes e Serviços Ltda. vs. Rodrimar S/A Transportes,

In this sense, and despite the fact that CADE's General Superintendence controls the proof that can (and should) be produced throughout the discovery phase, Antitrust Law does not address when the production of a given evidence requested by the parties should (not) be allowed. However, the Federal law on Administrative Procedures No. 9,784 of 1999 (applicable on a subsidiary manner to CADE's administrative proceedings according to Article 115 of the Antitrust Law) can provide useful insights on the matter, as according to Article 38 §2, "*evidences proposed by interested parties shall only be refused, by means of a reasoned decision, when it is illegal, impertinent, unnecessary or delaying*" (highlighted).

Based on a holistic interpretation of Brazilian legal framework, it is possible to conclude that CADE may refuse to carry out on-site inspections under the argument of "unnecessary proof", but not because there are "less costly means" or because "CADE already has experience" in the subject matter. This is a clear harm to the right of defense.

It is understandable that the authorities run a low budget. However, a legal possibility must be created to allow the payment of the evidence by the interested parties, if willing.

5. Conclusions:

The denial of expert opinions mainly relies on the misunderstandings of the requesting parties. But the denial of on-site inspections is mainly due to the difficulties of the authorities and can be deemed as an illegal harm to the right of defense.

Equipamentos Industriais e Armazéns Gerais. Technical Note No. 231/2013, issued on 06 November 2013.

WHAT IS CADE'S CASE LAW IN BIG DATA CASES?

Joyce Midori Honda
Marília Cruz Avila

1. What is big data?

The concept of "big data" commonly refers to large volumes of a variety of data which is collected at high velocity and is then processed by computing software to produce unique datasets with significant commercial value[1].

The legal literature usually mentions six main characteristics of big data, also referred to as the "6 V's model", namely: (i) *volume* (great volume) generation and mass data capture; (ii) *velocity* (rapid generation, processing of data) the rapid data capture as an opportunity to maximize their usefulness; (iii) *variety* (various modalities, types of data) the various data formats, namely, structured, semi-structured and unstructured; (iv) *value*, which means to extract value from a huge volume of data through high-speed in the capture and analysis; (v) *veracity*, the reliability of the data obtained to ensure the truth in their analysis leading to accurate information; and (vi) *validation*, the ability to assure that multiple data sources when grouped make sense.[2]

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[1] Organization for Economic Co-operation and Development - OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Big Data: Bringing Competition Policy to the Digital Era*, available at: https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf

[2] According to the definition proposed by Doug Laney (3D data management: Controlling data volume, variety and velocity, MetaGroup research publication – 2001) and completed latter by, for example, George Firican (The 10 Vs of Big Data, UpSide- February 8, 2017). See also Bagnoli, Vicente, The Big Data Relevant Market as a Tool for a Case by Case Analysis at the Digital Economy:

Although the term big data mainly refers to the information created and collected through technological devices, websites, applications and services related to the so-called digital economy, the analysis and use of such results can be performed by any sector of the economy, allowing businesses to come up with product innovations, improve the efficiency of productive processes, forecast market trends, improve decision making and enhance consumer segmentation.

2. Why is big data relevant for the competition analysis?

Recently the access and the use of big data as a competitive advantage has been discussed by authorities and academics. While the collection and use of personal data falls under the domain of data protection laws, a question that is now being examined by several competition law regulators is whether the use of big data can impact competition in the markets.

In theory, personal data is a non-exclusive, unrivalled resource. This means that the use of data by a certain player does not reduce its amount or value for further uses. The control over a large volume of data is not a sufficient factor to establish market power, as nowadays a variety of data can be easily and cheaply collected by small companies.

On the other hand, the ability to process and analyze big data, in order to convert it into useful information (what is done by algorithms programed by a certain company, website or software) is considered to be as relevant, or even more important than access to big data itself. Generation of value depends on simultaneous access to the two resources, and the real competitive advantage is not in personal data, but in the ability of companies to deal with algorithms to create products, to solve problems or to meet consumer needs. Data analytics and good predictive

Could the EU Decision at Facebook/WhatsApp Merger Have Been Different? (June 12, 2017). Ascola Conference 2017. Available at SSRN: https://ssrn.com/abstract=3064795

algorithms may require high investments in complementary assets, including hardware, software and expertise[3].

Another relevant issue is that in digital markets, where data plays a fundamental role in business strategies, incumbents may compete vigorously across multiple products. At the same time, there is frequently a dynamic competitive pressure exerted by potential entrants that come up with innovative ideas.

In order to incorporate big data into competition law enforcement authorities may treat data as an input or asset that companies may use to enhance their market power and engage in exclusionary practices.

Another aspect that must be analyzed is that competition in markets where data is massively relevant is usually non price related. While quality may be an important aspect of competition policy, not all product characteristics are necessarily relevant for consumers or directly affected by the process of competition. Therefore, the potential effects of big data on a product characteristic can be perceived differently by consumers. For example, the level of privacy protection is relevant only when consumers value privacy rights.

The Administrative Council for Economic Defense (CADE) is still a beginner in the analysis of the subject, having limited case law in relation to big data and abuse of dominance based on it.

We mention below some of the main cases involving challenges related to big data in CADE's recent case law in order to evaluate whether the authority has shown any specific application of antitrust law, or whether the traditional approach is still being used.

[3] Monteiro, Gabriela Reis Paiva, Big data e concorrência: uma avaliação dos impactos da exploração de big data para o método antitruste tradicional de análise de concentrações econômicas, Dissertação de mestrado, FGV – RJ, 2017. Disponível em http://bibliotecadigital.fgv.br/dspace/handle/10438/20312.

3. Big data on CADE's administrative proceedings

The most recent and relevant conduct cases involving big data are related to Google Brasil. CADE is currently analyzing four cases involving the company, one of them is a Preliminary Investigation[4] and the other three are already at a more advanced stage (Administrative Process)[5]. The three administrative processes are being analyzed by CADE's Tribunal and the General Superintendence (GS) has already recommended the dismissal of the cases.

The only case where the GS has specifically analyzed the concept of big data is the Administrative Process n. 08012.010483/2011-94, initiated due to a claim presented by the price comparison websites Buscapé and Bondfaro against Google.

According to the claim, Google Shopping's positioning practice according to which the results of the "organic searches" of Google Search appear in the top positions causes rival price comparison websites of Google Shopping to lose audience, clicks and revenue, resulting in higher prices for the end consumer. The concept of big data was used by the GS not only to conclude on Google's dominant position, but also to analyze the barriers to new entrants in the market of general web search.

According to the GS, Google's market power tends to grow over time due to the accumulated network externalities, learning of the algorithm (machine learning) and a database in constant accumulation of information, reinforcing the distance of the incumbent from potential entrants. Given the long history of dominance of Google in the market, using Google is part of people's daily lives, characterizing path dependence that reinforces the maintenance of its dominant

[4] Preliminary Investigation n. 08700.003211/2016-94.

[5] Administrative Process n. 08012.010483/2011-94; Administrative Process n. 08700.005694/2013-19 and Administrative Process n. 08700.009082/2013-03.

position. For a rival search engine to contest it, it is not enough to present improvements or marginally higher differentials, it would be necessary to offer a product with significant competitive advantages which, considering the barriers to entry in this market, would not be something trivial.

However, the GS concluded that the evidence collected through the investigation does not lead to the conclusion that the damages created by Google's conduct, actual or potential, are greater than the benefits to the consumer in a context of constant change in the competitive dynamics in this market. GS did not affirm that the practices adopted by Google did not cause harmful effects to competitors but only that, faced with such a dynamic market, it understands that the antitrust authority must be even more cautious in the imposition of sanctioning measures.

In the analysis of the Administrative Process n. 08700.009082/2013-03, the GS only removed any link to big data issues, stating that the scrapping conduct investigated therein had a narrower effect on the market: *"it is not observed, however, that the practice under analysis has any relation with the exploitation of big data, which has become a relevant competitive factor by allowing the availability and access to data that enable to leverage assets with the use of information in order to identify patterns and behaviors of consumers and organize them in such a way that they are given value. Rather, in a narrower sense, the assessment of the impact of the conduct concerns the use of comments from users of competitors' price comparison websites about prices and product quality, information that serves to evaluate the results of purchases and sales and that supports decision-making by other users, unlike the use of information about the users themselves and their preferences for various commercial purposes."*

4. Conclusion

It is too soon to identify any conclusion or trend from CADE in issues related to big data since the case law related to this matter is scarce. The only thing that is possible to anticipate is that the Brazilian antitrust authority will be cautious in relation to more definitive measures, such as structural restrictions or heavy penalties.

Some issues related to big data cases will certainly be on CADE's radar in the next years. One of the questions, for example, is how to measure the amount of data accessed by a certain company, its processing abilities, as well as its influence over consumers, due to network effects and path dependence.

Due to stronger cooperation with foreign authorities, it is expected that CADE will learn from the experience of more mature jurisdictions which are also facing this new challenge to apply competition rules to a dynamic and ever evolving economy. So far CADE is following a more US approach but in fast changing and innovative markets the antitrust authorities' views may also change dramatically.

WHAT IS CADE'S POSITION ON GUN JUMPING?

Isabela Maiolino

Until 2012, the Brazilian merger control procedure, which is under the competence of the Administrative Council for Economic Defense (Cade), happened only after the merger took place. That changed with the enactment of the new Brazilian antitrust law, Law n. 12,529/12, which determined that the merger parties should notify Cade of the merger previously to its consummation, waiting for Cade's green light to go on with the transaction.

Given that the Brazilian antitrust law establishes the need for the maintenance of competitive conditions until Cade's authorization, a new type of anticompetitive infringement emerged, which was called "gun jumping". The referred conduct consists in the premature consummation of a merger operation, that is, the companies close the deal before the antitrust authority's green light.

In the Brazilian legal system, the mentioned infringement is provided for in article 88, of Law n. 12,529/2011, in the Resolution Cade n. 03/2015 and in Cade's Internal Ruling. Essentially, the legislation foresees that, in case the parties fail to submit the merger to the due analysis, they can be punished for the practice of gun jumping, if the following conditions are met: one of the companies has had an income equal to or higher than BRL 750 million and the other merging company has had at least BRL 75 million worth of income, both in the previous year to the closing of the transaction.

It may seem that these economic criteria are easy for the companies to recognize, but it is not always the case. In many cases, companies fail to submit their merger to analysis because they are not aware of the need to do it, due to miscalculation of income amounts for notification purposes, lack of knowledge about the antitrust law or even confusion regarding the obligation to notify, which happened at least in

the Concentration Acts between Supermercado BH Ltda./Opção Comércio de Alimentos Ltda.; Rede D'or/GGSH; Smaff Automóveis Ltda./others

In regards to the initiation of an investigation, it can be motivated by a complaint received by Cade or by evidence perceived during the instruction phase of a Concentration Act. In those cases, if there is enough evidence, the General Superintendence starts an administrative proceeding to investigate the merger (APAC in its acronym in Portuguese). During the proceeding, the instruction phase of the Concentration Act (if there is one ongoing) is suspended.

The proceeding is started by the General Superintendence, which investigates if the Concentration Act was notified, but the parties consummated the merger before Cade's analysis or if the Concentration Act was consummated before Cade was notified.

If the Tribunal understands there was gun jumping, it can punish the merging parties with penalty of nullity of the merger and with a fine ranging from BRL 60,000 to BRL 60,000,000, depending on the economic condition, intent and bad faith of the parties involved, and on the anticompetitive potential of the transaction, among other elements. Cade can also open an administrative proceeding against the involved parties in case of infringement of the antitrust law, such as exchange of sensitive information, agreement between competitors on pricing and interference in the decisions of the target company, especially in cases of vertical integration or horizontal overlap.

However, according do Cade, failing to submit a Concentration Act to the authority's appreciation is not the only hypothesis that consists in gun jumping. According to the Gun Jumping Guidelines[1], there are other business activities related to merger transactions that may generate liability for gun jumping, such as: (i) the exchange of information

[1] English version available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf>

between economic agents involved in a merger; (ii) the definition of contractual clauses governing the relationship between economic agents; and (iii) the activities of the parties before and during the implementation of the merger.

Even though this matter has been up for debate for a long time in other jurisdictions with older pre-merger regimes, such as the U.S., it can be considered a new subject in Brazil, being important to access Cade's position on the matter.

This research was framed from 2012 (when Law n. 12,529/11 came into force) to 2018. Within this period, Cade has judged 16 gun jumping cases[2], and convicted the merging parties in 14 of them[3]. After

[2] Cases: Concentration Act n. 08700.005775/2013-19, Applicants: OGX and Petrobrás; Concentration Act n. 08700.008292/2013-76, Applicants: Potióleo and UTC; Concentration Act n. 08700.008289/2013-52, Applicants: UTC and Aurizônia; Concentration Act n. 08700.007899/2013-39, Petrobrás and Total; Concentration Act n. 08700.002285/2014-41, Applicants: Chrysler and Fiat.; Concentration Act n. 08700.010394/2014-32, Applicants: Brasfrigo and Goiás Verde.; Concentration Act n. 08700.000137/2015-73, Applicants: Gasmig and GásLocal; Administrative Proceeding n. 08700.011836/2015-49, Applicants: Cisco and Technicolor; Administrative Proceeding n. 08700.002655/2016-11, Applicants: Blue Cycle and Shimano; Administrative Proceeding n. 08700.007160/2013-27, Applicants: JBS, Tinto, Unilav, Flora and Tramonto; Administrative Proceeding n. 08700.005408/2016-68, Applicants: Reckitt Benckiser and Hypermarcas; Administrative Proceeding n. 08700.007612/2016-13, Applicants: Mataboi and JBJ; Administrative Proceeding n. 08700.011294/2015-12, Applicants: União Transporte Interestadual de Luxo S.A. and Expresso Gardênia Ltda.; Administrative Proceeding n. 08700.010394/2015-13, Applicants: Supermercado BH Ltda. and Opção Comércio de Alimentos Ltda.; Administrative Proceeding n. 08700.000631/2017-08, Applicants: Rede D'Or São Luiz S.A. and GGSH Participações S.A.; Administrative Proceeding n. 08700.010071/2015-20, Applicants: Smaff Automóveis Ltda., Smaff Japan Automóveis Ltda., Karlos Cesar Fernandes, Kenya Camila Fernandes Beltrão and Nilson Barbosa Machado.

studying both the legal texts and the Gun Jumping Guidelines, it is possible to conclude that neither those regulations nor Cade have stablished a specific methodology on how to analyze gun jumping cases, especially regarding the calculation of fines[4], which is being decided in an *ad hoc* basis. However, even though there is not a specific leading case, an examination of the case law shows that the authority often uses certain set of criteria in its analysis, and as Burnier[5] explains, the precedents show a series of messages to the market.

First, it is important to understand what Cade has considered, so far, as gun jumping practice. The infringement may be easily identified in cases in which the merger has happened at its full, such as Cisco/Technocolor, Blue Cycle/Shimano, Mataboi/JBJ and União Transporte/Exp. Gardênia. However, that is not always the case. For example, the Tribunal considers that the exchange of sensitive commercial information (OGX/Petrobrás) and full payment for the merger consists as gun jumping (UTC/Potióleo), but a partial payment, such as signal, does not (Reckitt/Hypermarcas).

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[3] The following cases were dismissed: Concentration Act n. 08700.007899/2013-39, Petrobrás and Total; Administrative Proceeding n. 08700.005408/2016-68, Applicants: Reckitt Benckiser and Hypermarcas. In the first case, the Tribunal dismissed the gun jumping accusation for lack of evidence. In the second case, a partial payment (a signal) was made, but the Tribunal does not considered it as gun jumping practice.

[4] Luis Alho Batista and Isabela Maiolino concluded there is no parametrization or clear standards for the enforcement of penalties from 2012 to 2016 (BATISTA, Luis Guilherme Alho; MAIOLINO, Isabela. Os critérios de dosimetria adotados pelo CADE na aplicação de multa pela prática de gun jumping. In: MACEDO, Alexandre Cordeiro; BRAGA, Tereza Cristine Almeida (Orgs.). *Tópicos Especiais de Direito Concorrencial*. São Paulo: Cedes, 2018).

[5] SILVEIRA, Paulo Burnier. Gun jumping no Brasil: balanço dos primeiros cinco anos da nova lei de defesa da concorrência. In: CAMPILONGO, Celso; PFEIFFER, Roberto (Orgs.). *Evolução Antitruste no Brasil*. São Paulo: Singular, 2018.

Furthermore, as already mentioned, it seems some companies still have difficulties to identify what is a reportable transaction, either due to trouble calculating the parties' income in the previous year before the transaction (Supermercado BH Ltda./Opção Comércio de Alimentos Ltda.; Rede D'or/GGSH; Smaff Automóveis Ltda./others) or to difficulties in identifying what types of business contracts must be subject to antitrust analysis (UTC/Potióleo; Brasfigo/Goiás Verde; JBS/Tramonto; Gasmig/Cia. De Gás; União Transporte Interestadual de Luxo S.A. and Expresso Gardênia Ltda.).

As to the ways of resolving the matter, of 14 convicted cases, 12 were solved through an agreement between Cade and the merging parties, representing 85,7% of the cases. This shows a tendency to resolve the cases through agreements, probably to diminish the time and debate regarding the existence of the infringement and the extent of the penalty.

It is also important to highlight that, to Cade, carve-out agreements are non-applicable. A carve-out agreement consists in a contractual term with the intention to isolate the effects of a global transaction in jurisdictions where the transaction has not yet been approved by antitrust authorities. Several antitrust authorities do not accept these agreements, such as the U.S., Canada, European Union and, as it seems, also Brazil. In the Concentration Act between Cisco and Techinocolor, the Tribunal set an important precedent by not accepting the parties' explanation regarding the conclusion of the merger before Cade's approval.

Furthermore, it is worth noting that, so far, the penalty of nullity was imposed only in one investigation: the Concentration Act between Shimano and Blue Cycle. The Tribunal decided to settle with the merging parties through an agreement, which would suspend the effects of the merger while Cade analyzed the Concentration Act. Nevertheless, given it was not possible to reach an agreement, the Tribunal decided to declare the merger's nullity counting from when it was consummated.

This case sent two messages to the market: first, that it is beneficial for companies to reach an agreement with Cade in gun

jumping cases; second, that Cade not only can but also is willing to apply this type of sanction, which was, until then, a target for questions from the Brazilian antitrust community as to its possible enforcement.

Finally, in regards to the fines imposed, the lower fines were BRL 60 thousand (the minimum according to Law n. 12,529/2011), and the higher was BRL 30 million. Even though there is not a clear methodology to calculate the imposed fees, as in other countries, on the last 03 cases ruled by the Tribunal, the Commissioners showed a growing concern regarding the calculation of the monetary fee to be paid by the merging parties.

On the last judged case, that is, the merger between Smaff Automóveis Ltda./others, Commissioner Paula Farani recognized that both the legal texts regulating gun jumping and the Guidelines do not establish clear rules to calculate the fine. While Cade does not edit a Resolution to address the matter, she proposed a methodology using not only the legislation, but also the sum of the merger, the period of delay for notification and other parameters already used by the Tribunal in accordance to article 45 of Law n. 12,529/2011[6].

On the same case, even though agreeing with the methodology used by Commissioner Farani, Commissioner João Paulo Resende suggested that Cade should adopt, in the future, the methodology already used by the U.S. and the European Union, which consists in:

$$\text{fee} = \textit{percentage} * \textit{duration} * \textit{merging parties income}$$

In conclusion, it is not possible to know if the Tribunal will use either of those methodologies in future cases or if Cade will present a

[6] According to article 45, the Tribunal should consider the following items in the enforcement of penalties: "*I - the seriousness of the violation; II - the good faith of the transgressor; III - the advantage obtained or envisaged by the violator; IV – whether the violation was consummated or not; V - the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties; VI - the negative economic effects produced in the market; VII - the economic status of the transgressor; and VIII – any recurrence"*.

new Resolution to regulate the matter, but recent cases showed a growing concern regarding this issue. Additionally, although gun jumping might be a new type of conduct in Brazil, recent cases show that Cade is slowly developing its case law, and that the methodology for calculating the gun jumping penalty should and probably will receive more attention in the near future.

COMPETITION?

Gustavo Madi Rezende
Paulo Adania Lopes

Taxation has a material impact on the economy, with substantial implications for resource allocation and competitiveness (Stiglitz & Rosengard, 2015).[1] Generally speaking, the higher a country's tax burden the greater the negative impact of taxation on companies' capacity to invest, so that they are less equipped to compete with companies located in countries with that have a lower tax burden. It is no accident that taxation of corporate profit is trending down worldwide (Appy et al., 2018).[2]

The pursuit of lower tax burdens is not occurring only in the international sphere. When companies are established in a country, they tend to seek a tax arrangement there that enables them to pay less tax. The higher the tax burden in that country the more incentive there will be to engage in tax planning to reduce the amount of taxes paid.

This is not always possible. Specifically, the simpler and more isonomic the system the harder it will be for firms to obtain a competitive advantage on the basis of tax planning. Conversely, a complex system permits different types of tax classification for firms with similar characteristics, offering loopholes via interpretation of the rules. This is the case in Brazil.

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[1] Stiglitz, J. E. & Rosengard, J. K. **Economics of the public sector**. WW Norton & Company, 2015.

[2] Appy, B., Santi, E., Coelho, I., Machado, N. & Canado, V. R. **Tributação no Brasil: o que está errado e como consertar.** Available at: <http://www.ccif.com.br/wp-content/uploads/2018/07/Diretores_CCiF_Reforma_Tributaria_201802-1.pdf>. Last visited on Feb. 22, 2019.

If oversight and inspection are weak and the judicial system is slow and unpredictable, unlawful tax practices are unlikely to be detected. Even if they are, the slowness of judicial proceedings mitigates the effects of punitive decisions by deferring their execution (Jacobzone, Choi & Miguet, 2007).[3] Worse still, the existence of tax arrears payment plans allowing individuals and corporations to pay off debts to the tax authorities in installments (such as REFIS in Brazil) further weakens the disciplinary capacity of judicial punishment.

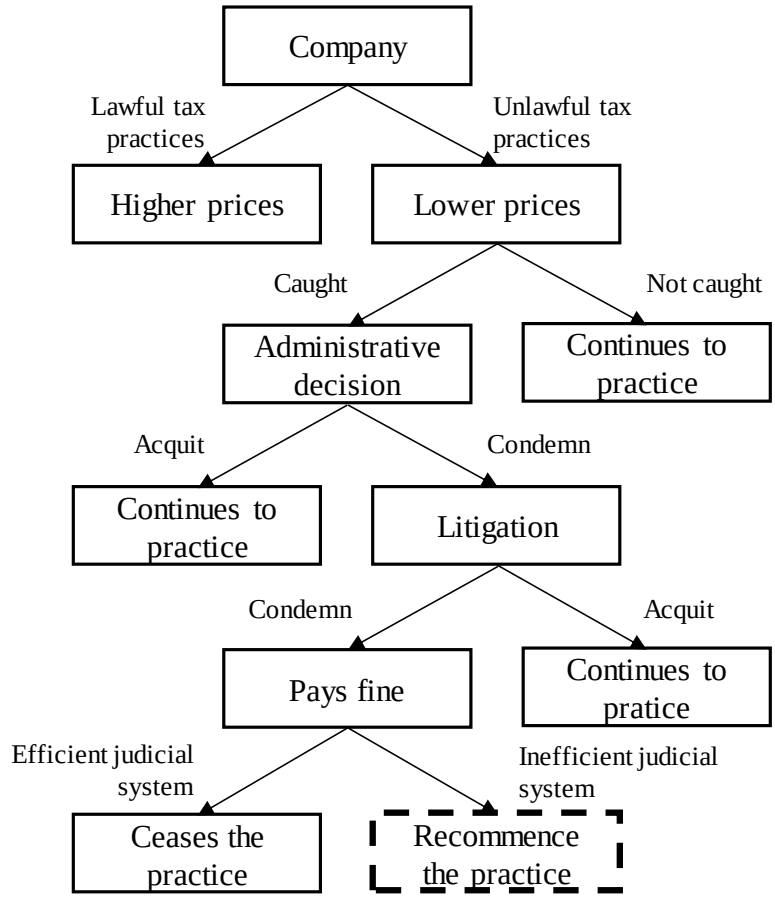
Tax management as a driver of competition is undesirable from the economic standpoint, in that firms with potentially less efficient production processes but aggressive tax planning may prosper to the detriment of less efficient firms with more conservative tax practices.[4] Ultimately a firm that uses unlawful tax practices to gain a competitive advantage could achieve and sustain a dominant position by means of such practices alone (Hovenkamp, 2005, p. 335).[5]

[3] Jacobzone, S., Choi, C. & Miguet, C. **Indicators of Regulatory Management Systems**. OECD Working Papers on Public Governance, Paris, Working Paper 4, 2007.

[4] Analysis of the impact of tax on competition has become especially pertinent in light of a recent decision by Brazil's Supreme Court (STF) acknowledging the link between these two spheres and concluding that repeated tax evasion is a means of obtaining competitive advantages in sectors with a high tax burden (Recurso Extraordinário N. 550,769/RJ).

[5] Hovenkamp, H. **Federal Antitrust Policy: The Law of Competition and Its Practice**. St. Paul, MN: West Group Publishing Co, 2005.

Figure 1 – Use of unlawful tax practices to gain a competitive advantage



Source: The authors.

Figure 1 shows an example as a game tree in which even after conviction the firm chooses to recommence the unlawful tax practice since the benefits obtained thereby (market share gains resulting in additional profit) more than compensate for the fine imposed. Thus this is not a case of competitive distortions due to sporadic practices but one of more lasting distortions produced by recurring unlawful tax practices.

As a rule the damage theory used to analyze the impact of unlawful tax practices on competition is that of predatory pricing, according to which the firm deliberately sells below cost in order to eliminate competitors and then leverages the relative lack of competition by setting monopoly prices with an intensity that at least offsets the period of profit sacrifice. The strategy requires the firm to have sufficient financial capacity to absorb the losses incurred during the predation period, and tax evasion can be used for this purpose.

This practice can be detected by the competition authorities but they rarely do so, and proving its existence is extremely difficult. However, other damage theories can be used more effectively to curb unlawful tax practices on the basis of antitrust law. Initially, it would be necessary to recognize the situations in which recurring tax evasion could potentially exclude competitors. In addition, it would be necessary to show that the excluded competitors are likely to be more efficient that the survivors.[6]

As with predatory pricing, consumers benefit from lower prices (offset by the advantage gained from tax evasion) initially, but not later, because the only firms left in the market are the most aggressive in tax terms and these are not necessarily efficient from the production standpoint, as the absence of potentially more productive players lowers the bar for competitors. Thus in the period following cessation of the practice, when consumers no longer benefit from pass-through of the tax advantage, the new price equilibrium is higher than it was initially (before the onset of tax evasion).[7] In this situation, the drivers of

[6] Firms that set out to practice tax evasion often organize less efficiently in order to do so, operating production plants in widely scattered locations, for example, or in locations ill-suited to the activity in question. This distorts the market's capacity to select the most efficient firms in terms of production, distribution or allocation. Potentially more efficient firms lose market share and are ultimately forced out, leaving only players capable of avoiding payment of taxes.

[7] Another assumption of this damage theory (besides the exclusion of more efficient players) is that the market in question has high barriers to entry.

competition are distorted, with more weight for tax issues and less for productive efficiency, innovation and product differentiation.

This damage theory differs from predatory pricing in that the perpetrator does not have to abuse market power in the period following the practice in order to compensate for the sacrifice, since already during the predation period it is able to absorb part of the benefit gained from tax evasion.[8] On the other hand, the two theories have some similarities: (i) exclusion of competitors that are more efficient than those who remain (adverse selection), and (ii) higher prices after cessation of the practice than before, in the former case owing to abuse of the dominant position and in the latter because the remaining productive structure is less efficient than the excluded structure.

With regard to the position taken by the Administrative Council for Economic Defense – CADE, Brazil's antitrust authority, on one hand it has clearly acknowledged for some time that tax issues affect the competitive environment. According to Consultation N. 0038/99 on the fiscal war among states:

> "[The] granting of tax incentives, like any other aspect of the national tax system, influences price formation in the market, and this in turn is umbilically tied to the defense of competition. [...] Benefits granted [...] give the firms concerned a dramatic advantage. [...] This colossal favoritism makes the economic playing field uneven and has an array of effects on competition and consumer welfare."[9]

Otherwise efficient firms would reappear once the practice ceased, eliminating the risk of harm to consumers.

[8] The perpetrating firm absorbs part of the benefit and shares another part with consumers. Yet another part is allocated to offset the firm's diminished productive efficiency.

[9] Reply to Consultation N. 0038/99, written by Commissioner Marcelo Calliari.

More recently, in CADE's judgment of Ipiranga's takeover bid for Alesat in the fuel distribution market, a member of the Tribunal opined that "the higher the tax burden the greater the incentive to tax evasion. [Tax evasion is a veritable disaster] for competition, making it unfair to those who act lawfully and pay their taxes properly".[10]

Despite this acknowledgment, however, CADE has handled few cases involving tax conduct and even so its analysis has been grounded in predatory pricing theory. No evidence of anticompetitive practices by the respondents has been detected in any of these cases.

For example, in the Administrative Process N. 08700.004480/2018-30 CADE analyzed the possibility of predatory pricing practices in the private education market by vocational training organizations belonging to the S System, especially SENAC and SENAI. The Interstate Federation of Private Schools (FIEP) argued that the prices charged by the respondents were only viable because of the subsidies they received and hence could not be replicated by third parties. The General Superintendence – GS analyzed the case from the angle of predatory pricing and concluded that this practice had not occurred. It added that CADE had no mandate to judge competitive distortions deriving from external factors, such as tax laws or administrative rules, affecting competition only temporarily or sporadically.[11]

Sporadic tax evasion is indeed unlikely to harm competition, since after the practice ends the market tends to return naturally to its

[10] Opinion of Commissioner Cristiane Alkmin.

[11] CADE has analyzed tax issues as they affect competition in other cases, such as Administrative Process N. 08700.003984/2010-85 (cigarette market), Administrative Process N. 08012.000668/1998-06 (retail market for pharmaceuticals), and Preliminary Investigation N. 08000.013472/1995-51 (hospitality market).

normal pattern of operation. What truly needs to be appraised is recurring weaponization of the tax system as part of an anticompetitive strategy. The parameters for such an appraisal are not clearly established in the literature or in Brazilian case law.

ANTITRUST INVESTIGATIONS AND COMPETITION COMPLIANCE PROGRAMS: HOW DO THEY INTERPLAY?

Guilherme Teno Castilho Misale
Julia Raquel Haddad
Leda Batista da Silva Diôgo de Lima
Luis Claudio Nagalli Guedes de Camargo

Introduction

This Q&A is focused on the interplay between Competition Compliance Programs ("CCPs") and cartel conducts under Law N. 12,529/2011 and other applicable rules ("Brazilian Antitrust Regulations").

The role of CCPs is essentially twofold: (i) primarily, it has a preventive role, focused on preventing and minimizing the risks of competition violations by implementing a culture of compliance within the organization (fully supported and vividly disseminated by the board and senior executives) with adequate procedures to avoid infractions, in addition to contributing to maintain a level playing field within the market and, more generally, encouraging compliance initiatives along the industry; and (ii) if anticompetitive practices were not avoided, a sound CCP offers appropriate tools to readily detect, manage and react to the adverse situation in order to duly remediate the harms and impacts of the infraction, thus minimizing their extension (e.g., applying for Leniency or Settlement Agreement with the antitrust agencies), besides avoiding recidivism.

One should highlight that larger companies and small and medium-sized enterprises, as well as other types of organizations, are potentially liable in case of infringement of the Brazilian Antitrust Law, and, therefore, the implementation of CCPs is generally recommended to all sorts of entities. Indeed, an effective CCP should be tailored according to size, structure, risks exposure and needs of the organization (the so-

called “one size fits all approach” is questioned when it comes to craft a credible, robust and effective CCP).

Are there specific rules in Brazil regulating CCPs under an antitrust perspective?

There are no provisions set forth in the Brazilian Antitrust Law specifically related to CCPs. Nonetheless, in 2016 the Administrative Council for Economic Defense (“CADE”) issued two important Guidelines that greatly helped instructing companies and advocating on behalf of CCPs.

The first one is CADE’s Guidelines for Competition Compliance Programs[1] (“CCP Guidelines”), which, not only brought non-binding rules and helpful guidance on how to build effective CCPs, but also laid out what are the main benefits companies can obtain from such effort.

The CCP Guidelines points out that a “robust” CCP must encompass: (i) the organization’s genuine commitment, as a way to assure that the program will be truly effective and that all employee levels are subject to the rules established by the program, which includes allocating adequate resources to guarantee the program’s effectiveness and nominating an independent compliance leader; (ii) a risk analysis preceding and following the implementation of the CCP to assess and classify risks associated with company’s activities in order to prioritize compliance actions in areas with higher associated risks; (iii) risk mitigation as a result of the program – once potential problematic areas are identified, the CCP must succeed in mitigating potential risks associated with company’s activities; and (iv) continuous review of the CCP – as associated risks are constantly being altered .

[1] Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/ compliance-guidelines-final-version.pdf (English version).

Those elements[2] are aligned with the best practices internationally recognized for the implementation of a credible CCP, always underscoring the "tone from the top" principle to effectively incorporate the compliance culture within the heart of the organization[3].

Moreover, The CCP Guidelines signalizes that CADE will evaluate whether the CCP is effective or merely a "sham program", *i.e.*, when companies purposefully emulate CCPs with a view to taking advantage of possible pecuniary benefits (e.g., reduction of fines in the face of a condemnation or negotiation). In this sense, the CCP Guidelines is clear in stating that the mere formal implementation of a CCP ("window dressing") is not necessarily an evidence that the organization is effectively concerned and committed to complying with the Brazilian

[2] For the sake of completeness, in light of Car Wash Operation's TCCs (please refer to item 2 below), the following elements were pointed to be embedded within the competition compliance/integrity program: a) engagement of top management; b) implementation of a code of conduct encompassing specific guidelines of competition integrity; c) autonomy and independence of the compliance team; d) establishment of specific criteria and methodologies, as well as definition of the individuals responsible for the analysis of competition risks; e) establishment of specific activities and internal communication and reporting channels, with wide publicity to employees, suppliers and service providers, and guarantee of anonymity of those who offer complaints ; f) regular courses and training; g) formal guidelines of competition integrity; h) review, adaptation and modification of the program; and i) adoption of specific procedures to prevent the exchange of commercially sensitive information or agreements between competitors, especially in the context of participation in bids and in meetings of trade unions and representative entities.

[3] By way of reference, the International Chamber of Commerce (ICC) has published a comprehensive toolkit that is referred by a number of competition agencies worldwide (available at: https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/) and has also published a specific and straightforward toolkit focusing on small and medium-sized enterprises (available at: https://iccwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business/).

Antitrust Regulations, nor that the implemented program is in fact credible and effective in attaining that goal.

The second Guidelines important for this article was issued later in the same year, called CADE's Guidelines for Settlement Agreement (Cease and Desist Agreement, "TCCs", in its Portuguese acronym) in cartel cases[4],which also establishes a specific possibility of using CCPs as a potential mitigating circumstance on the calculation of the expected fine. This possibility is discussed in the items below.

1. What are the overall impacts and benefits of adopting a CCP (a) prior to the launching of an anticompetitive conduct investigation and (b) after the launching of an anticompetitive conduct investigation?

The implementation of CCPs could generate several benefits to the company, such as reputational benefits, employees' awareness and reduction of costs and contingencies, also benefiting the market in which the company acts, guaranteeing a fair and sound competition environment.

Thus, companies under antitrust scrutiny (or with antitrust exposure) should also take into consideration important additional benefits when assessing whether to implement or not CCPs, particularly in two different moments:

> (a) First, the adoption of CCPs could enable the earlier detection of anticompetitive conducts carried inside the company or carried by third parties (competitors, suppliers, distributors and clients, for instance). Considering that the Brazilian Antitrust Law is one of the few legal statutes in the world that provides companies with a leniency program that gives to the first applicant full administrative and criminal immunity to antitrust violations, the fast identification of an anticompetitive conduct

[4] Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/ guidelines_tcc-1.pdf (English version).

could be a strategic measure of the company's – and shareholders – utmost interest. Therefore, in case an anticompetitive conduct is promptly identified and the company intends to settle with CADE in good faith, the application for a Leniency Agreement shall be addressed to CADE's General Superintendence's Office, which is CADE's competent branch to negotiate this type of agreement. To be eligible for the benefits of the Leniency Agreement, the applicants must be the first to disclose information regarding the conduct to CADE's knowledge and must also confess their participation in the conducts.

(b) Voluntarily adopting a CCP after the launching of an anticompetitive conduct investigation could also lead to significant benefits (to the companies and antitrust agencies):

(i) The uncover of evidence related to the investigated conduct. While Leniency Agreement – and full administrative and criminal immunity – is only available to the first applicant, companies could still benefit from the option of applying for TCC. Settling with CADE could result in a reduction of 15% to 50% of the expected fine to be imposed as a sanction[5].

(ii) The uncover of evidence of other unrelated conduct(s). If additional anticompetitive conducts (which are not yet of CADE's knowledge) are identified, the company could qualify for the benefits of a "leniency plus"[6].

Moreover, it is also important to point out that, in a few recent cases, CADE had granted additional discount to companies negotiating

[5] Depending on the moment when the marker is submitted and the defendant's place in line.

[6] Extra discount granted in a TCC negotiation when a Leniency Agreement for a different conduct is executed by the same company with CADE.

TCCs that committed to adopt a CCP (forward looking approach). Such possibility is set forth in both above mentioned Guidelines. For instance, CADE has recently granted an extra discount to one of the defendants involved in the Car Wash Operation: CADE has pointed that the implementation of CCPs could generate a discount of up to 4% of the expected fine[7], in line with the Brazilian anticorruption laws[8].

Based on these few recent precedents, it seems that granting such discounts will not be ordinary, but a case-to-case approach, meaning that the mere adoption of a CCP is not per se sufficient to secure an infringing company a fine reduction.

Furthermore, as set forth in Article 45 of Law N. 12,529/2011, in spite of the moment when the CCP is adopted, CADE might consider the "good faith factor" as a mitigating effect when sanctions/fines are established.

Can CADE impose the adoption of a CCP as part of a non-pecuniary sanction?

As per Article 38, VII of Law N. 12,529/2011, CADE could establish any act or measure required to eliminate harmful effects to the economic order as a sanction for anticompetitive conducts. Thus, theoretically, CADE could impose the implementation of a CCP as a sanction to companies condemned for the practice of anticompetitive conducts.

Nonetheless, CADE's Tribunal has decided in previous cases that the adoption of a CCP is a suggestive measure and cannot be

[7] See: TCC Requests N. 08700.004337/2016-86; 08700.004341/2016-44, 08700.008159/2016-62, 08700.007077/2016-09, 08700.008158/2016-18, 08700.005078/2016-19.

[8] Decree N. 8,420/2015 (Article 18, V).

imposed to companies without exceeding the boundaries of CADE's jurisdiction[9].

Finally, it would be opportune to raise a debate on to what extent CADE would have powers to impose a CCP to an infringing economic agent condemned in an anticompetitive conduct investigation.

[9] Such position was adopted, for instance, in the ruling of Administrative Proceedings N. 08012.002568/2005-51, 08012.000504/2005-15 and 08012.010744/2008-71.

PER SE OR RULE OF REASON: HOW DOES CADE REVIEW CONDUCT CASES IN BRAZIL?

Fabricio A. Cardim de Almeida[1]

Antitrust enforcers and Courts in the U.S. and elsewhere have been largely using per se or rule of reason to review conduct cases. The aim of this article is to provide a brief overview of the legal framework, relevant precedents and the practice of how the Administrative Council for Economic Defense - CADE has been using per se or rule of reason, as well as other standards, to review conduct cases in Brazil.

In Socony-Vacuum Oil Co., United States v., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), the U.S. Supreme Court named for the first time the "per se rule",[2] although the standard had been largely used by U.S. Courts in the previous decades.[3] In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L. Ed. 619 (1911), the U.S. Supreme Court noting that the language of Section 1 of the

[1] The author acknowledges and is thankful for the valuable contribution of Mauricio Domingos and Mayara Ogea, both associates of the antitrust and competition department at Souza, Mello e Torres Advogados, particularly with respect to their research over CADE's precedents referenced in the chart attached to this article.

[2] "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense (…)." Socony-Vacuum Oil Co., United States v., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

[3] *E.g.* Addyston Pipe & Steel Co., United States v., 85 F. 271 (6th Cir.1898), *affirmed*, 175 U.S. 211 (1899) and Trenton Potteries Co., United States v., 273 U.S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927).

Sherman Act could be read as "broad enough to embrace every conceivable contract or combination" rejected this interpretation to support a reasonable approach.[4] According to Justice White, U.S. Congress "intended that the standard of reason which had been applied at common law (…) was intended to be the measure used (…)."[5]

This debate has largely influenced antitrust analysis around the globe, including in Brazil.

Article 36 of the Brazilian Antitrust Law sets forth that "[t]he acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved: (…)".[6] This is the basic legal framework for reviewing conduct cases in Brazil and CADE has been developing different interpretations for such provisions over the years.

CADE's Guidelines for the Review of Conducts ("Guidelines")[7] refer to the rule of reason as the basic standard for the review of conduct cases in Brazil.[8] For horizontal practices, although the Guidelines

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[4] Robert Pitofsky, Harvey J. Goldschmid & Diane P. Wood, Trade Regulation: Cases and Materials, 49 (6th ed. 2010).

[5] 221 U.S. at 60.

[6] Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.12.2011 (Braz.).

[7] Resolução CADE No. 20, de 9 de Junho de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.6.1999 (Braz.). CADE's Resolution No. 20/1999 were issued on June 9, 1999 (when Law No. 8,884/94 was effective) and, although part of its provisions was revoked by CADE's Resolution No. 45/2008, the Guidelines (under Attachments I and II of CADE's Resolution No. 20/1999) are still in full force.

[8] "Examination of anticompetitive practices requires a careful scrutiny of the effects of the different practices on the markets in light of Articles 20 and 21 of Law No. 8,884/94. Domestic and international experience has shown that it is necessary to take into consideration the specific context in which each practice occurs and its economic reasonableness." *Id.* at 3. Articles 20 and 21 of Law No.

recognize some presumptions (e.g. existence of or the search for market power in the relevant market), which could be construed as an application of the per se rule, they also recommend the application of the rule of reason for many of these practices that may generate economic efficiencies.[9]

CADE, however, does not necessarily refer to such recommendations when reviewing every conduct case in Brazil. In fact, as argued in this article, CADE's precedents have been evolving over the years by using different criteria and standards for reviewing conduct cases in Brazil, even though the legal framework has remained the same over decades.

In the Administrative Proceeding No. 08012.002127/2002-14, CADE applied the per se rule to condemn the companies and the trade union involved in a hard core cartel in the market for crushed rock.[10] According to the opinion of the Reporting Commissioner Luiz Prado,

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8,884/94 contained very similar provisions to Article 36 of Law No. 12,529/2011. In fact, although Law No. 12,529/2011 has introduced significant changes in the institutional design of CADE as well as in merger control review in Brazil, the legal framework for the review of conducts in Brazil has not significantly changed since Law No. 8,884/94. The recognition of Brazil's anti-cartel program is, therefore, due to enforcement actions taken by the antitrust authorities (including the leniency and the cease and desist agreement programs), rather than significant changes in the legal framework.

[9] "In general, these practices presume the existence of or the search for market power in the relevant market. In different levels, some of these practices may also generate benefits in terms of market welfare (economic efficiencies); in this case, application of the rule of reason is recommended. It is therefore necessary to consider these effects in light of the practice's potential antitrust impacts. A restrictive practice will only generate net efficiencies if the economic efficiencies resulting from it outweigh its anticompetitive effects." *Id.* at 4.

[10] CADE, PA No. 08012.002127/2002-14, Relator: Cons. Luis Carlos Thadeu Delorme Prado, 13.7.2005, 146, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 66 (Braz.).

"the classic cartel is one of the exceptions under Brazilian antitrust law in which it may be characterized as illegal *per se*, i.e., in order to determine its illegality, it is sufficient to prove its existence."[11]

In the Administrative Proceeding No. 08012.004702/2004-77,[12] CADE reaffirmed that the per se rule should be the standard of review of hard core cartels. According to the opinion of the Reporting Commissioner Carlos Ragazzo, "[i]n summary, as set forth under Law No. 8,884/94 and CADE's precedents, in cases where there is a classic cartel acting, only the proof of existence of the conduct will be required for the configuration of the infraction, presuming that potential effects contrary to competition are produced. Therefore, as set forth under the "crushed rock cartel case", once verified the conditions of existence of a classic cartel […], it will not be necessary to prove the effects."[13]

In light of the these two precedents, CADE has been reviewing hard core cartels under the per se rule ever since, although in some cases it may still go further in additional steps that could be easily identified as part of the rule of reason.

For other types of conducts, however, it is not always possible to identify a same standard of review applied by CADE, and its analysis may range from the per se rule to the rule of reason, or even a more elaborated version of the latter, named "truncated rule of reason."

In Administrative Proceeding No. 08012.001271/2001-44, there has been a long and controversial debate among CADE's Commissioners on which should be the standard of review of resale price maintenance (RPM) cases in Brazil.[14] After 6 Plenary Sessions and individual

[11] *Id.* Reporting Commissioner's Opinion, PA No. 08012.002127/2002-14.

[12] CADE, PA No. 08012.004702/2004-77, Relator: Cons. Carlos Ragazzo, 9.5.2012, 91, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 78 (Braz.).

[13] *Id.* Reporting Commissioner's Opinion, PA No. 08012.004702/2004-77.

[14] CADE, PA No. 08012.001271/2001-44, Relator: Cons. Cesar Costa Alves Mattos, 30.1.2013, 25, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 31 (Braz.).

opinions from 7 different Commissioners, CADE's Tribunal ultimately held, by majority vote, that RPM cases in Brazil should be reviewed under a "truncated rule of reason", meaning that the defendant would have the opportunity to "demonstrate, first of all, that it would never be feasible to produce any anticompetitive effects due to the absolute lack of unilateral or coordinated market power."[15]

In other more recent cases, it seems that CADE is trying to deviate from the traditional debate over per se or rule of reason towards an European approach over illicit by object and illicit by effects.

In the Administrative Proceeding No. 08012.001600/2006-61, Commissioner Paulo Burnier applied the illicit by object approach to an alleged hard core cartel.[16] As formulated by Commissioner Vinicius Marques de Carvalho in one of his opinions, under the illicit by object approach, "not only the proof of effects are dispensable (their potential outcomes are sufficient), but also the intent from the party to pursue the conduct is irrelevant."[17]

For the purpose of this article, we have analyzed each of the most relevant conduct cases reviewed by CADE under Law No.

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[15] *Id*. Opinion of Commissioner Marcos Paulo Verissimo, PA No. 08012.001271/2001-44. "As from what I have presented throughout this opinion, I understand that the conduct (…) [RPM] shall be reviewed in light of the regime of presumptions required by the rational application of the rule of reason (…)." *Id.* at 61.

[16] CADE, PA No. 08012.001600/2006-61, Relator: Cons. Paulo Burnier, 16.3.2016, 55, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 71 (Braz.). "This case meets the potential illicit by object approach, as this is a classic cartel, also known as hard core cartel, due to its harshness." *Id*. Opinion of Commissioner Paulo Burnier, PA No. 08012.001600/2006-61. The case, however, was dismissed due to the lack of evidence of the existence of a cartel.

[17] Opinion of Commissioner Vinicius Marques de Carvalho. CADE, PA No. 08012.009462/2006-69, Relator: Cons. Olavo Chinaglia, 19.8.2015, 162, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 41 (Braz.).

12,529/2011 and tried to identity which was the standard of review for each type of conduct most commonly analyzed by CADE. The chart in the annex of this article summarizes each standard of review used by CADE and the references to the specific cases in which they were applied.

As one can conclude from the analysis of the chart in the annex of this article, there is no set standard for the review of conduct cases by CADE. While CADE tries to deviate from the analysis of effects in hard core cartel cases, its analysis still alternates from a per se (in the first relevant precedents) to an illicit per object approach (in other recent cases). Although CADE has been traditionally reviewing unilateral conducts under the rule of reason, there is also room for the application of a more elaborated "truncated" version of the rule as well as the illicit per effects approach in other recent cases. Uniform behaviour, for instance, has been reviewed by CADE under all different standards (except for illicit by effects) depending on the case.

As affirmed by Commissioner Marcos Paulo Verissimo in the Administrative Proceeding No. 08012.001271/2001-44, CADE's standard for review of conducts is based on a case-by-case approach, rather than a systematic and elaborated version of the different standards of review found in the U.S. or in Europe.[18]

Irrespective of the case-by-case approach, this article is a first attempt to organize and discuss CADE's precedents in light of the

[18] "Therefore, the touchstone for the comprehension of conducts review under Articles 20 and 21 of Law No. 8,884/94, as it occurs in may other jurisdictions, is less likely to determine, in a rigid manner, if Brazil has adopted the "rule of reason" or the "per se rule" for this or another conduct, but rather to learn, in each specific case, which should be the concrete application of the rule of reason, in other words, which are the standards of proof and presumption which shall be used to review each potential act which may have as an objective or may have the potential effect of limiting free competition, exercising a dominant position abusively or controlling a relevant market of goods or services." *Id. supra* note 15.

different standards of review of conduct cases in Brazil and elsewhere. While the legal framework for the review of conducts in Brazil has not significantly changed since Law No. 8,884/94, cartel enforcement (among other conducts) has been widely recognized over the past decade due to well orchestrated enforcement actions taken CADE (including its leniency and cease and desist agreement programs). As cases evolve, it is now time to dedicate more efforts in reviewing the standards for conduct cases under CADE's precedents. This is a task that should be taken seriously by CADE as it largely contributes to uniformize its precedents and to give more foreseeability and transparency for companies and individuals doing business in Brazil with respect to what is the standard of review of their conducts. It is time to set the standards.

Annex – Chart - Relevant conduct cases reviewed by CADE under Law No. 12,529/2011

CONDUCTS	***Per se***	***Rule of Reason***	***Truncated Rule of Reason***	**Illicit by object**	**Illicit by effects**
1. Cartel					
1.1. Classic/Hardcore	**X**[19]			**X**[20]	

[19] *E.g.*, Administrative Proceedings No. 08012.002414/2009-12; 08012.002127/2002-14; 08012.004472/2000-12; 08012.009088/1998-48 and 08700.001859/2010-31. In addition, refer to Administrative Proceedings No. 08012.004674/2006-50**(*)**; 08012.004422/2012-79**(*)**; 08012.002812/2010-42; 08012.011791/2010-56; 08012.007818/2004-68**(*)**; 08012.011142/2006-79; 08012.002568/2005-51; 08700.005326/2013-70; 08012.005928/2003-12; 08012.005928/2003-12; 08012.009611/2008-51; 08012.008847/2006-17**(*)**.

[20] *E.g.*, Administrative Proceedings No. 08012.006923/2012-18; 08700.000739/2016-10; 08700.000738/2016-67; 08700.000729/2016-76; 08012.005882/2008-38; 08012.004422/2012-79**(*)**; 08012.002812/2010-42**(*)**; 08700.004627/2015-49; 08700.002821/2014-09; 08012.007818/2004-68**(*)**; 08012.001600/2006-61; 08012.007356/2010-27; 08012.009606/2011-44; 08012.008847/2006-17**(*)**; and 08700.000649/2013-78.

Cartel					
1.2. Price fixing Cartel	**X**[21]	**X**[22]		**X**[23]	
1.3. Bid-rigging Cartel	**X**[24]			**X**[25]	
1.4. International Cartel	**X**[26]			**X**[27]	**X**[28]
2. Uniform Behaviour					
2.1. General	**X**[29]	**X**[30]	**X**[31]	**X**[32]	

[21] *E.g.*, Administrative Proceedings No. 08012.007033/2006-57; 08700.008551/2013-69; 08012.000377/2004-73**(*)**; 08012.012032/2007-13**(*)**; 08012.010187/2004-64*; 08700.002632/2015-17**(*)**; 08000.009354/1997-82.

[22] *E.g.*, Administrative Proceeding No. 08012.010470/2005-77**(**)**.

[23] *E.g.*, Administrative Proceedings No. 08012.005004/2004-99; 08012.007033/2006-57; 08012.000377/2004-73**(*)**; 08012.012032/2007-13**(*)**; 08012.010187/2004-64**(*)**; 08012.010470/2005-77**(**)**; 08012.001020/2003-21; 08012.000758/2003-71; 08700.002632/2015-17**(*)**; 08012.006764/2010-61; 08012.008611/2007-53.

[24] *E.g.*, Administrative Proceedings No. 08012.000030/2011-50**(*)**; 08012.006130/2006-22; 08012.001273/2010-24; 08012.009382/2010-90; 08012.011853/2008-13; 08012.008507/2004-16; 08012.006199/2009-07; 08012.010362/2007-66.

[25] *E.g.*, Administrative Proceedings No. 08012.000030/2011-50**(*)**; 08012.003321/2004-71; 08700.006551/2015-96; 08012.008850/2008-94; 08012.008821/2008-22; 08012.009885/2009-21; 08012.009645/2008-46.

[26] *E.g.*, Administrative Proceedings No. 08012.000820/2009-11**(*)**; 08012.010932/2007-18**(*)**.

[27] *E.g.*, Administrative Proceedings No. 08012.001376/2006-16; 08012.005930/2009-79; 08012.005255/2010-11; 08012.000820/2009-11**(*)**; 08012.010932/2007-18**(*)**.

[28] *E.g.*, Administrative Proceedings No. 08012.000774/2011-74; 08012.000773/2011-20.

2.2. Price tables	**X**[33]	**X**[34]		**X**[35]	

[29] *E.g.*, Administrative Proceeding No. 08012.010744/2008-71**(*)**; 08012.004365/2010-66.

[30] *E.g.*, Administrative Proceedings No. 08012.007155/2008-13; 08012.000456/2012-94; 08012.000504/2005-15.

[31] *E.g.*, Administrative Proceedings No. 08012.011381/2008-91; 08012.007967/2004-27.

[32] *E.g.*, Administrative Proceedings No. 08012.004736/2005-42; 08012.006685/2004-11; 08012.008960/2010-71; 08012.010744/2008-71**(*)**.

[33] *E.g.*, Administrative Proceeding No. 08012.003873/2009-93.

[34] *E.g.*, Administrative Proceedings No. 08012.013467/2007-77; 08012.003422/2004-41; 08012.003706/2000-98 (M); 08012.006859/2008-61 (M); 08700.006965/2013-53.

[35] *E.g.*, Administrative Proceedings No. 08012.004054/2003-78; 08012.002540/2002-71(M); 08700.001830/2014-82(M); 08012.000415/2003-15; 08012.002381/2004-76; 08012.001794/2004-33; 08012.007002/2009-49; 08012.000415/2003-15; 08700.000719/2008-21; 08012.000261/2011-63; 08012.002866/2011-99; 08012.008477/2004-48; 08012.005374/2002-64; 08012.000643/2010-14; 08700.006292/2012-51; 08012.004276/2004-71 (M); 08012.006647/2004-50 (M); 08012.005101/2004-81 (M); 08012.001591/2004-47 (M); 08012.009381/2006-69 (M); 08012.004020/2004-64 (M); 08012.007833/2006-78 (M); 08012.006552/2005-17 (M); 08012.001790/2004-55 (M); 08012.002985/2004-12 (M); 08012.003568/2005-78 (M); 08012.005101/2004-81 (M); 08012.009566/2010-50 (M); 08012.007011/2006-97 (M); 08012.002874/2004-14 (M); 08012.009462/2006-69; 08012.003048/2003-01(M); 08012.005004/2004-99(M); 08012.006969/2000-75(M); 08012.014463/2007-14(M).

3. Unilateral conducts		**X**[36]	**X**[37]		**X**[38]
4. Resale price maintenance			**X**[39]		
5. Others		**X**[40]	**X**[41]	**X**[42]	

FOOTNOTE LEGENDS:

(*): Leading Commissioner's opinion considered "per se" and "illicit by object" as synonyms.

(**): Leading Commissioner's opinion considered as an "illicit by object" but performed its analysis based in the "rule of reason".

(M): Price fixing involving medical-care companies and/or unions.

[36] *E.g.*, Administrative Proceedings No. 08012.001518/2006-37; 08012.005967/2000-69; 08012.009757/2009-08; 08012.006272/2011-57; 08012.011881/2007-41; 53500.004704/2003; 08700.009890/2014-43; 08012.008554/2008-93.

[37] *E.g.*, Administrative Proceeding No. 08012.009670/2010-44.

[38] *E.g.*, Administrative Proceedings No. 08012.007423/2006-27; 08012.002917/2002-91.

[39] *E.g.*, Administrative Proceedings No. 08012.011042/2005-61; 08012.001271/2001-44.

[40] *E.g.*, Administrative Proceeding No. 08012.012740/2007-46.

[41] *E.g.*, Administrative Proceeding No. 08012.005135/2005-57.

[42] *E.g.*, Administrative Proceeding No. 08012.008855/2003-11.

WHAT IS CADE'S EXPERIENCE WITH CONSULTATION/QUERY PROCEDURES RELATED TO ANTICOMPETITIVE PRACTICES?

Enrico Spini Romanielo
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1. Introduction

The purpose of this paper is to assess a very specific and important (but sometimes overlooked) type of procedure established by the Brazilian Antitrust Law called "consultation procedure" or "query procedure".

The paper will address (i) the main legal provisions applicable to the procedure under analysis, and (ii) the cases reviewed by the Administrative Council for Economic Defense ("CADE") since the enactment of Law 12,529/11, highlighting some details of the most important precedents.

2. What are the main legal provisions applicable?

According to Law N. 12,529/11 ("Brazilian Antitrust Law"), CADE's Tribunal is empowered to, besides taking final decisions (on the administrative level) on merger control cases and investigations of anticompetitive conducts, "answer queries about ongoing practices, upon the payment of a fee and the submission of relevant documents".

In March 2015, CADE enacted Resolution N. 12/2015 ("Resolution"), which established the procedural rules applicable to queries. According to it, any interested party (defined as those directly involved in the matter, as well as entities or associations whose activity are somehow related to the object of the query) may file

submissions with CADE, asking the authority to provide its option on the enforcement of the Brazilian Antitrust Law.

More specifically, queries can be filed to address (i) the interpretation on law or CADE's regulation related to merger control, transactions or specific situations; and/or (ii) legality of acts, agreements, corporate strategies or conducts of any kind, already initiated or envisaged and planned. If a query is related to a conduct already initiated, it shall be rejected with no further analysis if CADE has already ruled on the practice (or if there is an investigation in place). Moreover, queries must address specific conducts, at least envisaged and planned.

The interested party must file a submission with the following information: (i) its qualification; (ii) precise definition of the object of the consultation, including a "complete and exhaustive" description of all relevant facts; (iii) necessary documentation; (iv) indication of all rules and precedents applicable to the case; (iv) demonstration of its interest on the matter; and, (v) in case the conduct has already been implemented, a statement that the facts are not being investigated by CADE.

It is important to highlight the need to be particularly meticulous with the documentation: queries will be immediately dismissed if the information provided is not sufficient for a thorough review. In other words, applicants only have one shot at presenting the situation to CADE – although the Tribunal may use publicly available information.

According to the Resolution, the Tribunal has up to 120 days to reach a decision, and the position adopted by the authority is binding for 5 years (to the applicants and to the Tribunal). Nevertheless, the Tribunal is entitled to reconsider its interpretation afterwards, and even impose the ceasing of the conduct under public interest grounds – although, in this case, the authority is prevented from using the new interpretation to impose fines for previous conducts.

3. What is CADE's experience?

Since the enactment of Law N. 12,529/2011, 23 queries were submitted to CADE[1], and 15 of them (65%) were related specifically to conducts. The subject matters discussed were: (i) access to sensitive information (*Mastercard, 2015*, *Visa, 2017* and *Redecard, 2018*); (ii) price tables (*SINCOOMED, 2015* and *SINTRACON, SEVEICULOS, 2018*); (iii) influencing the adoption of uniform or agreed business practices among competitors (*APRO, 2016*, *FENAVIST, 2018* and *APPS*); (iv) sharing of business units and infrastructure (*CGMP, Conectar, 2015*); (v) exclusivity (*ABB, 2015* and *Center Norte, 2015*); and (vi) resale price maintenance (*Continental, 2018*).

The economic segments involved were payment services (*CGMP, Conectar, 2015*, *Mastercard, 2015, Visa, 2017* and *Redecard, 2018*), healthcare (*SINCOOMED, 2015*), transportation (*FENAVIST, 2018* and *SINTRACON, SEVEICULOS, 2018*), power systems

[1] In order to analyze CADE's experience, a research on the authority's data base was made. The authors only considered case law under the Brazilian Antitrust Law. The cases found in the research are: (i) 08700.000207/2014-02 (*Instituto Brasileiro de Petróleo, Gás e Biocombustíveis, 2014*), (ii) 08700.009432/2014-04 (*SAAB Participações e Novos Negócios S.A., 2015*); (iii) 08700.006564/2014-85 (*Castrolanda, 2015*); (iv) 08700.010488/2014-01 (*IFC, 2015*); **(v) 08700.009476/2014-34 (*ABB, 2015*)**; **(vi) 08700.003811/2015-71 (*SINCOOMED, 2015*)**; **(vii) 08700.007192/2015-94 (*CGMP, Conectcar, 2015*)**; **(viii) 08700.007817/2015-18 (*MasterCard, 2015*); (ix) 08700.007124/2015-25 (*Center Norte, 2015*)**; (x) 08700.010927/2015-67 (*Polimix, 2016*); **(xi) 08700.004483/2016-10 (APRO, 2016)**; (xii) 08700.006858/2016-78 (*Hamburg, 2016*); (xiii) 08700.008081/2016-86 (*CMA, Hamburg, 2017*); (xiv) 08700.008419/2016-08 (*EA SWISS SÀRL, Warner Bros., 2017*); **(xv) 08700.000468/2017-75 (*Visa, 2017*)**; **(xvi) 08700.001540/2018-62 (*SINTRACON, SEVEICULOS, 2018*)**; **(xvii) 08700.004009/2018-41, 08700.004010/2018-76, 08700.004011/2018-11 and 08700.004012/2018-65 (*Redecard, 2018*)**; **(xviii) 08700.004208/2018-50 (*FENAVIST, 2018*); (xix) 08700.004594/2018-80 (*Continental, 2018*)**; and **(xx) 08700.007296/2018-41 (*APPS, not yet decided*)**. The queries related to conducts are highlighted in bold.

components (*ABB, 2015*), advertising (*APRO, 2016*), automotive tires (*Continental, 2018*), malls administration (*Center Norte, 2015*) and seeds and seedlings production (*APPS*).

Most of the cases (9) were filed before the practice was implemented (*APPS; Center Norte, 2015; SINTRACON, SEVEICULOS, 2018; APRO, 2016; CGMP, Conectcar, 2015; ABB, 2015; SINCOOMED, 2015; Continental, 2018 and FENAVIST, 2018*).

CADE ruled on 13 procedures[2], and issued decisions on the merits in 10 (3 were immediately dismissed because the submitted information was deemed to be insufficient for a thorough review). The position of the authority in each of them is summarized below:

- *ABB, 2015*: in November 2014, ABB filed a query asking CADE to issue a decision on the legality of exclusivity clauses in agreements between suppliers of High Voltage Direct Current (HDVC) converter stations and potential participants of a bidding process for the concession of the construction of transmission lines in the Belo Monte power plant. The exclusivity clauses could be pre-bidding (clause would prevent the provider of HDVC converter stations from entering into agreements with competing bidders only until the filing of the proposal), or post-bidding (clause would prevent the provider of HDVC converter stations from entering into agreements with competing bidders after the conclusion of the biding process). Since CADE had previously ruled on the illegality of post-bidding exclusivity clauses, the query focused on pre-bidding exclusivity. Although Reporting Commissioner Ana Frazão voted for dismissing the query for concluding that there were not sufficient elements to warrant a full assessment, CADE's President Vinicius Marques de Carvalho disagreed, and, on the merits, stressed that the exclusivity could have anticompetitive

[2] The Applicants of *Center Norte, 2015* requested the dismissal of the case (so it is not included in the final figure), and *APPS* is still pending decision.

(by means of reducing the participation on the public bidding, since there were few providers of HVDC converter stations, and a previous communication/pre-agreement between such players and potential bidders was essential) and pro-competitive effects (e.g., reduction of transaction costs). Therefore, if implemented, CADE could initiate an independent investigation to assess potential anticompetitive effects. The remaining commissioners agreed with the vote presented by CADE's President.

- *CGMP, Conectar, 2015*: in July 2015, CGMP and Conectcar, two providers of payment services via Automatic Vehicle Identification (AVI), filed a query asking for CADE's opinion on the legality of contracts among them for providing TAG Reading System services in parking lots. After asserting that all necessary elements for assessing the consultation were present, Reporting Commissioner João Paulo de Resende concluded that the agreements were not illegal from an antitrust perspective, especially because there were no exclusivity clauses, they preserved the commercial independence of both companies and contained clauses to avoid potential coordination. Furthermore, they could enable competition in certain places in which only one of the companies operated. The remaining commissioners agreed with his vote.

- *APRO, 2016*: in June 2016, APRO (the Brazilian Association for the Production of Audiovisual Content) asked CADE whether the imposition of a rule to oblige all of its associates to only enter into agreements with advertising agencies/advertisers that would pay for the services within certain deadlines could violate the Brazilian Antitrust Law. Reporting Commissioner Gilvandro Vasconcelos argued that CADE had a well-established case law that influencing/imposing the adoption of uniform conduct is anticompetitive and should be convicted. Therefore, the conduct envisaged by APRO was deemed illegal. The remaining commissioners agreed with his vote.

- *Visa, 2017*: in January 2017, Visa asked CADE to assess whether certain clauses it intended to include in its Participation Agreement were legal from an antitrust perspective. More specifically, such clauses referred to the obligation of sub-acquirers/facilitators to provide Visa with certain information that could be considered commercially sensitive (data from merchants, such as name, Merchant Category Code, country and city codes of the merchant). In May 2017, CADE concluded, by majority of votes, that the access to such information would not violate the Brazilian Antitrust Law on its own and per se, especially because there appeared to be rationality and benefits associated. Nevertheless, CADE stressed that the misuse of such information could be an antitrust infringement.

- *SINTRACON, SEVEICULOS, 2018*: in January 2018, SINTRACON and SEVEICULOS (local unions for the industry of cargo transportation) asked CADE if establishing a table on minimum freight rates was legal. Reporting Commissioner Paula Farani concluded that imposing price tables has obvious potential anticompetitive effects and is illegal by object, as established in the authority's case law. Moreover, she determined the initiation of an independent administrative process against the unions (Administrative Process N. 08700.002160/2018-45, pending judgment).

- *Redecard, 2018*: in June 2018, Redecard filed 4 queries (one for each of the following card brand schemes: Visa, Mastercard, American Express and Elo) asking CADE about the legality of the access to certain information from sub-acquirers/facilitators (the exact scope of the information was kept confidential). In October 2018, CADE concluded that, despite of the position adopted in *Visa, 2017* (which dealt with similar issues), no definitive and final response was possible considering the complexity of the matter. The Tribunal decided then for the initiation of a preliminary investigation against

Visa, Mastercard, American Express and Elo (Preliminary Investigation N. 08700.005986/2018-66).

- *Continental, 2018*: in July 2018, Continental asked CADE to assess whether its Policy of Minimum Advertised Price was legal under the Brazilian Antitrust Law. Reporting Commissioner Paulo Burnier concluded, initially, that the practice was very similar to Resale Price Maintenance (RPM), which is presumably illegal, according to CADE. However, since Continental was able to demonstrate that it did not have economic power (market share inferior to 20%, and C4 inferior to 75%), the Reporting Commissioner concluded that the practice was not an antitrust infringement. With the exception of Commissioner Cristiane Alkmin, the remaining commissioners agreed with his vote.

4. Conclusions

The consultation or query procedure is an important tool established by the Brazilian Antitrust Law, and a good opportunity to be used by players, especially considering (i) the very open nature of antitrust rules, and (ii) that sometimes the existing case law on a specific subject is not clear or well established enough. In these situations, filing a query with CADE to obtain a response from the authority might be a good solution.

It was possible to note that at least in two cases (*ABB, 2015* and *APRO, 2016*), the applicants obtained a response about the potential illegality of envisaged practices from the antitrust authority before they implemented the conduct. In other two situations, applicants were able to confirm that the envisaged practices were legal from an antitrust perspective (*CGMP, Conectcar, 2015* and *Continental, 2018*), bringing more legal certainty to the market.

In any event, one should use the procedure with caution, especially because CADE may initiate an independent investigation as a

result of the judgment – as in *SINTRACON, SEVEICULOS, 2018* and *Redecard, 2018*.

WHAT HAS ALREADY BEEN DONE BY THE BRAZILIAN COMPETITION AUTHORITIES IN TERMS OF COMPETITION ASSESSMENT TO AVOID ANTICOMPETITIVE CONDUCTS?

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1. Introduction

The anticompetitive conducts combat is one axes of the SBDC in its institutional mission. It can be implemented by different ways, as for example: (i) controlling the market structure though merger and acquisition control and (ii) implementing the Competition Assessment as an instrument of competition advocacy. The first one is an exclusive competence of Council for Economic Defense (CADE) and the second one is a competence of the Secretariat for Economic Monitoring (SEAE).

On the one hand, the structure control has the aim to avoid excessive market concentration and, as consequence, eliminate the incentives to market power abuse. In the other hand, the competition assessment has the objective to avoid that regulatory rules, laws and acts generate incentives to anticompetitive conducts.

SEAE has implemented the Competition Evaluation Checklist several times in a wide variety of sectors since this issue was highlighted by Office of Fair Trad (OFT), International Competition Network (ICN) and Organisation for Economic Co-operation and Development (OECD).

This paper has the aim to present the SBDC experience with Competition Assessment in order to avoid and mitigate the incentives to anticompetitive conducts implementation. So, this paper is divided in two section além of this introduction: (i) Competition Assessment: an important instrument to mitigate the incentives to anticompetitive

conducts; and (ii) the SBDC experience with Competition Assessment: the cases of funeral services.

Competition Assessment: an important instrument to mitigate the incentives to anticompetitive conducts

The antitrust community around the world and the main international organisms have been worried about the anticompetitive effects generated by the regulatory systems, mainly if the regulatory policies are not capable to address competition in the right way, be in terms of market structure control or be in terms of conduct control (cartel, unilateral conducts etc).

The Competition Assessment is an instrument used by competition agencies to identify the effects of regulation acts, bills, laws and all other correlated aspects to competition. This instrument is associated to Regulatory Impact Assessment (RIA), which is defined by OECD as *a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives*[1].

According to OFT[2], *The requirement to undertake a Competition Assessment applies to those regulations that also require a Regulatory Impact Assessment (RIA); that is, those regulations that are likely to have an impact on businesses, charities or the voluntary sector. 2 The Competition assessment draws on much of the same information as*

[1] OECD. Regulatory Impact Analysis. Available at: http://www.oecd.org/regreform/regulatory-policy/ria.htm. Accessed at: 02/23/2019.

[2] OFT. Guidelines for competition assessment: A guide for policy makers completing Regulatory Impact Assessments. Available at: http://www.osservatorioair.it/wp-content/uploads/2009/08/fairtrading.pdf. Accessed at: 02.24.2018. 2002.

the RIA and should be carried out as part of the RIA process [OFT (2002), pg. 1].

In 2002, the OFT produced a competition filter with the aim to *provide a discipline so that those proposing new regulations consider the direct and indirect effects of the proposal to competition* [OFT (2002)]. The OFT (2002) brings relevant aspects of the relationship between proposed regulation and competition in the economy. According to OFT (2002), there is a direct causality between supply and demand factors (costs, switching costs, incentives, information), competitive process and market outcomes, and changes to former *will lead to changes in market outomes, working through the competitive process* [OFT (2002), pg. 9].

The ICN Report[3] postulates several important elements to Competition Assessment. Among these aspects it is relevant to mention that one who tells about the selection criteria to prioritize Competition Assessment, since this criterion contribute *to competition agency to focus its action on the most significant matters and consider the interaction between its enforcement and advocacy* [ICN, pg. 5].

OECD (2005)[4] brings important elements to monitor Competition assessment in one country. In relation to the competition policy, the Guide woks with the aim (i) to strengthen the scope, effectiveness and enforcement of competition policy; (ii) to design economic regulations in order to stimulate competition and efficiency; and (iii) to eliminate that one where clear evidence demonstrates that do not converge to public interests.

OECD (2007) elaborated a guide denominated "Competition Assessment Guide". This Guide recommended that competition

[3] ICN. Recommended Practices on Competition Assessment. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/AWG_RP_English.pdf. Accessed at: 02/22/2019

[4] OECD. Guiding Principles on Regulatory Quality and Performance. Available at: https://www.oecd.org/fr/reformereg/34976533.pdf. Accessed at: 02.02.2019. 2005

assessment should be conducted if a legal provision has any of the following effects: (i) Limits the number or range of suppliers; (ii) Limits the ability of suppliers to compete; and (iii) Reduces the incentive of suppliers to compete.

In 2014, OECD elaborated a guide denominated "Competition Assessment Toolkit[5]", which provides a general methodology for identifying unnecessary restraints and developing alternative, less restrictive policies that still achieve government objectives. A key element of the Toolkit is the "Competition Checklist" that asks a series of simple questions to screen for laws and regulations that could unnecessarily restrain competition. This screening focuses limited government resources on areas where competition assessment is most needed [OECD (2014), pg. 3].

This Guide add one more important effect to "Competition Assessment Guide" elaborated in 2007 by OECD: limits the choices and information available to customers. So, with this new effect mentioned, it is possible to identify almost all elements compatible with anticompetitive conducts and elements that can generate incentives to anticompetitive behauviour.

The implementation of any kind of competition assessment instrument, as proposed by OFT, ICN and OECD, allows the competition authorities to know more about the quality of legislation proposed by their legislative staffs and, as consequence, allows to decrease the incentives to anticompetitive practices, like cartels.

2. The SBDC experience with Competition Assessment: the cases of funeral services

The SBDC was reformulated in 2011 when Law N. 12.529/2011 came into force and the SBDC became compound by two bureaus: CADE and SEAE. CADE is a federal autarchy subordinated to the

[5] OECD. Competition Assessment Toolkit: 2 Guidance. Available at: http://www.oecd.org/daf/competition/45544507.pdf. Accessed at: 02.26.2019.

Ministry of Justice, that is responsible for instructing and judging the administrative processes and SEAE is a Secretariat from Ministry of Economy and it is formal linked to SBDC by article 19 of the Law N. 12,529/2011, who has competition advocacy as assignment[6].

SEAE has been evaluated several sectors under the perspective of competition advocacy since the Law N. 12,529/2011 came into in force. The SEAE Competition Advocacy Report jan/2018[7] brings several cases either in regulated and in non-regulated sectors, as for example: oil and gas, land transport, air transport, water resources, banking correspondents; drinking water container; retail sale of cachaça; taxi segment; funeral services and Traffic Department procedures. Almost all regulated cases of competition advocacy were analyzed by SEAE as contribution in the public consultations and public hearing audiences.

Among the mentioned cases, SEAE worked with competition assessment checklist to identify anticompetitive conducts in a funeral service cases, with special attention to the Nova Iguaçu City Hall and Curitiba City Hall. The first one was originated from Administrative Process n. 08012.004992/2003-78 instated by Secretariat of Economic Law (SDE) of Ministry of Justice, with the aim to evaluate an infringement to economic order in the funeral services or Nova Iguaçu (RJ) municipality. The anticompetitive conducts involved the Nova Iguaçu City Hall and the company that won the bidding process. The anticompetitive conducts were classified in the articles n. 20 and 21 of the Law N. 8.884/1994.

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[6] Among assignments conferred to SEAE, the Secretariat can elaborate competition studies about specific sectors by itself or when it is demanded by CADE and can elaborate reports about private and public entity submitted to public consultation in all aspect related to competition advocacy.

[7] SEAE. Relatório de Promoção da Concorrência. Jan/2018. Available at: http://www.fazenda.gov.br/centrais-de-conteudos/publicacoes/relatorio-de-atividades/arquivos/relatorio-promocao-da-concorrencia_ref2017.pdf/view. Accessed at: 02.25.2019.

SDE analyzed several documents and conclude that there were not indications to infringements to economic order. With the aim to produce competition advocacy measures, SDE sent the decision to SEAE, who applied the OECD Competition Assessment Checklist.

The result of checklist allowed SEAE to conclude that funeral services are competitive activities and the bidding process is inappropriate for this kind of market. So, SEAE identified that the design of market was not appropriated to generate a competitive environment, the intervention of Nova Iguaçu City Hall with bidding process was not justified in competition bases, because the funeral services are not a natural monopoly, and Nova Iguaçu City Hall implemented an exclusive contract to only one company, which generate incentives to all kinds of anticompetitive conducts.

The second case was originated from a complaint made by a funeral home named "Organização Social de Luto Curitiba S/C Ltda (Representant)", which complained about supposed cartel among funeral homes and the Curitiba/PR City Hall.

The Representant pointed out that the coordinated action it was explicit and it was a result of the contract imposed by the Curitiba City Hall. The funeral services in the city of Curitiba were attended by a set of funeral homes chosen in the bidding process. The contract previewed (i) a kind of turnover among funeral homes; (ii) a market prices were fixed by the Curitiba City Hall; and (iii) prices adjusted by a municipality bill.

SEAE concluded that the arrangement of funeral services implemented by Curitiba City Hall restricted the competition among funeral homes, because the implemented turnover method associated with a market fixed price with ad hoc price adjustment did not allowed that price mechanism worked and that new companies entrered in the market.

Conclusion

The article 19 of the Brazilian competition law gives to SEAE the competence to evaluate, among other aspects, the Competition Assessment in the Brazilian regulated and non-regulated sectors.

As mentioned, the Competition Assessment is an important instrument to figure out if regulation acts, law and resolutions exposed to public consultation and public heading audience or by own initiative of SEAE generate incentives or facilitate arising of anticompetive conducts, like cartels and unilateral conducts.

SEAE have been applying the Competition Assessment Checklist that was built by OECD since 2014 in important sectors of the Brazilian economy like taxi segment, funeral services and Traffic Department procedures (driver training center; vehicle registration, accreditation of clinics; and vehicle registration).

In all cases mentioned, it was possible to see that applying Competition Assessment Checklist in the field of competition advocacy is an important instrument to mitigate the anticompetitive conducts. In the funeral services cases, it was clear that the bidding processes, which was implemented by Nova Iguaçu City Hall and by Curitiba City Hall, increased the incentives to market power abuse and, as consequence, increased the probability of a anticompetitive conducts implementation

IS PARALLEL IMPORTATION A VIOLATION OF THE BRAZILIAN ANTITRUST LAW?

Ana Cristina von Gusseck Kleindienst

The subject matter is not simple, but the answer to the above question is negative. Parallel importation, *per se*, is not considered a violation of the Brazilian antitrust law. At the very most, it can be seen as a practice of unfair competition on the economic entities' private sphere. However, there is a competitive issue to be better explored when it comes to parallel importation, once the player's conduct to prevent it from happening can be seen as an antitrust offense.

In Brazil, the issue of parallel importation is far from the antitrust authority. Up to this moment, it has been treated only in judicial disputes. In general, there are cases in which an intellectual property's (trademark or patent, also known as "IP") owner invokes his right to exclude others from making, using, offering for sale, or selling the IP-protected good throughout the country in order to prevent the parallel importer's activity.

In brief, parallel importation comprehends the activity of acquiring or commercializing imported products performed by entities which are not part of the distribution chain established by the foreign manufacturer and/or by the IP rights owner in the country. The term "parallel" is used because it is a commercial activity carried out outside the official distribution system established by the manufacturer of the product and/or by the IP rights owner in a certain territory – note that hypotheses of counterfeiting (forgery and piracy) of goods are kept out of the discussion.

Notwithstanding, there is no consolidated legal regime on the lawfulness or illegality of the practice of parallel importation in Brazil – neither in relation to trademarks nor in relation to patents –, and the

discussions on the subject matter bring up an apparent tension between the concept of exclusivity of IP rights and the principles of free enterprise and free competition.

On the one hand, the intellectual property protection, set forth by the Brazilian Constitution, is ensured through the granting of exclusivity of use in the entire Brazilian territory to the owner who duly registered it before the National Institute of Industrial Property (INPI) (principle of territoriality).[1] On the other hand, the Industrial Property Law ("IPL") limits the right of the patent and/or trademark's owner to prevent third parties from carrying out commercial acts when the IP-protected good is placed into the domestic market by him or with his consent (principle of national exhaustion of rights).[2]

This means that the right of exclusivity of the intellectual property owner is exhausted from the moment in which the IP-protected good is placed in the national market with his consent. If this were not the case, the exclusivity granted to the owner of the right would guarantee

[1] "Article 5. XXIX – the law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country; [...]."

[2] "Article 42. A patent confers on its owner the right to prevent a third party from, without his consent, producing, using, offering for sale, selling or importing for these purposes: I - a product that is the object of the patent; II - a process or a product directly obtained by a patented process […]

Article 43. The provisions of the previous Article do not apply: […] IV. to a product manufactured in accordance with a process or product patent that has been introduced onto the domestic market directly by the patentholder or with his consent; […]

Article 132. The owner of a trademark may not: […] prevent the free circulation of the product placed on the domestic market by himself or by another with his consent, except as provided in Paragraphs 3 and 4 of Article 68."

him the infinite control of the commercial operations related to his IP-protected goods – which is out of the scope of IP rights protection.

Therefore, the *argumentum a contrario* of the IPL supports the understanding that, as a rule, parallel importation – either in relation to trademarks or in relation to patents – is an illegal practice in Brazil.[3] This occurs because, when defining exceptions to the IP owner's right to prevent third parties from practicing certain commercial acts, the IPL establishes as a condition that the IP-protected goods be placed into the national market by the IP right owner, or with his consent – such condition, in itself, is incompatible with the practice of parallel importation.

Despite the provisions of the IPL, the cases that reach the judicial courts – either in relation to parallel importation of trademarks or in relation to parallel importation of patents – are ordered based on different understandings. Curiously, among the legal cases that indicate a direction of positioning by the legality of the parallel importation, it is common to invoke the incidence of the general principles of the economic activity, in order to protect the economy based on the private property and the free competition, and clarifying that market domination by the IP owner is a practice prohibited by the Brazilian legal system. Hence, then, the relevance of bringing this discussion also to the antitrust agenda.

In more details, the number of cases related to parallel importation of trademarks that are taken to the Brazilian judicial courts is much more expressive than the cases related to patents.[4] Evidence of this

[3] In principle, the IPL adopted the national exhaustion of industrial property rights, and, as a rule, the practice of parallel importation constitutes an unlawful act (Article 43, IV, and Article 132, III of the IPL). As an exception, the IPL adopted the international exhaustion of patent rights, allowing parallel importation in specific cases related to compulsory licensing and non-exploitation of the patent (Article 68, Paragraphs 3 and 4 of the IPL).

[4] Probably, this significant difference between the number of cases law related to the parallel importation of trademarks and the number of cases law related to

is the fact that the four existing decisions held by the Superior Court of Justice ("STJ") on parallel importation concerns trademarks.[5]

These judgments were handled by the 3rd and 4th STJ's Panels, between October 2009 and December 2012, and present distinct positions regarding the legality of the parallel importation of trademarks. The most recent decisions followed the understanding that the trademark owners had the prerogative to prevent the activity of the parallel importer in the country; while the older ones – supported by the principle of free competition and the argument that the system of protection of trademark law does not have the scope to protect the distribution networks imposed by the trademark manufacturer/owner – have decided towards the lawfulness of parallel importation of trademarks.

It is noteworthy that two of the cases ruled by STJ addressed the need and possibility of a special treatment of the exhaustion of rights and, consequently, parallel importation for trademarks and patents.

Generally, it is possible to infer that both decisions took into account the fact that the interests involved in the protection and the economic and social values associated with each species of intellectual property (trademarks and patents) are different from each other.

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the parallel importation of patents is due to the fact that the volume of trademarks actually granted by INPI and in force is substantially higher than the volume of patents granted and in force in Brazil.

[5] Research updated up to February 28th, 2019. The legal cases are the following: (i) BRAZIL. Superior Court of Justice. *Recurso Especial* No. 1.200.677/CE and *Recurso Especial* No. 1.249.718/CE. 3th Panel. Reporting Minister: Sidnei Beneti. Ruled on December 18th, 2012; (ii) BRAZIL. Superior Court of Justice. *Recurso Especial* No. 1.207.952/AM. 4th Panel. Reporting Minister: Luis Felipe Salomão. Ruled on August 23, 2011; (iii) BRAZIL. Superior Court of Justice. *Recurso Especial* No. 930.491/SP. 3th Panel. Reporting Minister: Sidnei Beneti. Ruled on April 12, 2011; (iv) BRAZIL. Superior Court of Justice. *Recurso Especial* No. 609.047/SP. 4th Panel. Reporting Minister: Luis Felipe Salomão. Ruled on October 20, 2009.

Therefore, the protection afforded to patents affects public interests distinct from those achieved by the protection afforded to trademarks.

Thus, the social costs (associated with the "monopoly" conferred by the exclusivity) entailed by the protection of trademarks are distinct from the social costs of patent protection. While the right of consumers to have products of different qualities at different prices is compromised in relation to patents, consumers' right to health may be undermined, as access to patented essential medicines may be restricted.

However, this does not mean that the legal cases involving parallel importation of patents in Brazil are uniform. It's quite the opposite.

The only two legal cases identified on parallel importation of patents in Brazil are from the 9th Chamber of Private Law of the Supreme Court of the State of Sao Paulo (TJSP). Both of them were filed by the same company, with the purpose of preventing the activities of parallel importers. The first case was ordered in June 2011 and the second case in March 2015. However, interestingly, such decisions are based on completely divergent understandings and, therefore, the cases had diametrically opposite results.[6]

In summary, the decision issued in 2011 authorized the activity of the parallel importer, considering the relativity of IP rights and addressing the need to satisfy the public interest and to restrain the abuse of the IP right owner, based on the principles which *"dispose on the*

[6] Research updated up to February 28th, 2019. The legal cases are the following: (i) SAO PAULO (State). Supreme Court of the State of Sao Paulo. Appeal No. 0272901-70.2009.8.26.0000. Barueri. Claimant: Galena Química e Farmacêutica Ltda.; Respondent: Pharmaspecial Especialidades Químicas e Farmacêuticas Ltda. Reporting Judge: João Carlos Garcia. Ruled on June 7th, 2011; e (ii) SAO PAULO (State). Supreme Court of the State of Sao Paulo. Appeal No. 0025224-50.2004.8.26.0114. Campinas. Claimant: Galena Química e Farmacêutica Ltda.; Respondent: Pharma Nostra Comercial Ltda. Reporting Judge: Mauro Conti Machado. Ruled on March 10th, 2015.

Economic and Financial Order, which are not compatible with the market reserve sought by the claimant".

The more legalistic decision of 2015 was based on the argument that *"since the exclusive representation was given by the manufacturer to a different person of the importer, the importation occurred without his consent, contrary to Law 9.729 of 1996* [i.e., IPL]*"*. Thus, it recognized the exclusive representative's right to prevent the parallel importation of the patented good, *"under penalty of being allowed unfair competition"*.

All in all, the absence of a consolidated legal regime regarding the issue of parallel importation in Brazil is evident – either in relation to trademarks or in relation to patents, regardless of the different function they have –, which results in a scenario of extreme insecurity for players, authorities and lawyers, damaging, even indirectly, the economic, social and technological development of the country.

Not by accident, there are legislative proposals that aim to change the legal regime and are currently in progress in the Brazilian National Congress. The first and main proposal for the legislative amendment of the parallel importation regime in Brazil was presented under Bill No. 139/1999, and it is still pending.[7]

Basically, Bill No. 139/1999 intends to adjust the IPL to allow the parallel importation of patents at least. Its "Justification" is based on the fact that according to the current law wording *"only the patent owner can sell or import, only he can produce where he wishes and only he can define how and when we can use the patented good"* – which characterizes a market reserve for the benefit of the patent owner, which *"allows to define the price to the market, being very difficult to characterize the abuse, since the comparison becomes impossible"*.[8]

[7] Research updated up to February 28th, 2019.

[8] BRAZIL. CHAMBER OF DEPUTIES. Journal of the Chamber of Deputies, March 19, 1999. Available at: http://imagem.camara.gov.br/Imagem/d/pdf/DCD19MAR1999.pdf#page=163, p. 10511-10512. Accessed on February 28, 2019.

In view of all the above, the participation of the Administrative Council for Economic Defense and the antitrust community is relevant and necessary, along with the intellectual property's authorities, operators and scholars, in the discussion on which legal regime is best suited to parallel importation in Brazil – either in relation to trademarks or in relation to patents, but that takes two aspects into account: (i) the dichotomy between private interests and public interests that permeates the subject matter; and (ii) the effects of the legal treatment of parallel importation over the market.

WHAT ARE THE LESSONS FROM THE ANFAPE CASE?

Eduardo Ribeiro Augusto

1. Introduction

This essay undertakes a brief theoretical analysis of the concepts of industrial property, especially industrial design, from the standpoint of competition law, and in particular considers the matter of Administrative Proceeding 08012.002673/2007-51 conducted by Brazil's antitrust authority, the Administrative Council for Economic Defense (CADE), in which the National Association of Automotive Parts Manufacturers (ANFAPE) was the complainant and the companies Volkswagen do Brasil Indústria de Veículos Automotivos Ltda., Fiat Automóveis S.A. and Ford Motor Company Brasil Ltda. were the respondents, to comment on situations when the exercise of exclusive rights resulting from industrial property might configure an illicit monopoly.

2. Industrial property – overview

In Brazil, the rights and obligations related to industrial property are regulated by Law N. 9,279/96 (*Lei de Propriedade Industrial*, or LPI) in the infra-constitutional sphere. In turn, the Federal Constitution also covers the theme by assuring a temporary privilege over industrial inventions and protection of industrial creations, trademarks, company names and other distinctive signs, in view of the social interest and the technological and economic development of the country.

The protection of industrial property rights fosters the country's technological and economic development, especially by a system of exchanges. That system is based on mutual concessions among the *inventor*, *State* and *society*. The first takes the initiative, by striving for and investing in the creation of new technology with industrial

application, which when satisfying the legal requirements[1] will receive temporary legal protection (monopoly) granted by the second. In applying for that protection, the inventor reveals all the technical, esthetic and functional details of the creation, and the State publishes those details and grants protection after due analysis.

The exclusivity period enables the inventor to recover the investments made and to obtain a profit, as encouragement to inventive effort, while society respects this exclusivity, in benefit of the technological advancement created and revealed by the inventor.

3. Industrial designs

The decorative form of an object can be protected as an industrial design, provided that it has a new and original visual result. New means everything not included in the prior state of the art, i.e., never before disclosed in any way or means (respecting certain legal exceptions). Original means different, distinctive in relation to previous objects.

An industrial design does not have any technical function; rather it is decorative or ornamental. These designs count on protection lasting

[1] Article 8. An invention shall be patentable if it meets the requirements of novelty, inventive step and industrial application.

Article 9. An object of practical use, or part thereof, shall be patentable as a utility model if it is susceptible of industrial application, presents a new shape or arrangement and involves an inventive act, resulting in functional improvement in its use or manufacture.

Article 95. An industrial design shall be deemed to be any ornamental plastic form of an object or any ornamental arrangement of lines and colors which may be applied to a product, obtaining a new and original visual result in its external configuration and that may serve as a model for industrial manufacture.

10 years from the filing date, renewable for three periods of five years each, for a total of 25 years at most.

After the grant and at any time during the validity period, the owner of the industrial design can ask the National Industrial Property Institute (INPI) to conduct an examination of the merit, to analyze the satisfaction of the requirements of novelty and originality[2]. Without this examination, the registration becomes a declaratory act, meaning its efficacy against third parties is relative, since they can claim the object is not new or original.

The protection granted by the INPI, especially after examination of the merit, guarantees the exclusive use throughout the country, and thus the right to impede other parties from producing, using, selling, offering for sale or importing any object that incorporates the registered industrial design, or a substantial imitation that can cause error or confusion among consumers, except with the consent of the registration holder.

Like any property right, industrial property is subject to legal limitations, both in the constitutional and infra-constitutional spheres. The Brazilian Constitution establishes that industrial creations shall be assured of protection in view of the social interest and the technological and economic development of the country. In other words, the State will not guarantee protection unless these requirements are fulfilled.

In turn, the LPI comprehensively indicates situations[3] where the use of an object protected as an industrial design is not considered legal. These are exceptions, limitations on the right, namely: acts practiced by third parties, in private character and without commercial purpose, as long as this does not cause any harm to the economic interest of the registration holder; acts practiced by unauthorized third parties for experimental purposes, related to scientific or technological research; and

[2] Article 111 of the LPI.

[3] A combined reading of Article 43 and Article 109, sole paragraph, of the LPI.

products manufactured according to a process or product patent that have been placed in the internal market directly by the patent holder or with the consent thereof.

Finally, the outlines of the protection will be delineated by the drawings, and as the case may be, the specifications and claims, as stated in the certificate issued by the INPI.

4. The intersection with antitrust law - *case: ANFAPE v.* Volkswagen, Fiat and Ford

Law N. 12,529 of 2011 provides that the abusive exercise or exploitation of industrial or intellectual property rights, technology or trademarks is an infraction against the economic system.

On the other hand, the regular exercise of these rights, although involving a monopoly, is not considered to be an infraction.

In practical terms, abusive exercise of an industrial property right is to utilize judicial, extrajudicial and/or administrative means to expand or restrain the protection granted by the State. That expansion or restraint can involve either the scope or duration of the protection. Furthermore, filing lawsuits, administrative complaints and/or sending cease and desist letters based on industrial designs that have not undergone analysis of merit can, in theory, be configured as abusive exercise of rights. Other examples are filing lawsuits or administrative complaints based on industrial property rights that have expired, and presenting applications to obtain or renew patents and industrial designs that are manifestly not eligible for original or extended protection.

However, by all indications none of these situations were present in Administrative Proceeding no. 08012.002673/2007-51, seeking imposition of penalties for infractions against the economic system, in which the National Association of Automotive Parts Manufacturers (ANFAPE) was the complainant and the respondents were Volkswagen do Brasil Indústria de Veículos Automotivos Ltda.; Fiat Automóveis S.A. and Ford Motor Company Brasil Ltda.

The respondents stood accused of abusively exercising their industrial property rights by aggressively filing lawsuits and sending demand letters to independent makers of automotive parts, based on industrial design certificates covering auto parts. According to the report prepared by CADE Commissioner Mauricio Oscar Bandeira Maia, "*the central argument of the complainant is, in summary, that the intellectual property rights detained by the respondents can only be legitimately exercised in the primary market (foremarket), i.e., in the market for production of new vehicles, not in the secondary market for replacement parts (aftermarket). The imposition of the rights of the vehicle producers in the secondary market configures, in their view, abuse of intellectual property rights, generating anticompetitive effects, to be identified and suppressed by the action of CADE."*

After a lengthy process of analysis, CADE rejected the complainant's accusation and the respondents were absolved. This result appears to have been correct, since the complainant based its complaint on an exception envisioned by the Industrial Property Law. As well formulated by Commissioner Polyanna Ferreira Silva Vilanova in her voting opinion, *"at no time does the Constitution or infra-constitutional legislation – expressly or implicitly – determine (or even insinuate) the existence of a limitation on industrial property rights (industrial designs) related to the automotive sector, primary or secondary.*

The general rule is that the manufacture, without authorization of the rights holder, of a product that incorporates a registered industrial design or a substantial imitation that can cause error or confusion in the market is considered to be unlawful and punishable in the criminal and civil spheres. So, in theory, even when this production is by independent producers of replacement automotive parts for the secondary market, the conduct can be held in violation.

5. Conclusion

The defense of industrial property rights, when exercised within the exact limits specified in a valid certificate issued by the INPI, cannot be considered abusive, and much less be classified as sham litigation.

There should and can be no shame in litigating in these situations, to exercise industrial property rights against other parties. The right of exclusive use is a premise resulting from this type of protection. Like any property right, its exercise is only subject to the legal limitations. That's how the system works.

HOW DOES THE RELATION BETWEEN ANTITRUST AND INTELLECTUAL PROPERTY WORK IN BRAZIL?

Ana Frazão
Angelo Gamba Prata de Carvalho

1. Introduction

Even though Antitrust law and Intellectual Property are constantly irritating each other, they are not antagonistic. Actually, they complement one another in order to fulfill constitutional mandates of innovation promotion and protection of free trade and free competition. The creation of artificial monopolies as a reward to innovation is justified because it increases competition through dynamic efficiency gains by stimulating technological development, which is also an essential goal of Antitrust.

The intersection between Intellectual Property and Antitrust should be, considering these areas' common interest to protect and stimulate innovation and also to generate welfare gains to consumers, the concretization and harmonization of Brazilian constitutional principles, such as free market, free competition, innovation and technological development. Besides, Competition law, as stated by Fox[1], has a symbiotic link with democracy when it tries to balance power and equal opportunities of competition, based on private autonomy and own merits.

Under the perspective described, this paper intends to explore the relation between Antitrust law and Intellectual Property law in CADE's case law, trying to show the main parameters adopted by the

[1] Fox, Eleanor M. Post-Chicago, post-Seattle and the dilemma of globalization. In Cuccinota, Antonio; Pardolesi, Roberto; Bergh, Roger van dan (2002) *Post-Chicago Developments in Antitrust Law*. Edward Elgar, Cornwall.

competition authority to deal with these fundamental questions, mostly from the 'Eli Lilly' and 'ANFAPE' leading cases.

2. Abuse of IP rights and sham litigation

"Sham litigation" can be understood as the abusive pursuing of lawsuits in order to achieve an anticompetitive goal.[2] Although the right to petition to public powers is a constitutionally guaranteed right in Brazil, this right may be exercised abusively.[3] There will be sham litigation, hence, when someone repeatedly files lawsuits with the intent of obtaining anticompetitive advantages just for the fact that those suits were filed, not necessarily intending to get a favorable decision. This conduct is directly related to the costs derived simply from the litigation, and not from its results[4].

Sham litigation may be either intentional or not, and may produce relevant effects even when the misfeasor does not hold great market power. The non-intentional kind of sham litigation is based on the lack of due care by a given agent, whose conduct may observe high standards when faced with IP rights, since its effects are naturally exclusionary when legitimate and, thus, even worse when falsely enforced. The benefits derived from IP's need to be interpreted carefully in order to prevent even more serious competition restrictions, as stated by CADE[5]. In other words, sham litigation may be an instrument for implementing an abuse of IP rights.

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[2] Klein, Christopher C (2007) Anticompetitive Litigation and Antitrust Liability. *Department of Economics and Finance Working Papers Series*, August 2007.

[3] Sham litigation was developed on the United States case law as an exception to the Noerr-Pennington doctrine, which guarantees the right to petition government, mainly the Legislative power, even if the law for which someone is advocating may have anticompetitive effects.

[4] Klein, 2007.

[5] CADE, PA n. 08012.007189/2008-08, Comm. Ana Frazão, judged on October 1st, 2014.

The ability of competition authorities to look to the larger picture when judging a sham litigation case was part of CADE's ruling on a case involving the pharmaceutics industry Eli Lilly. Eli Lilly tried, in 1993, to register a patent on a process to produce a cancer drug formula before INPI, the Brazilian patents office. INPI's final ruling concluded that Eli Lilly's patent was not able for protection, so the company pursued the invalidation of that ruling through a judicial suit. This behavior is not unlawful at all, since it is rightful to believe one's claim is right, even against the opinion of an authority, so it is normal to pursue the judiciary system to correct any flaws on the process.

At the same time, however, the company modified the scope of the patent register files to reach not only a process, but also a pharmaceutical product. This part of the company's strategy built the basis for another suit that was moved on another jurisdiction, claiming a special exclusive marketing rights (based on TRIPS agreement) that could only be granted to a product patent. INPI, because of a decision that prohibited the administrative process to follow on, could not even officially say if the modified patent could be granted. Eli Lilly got the temporary exclusive marketing rights, hence, without any legal basis, for eight months, by omitting relevant information to different jurisdictions, thus incurring also in abusive forum shopping.

Commissioner Ana Frazão's leading opinion on Eli Lily's case stated that unlawfully claiming patent protection brings meaningful damages to competition, since it creates an artificial monopoly without granting the social counterpart of innovation to consumers. There were, in the eight months in which competitors were set aside, not only potential, but concrete damages to the market. After the end of the exclusive marketing right, the price of the protected medicine went down to a third of the price exercised while the monopoly was on. The lawsuit were considered baseless and unreasonable on the Antitrust point of view, and even the suits where the company won were doubtful, since crucial information was omitted from the judges or shown in an obscure way.

Eli Lilly's case is a clear example of an IP-related Antitrust infraction arising from the enforcement of a baseless and inexistent exclusivity right. Of course one cannot simply understand the whole bunch of the acts involved on the sham litigation accusation were rationally architected, and neither cannot state the individual acts were legitimate and thus the company was innocent. Sham litigation and IP rights abuse both lie on the border between lawful and unlawful conduct, which is why an authority capable of connecting isolated facts to picture the perpetrated strategy must thoroughly and carefully analyze this claim.

3. Legitimacy of Antitrust intervention over Intellectual Property rights: the ANFAPE case

In 2018, CADE has dealt with a very complex case in which the close relation between Antitrust law and Intellectual Property rights had to be thoroughly explored in the reporting Commissioner's opinion. The preliminary proceeding was filed by ANFAPE, the Brazilian national auto parts maker's association, presenting accusations of patent abuse perpetrated by automobile makers. Those makers (Volkswagen, Fiat and Ford) held the Intellectual Property rights for industrial designs concerning to some parts of the automobiles they built.

The carmakers filed injunctions to refrain independent auto parts makers from acting on the replacement parts markets, arguing that these companies were inflicting their exclusivity rights over the protected industrial designs. ANFAPE held that the injunctive measures intended to eliminate the independent makers from the replacement parts market, thus damaging competition, a constitutionally protected value. ANFAPE also argued that those Intellectual Property rights could not be enforced against agents operating at secondary markets, but only against automobile makers, the real competitors for the rights' holders.

Commissioner Paulo Burnier da Silveira, the council member in charge of reporting the case, found the carmakers' conduct to be abusive. According to the commissioner, the enforcement of the design rights on the secondary market exceeded its economic and social scopes, since there is no innovation on replacement parts, which shall always be

rigorously the same as the ones originally built into the vehicles, because of compatibility requirements (i.e. "Car A"'s replacement part would not fit "Car B). Furthermore, this lack of innovation would set aside any allegations of opportunistic behavior, since there is no competition through differentiation on the secondary market – of course, design is a basic requirement for a player to enter the replacement parts market. The commissioner's argument acquires an even deeper feature when he states that innovation is 'awarded' on the primary market, where R&D costs are recovered, and, according to the commissioner, the operation on secondary market would not be essential for this purpose, since design investments can be easily recovered by the manufacturer's worldwide car sales.

However, Commissioner Maurício Oscar Bandeira Maia presented a dissenting opinion, in which he argued that there was no anticompetitive conduct on the matter. The commissioner stated that IP rights are opposable towards everyone and CADE alone is not capable of, contrarily to the law itself, establish an interpretation according to which design rights should prevail only regarding a specific market or a specific group of people. Beyond that, Commissioner Paula Azevedo stated that there could be no anticompetitive conduct in this case, since replacement parts makers have not even tried to obtain the right to use those designs through license agreements – the denial of a request for licensing, still, could be considered illicit.

In short, CADE's majority – dissenting from the reporting commissioner – understood that IP rights could not be limited by the competition authority if the law does not authorize that. Even though the ruling on the preliminary proceedings on the case implied that the authority's ruling would establish a very sophisticated standard of competition analysis of IP rights' effects over competition, taking into account the Constitution and the convergent competences of the Brazilian

competition authority and the Brazilian patent office,[6] CADE's position went otherwise.

Of course a clear lining of CADE's interest and competence on IP rights' effects over competition is essential not only for an effective decision-making and for the predictability of these rulings, but also to maintain other entities' prerogatives to deal with this kind of rights, but it is certain that the Brazilian Constitution provides IP rights with a much vaster scope in order do promote innovation and economic welfare. Thus, CADE adopted a more conservative position on the matter, stating in a very clear way that IP rights – just like regular property rights – are opposable *erga omnes* and hence cannot be defied on antitrust terms regarding their extension to other markets.

4. Final Remarks

CADE has a great responsibility on promoting constitutional values, enforcing free competition in connection with fundamental principles such as innovation. The Eli Lilly case took very important

[6] CADE stated that the exclusivity rights granted to the automobile makers a monopoly on the replacement auto parts market, to which consumers were necessarily attached. Market analysis showed an information asymmetry for consumers, who would optimistically not consider the replacement parts market's conditions when buying a car. Hence, the primary market did not grant sufficient competition conditions to guarantee efficient prices, options and selling terms on the secondary market. Relaxing the enforcement of the industrial designs-related rights would mitigate exclusionary effects, since this enforcement was damaging statically the consumer as the prices went up. The potential dynamic efficiency generated from the enforcement – innovation, differentiation and raise on consumer welfare, for instance – were also not found by CADE, since the investments made on innovation were already compensated when the cars were sold, and therefore there was no reason for an enforcement of these rights on secondary markets. See: Ana Frazão and Angelo Gamba Prata de Carvalho. The relation between antitrust and intellectual property law on CADE's Case Law. In Paulo Burnier da Silveira (2017) *Competition law and policy in Latin America.* Kluwer, Alphen aan den Rijn.

steps on reaffirming the constitutional basis of Brazilian Antitrust law and building up CADE's position on the relation between Antitrust and IP rights. Eli Lilly, hence, established interpretative parameters not only for IP-related issues, but for Antitrust as a whole.

Even though the Brazilian Antitrust law has had this relevant precedent – among with the many other ones which helped to build CADE's stance on the issue – regarding the constitutional foundation of competition analysis, CADE has seen a setback in ANFAPE's case. Viewing the relation between Antitrust law and IP as a simple matter of conflict of laws – to be addressed through a kind of institutional neutrality regarding patent issues – may not only reveal a stricter prisms of competition analysis and policy, but mainly the adoption of a conservative position by the competition authority in order to preserve its purported institutional stability.

However, this conservative stance shall not be taken as final one, since although ANFAPE represented a step behind CADE's progress on the issue, the competition authority has a strong constitutional framework which presents a sophisticated and complex relation between Antitrust and IP. Thus, in spite of ANFAPE, Eli Lilly represents that much can be done regarding the relation of Antitrust and IP, both connected by a firm constitutional link.

WHAT ARE THE REQUIREMENTS FOR SIGNING THE SETTLEMENT AGREEMENT (TCC)?

Ana Luise Solon Sabatier
Ricardo Leal de Moraes

1. What is the TCC?

Firstly, what is the TCC? The Settlement Agreement (or Cease and Desist Commitment; in Portuguese 'Termo de Compromisso de Cessação'; hereafter referred to as TCC) is an agreement executed between the Brazilian antitrust authority (CADE) and companies and/or individuals investigated for violation of the economic order. During such formal investigation[1], through a TCC the antitrust authority may agree to halt the proceeding against the TCC signatories as long as these signatories comply with the terms of the referred agreement and agree to the commitments expressly provided by Article 85[2] of the Brazilian Antitrust Law (Lei n. 12.529/2011).

In this sense, the TCC is a CADE's negotiated procedure that shall be used in investigations for violations of the economic order under the Brazilian Antitrust Law. Also, the TCC is specially designed to help in investigations regarding agreements, combinations, manipulations or arrangements among competitors (such as cartels), through the cooperation of the parties involved in the anti-competitive behavior.

[1] Based on Article 36 and Article 48, I, II and III of the Brazilian Antitrust Law (Lei 12.529/2011).

[2] "Art. 85. In the administrative proceedings referred to in items I, II and III of Art. 48 of this Law, Cade may obtain from the defendant a cease-and-desist commitment related to the practice under investigation or its harmful effects, if duly grounded, for convenience and at the proper time, and if it understands that it complies with the interests protected by law".

Actually, in the course of an administrative proceeding, any party involved in the current investigation may propose said negotiation procedure to the CADE's authority.

2. The procedure

Briefly, the regulation of the TCC negotiation procedures[3] is provided by CADE's Internal Regulations (Articles 219 to 236). Basically, the TCC can be started in two different ways[4]: first, the investigated parties may file for a TCC before the General Superintendence of CADE (hereafter referred to as GS/CADE) until the case is submitted to the Administrative Tribunal for ruling; second, the proposal shall be negotiated with the Reporting Commissioner of the case, if the case is already at the Administrative Tribunal for ruling.

The investigated party interested in signing a TCC shall formally present before CADE the TCC Request. Since the order of the TCC requests is relevant (the first request regarding a behavior may receive more benefits than the subsequent ones), there is a system of markers that identifies said order. It should be noted that a party might present only one TCC Request per investigation. The TCC Request itself does not imply any confession of a behavior; it only serves as a formal request for a TCC negotiation proceeding. Until it is negotiated and dully signed, the TCC does not suspend the investigation administrative proceeding, therefore it is important to mind the timing of the respective proposal.

After the TCC Request is formally presented, a negotiation commission will be constituted. The duration of the negotiation period is defined on a case-by-case basis. By the end of the respective period, the

[3] For the detailed procedures, see: CADE's Internal Regulations and CADE's Guidelines: Cease and Desist Agreement for cartel cases ("TCC").

[4] There is also a third way to start a TCC, since the General Superintendent himself may propose a TCC for any party being investigated before the GS/CADE.

interested party must file a final TCC proposal. The Administrative Tribunal may accept or reject said final proposal (the Tribunal can not amend it). If the Tribunal rejects the proposal (or if the interested party declines to file a final proposal), the TCC procedure is ended and the respective investigation continues regularly. If the Tribunal accepts the final proposal, the TCC is signed and the investigation proceeding is ended upon the confirmation that the referred agreement is dully fulfilled.

3. Structure and requirements of TCC

The basic requirements for homologation of the final proposal are (i) the acknowledgement of participation in the conduct investigated; (ii) the obligation to cease and to not perform the conduct investigated again; and (iii) other possible measures. Those other possibilities might involve, for instance, structural and/or behavioral measures that encourage and/or reestablish competition in the market, action to repair the negative effects of the conduct, and so on.

When the investigation concerns agreements, combinations, manipulations or arrangements among competitors (such as cartels), the final proposal and the TCC must always cover (i) the acknowledgement of participation in the investigated conduct by the parties, (ii) the payment of a pecuniary contribution (with a reduction of up to 50% of the expected fine for the investigated conduct of the respective party[5]) to the Fund for the Defense of Diffuse Rights (hereafter referred to as FDD) and the commitment to collaborate with procedural instruction (such as the presentation of reports containing information and documents that help the SG/CADE identify other participants in the conduct and that prove the violation).

[5] Said reduction of up to 50% of the expected fine is only possible for the first TCC regarding an investigation; the possible reduction of the expected fine for the subsequent TCCs progressively declines.

Having this in view, the structure of a TCC usually contains[6]:

(i) parties identification; (ii) scope of the agreement (including the investigation proceeding and the conduct involved); (iii) acknowledgement of participation in the conduct investigated (including the history of the conduct); (iv) obligations assumed, including (iv.a) payment of pecuniary contribution to FDD, (iv.b) collaboration with authority through documents or relevant information, and (iv.c) refraining from future conduct; (v) suspension and closing of administrative proceedings; (vi) provisions and consequences in the case of a noncompliance to the TCC (including financial penalties); and (vii) publicity for the signed TCC (the confidentiality of the negotiation terms is guaranteed). .

As previously stated, regarding the payment of pecuniary contribution to the FDD, Articles 37 and 85, §1, III of the Brazilian Antitrust Law and Article 224 of CADE's Internal Regulations provide that the contribution shall be based on the value of the expected fine, on which a percentage reduction is applied (up to a maximum of 50%), varying in accordance to the scope and usefulness of the cooperation provided by the party and the time the TCC is proposed.

As an example of a TCC performed according to the Brazilian law, in 2017, at the 102nd Ordinary Session of CADE's Administrative Tribunal, it was homologated and subsequently signed the TCC negotiated with Cascol Combustíveis to Veículos Ltda. (Cascol) during a preliminary investigation proceeding concerning the fuel resale market in the Federal District (Brasília)[7]. According to the GS, the investigated cartel was acting by means of "*pricing and division of the market for the resale of fuels, using monitoring mechanisms and collusive practices, as well as strategic information exchanges between representatives*

[6] For a complete TCC sample form, see: CADE's Guidelines: Cease and Desist Agreement for cartel cases ("TCC").

[7] The TCC was signed regarding the conducts investigated in the administrative investigation n. 08012.008859/2009-86.

distributors and resellers on cost pass-throughs, intentions of exchanging the flag by specific resellers and imposing difficulties on the entry of new competitors". The preliminary investigation was a result of cooperation between CADE, Public Prosecution and Federal Police.

The TCC signed in said case involved the payment of an R$ 90 million contribution to the FDD and the commitment to stop the investigated anti-competitive practice. It also obliged Cascol to provide documents and fully cooperate with the authority. Additionally, the agreement foresaw the divestment of gas stations under Cascol's management in key points of the Federal District. Cascol had also to implement a compliance program, to create a Board of Administration and to adopt a stricter internal control and more professionalism in its management. In 2018, CADE recognized that Cascol fulfilled its TCC obligations.

4. Result of the TCC and possibility of an agreement with Public Prosecution

As a general rule, the TCC does not interfere or affect the criminal liability, as it is the case in the Leniency Agreement. However, if the party interested in signing a TCC before CADE also wishes to simultaneously negotiate an agreement with the Public Prosecution in order to settle the criminal liability, the GS/CADE may help and coordinate the negotiations with the TCC proponents.

Taking the same previous example, with the assistance of the GS/CADE, Cascol did settle an agreement with the Public Prosecution, by providing for the payment of an additional reparatory contribution.

5. Conclusion

The TCC is gaining momentum in the Brazilian antitrust law as an important instrument to be used in investigations for violations of the economic order, particularly in the case of cartel investigations, as viewed in the Cascol precedent.

WHAT ARE THE CRIMINAL AND CIVIL CONSEQUENCES OF EXECUTING LENIENCY AND SETTLEMENT AGREEMENTS WITH CADE?

Bruno Almeida Silva
Ricardo Lara Gaillard
Thales de Melo e Lemos

1. Introduction

Since Law 12,529/2011 was enacted in 2012, the enforcement of infringements against the economic order increased considerably in Brazil. Such repression was boosted by the Administrative Council for Economic Defense - CADE through the use of Leniency and Settlement ("TCC") agreements.

Learning by experience, CADE also approached the Prosecution Office to participate in the process, vis-à-vis its criminal jurisdiction on individuals' liabilities.[1] Only in 2018, the authority signed 22 cooperation agreements with state Prosecution offices.[2] Another example of increased criminal prosecution against cartels is the growing number of individuals being investigated for such practice in Brazil: they were more than 350 in 2015.[3]

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[1] See: https://www.jota.info/tributos-e-empresas/concorrencia/cade-quer-convenio-com-todos-os-mps-para-combater-carteis-29092017. Access on February 27, 2019.

[2] According to CADE's 2018 yearbook, available at: http://cade.gov.br/. Access on February 27, 2019.

[3] MARTINEZ, Ana Paula; ARAÚJO, Mariana Tavares de. Anti-Cartel enforcement in Brazil: status quo & trends. In: *Overview of competition law in Brazil*. São Paulo: IBRAC/Editora Singular, 2015.

Likewise, as part of the use of Leniency and TCC agreements in cartel cases, in which proponents have to admit wrongdoings, there was a significant increase in the number of antitrust damage claims filed before Brazilian Courts.[4]

That said, this paper aims to analyze the impacts generated by the continuous use of Leniency and TCC agreements over criminal enforcement and private damage claims in Brazil.

2. General Overview of the Leniency and TCC Programs

The Leniency Agreement is one of the most important mechanisms used by CADE to detect anticompetitive conducts, especially cartels, in sight of the occult nature of the infringement. Through this agreement, any participant involved in an antitrust conspiracy may denounce the practice to CADE aiming to obtain benefits, which may include full administrative and criminal immunity.

Certain requirements, though, must be observed by proponents: (i) be the first to report the infringement; (ii) confess its participation in the reported conduct; (iii) immediately cease the practice; and (iv) collaborate with CADE throughout the process. Once the agreement is signed, and all the requirements are fulfilled, the punitive action may be

[4] From only 20 cases in 2011 to more than 120 in 2017. Numbers from case law research conducted by the Brazilian Institute of Studies of Competition, Consumer Affairs and International Trade - IBRAC, mentioned in a presentation for the 24th International Seminar on Competition Policy, available at http://www.ibrac.org.br/UPLOADS/Eventos/383/Slides%20-%20Painel%202%20-%20Ações%20de%20Reparação%20Civil.pdf. Access on February 27, 2019.

declared extinct.[5] Likewise, in the criminal sphere it shall grant protection from criminal conviction.[6]

Not less important is the Brazilian Settlement Program. Accordingly, the TCC may only be proposed by participants already investigated by CADE.[7] The proponent must also contribute with information and documents related to the conduct and immediately cease the practice.[8] Furthermore, when it relates to cartel cases, the proponent must admit wrongdoing and offer a pecuniary contribution. As a result, the administrative investigation against the proponent is dismissed, but it does not generate any criminal benefits. Therefore, the TCC is clearly more burdensome to proponents when compared to the Leniency institute.[9]

[5] If CADE's General-Superintendence had previous knowledge of the conduct, the punitive action will not be declared extinct but the applicable fine shall be reduced from one to two thirds.

[6] CADE's Guidelines for CADE's Antitrust Leniency Program, available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf..

[7] There is no legal limit to the number of TCC that may be executed in a given investigation – this is a case-by-case analysis made by CADE, based on convenience and opportunity.

[8] CADE's Guidelines for Cease and Desist Agreement for cartel cases ("TCC"), available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf

[9] The possible reason is that the Leniency Agreement must be seen as more favorable not to discourage its use. See: BOTTINI, Pierpaolo; DE SOUZA, Ricardo Inglez; DELLOSSO, Ana Fernanda Ayres. A Nova Dinâmica dos Acordos de Cessação de Práticas Anticoncorrenciais no Brasil. In: *Revista do IBRAC*. São Paulo, v. 23, 2013.

3. Overview of Criminal Consequences

In Brazil, the practice of cartel is both an antitrust infringement and a crime.[10] Therefore, one of the most important benefits resulting from the execution of a Leniency Agreement with CADE is the criminal immunity granted to the correspondent individuals.

This specific provision used to generate certain level of controversy since the participation of the Prosecution Office in the agreement – whose jurisdiction to file criminal suits is assured by law - was not required. Later on, to end up controversies and assure criminal immunity, CADE successfully invited the Prosecution Office to participate in all such agreements as a third-party intervener.[11]

Such criminal immunity, though, is limited to individuals linked to the executed Leniency Agreement, meaning that others denounced shall be exposed to criminal charges. One example is a recent decision from a Federal Criminal Court in Brazil, within the context of the "Operation Car Wash",[12] through which several individuals were

[10] This is in accordance to Law 8,137/1990, which sets forth crimes against the economic order, including cartel, which is punishable with imprisonment from 2 to 5 years and a fine. Likewise, Law 8,666/1993 establishes as a crime to "*frustrate or fraud, through adjustment, combination or any other means, the competitive character of a public bid*", imposing a penalty of detention from 2 to 4 years and a fine. Finally, the practice of cartel can also be framed within Article 288 of the Brazilian Penal Code, which defines the crime of "*three or more persons associating with the specific intent to commit crimes*", punishable with imprisonment from 1 to 3 years.

[11] MONTEIRO, Gabriela Reis Paiva. A Participação do Ministério Público no Acordo de Leniência Firmado com o CADE. In: *Reflexos Penais na Regulação*. Curitiba, 2016.

[12] The Operation Car Wash is a large Brazilian investigation of corruption and money laundering that began in March, 2014. The investigation also uncovered the existence of cartels involving several companies and individuals. See:

condemned by cartel formation and fraud of public bids based on evidence gathered from a Leniency Agreement executed with CADE.[13]

By contrast, the TCC does not prevent a proponent to be criminally prosecuted, and this must be balanced, since one of the requirements in cartel cases is to admit wrongdoing. To incentive its use, CADE's Guidelines[14] mention that the authority may help intermediating a communication with the Public Prosecutor and/or the Federal Police targeting a plea bargain.[15]

4. Overview of Civil Consequences

According to the Brazilian Antitrust Law, those harmed by anticompetitive conduct[16] may sue potential defendants to obtain the cessation of the practice and compensation for losses and damages suffered, regardless of the existence of inquiry or administrative procedure opened by CADE.

This is currently the clearest exposition to proponents arising from the signature of Leniency and TCC agreements, since the admission of wrongdoing is a clear requirement of such institutes (at least in cartel cases). This may be extremely valuable to plaintiffs seeking to propose antitrust damage claims.[17]

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https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history. Access on February 27, 2019.

[13] Decision issued on September 12, 2018, in the Criminal Action N. 0017513-21.2014.4.02.5101, by the 7th Federal Criminal Court of Rio de Janeiro.

[14] CADE's Guidelines for Cease and Desist Agreement for cartel cases ("TCC"). *Op. Cit*.

[15] Pursuant to Law N. 12,850/2013.

[16] Directly or through entities entitled to collective defense.

[17] ANDREOLI, Daniel Oliveira; MARTORANO, Luciana. Acordos de Leniência e Reparação de Danos: o CADE entre a Cruz e a Espada. In: *Direito Concorrencial: Avanços e Perspectivas*. Curitiba, v.5, book 1, p. 186.

As part of this trend, there is an ongoing discussion on the use, in lawsuits, of confidential documents and information provided by Leniency and TCC proponents. At one side, there may be an inherent risk of discouraging violators to sign agreements with CADE. At the other, it must be acknowledged that plaintiffs face significant difficulties, since applicable procedural rules require demonstration of the conduct, damages suffered and the necessary causal link.[18]

To increase the controversy, the Brazilian Superior Court of Justice ("STJ") recently decided that confidentiality over documents and information part of CADE's investigations is not perpetual. Indeed, STJ understands that documents provided in Leniency Agreements must only be kept confidential to the extent necessary to protect investigations or in case they contain sensitive information that must be preserved.[19]

As part of this fierce debate, CADE recently issued the Resolution CADE N. 21/2018, which aims to regulate the access to documents and information gathered in administrative investigations. According to this resolution, the access to the History of Conduct Statement[20] shall not be granted to third-parties, except in case of: (i) determination of law; (ii) judicial decision; or (iii) authorization by the signatories, with CADE's consent.

The same resolution, aiming to boost damage recovery, also establishes that judicial or extrajudicial compensation for antitrust

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[18] MARTINS, Frederico Bastos Pinheiro. Acesso aos documentos de acordos firmando com autoridade (Leniência e Termos de Cessação de Conduta). In: *A Livre Concorrência e os Tribunais Brasileiros: Análise crítica dos julgados no Poder Judiciário envolvendo matéria concorrencial*. São Paulo: Singular, 2018, p. 95.

[19] Decision issued on March 11, 2016, in the Special Appeal n. 1,554,986/SP, by the Third Panel of the Brazilian Superior Court of Justice.

[20] Documents elaborated by CADE based on self-accusatory documents and information voluntarily provided in the negotiations of Leniency and TCC agreements.

damages may be considered as a mitigating circumstance in the calculation of pecuniary contributions or application of fines. The mentioned disposition was used for the first time in CADE's Judgement Session held in November 2018.[21]

In parallel, there is an ongoing bill (Bill N. 11,275/2018) which aims to institute double damages for those harmed by cartels. The new rule will be favorable to Leniency and TCC Agreement proponents, since they will not be obliged to pay such double damages neither subject to the joint and several liabilities applicable to other violators. Such bill could be seen as an extra incentive for violators to seek such agreements with CADE.[22]

5. Conclusion

As seen, while the Leniency Agreement grants full criminal immunity to individuals, the same does not apply to the TCC, were individuals may be criminally exposed. Likewise, when negotiating immunity and TCCs agreements, several sensitive information and documents are disclosed, and may expose proponents to potential damage claims.

[21] At that occasion, CADE's Tribunal decided for the homologation of 16 TCCs linked to investigations within the Carwash Operation, in which it was established a future discount of 15% over the amount of the pecuniary contributions after civil compensation was proved. See: http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato. Access on February 27, 2019.

[22] The bill also aims to establish that any controversies regarding compensation for damages suffered because of infractions against the economic order are submitted to arbitration by TCC proponents. The bill was approved by the Brazilian Federal Senate and now depends of approval by the Brazilian Chamber of Deputies.

Although CADE has been trying to balance such liabilities, the exposure remains, and it is clearly reflected in the increase of criminal investigations and damage claims. Such challenges are similar to those faced in other more mature jurisdictions

Therefore, when uncovering anticompetitive practices, companies must be aware that Brazil has sophisticated immunity and settlements programs in place which may help to decrease overall liabilities arising from antitrust infringements. However, companies should also balance the correspondent level of criminal and civil exposure, while regulations, case law and interaction among different authorities develop.

The overall message, though, is clear: the agreements must continue to be attractive, their procedures clearly settled and potential liabilities visible. This is the only possible equation to assure strong cartel prosecution in Brazil in benefit of consumers - the key target of any antitrust system.

TO WHAT EXTENT CAN RESOLUTION CADE N. 21/2018 INFLUENCE THE NEGOTIATION OF LENIENCY AND SETTLEMENT AGREEMENTS AT CADE?

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1. Introduction

The public enforcement has traditionally been much more developed than the private enforcement in antitrust in Brazil. Actually, the private enforcement is still very incipient in comparison to other jurisdictions – especially the USA – but is has faced a slight progress in recent years. In this scenario, a recent resolution enacted by the Administrative Council for Economic Defense - CADE aims to change this scenario, that is, to considerably foster the private action, or, at least, to improve certain mechanisms of public enforcement.

Article 47 of Law N. 12,529/2011 provides on the right that consumers have to claim for damages before the Judiciary and request for the cessation of antitrust violations. Such disposition has raised several discussions about how it should become more effective to bust cartel and other anticompetitive practices in Brazil. In 2018, CADE submitted to public consultations and enacted a proposed resolution to address the main questions raised so far about private enforcement in Brazil.

Resolution CADE N. 21/2018 ("**Resolution**") sets forth new rules on disclosure of documents and information presented in an Administrative Process derived from Leniency, Settlement Agreements and dawn raids. Therefore, the Resolution has two main objectives at the same time: stimulating private actions in Brazil (addressing the incentives of the dispositions of Article 47 of Law N. 12,529/2011) and, at the same

time, protecting the Leniency and Settlements policies – essential tools of the public enforcement.

The following sections describes (i) a brief overview of Resolution CADE N. 21/2018; (ii) CADE's recent case law on the matter; (iii) perspectives on the influence of the new culture encouraged by Resolution CADE N. 21/2018 on the negotiation of Leniency and Settlement Agreements by CADE.

2. Resolution CADE N. 21/2018

In September 2018, CADE approved Resolution CADE N. 21/2018 that regulates the access to documents of Administrative Processes, especially those related to Leniency, Settlements Agreements and dawn raids. In outline, the Resolution foresees the phases below described.

During the negotiation phase, all documents will be kept as confidential. When the investigatory phase starts, a public version of the General Superintendence - GS' opening Technical Note and the GS' final Technical Note will be available in the public records of the process.

The disclosure of other information/documents will be possible only after a final decision is rendered by CADE's Tribunal. Even in such a case, certain documents will remain confidential - except if authorized by the Leniency Beneficiary or by a judicial decision - such as the History of Conduct, its annexes and sensitive information (including trade secrets, fiscal and bank data or any information concerning a company or individual that may result in an anticompetitive advantage if disclosed).

Another innovation brought by the Resolution related to Settlement Agreements is that the GS may consider the proof of compensation for damages as a mitigating circumstance in the calculation of the pecuniary contribution in Settlement Agreements (it is also applicable for the calculation of fines at the end of the Administrative Process).

3. CADE's case law

Following the approval of Resolution CADE N. 21/2018, in November 2018 CADE signed several Settlement Agreements concerning six investigations related to the Operation Car Wash. Those investigations refer to alleged cartel formation and bid rigging practices in construction works and engineering services in Brazil in several occasions. The chart attached hereto contains a list of those Settlement Agreements.

This was the first time that Settlement Agreements have stipulated the possibility of reduction of the pecuniary contribution in case the Signatories proved judicial or extrajudicial compensation for damages. In the case of the abovementioned Settlement Agreements, the pecuniary contributions are expected to be paid in installments during 20 years. The Signatories may prove the compensation for damages and claim for a deduction in the total amount of their contribution at any time before the payment of last installment.

It is a landmark decision that may impacts future negotiations, especially because it is related to the Operation Car Wash – the most high profile cartel investigation in Brazil. However, those Settlement Agreements provided only on one aspect of Resolution CADE No. 21/2018, which is the proof of compensation for damages as a mitigating circumstance in the calculation of the pecuniary contribution.

There is still room for discussing the understanding CADE will adopt with respect to the access to be granted to third parties who are not under investigation but eligible to claim for damages derived from anticompetitive practices.[1] In this context, a challenge to be

[1] Access to documents derived from Leniency Agreements has already been discussed in two opportunities by the Brazilian Courts - the subway cartel (Administrative Process 08700.004617/2013-41) and the compressor cartel (Administrative Process 08012.000820/2009-11). However, both cases

faced refers to find a balance in order to not reduce incentives to investigated parties to negotiate Settlement Agreements and, at the same time, encourage the private enforcement, since there is a trend to have the Signatories of Settlement Agreements as the main (if not the only) defendants in damages lawsuits.[2]

4. Conclusion: perspectives for negotiation of Leniency and Settlement Agreements in view of Resolution CADE N. 21/2018

Despite the incentive to private actions, Resolution CADE N. 21/2018 is likely to positively influence the negotiation of Leniency and Settlement Agreements specially by guaranteeing the confidentiality of key documents such as the History of Conduct during CADE investigation.

Additionally, it is worth mentioning the Senate Bill 283 ("**Bill**"), which was approved by Federal Senate's Economic Affairs Committee in December 2018. The objective of the Bill is to both encourage private lawsuits and the negotiation of Leniency and Settlement Agreements by means of the following measures: (i) establishing of double damages in cartel cases, except for Leniency and Settlement Applicants; (ii) increasing the statute of limitation period (from three to five years); (iii)

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happened before Resolution CADE N. 21/2018. After the enactment of the Resolution, Integral Engenharia was the first entity to request access to confidential documents gathered during a dawn raid led by CADE in the midst of the cement cartel investigation (Administrative Process 08012.011142/2006-79) in order to seek damages compensation before Brazilian Courts in February 2019. Votorantim Cimentos requested CADE to deny the request. CADE's decision is still pending.

[2] For example, in the case of the subway cartel the Signatory of the Leniency Agreement, Siemens, was the first defendant in damages lawsuit related to CADE investigation. In the compressors cartel case, Electrolux claimed for damages against Whirpoll, which executed Settlement Agreement with CADE in the cartel investigation.

confirming the jointly liability for damages, except for Leniency and Settlement Applicants which will be liable only for the damages they caused, and (iv) incentivizing arbitration by including it as a mean to obtain compensation for damages. Now the Bill should be voted on by the full Senate and finally by the House of Representatives. If approved, the Bill intends to bring additional incentives for the negotiation of Leniency and Settlement Agreements considering that their Signatories would be waived from the payment of double damages and the joint liability for damages. Such innovations may mitigate the downside brought by Resolution CADE N. 21/2018 in relation to the negotiation of Leniency and Settlement Agreements, that is, the higher probability of suffering a damage claim due to the new culture that the Resolution intends to establish.

Finally, despite representing a significant advance in private enforcement in Brazil, if passed as it is, the Bill will bring up additional challenging questions to be answered by CADE and Brazilian Courts in decisions. Among those questions, one can mention: (i) in case a cartel is simultaneously subject to investigation by CADE and criminal authorities, should the statute for limitation initial term be counted as from the date of CADE's final ruling or the closing date of the criminal procedure? (ii) it will be necessary to use proof of confession made by the Signatories of Leniency and Settlement Agreements as evidence in the records of the claims for damages? (iii) will the lawsuits be treated as confidential? Those are the questions that should be addressed in the final version of the Bill or quickly by case law.

ANNEX - SETTLEMENT AGREEMENTS EXECUTED IN LIGHT OF RESOLUTION CADE N. 21/2018

Original investigation	Scope of the investigation	Signatories	Pecuniary contribution
Administrative	Bid rigging in the context of bidding processes	OAS	BRL 124.7

Original investigation	Scope of the investigation	Signatories	Pecuniary contribution
Process 08700.002086/2015-14	carried out by Petrobras to contract onshore engineering, construction and industrial assembling services.		million
		Carioca	BRL 54.1 million
		Odebrecht	BRL 338.9 million
Administrative Process 08700.007351/2015-51	Bid rigging in public bid for Usina Angra 3, carried out by Eletrobrás Termonuclear (Eletronuclear).	Odebrecht	BRL 13.8 million
Preliminary Investigation 08700.001836/2016-11	Bid rigging in bidding process carried out by Valec Engenharia, Construções e Ferrovias for implantation works in Ferrovia Norte-Sul and Ferrovia Integração Oeste-Leste in Brazil.	OAS	BRL 3.7 million
		Carioca	BRL 2.7 million
		Andrade Gutierrez	BRL 35.1 million
		Odebrecht	BRL 48.2 million
Preliminary Investigation 08700.006630/2016-88	Bid rigging in the Brazilian market for civil construction works, modernization and reconstruction of sports stadiums in the contexto of the World Cup occurred in Brazil in 2014.	Carioca	BRL 4.8 million
		Odebrecht	BRL 106.7 million
Administrative Process 08700.007776/2016-41	Bid rigging for public construction works and engineering services in the contexto of the urbanization of the Complexo do Alemão, Complexo de Manguinhos and Comunidade da Rocinha, coordinated by the Construction Works Secretariat of the Rio de Janeiro State with financing by the Brazilian Acceleration Growth Program (PAC).	OAS	BRL 13.5 million
		Carioca	BRL 7.1 million
		Odebrecht	BRL 29 million
Preliminary Investigation 08700.007777/2016-95	Bid rigging in public bid carried out by Petrobras for the construction works and engineering services to build the research center Leopoldo Américo Miguez de Mello ("Novo Cenpes") and the Integrated Center for Processing Information Technology Data (CIPD), located in Rio de Janeiro, and Petrobras headquarter in Vitória, Espírito Santo.	OAS	BRL 33.1 million
		Andrade Gutierrez	BRL 40.6 million
		Odebrecht	BRL 41.1 million

LENIENCY POLICY AND PRACTICE: WHAT ARE THE GREY ZONES?

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Brazil´s leniency program is practically an undisputed success story, attracting a growing number of applications over the years and profoundly changing the anti-cartel enforcement landscape in the country. However, the uncertainty that remains regarding some specific aspects of the program's practice or policy provide a challenge that cannot be overlooked. We have listed and elaborated on some of them below:

1. Does CADE's leniency cover all cartel-related wrongdoings?

CADE is the authority with jurisdiction to celebrate Antitrust Leniency Agreements, which provide full immunity for successful applicants. However, especially in cases related to bid rigging, it is not unusual for companies to be looking not only at potential violations of the Antitrust Law (Law No. 12,529/11), but also potential violations of the Procurement Law (Law No. 8,666/93), the Improbity Law (Law No. 8,429/92), and aspects of the Brazilian Anti-Corruption Law (Law No. 12,846/13) that pertain to fraud or frustration of public tenders. Would the leniency agreement with CADE apply to all of the issues and laws at play? Or would there still be exposure to potential liability for some of these issues (*e.g.*, corruption, bid rigging, procurement fraud, manipulation of tender notices) to the extent that the practice also violates laws other than the Antitrust Law as the ones mentioned above?

The leniency agreement entered into with CADE, by means of Superintendence General (SG/CADE), does *not* apply to all of the issues

or laws at play, so a company and the employees connected to the violations are still be exposed to potential liability for the issues mentioned above to the extent they violate laws other than the Antitrust Law. The leniency agreement with SG/CADE grants full administrative immunity to the company and the employees that join in and also criminal immunity to those employees (since there is no corporate criminal liability for cartels in Brazil). The criminal immunity provides protection not only for the crime of cartel itself but also to "crimes directly related to the cartel", such as conspiracy, for example. The question however relates to what other protection can be included in the CADE leniency, and for whom.

In this context, if neither the Anti-Corruption Agency of the Ministry of Transparency (CGU – *Controladoria Geral da União*) nor any other government agency would be entitled to apply administrative and criminal sanctions regarding the cartel, in theory they could however apply penalties in relation to bid rigging. Therefore, potential violations that are deemed to constitute bid rigging according to other laws, and which may bear relation to the cartel practice (such as manipulation of tender notices to direct tender outcomes, in alignment with competitors) could also be subject to penalties or damages claims from other agencies - such as the CGU, the Courts of Auditors (TCU or, for state tenders, TCEs), the Office of the Attorney General (AGU) and the Public Prosecution Service (MPF and, for state tenders, MPEs). This means that when a company is assessing whether to apply for leniency with CADE, it should also simultaneously evaluate the need to approach and negotiate with other relevant authorities as well. It will after all be exposing itself by cooperating with CADE without any protection towards these other agencies. Thus, coordination among these authorities is crucial for the continuing success of the leniency program and at a much greater degree than what exists today.

2. Is it necessary to negotiate with several public entities in bid rigging cases?

Although by law SG/CADE is the authority in charge of celebrating antitrust leniency agreements, a company may need to consider negotiating leniency agreements simultaneously with other entities than SG/CADE in the context of bid rigging. CADE's Leniency Guidelines ("Guidelines") point out in item 5 that "part[ies] may contact the Public Prosecution Service and/or the Judiciary to negotiate leniency agreements related in whole or in part to other offenses*".* Relatedly, in item 26, the Guidelines explain that SG/CADE may coordinate with the Public Prosecution Service, the CGU, and other investigative bodies, at the request of the antitrust leniency applicant.

Antitrust leniency is effective to protect against the high fines and other severe administrative penalties applicable against cartel participants by CADE, and to provide criminal protection for individuals. However, once the company enters into a leniency agreement with SG/CADE for cartel in a public bids context, it will expose itself to all other agencies potentially related (CGU, TCU/TCEs, AGU, MPF/MPEs or other public bodies in state or local levels), not to mention the risk of damages lawsuits from private parties.

This is because the other agencies have jurisdiction to investigate and punish the other potential violations associated with bid rigging, as explained above. After executing a leniency agreement, SG/CADE will launch an investigation (administrative proceeding) against all parties involved in the cartel, including the leniency applicant, whose status as such will not be disclosed until after the proceeding is concluded. Because the identity of the defendants will become public, together with certain information about the nature and possible victims of the violation, the other authorities may become interested in launching their own investigations over the conduct to punish it according to their governing own statutes (if they believe that the cartel conduct spills over to their sphere of jurisdiction – such as corruption, bid rigging, procurement fraud, etc).

Therefore, if the company determines that pursuing a leniency agreement with SG/CADE is the way to go, it should be prepared to negotiate leniency agreements with other enforcement control agencies in order to mitigate the negative effects arising from the disclosure.

3. What are the challenges related to cooperation of individuals in leniency negotiations?

According to the Guidelines, if the leniency applicant is a company, the benefits of the agreement can be extended to its current and former employees involved in the violation, as long as they cooperate with the investigation and sign the agreement. For the company, having individuals cooperating can help collect more complete and accurate information to negotiate with CADE (and potentially ensure that immunity is obtained). At the same time, many companies are reluctant to work with employees or former employees who may have broken internal rules and exposed the company to significant losses.

Although ultimately a business decision (and CADE normally does not interfere either way), retaining certain employees so that they are more readily available to be interviewed and to cooperate with the investigation may be strategic. At the same time, companies need to be cautious about conditioning the continuity of an individual´s employment within the organization to their cooperation with the investigation, as courts may understand this as unlawful coercion leading to labor liability. As to former employees, the decision whether or not to approach them needs to consider the confidentiality of the leniency proceedings and potential leaks to the leniency negotiations, for instance, especially in cases where there are pending matters or actual or potential litigation between the company and the individuals.

4. Public records of the leniency program – which documents go public and when?

As a rule, the History of Conduct (the corporate statement that describes the violation in leniency agreements) is confidential and should not be disclosed, even after the final decision by CADE, except in case of a court order or by express authorization of the leniency applicants.

In addition, the identity of the leniency applicants is treated as confidential and will not be made public until CADE's final decision. Different from many other jurisdictions, in Brazil the defendants in the investigation (i.e., the companies and individuals charged with the reported violation) have access to the identity of the leniency applicants and to the whole file of the case, including the corporate statement and supporting documents presented by the leniency applicant, from the very beginning of the case. Such information however must be used strictly in light of the due process principles and defendants' rights of defense within the administrative proceeding underway at CADE, and defendants are prohibited from disclosing information or documents to third parties, including other government agencies or foreign authorities.

As was the case with other jurisdictions, CADE struggled with the balance between confidentiality and access to the files, and finally regulated it with Resolution No. 21, enacted in 2018. As a rule, and in order to facilitate redress for cartel damages, this regulation states that documents and information contained in the administrative proceeding should be made publicly accessible. An exception, as noted above, is the History of Conduct leniency statement, which remains confidential even after the final decision, importantly providing some protection to and preserving incentives for leniency applicants. But Resolution 21/2018 does not explicitly state whether contemporaneous documents brought as evidence by the leniency applicant should be maintained as confidential, while recent decisions

issued by CADE (which do become publicly available) have included multiple screenshots of such leniency documents.

5. Damages claims – how do they affect the leniency policy?

In spite of the above-mentioned CADE Resolution 21, there is no statute governing the interaction between CADE's leniency program and the public policy of damage claims regarding to the disclosure of documents related to leniency agreements. Such resolution (and the protection it aims to provide to the leniency program) is merely an administrative CADE regulation, and not a Law. It is not binding on courts, which could order CADE to make all documents public on a case-by-case basis to serve as evidence for civil claims for damages. These points must be pondered and weighed from a public policy standpoint so as to incentivize civil claims while not excessively harming CADE's leniency program.

One other example of this delicate balance refers to joint and several liability over civil claims for damages resulting from a cartel. Since the leniency History of Conduct is an acknowledgment of guilt, determining that it goes public would open the door for civil actions against the applicant. It would become an easier target than the other cartel members who would not have admitted guilt, putting the leniency applicant in a worse position than non-cooperating defendants – a blatant violation of a golden rule of leniency.

This scenario becomes even more important in cases where the harmed entity does not wait for CADE's final decision to file a civil claim and CADE is asked to disclose the History of Conduct and leniency materials early on in the investigation. In this situation, the leniency applicant is placed at an even worse position – it has already admitted guilt and provided evidence on the collusion while the other

cartel members are still pleading innocent, pending CADE's judgment[1].

It is true that CADE's leniency program has been improving in terms of transparency and predictability, but this success itself is bringing the uncertainties mentioned above uncertainties to the forefront. The challenge now is to address them so as to ensure the preservation of the incentives and the sustainability of the leniency program and to take Brazil to an even higher level with regards to anti-cartel enforcement in the future.

[1] An example of this scenario is the civil claim filed by the state of São Paulo against Siemens in 2013, at a time when CADE's investigation was still at a very early stage.

LENIENCY PLUS: WHAT ARE THE KEY TOPICS?

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The Brazilian Leniency Plus program provide incentives for a defendant (company or individual) under investigation regarding an anticompetitive conduct in a certain market ("first infringement" or "original case"), to report its involvement in a violation in another market ("second infringement" or "disclosed case"), thereby securing full immunity in the disclosed case and also a considerable fine discount on the original case.

Despite having been created alongside the Leniency Program in 2000, CADE's experience with Leniency Plus is quite recent, with the first applications dated as of 2015. However, according to statistics published by the Brazilian Antitrust Authority, CADE - Administrative Council for Economic Defense's[1], the Leniency Plus has been used intensively with 23 applications filed through 2018. This surge in the Leniency Plus is a result of the Car Wash and Auto Parts investigations, considering the multiple companies and intersected relevant markets involved.

Considering the increasingly importance of the Leniency Plus for cartel enforcement in Brazil and based on the steep learning curve with the experience on recent years, we aim to provide below, with helpful and practical insights, comprehending questions related to general proceedings and best practices, on a Q&A format.

[1] Source: http://en.cade.gov.br/topics/leniency-program Accessed on February 20, 2019.

What are the requisites to apply for leniency plus in Brazil?

Applying for Leniency Plus in Brazil (referred hereinafter as the "Leniency Plus Applicant") requires the same requisites as to apply for a standard Leniency Agreement, as set forth in Article 86 of Law N. 12,529/2011 ("Brazilian Antitrust Law") and Article 238 of CADE's Internal Regulation[2] (e.g.: first-in, confess and cease the participation in the disclosed violation, full cooperation, etc.), in addition to other two specific conditions (Article 87, Paragraph 7 of the Brazilian Antitrust Law and Article 250 of CADE's Internal Regulation):

(i)The CADE's General Superintendence – GS must have no knowledge of the second infringement reported[3]; and

(ii) The application must be filed before the first case is sent by the GS to CADE's Tribunal for judgement.

What are the applicable procedures and timetable?

There is no detailed rule, nor prescribed timetable for Leniency Plus applications and negotiations. However, based on our experience and CADE's Guidelines, the following procedures are followed:

- The first step is requesting a marker from the CADE's GS, which follows the same procedure as the standard Leniency

[2] Resolution CADE N. 01/2012.

[3] Therefore, the plus reward shall not be granted to the defendant who enters into a "partial Leniency Agreement" regarding the second infringement, as CADE's GS would be already aware of the disclosed violation. See CADE's Antitrust Leniency Program Guidelines ("CADE's Guidelines"), p.63. (Q. 94). Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia_programa-de-leniencia-do-cade-final.pdf. Accessed on February 20, 2019.

marker[4] (Articles 238 and 239 of CADE's Internal Regulation), reporting a second infringement. At this moment, the information required to be provided about the disclosed case is: relevant market affected, period of infringement and companies involved;

- If the CADE's GS had no previous knowledge, it will accept the marker and start the negotiation of a Leniency Agreement concerning the disclosed case;

- If the negotiation of the Leniency Plus Agreement is concluded successfully, applicants will be entitled to a 33% discount of the fine in the first infringement (be it the fine to be imposed by CADE's Tribunal or the fine negotiated within a Settlement Agreement ("TCC").

Is the plus reward pre-defined and when is it received by the Leniency Plus Applicant?

The precise amount of the reduced fine will only be ascertained as CADE's issues the final decision at the end of the investigation of the first infringement, whether the Leniency Plus Applicant is convicted.

According to CADE's Guidelines[5], as a rule, the plus reward in the first infringement will only be granted after CADE's decision in the second infringement and if the authority considers that the Leniency Plus Applicant has fully complied with its obligations. In the event that CADE's final decision on the original case is issued prior to the judgement of the disclosed case, the decision of the first may contain provisions prescribing that if the Leniency Plus Agreement in the latter is

[4] CADE's Guidelines, p.56. (Q. 87).

[5] CADE's Guidelines, p.63. (Q. 95).

not fulfilled, the discount granted in advance shall be collected as a complementary fine[6].

Moreover, if the Leniency Plus Applicant enters into a TCC regarding the original case simultaneously with the Leniency Plus, the plus reward may be applied *ab initio*, under a clause that provides the loss of the benefits – both the "plus" discount within the TCC in the original case and the immunity within the disclosed case – should the Leniency Agreement be breached[7].

Is the negotiation of a TCC in the first infringement mandatory to obtain the Leniency Plus in the second case?

No, it is not mandatory. Pursuant to CADE's Guidelines[8], the "plus reward" is applied to the fine expected to be imposed in the first infringement and it is not necessary that the Leniency Plus Applicant negotiates a TCC within that case. Anyhow, if the Leniency Plus Applicant does so, it will receive both benefits (the plus reward + the TCC discount).

It is important to note, however, that the two discounts will be subsequently applied (i.e., the Leniency Plus discount and then the TCC's discount) and not cumulatively (i.e., the two discounts are not simply added together)[9]. Thus, whether the Leniency Plus Applicant is also interested in settling a TCC in the first infringement, the following parameters for discounts on the expected fine must be observed:

[6] CADE's Internal Regulation, Article 250, Paragraph 2.

[7] CADE's Guidelines, p.60. (Q. 92).

[8] Idem, p.60 (Q.90) and CADE's Internal Regulation, Article 250, Paragraph 1

[9] Idem, p.58 (Q. 89).

- First proponent of TCC (first infringement) with Leniency Plus (second infringement): from 53.33% to 66.67% of the expected fine in the first infringement;
- Second proponent of TCC with Leniency Plus: from 50% to 60% of the expected fine in the first infringement; and
- All other proponents of a TCC with Leniency Plus: up to 50 % of the expected fine in the first infringement.

Is there a "penalty plus" policy in Brazil?

No. Different from the U.S., the Leniency Plus is not a compulsory element of the Brazilian Leniency Program and CADE will not consider the failure to report other violations as an "aggravating sentencing factor"[10] when judging the first infringement. Although CADE considered introducing the omnibus (involvement-in-other-cartel-offenses) question, after reaction from the local antitrust community and claim that it would constitute a clear violation of the constitutional privilege against self-incrimination, the authority opted not to include such policy.

[10]"(…) If a company is knowledgeable about a second offense and decides not to report it, and the conduct is later discovered and successfully prosecuted, where appropriate, we will urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor" (emphasis added) in HAMMOND, Scott., *'An Update of the Antitrust Division's Criminal Enforcement Program*' (Address before the ABA Section of Antitrust Law Cartel Enforcement Roundtable, Washington, November 16, 2005), available at https://www.justice.gov/atr/speech/update-antitrust-divisions-criminal-enforcement-program Accessed on February 20, 2019.

Can the discount of a leniency plus be used in more than one original case?

No. The benefit of Leniency Plus is applied to each party only once in a single administrative proceeding which already has been launched by the CADE's GS before the marker request. However, for companies and individuals belonging to the same group applying for Leniency Plus that are facing several investigations, the award may be applied in different proceedings for each of the parties[11].

In the event that the Leniency Plus Applicant is a defendant in more than one proceeding and requests a Leniency Plus marker: is there any criteria to choose in which case the plus reward will be applied?

Although there are no consolidated rules on the criteria for choosing in which of the violations the plus reward will be used, CADE's GS experience with the Car Wash operation fixed a chronological criterion for the situation in which the Leniency Plus Applicant is also negotiating several TCCs in different cases – *i.e.* the plus reward may only be granted in the cases in which the TCC marker/waiting queue term was obtained prior to the Leniency Plus request.

Considering the above, the Leniency Plus Applicant must strategically evaluate possible scenarios of fines on the ongoing proceedings and then decide in which of them the plus reward would be more advantageous. It is important to point out that there are no restrictions regarding the size of market or the infraction and the Leniency Plus application. As such, the discount may be obtained by

[11] For instance, say there are two ongoing cases in which a company is being investigated and a specific individual is only implicated in one of these cases. If the company and this individual apply for Leniency Plus, the 33% discount within the first case may be used by the company in the case the individual did not participate and the 33% discount regarding the individual's fine may be applied to the other case. In other words, the discount of a Leniency Plus may only be used once by each party, but may be applied to more than one case for each specific party.

reporting an anticompetitive conduct in a far smaller and less impactful market than the original case.

Final remarks: is it worth to seek a Leniency Plus agreement in Brazil?

The opportunity to reduce fines in the first infringement and to obtain full immunity in the second is the most significant advantage to be considered by a defendant when assessing whether it should apply for Leniency Plus. This is especially true for individuals, who are subject to criminal prosecution in Brazil and who are entitled to criminal immunity within the Leniency Application of the disclosed case.

Fighting cartels is a major concern of the Brazilian antitrust authority, which displays increasing prosecution year by year[12]. Therefore, the possibility of obtaining full immunity in the second infringement, instead of facing an additional investigation as well as the discount in a possible fine in the first case certainly increases the companies' and individuals' incentives to conduct in-depth internal investigations and report all found violations.

An important situation that may improperly be seen as argument against filing for Leniency Plus may occur in a scenario in which a company is defending itself and does not admit to having participated in the conduct investigated in the first case and believes that CADE may interpret the admission of guilt in another conduct as further evidence of guilt in the first case. The independence of CADE's GS when negotiating Leniency Agreements is taken very seriously and, based on experience, there have been no cases in which the application for Leniency Plus has affected or harmed a distinct investigation. Based on this independence, whether or not a party is negotiating a TCC in the original case, there are

[12] According to CADE's 2018 yearbook, the authority launched 35 cartel investigations and signed 5 leniency agreements in 2018. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/anuario-2018.pdf Accessed on February 23, 2019.

no downsides regarding the results of the original case when applying for Leniency Plus in another market.

WHAT ARE THE LENIENCY APPLICATION REQUIREMENTS?

Ricardo Inglez de Souza

1. Introduction

For the application for a leniency agreement the applicants must comply with some legal requirements. Such legal requirements have a direct connection with the strength of the leniency program in Brazil. An important cooperation would provide better grounds for a high-level enforcement of the Brazilian Antitrust Law and, therefore, would result in less litigation against conviction decisions.

FERREIRA NETO (2012) mentions that the requirements for the implementation of a leniency program are fundamental for enhancing the instability of a collusion or cartel arrangement[1].

2. 2. Legal requirements

The first requirement is that the interested applicant ***effectively cooperate*** *with the investigations and with the administrative process*[2]. The effectiveness of the cooperation is not regulated or clearly described in the law. Nonetheless, it is possible to sustain that it is related to a full cooperation, providing credible and new pieces of information and documents that are useful for evidencing the facts that are described in the history of conduct.

[1] Ferreira Neto, Amadeu de Souza. *Programa de leniência e a lei 12.529/2011: avanços e desafios. in* Revista do IBRAC. ano 19; vol. 22. São Paulo: Editora Revista dos Tribunais, p. 151 ss.

[2] See Article 86 *caput*, of Law N. 12,529/2011 ("Brazilian Antitrust Law").

The first moment to cooperate is when the applicant is willing to get the marker. At this moment, the leniency applicant must submit some preliminary information, even if it is incomplete. The information requested would include the market affected (products/services and geographic area affected). It is possible to obtain a marker in international cartel cases, since it has (at least the potential) effects in the Brazilian marketplace. It is important to identify the leniency applicant and all others parties involved in the wrongdoing. Finally, it also advisable to share the information about the estimate period of duration of the reported violation.

After obtaining the marker, the leniency applicant will negotiate the leniency agreement and acknowledge the wrongdoing and provide information and documents. The guideline provided by the Brazilian Council of Economic Defense ("CADE") on leniency[3] provides that the beneficiaries should be able to identify, among others, *a summary description of the violation reported or under investigation*, *identification of the leniency applicants – companies and/or individuals*, *identification of the other participants of the violation reported or under investigation – companies and/or individuals, detailed description of the violation, and an indication of the existing evidentiary documents of the reported violation*.

The *effectively cooperation* may also be measured by the completeness of the information provided, good faith of the applicant and by not concealing or disguising information or submitting false or misleading information. In view of that, if a leniency applicant fails to provide full information on illegal practices and it participates in more acts than what has been reported, it may lose the benefits of the leniency agreement.

[3] See Guidelines: CADE's Antitrsut Leniency Program, available at http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf (last visit on February 20, 2019).

Besides full cooperation, another requirement for the validity of the leniency is that the leniency applicant must ***be the first*** *in with respect to the violation reported or under investigation*. Be the first does not mean that CADE should not accept a leniency application in case it already has an investigation on that matter. The leniency may serve to confirm, provide additional details and share additional and important evidence to support the accusation.

Another requirement that the leniency applicant must comply with is to **cease immediately its participation in the violation**. This requirement may conflict with the possibility that CADE has to include any obligation in the leniency agreement that could help the parties to achieve a more effective outcome with the agreement. This is because it can happen that CADE will ask the leniency applicant to keep the violating behavior for preserving the room for a dawn raid, for instance. This is a possibility that the Brazilian authority should use more often.

Plus, when the agreement is proposed, **CADE's General Superintendence ("SG") should not have sufficient evidence** to sustain the conviction of the other involved parties, including individuals. The leniency agreement must be beneficial for the society.

The leniency applicants **must confess the wrongdoing**. The confession of a co-participant is a very important to increase the instability of the illegal arrangement among the colluded parties. The increased instability may motivate the other defendants to settle the case with CADE. Additionally, the confession plays an important role in damage claims.

In addition to the broad cooperation, the law emphasizes such obligation, including the cooperation during the administrative process. The leniency applicant must *attend, at their own expenses, whenever requested, at all procedural acts, until a final decision is rendered by CADE on the reported violation.* In practical terms, this is an obligation for a more **instrumental cooperation**. SG always call the individuals that signed the leniency agreement to participate in the hearings to obtain

oral depositions. SG may also need some technical support to understand the product or service and the dynamics in the market.

The leniency agreement **must allow the authority to identify the others** involved in the violation. This should include, as much as possible, companies and individuals, including the definition of the individual role of each identified company or individual. It is important for the applicant to help the authority to determine the period in which each violating company or individual was involved in the wrongdoing.

Finally, the leniency must **provide *evidentiary information and documents*** *of the offense reported or under investigation*. This is a basic and, in theory, easy requirement to understand, but it is very complicated to implement. Several leniency cases in Brazil have a poor documental background and the information provided by the applicant is not clear or actually supported by the proper evidentiary elements.

3. Conclusions

The requirements provided in the Brazilian Antitrust Law do not differ too much from what is provided in other jurisdiction. The chart below compares the requirements for a leniency application in Brazil, US, EU and Argentina:

	Brazil	**US**[4]	**EU**[5]	**Argentina**[6]
Full Cooperation	Yes	Yes	Yes	Yes
Be the first	Yes	Yes	Yes	Yes
Stop the wrongdoing	Yes	Yes	Yes	Yes
Confess the violation	Yes	Yes	Yes	Yes
Identify other participants	Yes	Yes	Yes	Yes

[4] See https://www.justice.gov/atr/page/file/926521/download (last visit on February 21, 2019). We consider both types of leniency (i.e. A and B).

[5] See http://ec.europa.eu/competition/cartels/leniency/leniency.html (last visit on February 21, 2019).

[6] See http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310241/norma.htm (last visit on February 20)

Provide evidence	Yes	Yes	Yes	Yes
Restriction for leaders	No	Yes	Yes	No
Restitution to injured parties	No	Yes	No	No

The great challenge is the enforcement of such requirements to effectively obtain information with candor and completeness from the applicants. It is clear that the Brazilian authorities are learning and each new leniency agreement is better grounded than the previous ones. However, it is understood that the quality of the cooperation can improve. If improved, the quality of the cooperation will also help to make CADE's decision stronger and with less room for judicial discussions.

WHAT ARE THE CRITERIA FOR CALCULATING FINES IN CARTEL CASES?

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Marina Antunes Maciel Sertã
Pedro Paulo Salles Cristofaro

One point which is commonly in debate in CADE's decisions regarding cartel cases is the criteria for calculating fines since Law No. 12,529/11 provides quite broad parameters for calculation of the fine for these conducts. The broadness of these parameters has resulted in the publishing of resolutions by CADE to clarify some specific aspects, but there are still several discussions and divergent opinions in CADE's case law regarding the criteria for calculating fines in cartel cases.

The most relevant articles of Law No. 12,529/11 regarding this matter are freely translated below:

> "Article 37. The practice of an infraction to the economic order subjects the responsible parties to the following penalties:
> I – in case of companies, fines ranging from 0,1% (one decimal per cent) to 20% (twenty per cent) of the gross revenue of the company, group or conglomerate obtained in the fiscal year prior to the initiation of the administrative proceeding, within the range of corporate activity in which the infraction occurred, which shall never be smaller than the benefit obtained, when its estimation is possible;
> II – in case of other natural people or public or private legal entities, as well as any associations of entities of people, constituted by fact or by law, even if temporarily, which do not pursue corporate activities, when it is not possible to use the gross revenue criteria, the fine shall be between R$50,000.00 (fifty thousand reais) and R$2,000,000,000.00 (two billion reais);

III – in case of a manager who is directly or indirectly responsible for the infraction committed, when their fault or fraud is proven, the applicable fine shall range from 1% (one per cent) to 20% (twenty per cent) of the fine applied to the company, in the case of item I of this article, or to the legal people or entities, in the case of item II of this article.

1st paragraph – in case of repeated violations, the imposed fines shall be applied in double.

2nd paragraph – for the calculation of the fine mentioned in item I of this article, CADE may consider the total gross revenue of the company or group of companies, when it does not dispose of the revenue amount in the branch of activity in which the infraction occurred, as defined by CADE, or when it is presented in an uncomplete manner and/or not demonstrated in an unequivocal or reputable manner."

"Article 45. For the application of fines established in this Law, the following aspects shall be considered:

I – the gravity of the infraction;

II – the good-faith of the offender;

III – the benefit gained or intended by the ofender;

IV – the consummation or not of the infraction;

V – the degree of harm, or danger of harm, to the free competition, the national economy, consumers, or to third parties;

VI – the negative economic effects produced in the market;

VII – the economic situation of the offender; and

VIII – repeated violations."

Since the enactment of Law No. 12.529/11, CADE has issued a few Resolutions to aid in the interpretation of the articles above.

Resolution No. 3, dated May 29th, 2012, for instance, sets forth a list of corporate activity branches, for means of application of article 37. It also states that (i) if the infraction against the economic order has occurred in more than one branch of corporate activity, CADE shall

consider the sum of the gross revenue obtained in all the affected branches of activity; and (ii) whenever the party does not present the gross revenue in the branches where the infraction occurred in a complete, unequivocal and reputable manner, CADE shall consider the total gross revenue of the company or group of companies, in the fiscal year prior to the initiation of the administrative proceeding.

According to Resolution No. 18, dated May 23rd, 2016, CADE may adapt the branch of activities to specificities of the conduct when the dimensions indicated in Resolution No. 3 are manifestly disproportionate to the concrete case.

Finally, Resolution No. 21, dated September 11th, 2018 refers to commitments to cease activities (TCC), which are agreements that may be celebrated by the accused party, who agrees to pay a certain amount and cease the indicated activities, and CADE, who, in turn, archives the proceeding. According to this Resolution, CADE's Administrative Court may consider extrajudicial or judicial reparations as mitigating circumstances for the calculation of the monetary contributions in TCCs.

Despite the resolutions above, which have clarified a few aspects of articles 37 and 45 of Law No. 12.529/11, there are still some central points regarding calculation of fines in cartel cases which remain subject to discussions. Given the broad margin of discretion and the imprecise parameters of articles 37 and 45, CADE has been handling arising discussion on a case-to-case approach.

One of these issues regards the wording of item I of article 37, which states that fines shall be calculated considering the gross revenue of the company (0,1% to 20%), which "*shall never be smaller than the benefit obtained*".

The controversy with such wording is that it allows for two distinct interpretations. The first interpretation is that the fine will always necessarily be within the 0,1 to 20% gross revenue range stated in the beginning of the article, whereas the phrase "*shall never be smaller than the benefit obtained*" was intended merely as an element to aid in the calculation of the fine (pursuant to article 45 of Law No. 12.529/11).

Another interpretation of article 37 is that the phrase "*shall never be smaller than the benefit obtained*" provides a minimum limit which cannot be ignored, even if it results in a fine which is superior to the maximum gross revenue percentage fixed in the first part of the article.

Due to these interpretations, there was debate during some time on whether the fines established by CADE in cartel cases could surpass 20% of the company's gross revenue in order to reach the amount of the benefit obtained by the illegal practice. This is especially relevant in cartels of continued activity, since in many cases the benefit obtained over the years with the illegal practice may easily surpass the 20% gross revenue limit.

In any case, the prevailing opinion in Brazilian law is aligned with the first interpretation, in the sense that the fine must always be calculated in observation to the 0,1 to 20% gross revenue range stipulated in the beginning of article 37, and that the benefit obtained by the cartel practice shall be used merely as a criteria for calculation of the fine.

In this sense, in the Administrative Proceeding No. 08012.006130/2006/22, Counselor Alexandre Barreto de Souza expressed the understanding that the company's gross revenue must be the basis for application of the monetary sanction (since the law expressly defines this criterium as basis for the fine), whereas the benefit obtained with the illegal activity must be used as reference specifically when it is possible to estimate such benefit.

In the Administrative Proceeding No. 08012.002568/2005-51, Counselor Márcio de Oliveira Júnior explains that the application of fines by CADE aims to punish and deter antitrust conducts, and that Brazilian legislation does not grant CADE the attribute to demand reparations for damages. This means that offenders do not have to return illicit gains of cartel practices to CADE – the restitution of these amounts occurs on a civil liability basis. The counselor understands that the benefit obtained is only one of several criteria used for the definition of sanctions in each

case, and that the calculation of fines using only the benefit criteria, without weighing other factors, can even be illegal.

On the other hand, Counselor Cristiane Alkmin Junqueira Schmidt's defeated understanding is that the main criteria to be considered for calculation of the fine should actually be the economic benefit obtained with the illegal practice, and therefore the fine imposed can surpass 20% of the gross revenue of the company in order to reach the amount of the economic benefit[1]. This understanding, however, does not reflect the majority of the Court's understanding.

An analysis of CADE's recent case law brings to light other interesting criteria applied by different counselors in the calculation of fines in cartel cases.

For instance, in his decision regarding the TCC Request No. 08700.001880/2016-21 (related to the Administrative Proceeding No. 08700.002086/2015-14)[2], dated November 21st, 2018, counselor João Paulo de Resende explained that in all his votes since 2016, he has suggested the application of a methodology consisting of the following three steps: (i) a base value must be calculated considering the application of a certain overprice (10%) over the value of sales of the product affected by the cartel during the whole period of the illegal practice, in order for the expected fine to be proportional (even if not exactly equal) to the benefit and/or damage caused by the conduct; (ii) discounts or increases shall be applied to the base value calculated according to item (i), according to the existence of mitigating or aggravating factors related to the conduct; and (iii) in observance to the

[1] Cristiane Alkmin Junqueira Schmidt's votes in the Administrative Proceeding No. 08700.002821/2014-09, dated June 7th, 2017, and in the TCC Request No. 08700.008223/2016-13 (related to the Administrative Proceeding No. 08700.007777/2016-95) dated November 21st, 2018, express this position.

[2] The Counselor's proposed criteria for calculation of the fine did not prevail in this case because the majority of the Court agreed upon the celebration of a TCC with the accused party, with the consequent extinguishment of the proceeding.

legal command, the amount calculated according to items (i) and (ii) may not surpass the legal limit for administrative fines (in this case, 20% of the company's gross revenue).

On another case[3], the voting counselor Gilvandro Vasconcelos Coelho de Araújo calculated and set the fine based on the company's gross revenue, and according to his understanding of rate of gravity of the cartel, which he set at 15% (from a range of 0,1% to 20%), in view of a lack of mitigating or aggravating factors. The counselor also emphasized that such percentage is in accordance with CADE's case law, in the sense that cartels must be punished with percentages ranging from 12% to 15% (except in specific cases of long duration or specialization of the infractors' conducts).

Despite the existence of case law for the calculation of fines and monetary contributions in cartel cases, some appoint an absence of methodology and consistency between different cases[4].

In the Administrative Proceeding No. 08012.001377/2006-52, recently ruled by CADE, on February 13, 2019, Counselor João Paulo Rezende once again stressed the dubious wording of the law regarding the limit of 20% of the gross revenue for fixing the fine. Despite complying with this limit, the Board member suggested the application of a calculation methodology that would consider the gross revenues of the offender in all the years of existence of the cartel.

CADE, however, by majority vote, adopted the vote of Counselor Paulo Burnier Silveira and considered as a basis for calculation of the fine the sales of products affected by the cartel,

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[3] Vote on the Administrative Proceeding No. 08012.010744/2008-71, dated January 18th, 2017.

[4] As recently expressed by counselor João Paulo de Resende in his vote regarding TCC Request No. 08700.001880/2016-21 (related to the Administrative Proceeding No. 08700.002086/2015-14), dated November 21st, 2018.

including amounts referring to exports, in the year prior to the initiation of the administrative proceeding.

In his vote, Counselor Paulo Burnier Silveira drew attention to the fact that CADE jurisprudence has been consistently applying a penalty around 15% of such basis for classic cartels, depending on the duration of the cartel, the good faith of the offender and other factors of dosimetry (Administrative Proceedings 08012.004472 / 2000-12, 08012.004573 / 2004-17 and 08012.007149 / 2009-39). In this specific proceeding, the penalty was applied between 13 and 15% of the gross revenues of the offenders.

Finally, in relation to natural persons, it was highlighted in this recent judgment that the penalty for hardcore cartel cases has been normally fixed between 50 thousand and 300 thousand UFIR

Notwithstanding those most recent decisions, it is clear that only time, the development of a more consolidated case law – and perhaps the production of a guide for antitrust fines, as suggested by many of CADE's counselors – will help standardize or at least predict the criteria used in calculation of fines in cartel cases.

DOES THE EXCHANGE OF SENSITIVE INFORMATION AMOUNT TO AN ANTITRUST INFRINGEMENT?

Michelle Marques Machado
Stephanie Scandiuzzi[1]

1. Introduction

The exchange of competitively sensitive information between companies, and in particular competitors, is a concern of antitrust authorities all around the world as it may amount to an anticompetitive infringement. Accordingly, in Brazil, exchanges of competitively sensitive information are not necessarily punishable by Law No. 12,529/2011 (the "Brazilian Antitrust Law"). They can be legitimate, as those that take place in the context of M&A negotiations and commercial agreements, but may be unlawful when they occur in the context of anticompetitive agreements between competitors. The exchange of information may also occur as an autonomous practice, which lawfulness must be assessed on case-by-case basis. The undue exchange of sensitive information that amounts to an antitrust infringement is subject to penalties imposed by the Brazilian antirust authority – the Administrative Council for Economic Defense ("CADE") – such as the payment of fines.

This article will provide a brief overview of the types of exchange of competitively sensitive information in order to answer the following question: "does the exchange of sensitive information amount to an antitrust infringement?" To this end, the exchange of competitively information will be addressed taking into in account the following contexts: (i) M&A negotiations and commercial agreements; (ii)

[1] This article was written with the collaboration of Amalia Batocchio and is a short and revised version of an article originally published by the authors and others.

anticompetitive agreements between competitors; and (iii) as an autonomous conduct.

2. Exchange of competitively sensitive information

2.1 Competitively sensitive information

According to CADE's Guidelines for the Analysis of Previous Consummation of Merger Transactions2 ("the Guidelines") competitively sensitive information would concern: (i) costs; (ii) capacity level and plans for expansion; (iii) marketing strategies; (iv) pricing (prices and discounts); (v) main customers and discounts; (vi) employees' wages; (vii) main suppliers and terms of the contracts signed with such suppliers; (viii) non-publicly available information on trademarks, patents and R&D; (ix) plans for future acquisitions; and (x) competition strategies. This list is not exhaustive, so other types of commercial information can also be considered competitively sensitive.

2.2 Exchange of competitive information in M&A transactions and commercial agreements

CADE acknowledges that the exchange of sensitive information is inherent to corporate transactions and commercial agreements, and therefore it would not be anticompetitive by nature. However, it is possible that the exchange of sensitive information goes beyond what is necessary to carry out negotiations and the assessment of the feasibility of the transaction, thus likely negatively affecting competition. For example, the information exchanged may be used by parties to a transaction to coordinate with each other, or by only one party to gain competitive advantages in the market in which operates.

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[2] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. Guidelines for the Analysis of Previous Consummation of Merger Transactions. Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/capa-interna>. Last accessed on: March 1st, 2019.

In this regard, CADE provides guidance in its Guidelines on how companies should behave throughout negotiations and related due diligence processes, in addition to which measures they should take to mitigate the risks of generating anti-competitive effects through the exchange of information. CADE suggests, for example: (i) the establishment of clean teams – committees consisting of companies' employees and/or independent third parties, that is responsible for the analysis of the sensitive information relevant to the assessment or planning of the transaction –; (ii) the execution of confidentiality agreements, such as non-disclosure agreements, antitrust protocols and the like; and (iii) the exchange and analysis of aggregated and historical information, whenever possible, in order to avoid the identification of individualized data.

Once these precautions are taken, the exchange of sensitive information will be legitimate under the Brazilian Antitrust Law. Conversely, in the event of the exchange is undue, it may be deemed an early implementation of the transaction (known as "gun jumping"), subjecting companies to fines between R$60,000 (US$16,000) and R$60 million (US$16 million).

2.3 Exchange of competitively sensitive information in the context of anticompetitive arrangements

The exchange of competitively sensitive information may also take place between competitors in a given market, within the context of tacit or explicit anticompetitive arrangements – for example, those aiming at fixing prices, restricting supply of products and services, and dividing markets and biddings.

In this case, the exchange of information acts as a fundamental instrument to the establishment of a cartel, as well as to its operation and monitoring. In practice, the unlawful exchange of information is assessed by the authority under the broader scope of the cartel, and not as a separate infringement. Under the Brazilian Antitrust Law, companies and individuals involved in a cartel are subject to the payment of significant

fines, besides other penalties. Individuals are also subject to criminal prosecution, the penalty of which may be of an up to five years imprisonment and a fine.

2.4 Exchange of competitively sensitive information as an autonomous practice

The exchange of competitively sensitive information may also occur as an autonomous practice, i.e., dissociated from a cartel. In this case, there is no anticompetitive arrangement put in place by competitors; instead, the exchange of information is the only interaction between two or more competitors and occurs on a limited basis.

The effects of the exchange of sensitive information on competition as an autonomous conduct must be assessed on a case-by-case basis. So far, in Brazil, the exchange of information typically has been reviewed only in the context of broader cartel investigations (see item 2.2), so that, to date, there is no specific precedent regarding the exchange of information as an autonomous conduct. In the ODD case ruled in January 2019,[3] the CADE's Tribunal considered that one of the investigated companies had only engaged in exchange of sensitive information as opposed to a cartel, and dismissed the case against it in view of the 5-year statute of limitations set forth in the Brazilian Antitrust Law. There are also at least two investigations exclusively concerning autonomous exchanges of information.[4] Based on the Opening Note of such investigations, the General Superintendence would seem to be treating the autonomous exchange of information as a "cartel-like" behavior, indicating that the exchange of information would be subject to a "per se" rather than a rule of reason legal test. However, as the CADE's Tribunal is yet to issue its final ruling on these cases and may adopt a

[3] See the ODD cartel investigation (Case No. 08012.001395/2011-00).

[4] See Case No. 08700.006386/2016-53 (auto-parts in the IAM) and Case No. 08700.000171/2019-71 (market for aviation insurance and reinsurance brokerage).

different approach, the topic on the exchange of competitively sensitive information remains yet to be settled.

The Organization for Economic Co-operation and Development ("OECD") points out some guiding factors that may assist in the assessment on whether an autonomous exchange of competitively sensitive information may amount to an antitrust infringement. These factors would generally relate to: (i) the structure of the market affected; (ii) the characteristics of the information exchanged; and (iii) how the exchange of information occurs.[5] The analysis of the competitive concern that the exchange of sensitive information can raise is made on a case-by-case basis, taking into account all these factors, among others that might be relevant as well.

With regard to the structure of the market affected, a first determinant factor is the level of concentration of the market in which the exchange of information takes place. Coordination between competitors is more easily achieved in concentrated markets, that is, in those markets characterized by the existence of just a few players. This is because the costs of organizing and monitoring the conduct are smaller in view of the reduced number of competitors. Conversely, in fragmented markets composed of a greater number of players, the monitoring and punishment by the non-complying members is more difficult because of the greater number of agents. In more dispersed markets, agents have more incentives not to comply with the terms of the anticompetitive agreement in order to attempt increasing their market shares, thus putting in check the existence of the anticompetitive arrangement.

Other factors relate to the characteristics of the products whose sensitive information is about and the dynamics and innovation of the market in question. Accordingly, the more homogeneous the products

[5] Organization for Economic Co-operation and Development. *Information exchanges between competitors under competition law*. *Policy roundtables*. [S.l.], 2010. Available at: <http://www.oecd.org/competition/cartelsandanti-competitiveagreements/48379006.pdf>. Last accessed on: March 1st. 2019.

are, the greater the chances of the exchange resulting in collusion, and the less dynamic and innovative the market is, the greater the chances that competitors would coordinate.

Not all competitively sensitive information has the potential to generate negative effects when exchanged. In this regard, when assessing whether the exchange of sensitive information may amount to an infringement, authorities typically look at the type of information that is exchanged, their level of detail and individualization, their date and period, the frequency of sharing, and whether they are public, private or confidential information.

Information on prices (including future prices), volumes and commercial strategies would be those that pose more risks of collusion between competitors, since they allow competitors to change and adapt their behavior accordingly. The level of detail of the information is also relevant. Aggregate information would pose fewer risks of inducing competitors to coordinate or monitor the actions of competitors; the less aggregate and individualized the information, the greater the competitive concern of the anticompetitive effect of the exchange.

In general, past and historical information have less potential for collusion than future or current information. This is because future information allows companies to understand what actions its competitors will take, making it easier to coordinate their strategies and reach an agreement. There is no legal provision determining how old an information should be so that it does not raise competition concerns, but in general, information about six months could be considered as historical.

The frequency of sharing of sensitive information also influences the analysis of effects that the exchange can generate. Exchanges that are more frequent are more likely to lead to an anticompetitive outcome, since they allow companies to adapt their strategies to their competitors'. Finally, in general, the exchange of information does not create greater risks when it refers to public information. Conversely, exchanges involving information that is not

readily accessible to the market, because it is unavailable or even because payment is required (for example, large consultancies' market reports), may pose greater concerns.

A third relevant point for the analysis of anti-competitive effects of an autonomous exchange of information is the way such information is changed. It can occur directly between competitors, indirectly, or even through related third parties, such as class associations or consultancies. Antitrust authorities often see the direct exchange of private and confidential information with greater suspicion, even though this does not mean that other forms would not be considered equally problematic.

3. Conclusion

As seen above, the exchange of competitively sensitive information may be either lawful or unlawful under the Brazilian Antitrust Law, relying heavily on a case-by-case assessment. For these reason, companies should be mindful of their interactions with other players in the market, in particular with competitors, seeking to act within the limits set forth in antitrust legislation and to take the necessary precautions to avoid involvement in any unlawful conduct.

ARE NO-POACHING AGREEMENTS AMONG EMPLOYERS AN ANTITRUST VIOLATION IN BRAZIL?

Carolina Destailleur G. B. Bueno
José Rubens Battazza Iasbech
Leonardo Peres da Rocha e Silva
Marcos Pajolla Garrido

1. Are there specific provisions in the Brazilian Antitrust Law about no-poaching agreements?

There are no specific provisions in the Brazilian Antitrust Law (Law N. 12,529/2011) on no-poaching agreements, by which competing firms agree not to solicit or hire each other's employees.[1] Even so,[2] no-poaching agreements may be subject to investigation and even sanctioning in Brazilas the Brazilian Antitrust Law broadly establishes that the following acts may be considered an antitrust violation ("violation of the economic order"), regardless of fault and even if not achieved: (i) limiting, restraining or in any way injuring free competition or free initiative; (ii) controlling the relevant market of goods or services; (iii) increasing profits arbitrarily; and (iv) exercising a dominant position abusively.

No final decision has ever been rendered by the Administrative Council for Economic Defense – CADE on investigations specifically related to the lawfulness of no-poaching agreements. However, in Administrative Case N. 08012.003021/2005-

[1] This definition is used in the "Antitrust Guidance for Human Resource Professionals", issued by the DOJ and the FTC, on October 2016.

[2] The Brazilian Antitrust Law also provides for some examples of conducts that could be considered anticompetitive conducts, such as refusals to deal, predatory pricing, tie in sales, among others.

72, a cartel investigation into private and public bids for the provision of IT services, CADE found that one of the existing agreements was to "respect" employees from competitors and then ruled that such conduct would create artificial conditions for employment, aiming or resulting, for instance, in keeping salaries below average when compared to an otherwise competitive environment. The defendants were punished for cartel behavior but on several counts beyond the no-poaching commitment.

Based on the broad terms of the Brazilian Antitrust Law and CADE's precedents on anticompetitive conduct, the current expectation is that CADE would take into consideration with the statement made by the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") in the sense that no-poaching agreements "*eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.*" [3]

Therefore, to avoid potential investigations and penalties for anticompetitive conduct, companies doing business in Brazil should not only be mindful of the broad terms of the Brazilian Antitrust Law, but also take into consideration the decisions and guidelines issued on the topic in other jurisdictions, as they may impact/influence CADE's enforcement activities.

2. What we expect CADE to learn from foreign authorities that are already prosecuting companies that have entered into no-poaching agreements?

CADE has been cooperating extensively with several foreign authorities not only in relation to merger control functions, but also during probes into anticompetitive practices. CADE's recent Annual

Report[4] lists several cases in which cooperation was intense and shaped (or at least influenced) the final decision rendered by CADE in 2018. It is also interesting to note that in CADE's decision in the Disney/21st Century Fox ("Fox") deal, for instance, CADE's commissioners stressed the discussions held with officials from the US, Mexico and Chile not only on the structural remedies for clearance, but also on the relevant market definition. Fox eventually entered into a merger control agreement with CADE, by which it undertook *"to take all the reasonable measures, or act in a manner that all reasonable steps are taken, to encourage all Key Employees to remain in the Divesting Business, and not to solicit or allocate any Key Employees into Spinco* [the company that will acquire the divested assets]."

Therefore, when it comes to evaluation of no-poaching agreements in the future, it seems fair to expect CADE's cooperation with the DOJ and the FTC, which have been devoting a lot of time in investigations involving such arrangements in the last five years at least.

CADE will most likely consider the fact that the DOJ investigations involving certain high tech companies[5] concluded that those companies were not direct competitors but conspired, via bilateral agreements, to eliminate competition for skilled employees by fixing and suppressing employee compensation to restrict their mobility. CADE would also consider that fast-food franchise agreements have also been facing opposition from the DOJ and from

[4] The 2018 CADE's Annual report is available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/anuario.pdf

[5] Please see: https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al, https://www.justice.gov/atr/case/us-v-lucasfilm-ltd and https://www.justice.gov/atr/case/us-v-ebay-inc.

some Attorneys-General,[6] due to restrictions prohibiting franchisees from hiring employees from other companies within the same chain.

CADE is aware that unreasonable no-poaching agreements are being considered "*per se*" violations in the US and that: (i) such agreements need not take place between companies active in the same relevant product market; (ii) besides administrative prosecution, employees may bring suit for damages against companies involved in no-poaching agreements; and (iii) those involved in illegal no-poaching agreements may also face criminal prosecution.

As CADE has been keen on issuing guidelines on various important topics such as leniency, gun-jumping, horizontal concentration and remedies, for instance, it will definitely be mindful of the terms of the Antitrust Guidance for Human Resource Professionals issued in 2016 by the DOJ and the FTC in an attempt to warn those involved in hiring and compensation decisions about potential antitrust violations.

As CADE's cooperation efforts are not limited to the US authorities (also encompassing relevant authorities in the European Union, China, Russia, South Africa and India, for instance), CADE's investigations into potentially illegal no-poaching agreements will also draw on the experience of other antitrust agencies that have also been discussing the lawfulness of no-poaching agreements, either through formal investigations, or through guidelines describing to what extent they would be considered antitrust violations.

CADE is definitely aware that in Europe, for instance, national competition authorities (including Spain,[7] the Netherlands,[8]

[6] Please see: https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html and https://www.forbes.com/sites/tonymarks/2018/07/22/state-attorneys-general-put-anti-poaching-clauses-in-their-sights/#31a8fcdf7d57.

[7] Please see: https://www.cnmc.es/expedientes/s012008.

Croatia, and France) have investigated no-poaching agreements in the markets of road transport, hospitals, IT employment and PVC flooring, ultimately concluding that such conducts as setting a period during which employees may not work for a competitor or requiring the competitor's approval to hire their current employees could be considered anticompetitive.

Other potential sources for CADE's probe into no-poaching agreements are the study conducted by the Japanese authority[9] pointing to the unlawfulness of certain no-poaching agreements and the Advisory Bulletin issued by the Hong Kong Competition Commission in April 2018, which holds that "*undertakings that reach an agreement in relation to solicitation, recruitment or hiring of each other's employees or classes of employees (non-poaching or other arrangements) or exchange information about their intentions in this respect are, effectively, engaging in market sharing by allocating sources of supply.*"[10]

In view of this attention recently given to non-poaching agreements in various jurisdictions, it stands to reason that companies doing business in Brazil should be aware of such trends, especially now that the new Brazilian Federal Administration seems to understand that more flexible labor laws are important and will continue to be implemented in an effort to reduce the currently high unemployment rates. A reduction in employees' broad rights may also

[8]Please see: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366.

[9] Please see: https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html.

[10] Please see: https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf.

lead to less employment stability, eventually favoring the adoption of practices by some employers to secure key employees within their companies. It is therefore important that companies doing business in Brazil take this international experience as a reference to the best practices most likely to be adopted locally.

3. Are no-poaching agreements allowed in certain specific situations?

Although no-poaching agreements may constitute an antitrust violation, they can be deemed necessary under specific circumstances and should not be immediately ruled out. A review of CADE's precedents shows that, in the context of mergers and acquisitions, no-poaching agreements may be used to prevent the acquired company's employees from being poached by the seller soon after the deal is closed. There seems to be no disagreement amongst CADE's members that the rationale of such an exception would be the same of a non-compete agreement, allowing the acquirer to establish itself in the market without the intervention of the seller (which, in principle, is way more aware of the market specificities). As mentioned, a no-poaching agreement clause has been recently included in the merger control agreement executed by Disney and Fox with CADE for conditional clearance of the deal.

The clause in the merger control agreement executed by Disney/Fox with CADE is not new and has been used in other jurisdictions. The European Commission ("EC") has long established that these clauses may be allowed in a merger context, when directly related and necessary to implementation of the concentration (*ICI/Williams* case).[11] Other examples may also be seen in the EC's

[11] Case N. IV/M. 1167.

decisions in *BASF/INEOS/STYRENE/JV*[12] and *KingFisher/Wegert-Großlabor*.[13]

CADE is certainly aware that the authorities in the US follow a similar approach in connection with the US Third Circuit's ruling in *Eichorn v. AT&T*.[14] It is worth noting that those clauses were considered acceptable under an antitrust perspective, since they were ancillary to the merger and their conditions and terms were reasonably defined.

4. What are the recommendations to companies doing business in Brazil in relation to no-poaching agreements?

Considering the result of investigations already conducted by several authorities on no-poaching agreements, it seems fair to state that companies doing business in Brazil should basically consider that "naked" no-poaching agreements (i.e., those unrelated to a merger/acquisition/joint-venture) may be found illegal and should be avoided. In other words, if the agreement is unnecessary or has no legitimate purposes (in the context of other legitimate agreements), this type of collaboration between employers should by no means take place, even if they are not competitors. Companies must have it clear that the concerns in this respect do no arise solely from written agreements, but may also come from any oral discussions pursuing the same restrictive objective.

Finally, it is worth stressing that any type of agreement on wages, salaries, benefits and other contractual terms may likewise be troublesome. Thus, companies doing business in Brazil should definitely seek expert advice before engaging in any type of agreement of this ilk, especially with a competitor. It is also advisable

[12] Case N. COMP/M.6093.

[13] Case N. IV/M.1482.

[14] 248 F.3d 131 (3rd Cir. 2001).

that human resources professionals and managers in charge of recruitment be included in antitrust compliance programs and training so that they can be fully informed of the best practices and enforcement trends in this regard.

WHAT ARE THE CRIMINAL EFFECTS OF THE LENIENCY AGREEMENT SETTLED WITH THE BRAZILIAN ANTITRUST AUTHORITY?

Gabriel Ursi
Rodrigo Mudrovitsch
Sofia Campelo

1. The sanctions to cartel in Brazil and the Leniency Agreement with Cade

Considering that, in Brazil, participation in a cartel is an illicit act under both administrative and criminal laws – punished respectively with fines and imprisonment –, signing and fulfilling a Leniency Agreement with Cade grants the applicant immunity benefits under these two spheres.

The full immunity under the administrative law only applies if the Antitrust Authority did not have previous knowledge on the illicit reported on the Agreement. Otherwise, the applicant will only benefit from a reduction by one to two-thirds of the applicable fine.

On the criminal level, in turn, such limit regarding the awareness of the facts do not exist, since article 87 of Law No. 12.529/2011 does not require the facts to be unknown. Actually, the rule stablishes that entering into a Leniency Agreement will prevent leniency recipients to be criminally prosecuted and, once the obligations stablished on the Agreement are fulfilled, extinguish their criminal liability.

2. The criminal immunity granted by the Leniency Agreement with Cade

The Leniency Agreement is therefore a *sui generis* mechanism in Brazil, since it is an agreement negotiated with an administrative authority, which also has effects in the criminal sphere. In practice, in order to avoid potential objections and to guarantee that the criminal

immunity will be granted, Cade usually invites the Public Prosecution Service ("Ministério Público" or "MP" in its Portuguese acronym) to participate as a consenting party of the Leniency Agreement.

Although the law only expressly prevents a formal criminal complaint against the leniency recipients from being offered, it does not mean that the immunity depends solely on a commitment by the public prosecutors to not prosecute. Actually, it is also possible that judges, with the consent of the MP, apply immunity to recipients already subjected to criminal lawsuits, when their Leniency Agreements are signed after the presentation of the complaint. [1]

In what regards the extent of the criminal immunity provided by the Leniency Program – to which criminal offenses it applies to –, it is reasonably well established when it comes to strictly private cartels, when competitors in an open market coordinate and agree for the purpose of hindering free competition. In such circumstances, usually only one criminal offence is committed – the cartel itself – and granting the immunity based on the Leniency Agreement is mostly unequivocal.

2.1 The immunity in the specific context of cartel in biddings

It is a completely different situation when it comes to cartel formation in the specific context of public procurement. As it has been identified internationally[2], it is common for cartels in biddings to be committed along with other offenses.

[1] This is the position adopted by the 7th Federal Court of Rio de Janeiro – under whose jurisdiction are the cases related to the Carwash Operation in that State – in the Criminal Suit nº 0017513-21.2014.4.02.5101.

[2] Already in 2010, the contributions of different countries to the edition of the "Global Forum on Competition" - organized by the OECD indicated that the relation between corrupt and anticompetitive practices is recognized worldwide: OCDE, Global Forum On Competition. Round table on collusion and corruption on public procurement. Available in:

This has become clear in the national context by the results of Car-wash operation, a major investigation conducted by Brazilian authorities into unlawful actions taken by public and economic agents that uncovered the practice of several crimes, such as bribery of public agents and/or violation of criminal laws that specifically protect the integrity of the bidding procedure.[3]

In this context, the analysis of the criminal effects of Leniency Agreements is becoming much more complex, especially in what refers to the possibility of extending the immunity to crimes related to the confessed anticompetitive practice, besides cartel itself.

The issue is relevant because it deeply interferes with the consistency of the Brazilian leniency program, which will be more attractive the more it reassures the potential applicants that the admission of the facts related to the cartel will not have additional and unexpected criminal repercussions.

2.2 The legal debate on the extent of the criminal immunity

Brazilian Antitrust legislation currently offers an attempt to solve this issue. This is so because the immunity set forth by the Leniency Program covers, according to Article 87 of Law No. 12.529/2011, criminal offenses beyond those set forth under the Economic Crimes Act (Law No. 8.137/1990). The rule extend the benefits of a Leniency Agreement to other *"crimes directly related to the cartel activity"*, expressly mentioning offenses provided under the

<https://www.oecd.org/competition/cartels/46235884.pdf>. Acessed in 26 February 2019, p. 10.

[3] An analysis of Cade's data shows a significant increase in leniency agreements in the context of the Carwash Operation. From 2015 to 2018, the Antitrust Authority settled 47 Leniency Agreements, of which 23 relate to facts investigated within the scope of Carwash Operation. Available in: <http://www.cade.gov.br/assuntos/programa-de-leniencia>. Acessed in 26 February 2019

General Procurement Act (Law No. 8.666/1993), and the article 288 of the Criminal Code (Criminal Conspiracy).[4]

Nevertheless, knowing that crimes committed in the context of an anti-competitive behavior are not limited to those set forth in the cited Article, two relevant questions remain: (i) whether immunity can be granted to crimes not expressly listed in the provision, such as, e.g., bribery; and (ii) if so, how to define what is a "*crime directly related to the cartel activity*"?

Although there is no consensus in this respect, the best interpretation of this legal provision seems to be that the crimes listed on Article 87 are only examples given by the law. This is so because, when expressly naming the criminal offenses that are considered related to anticompetitive practices, the provision uses the expression "such as", indicating that they are only illustrative of the kinds of crimes to which the norm intends to apply[5].

This reading of the article is also adequate from a policy viewpoint since it provides legal certainty on the extent of the immunity for potential applicants, encouraging cartel members – especially international - to apply for Leniency in Brazil[6]. In addition, it is worth highlighting that the "Guidelines for CADE's Antitrust Leniency Program", produced by the Antitrust Authority itself, when reviewing

[4] Criminal Code: "Article 288. When 3 (three) or more people associate with the specific purpose of committing crimes. (…) "

[5] MENDRONI, Marcelo Batlouni. Crime Organizado: aspectos gerais e mecanismos legais. 5. ed. São Paulo: Atlas, 2015, p. 326.

[6] MARTINEZ, Ana Paula. Challenges Ahead of Leniency Programmes:: The Brazilian Experience. Journal of European Competition Law & Practice Advance Access, Oxford, v. 1, n. 1, p.1-8, fev. 2015, p.7

this legal provision, recognizes that the "listing of crimes directly related to the practice of cartels in non-exhaustive" [7]

Notwithstanding the controversies regarding this issue, Brazilian legal scholarship have been proposing some criteria derived from criminal law and criminal procedural law in order to settle an appropriate interpretation for this provision by.

Some scholars suggest the use of a criterion, derived from criminal law, which would extend the immunity to "previous facts necessary or normally used to commit a cartel "[8]. Under this parameter, personal injuries, for example, would not be covered by the immunity, as they are clearly not a normal stage of preparation or execution of a cartel.

Another suggestion is to extend the immunity to crimes (i) committed to facilitate or to conceal the cartel (e.g. bribery to obtain information on a bidding process); (ii) committed to seek impunity or to secure the advantage gained through cartel practice (e.g. the destruction of public documents that could help to uncover cartel conducts); or (iii) whose evidences are related to the probative material of the cartel (what can cover a great variety of criminal offenses)[9].

2.3 The criminal immunity in the view of the authorities

[7]Available in: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia_programa-de-leniencia-do-cade-final.pdf>, p.20 Accessed in 26 February 2019

[8] ATHAYDE, Amanda; GRANDIS, Rodrigo de. Programa de Leniência Antitruste e Repercussões Criminais: Desafios e Oportunidades Recentes. In: CARVALHO, Vinicius Marques de (Org.). A Lei 12.529/2011 e a Nova Política de Defesa da Concorrência. São Paulo: Editora Singular, 2015. p. 287-304, p. 292

[9] These criteria are based on Brazilian procedural law provisions used to reunite different criminal procedures under the same jurisdiction, when they are related to one another ('conexão de crimes').

Unfortunately, there are few practical cases related to this issue available for analyses, and even the existing ones are not very conclusive.

In part, this is because most of the cartel schemes unveiled during the Car-wash Operation were settled not only through a Leniency Agreement signed with Cade, but also using recently introduced criminal agreements ("rewarded collaboration" [10]), which are negotiated directly with the criminal authorities and can cover a large range of criminal offenses. Thus, since admitted crimes can be protected simultaneously by both of these mechanisms, it is not possible to state in most cases whether immunity stems directly from the agreement signed with Cade or from these other criminal mechanisms.

In any case, some indicative behaviors are noteworthy: in different situations, when public prosecutors were asked to express their views on the extent of the immunity granted by the Leniency Agreement with Cade, they refused the idea of offering benefits beyond cartel and crimes regarding public bids.[11]In spite of this, until now, the Public Prosecutor's Office has not offered any criminal complaint about offenses

[10] Brazil established in 2013 (Law n. 12.850/2013) a specific collaboration mechanism to be used between procedural parties in cases involving criminal organizations, the so-called "rewarded collaboration".

[11] This was the opinion of the Public Prosecutor's Office of the State of Rio de Janeiro, when asked about the Leniency Agreement signed by Camargo Corrêa with Cade in the scope of the "Angra 3 Nuclear Plant" case and of the Public Prosecutor's Office of the State of São Paulo, commenting on the agreement signed by Siemens on the context of the "subway cartel". Available in: <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-forca-tarefa-do-mpf-e-cade-celebram-acordo-de-leniencia-com-camargo-correa>. Accessed in 28 February 2019

committed in the context[12] of the cartel reported to Cade on a Leniency Agreement. [13]

However, as stated, the evidences are still ambiguous and do not allow us to settle precisely what is the Brazilian criminal authorities' position on this subject.

3. Conclusion

The Antitrust Leniency Agreement grants - without major controversies – criminal immunity to their applicants in cartels committed through collusion between private agents, without the practice of other offenses.

Criminal immunity is normally obtained by preventing the prosecution of the cartel participants, but can also be achieved through the suspension of ongoing criminal proceedings.

The participation of the Public Prosecution Service in the signing of the Leniency Agreement offers an additional degree of legal security to leniency recipients.

However, there is room to increase even more the security of Leniency Agreements, especially when dealing with cartels that also involve public authorities, such cartel in biddings, when the practice of other crimes, besides cartel, is very common.

Brazilian legislation, as well as the legal scholarship's arguments offer strong reasons to defend that different crimes related to the cartel activity must also be covered by the immunity granted by the Leniency Program. However, the recent experience of the Car Wash

[12] The cases in which the group's illicit conducts go far beyond the context of the cartel are not being considered in this statement.

[13] Ana Paula Martinez has also come to this conclusion in an analysis carried out in 2015: MARTINEZ, Ana Paula. Challenges Ahead of Leniency Programmes: The Brazilian Experience. Journal of European Competition Law & Practice Advance Access, Oxford, v. 1, n. 1, p.1-8, fev. 2015.p.7

Operation still does not allow conclude with confidence that this is the understanding applied to effectively negotiated cases.

This seems to be one of the great future challenges for the strengthening of the Brazilian antitrust leniency program.

HOW DOES CADE DEAL WITH SHARING OF EVIDENCE WITH OTHER AUTHORITIES?

Adriana Giannini
Lígia Melo
Renata Arcoverde

1. Introduction

Investigations involving more than one type of legal infringement are becoming more frequent and, as a result, cooperation between authorities is on the rise in Brazil. Governmental authorities seem to have realized that the exchange of information and evidence between them is not only desirable but also more efficient, as it unites efforts to detect and investigate unlawful behavior.

The Administrative Council for Economic Defense – CADE is frequently stressing the value of coordinated actions between authorities, and institutional cooperation is listed as one of the pillars of the current administration in CADE's 2018 Yearbook[1]. CADE has also manifested to the OECD that "*collaboration with other agencies and public bodies, whether formally or informally, has been a keytool in the protection and promotion of competition*"[2].

In fact, anticompetitive conducts are frequently part of schemes that may also result in violation to the anti-bribery and public bid statutes, among others. In this case, the investigation of the same facts will fall under the jurisdiction of different authorities, which will typically cooperate to first detect and then investigate these types of conducts. A cartel to rig a public bid backed by payment of bribes to public officials,

[1] CADE 2018 Yearbook, page 14.

[2] OECD Peer Reviews of Competition Law and Policy Brazil 2019, page 145.

for instance, can result in liabilities under the jurisdiction of at least the following authorities:

(i) CADE - which enforces the anti-cartel law[3] under the administrative sphere;

(ii) Prosecution Offices - which enforce the anti-cartel[4], anti-bribery[5], and public bidding[6] laws under the criminal sphere and also the improbity law (among others)[7];

(iii) Audit Courts - which are in charge of determining if the damage arising from the violations affected the national or state treasuries[8];

(iv) Controller Offices - which enforce the anti-bribery law[9] under the administrative sphere.

CADE may also cooperate with regulators in order to deepen its knowledge of a certain market that is under scrutiny. In fact, CADE has co-operation agreements in place with many specialized agencies or governmental bodies, such as the Brazilian Central Bank (BACEN); National Institute of Industrial Property (INPI); the National Petroleum, Natural Gas and Bio-fuel Agency (ANP); the National Agency for Supplementary Health Services (ANS); the National Health Surveillance Agency (ANVISA); the National Agency for Electrical Energy (ANEEL); the National Agency for Civil Aviation (ANAC); the National

[3] Law N. 12,529/2011

[4] Law N. 8,137/1990

[5] Law N. 2,848/1940

[6] Law N. 8,666/1993

[7] Law N. 8,429/1992

[8] Law N. 8,443/1992

[9] Law N. 12,846/2013

Waterway Transportation Agency (ANTAQ); and the National Agency for Land Transportation (ANTT).

The OECD Peer Review describes the number of cooperation agreements that CADE has in place as impressive, and points out that such agreements go beyond a statement of intent – leading to actual cooperation (either formal or informal) between CADE and other governmental authorities[10]. In this context, where authorities' enforcement is increasingly coordinated, companies should be prepared to conduct a multidisciplinary risk assessment of investigations opened against them, even if at a first glance allegations seem focused in only one area of law.

2. Multidisciplinary investigations: Cooperation with Prosecution Offices, Controller Offices and Audit Courts

The more emblematic example of a multidisciplinary investigation is certainly the Car Wash Operation. CADE's 2018 Yearbook reports that the agency and the Car Wash taskforce kept an intense partnership as of 2015, after the execution of the first leniency agreement related to the antitrust violations involved in the Car Wash Operation[11]. The Yearbook also mentions the creation of the interinstitutional lab by the Federal Prosecution Office, composed by CADE, the Federal Audit Court ("TCU"), the Federal Controller Office ("CGU") and the Paraná Prosecution Office – aiming at coordinating the investigative efforts related to the Car Wash Operation[12].

CADE and the Prosecution Offices have a history of cooperation that dates back to long before the Car Wash Operation. This history mainly includes joint operations to investigate cartels, which have made it easier for both authorities to have access to the set of evidence relating to a violation. Prosecution Offices are also typically part of

[10] OECD Peer Reviews of Competition Law and Policy Brazil 2019, age 151.

[11] CADE 2018 Yearbook, page 29.

[12] CADE 2018 Yearbook, page 29.

leniency agreements negotiated by CADE, and thus have access to evidence provided by companies in this context.

More recently, on March 15, 2016, CADE and the Group for Combating Cartels at the Federal Prosecution Office in São Paulo entered into a memorandum of understanding in which both parties commit to cooperate in investigations related to the so-called "*crimes against the economic order*"[13]. The document also determines that individuals entering into settlement agreements with CADE can request the authorities' assistance to intermediate negotiations of plea bargains with the Federal Prosecution Office, and vice-versa. This enables both authorities to have access to the information and evidence provided by the individuals in the context of their collaboration to the investigations.

As announced in CADE's 2018 Yearbook, CADE has reached the milestone of 22 cooperation agreements with State Prosecution Offices[14]. In the same document, CADE acknowledges that it can benefit from the local presence of the State Prosecution Offices, and stresses that it frequently helps local prosecutors to analyze documents obtained in dawn raids and identify economic evidence of cartel behavior.

The cooperation with the Prosecution Offices has also included the undertaking of joint dawn raids, in which CADE has often taken part over the past years. In 2018, for instance, 3 out of the 4 dawn raids in which CADE took part were carried out in cooperation with Prosecution Offices[15] and other governmental authorities:

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[13] Crimes set forth in Law No. 8,137/1990, which include abuse of market power and agreements between competitors to fix prices, allocate markets or control supply networks, among others.

[14] CADE has cooperation agreements in place with Prosecution Offices of the following states: Acre, Alagoas, Amapá, Bahia, Ceará, Federal District and Territories, Espírito Santo, Goiás, Maranhão, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Pará, Paraíba, Paraná, Piauí, Rio Grande do Sul , Rondônia, Santa Catarina, São Paulo, Sergipe, Tocantins.

[15] CADE 2018 Yearbook, page 4.

i. Resonance Operation – dawn raids carried out on July 4, 2018 by CADE, the Federal Prosecution Office, TCU and CGU to investigate alleged cartel, bid rigging and bribery conducts[16];

ii. Nexus Operation – dawn raids carried out on July 17, 2018 by CADE and the Espírito Santo Prosecution Office to investigate alleged cartel, bid rigging, bribery and money laundering conducts [17];

iii. Container Operation – dawn raids carried out on July 24, 2018 by CADE and the Paraná Prosecution Office to investigate alleged cartel, bid rigging and bribery conducts, in addition to environmental crimes[18].

Similarly, CADE and TCU executed a cooperation agreement on December 21, 2018 to improve the detection and prosecution of anticompetitive conducts in the context of public tenders[19]. The agreement sets forth that CADE can request information about ongoing investigations conducted by TCU, and vice-versa. It also enables CADE and TCU to have mutual access to the tools developed by each of them to detect anticompetitive behavior in public tenders. TCU will have access to Project Brain (a software developed by CADE to map irregular

[16] Available at <http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/operacao-ressonancia-mpf-rj-aprofunda-investigacao-sobre-fraudes-no-into>. Accessed on 28 Feb. 2019.

[17] Available at <https://www.mpes.mp.br/Arquivos/Modelos/Paginas/NoticiaComFoto.aspx?pagina=2525>. Accessed on 28 Feb. 2019.

[18] Available at <http://www.mppr.mp.br/2018/7/20683,10/Operacao-Container-apura-fraudes-em-licitacoes-municipais-para-coleta-de-lixo.html>. Accessed on 28 Feb. 2019.

[19] Agreement of Technical Cooperation and Mutual Assistance between the Federal Audit Court and CADE (Federal Audit Court Proceeding N. 033.823/2018-9), executed on December 21, 2018.

bidding patterns[20]) and CADE will have access to LabContas (a database from TCU that provides daily reports on public tenders with indication of potential unlawful behavior[21])[22][23]. Before the execution of this agreement, CADE and TCU had already cooperated in cases related to the Car Wash Operation. In fact, this caused the authorities to identify the need for clearer rules concerning the sharing of evidence between them – which ultimately led to the abovementioned agreement[24].

CADE also has a similar agreement in place with the CGU. According to the document executed on January 22, 2014, CADE and CGU commit to send to each other evidence related to bid rigging and other frauds to the bidding procedure[25]. In addition to that, on July 1, 2018 CADE and CGU entered into a cooperation agreement focused on the exchange of information for the purposes of investigating transnational bribery[26]. OECD Peer Review also reports that the CGU

[20] Available at: <http://www.cade.gov.br/noticias/cade-e-pf-realizam-operacao-para-investigar-cartel-em-licitacoes>. Accessed on 28 Feb. 2019.

[21] Available at: <http://www.atricon.org.br/imprensa/destaque/tcu-usa-tecnologia-para-combater-fraudes/>. Accessed on 28 Feb. 2019.

[22] See Clauses 2.1 and 3.5 of the agreement. It is worth highlighting that Clauses 3.10 and 3.11 set forth that in all cases, the confidentiality of the information must be respected by the authority receiving it. The agreement also requires that the data and information shared between the authorities is only used in formal investigations.

[23] CADE also has cooperation agreements in place with the Audit Courts from the States of Sao Paulo, Rio de Janeiro and Minas Gerais, as well as with the Audit Court of the city of Sao Paulo.

[24] Available at: <https://www.jota.info/opiniao-e-analise/artigos/articulacao-entre-cade-e-tcu-no-combate-a-fraudes-a-licitacao-25012019>. Accessed on 28 Feb. 2019.

[25] Cooperation Agreement No. 2/2014 between CADE and CGU, executed on January 22, 2014.

[26] Joint Decree No. 4 of CADE and CGU, dated May 30, 2018.

has granted CADE with access to the Public Expenditure Observatory – a useful database relating to public expenditure that could be screened using Project Brain's software to detect patterns that indicate anticompetitive behavior[27].

CADE will typically protect the confidentiality of certain documents presented by companies in the context of settlement or leniency agreements. Resolution CADE N. 21/2018 dated September 11, 2018 establishes that the history of conduct presented by settling companies and other documents that fall within confidentiality provisions established by law, regulation or court order will not be shared with third parties. Exceptions to this would be when there is a court order, a legal obligation or an authorization from the settling companies to share the documents. Nonetheless, CADE Resolution No. 21/2018 confirmed that the Prosecution Office who is part of the leniency agreement will have full access to the documents and information presented by the company.

3. Conclusion

Cooperation between authorities aiming at sharing knowledge, information and evidence seems to be a priority agenda not only for CADE, but also for all other governmental authorities somehow involved in the fight against corruption and other related violations – a trend in Brazil that was enhanced after the Car Wash Operation. In fact, this type of cooperation enables authorities to join forces in the investigation of big schemes involving multiple violations to the law in a very efficient way. For companies, this means that an investigation started by one authority may be only the start of a series of other investigations, thus triggering multiple liabilities relating to a single conduct. In order to face this reality, coordination will also be required in the defense front.

[27] OECD Peer Reviews of Competition Law and Policy. Brazil. 2019. Page 59.

DOES THE BRAZILIAN ANTITRUST AUTHORITY INVESTIGATE CONDUCTS CARRIED ABROAD?

Fernanda Nemer
Gabriela Monteiro
Leonardo Duarte
Thaiane Abreu

1. Introduction

The Administrative Council for Economic Defense – CADE is the Brazilian Antitrust Authority in charge of investigating and punishing anticompetitive conducts, including conducts carried out abroad if they may produce effects in Brazil. Article 2 of the Brazilian Antitrust Law (Law N. 12,529/2011) establishes that its enforcement is not limited to conducts performed within the national territory, but it also includes conducts performed abroad that may produce effects in Brazil, even if such effects are not achieved.[1]

CADE has developed an effects theory when analyzing international conducts that may have effects in Brazil, particularly international cartels. This chapter provides an overview of the relevant decisions in which CADE established this cause-effect connection between conducts abroad and their possible effects in the Brazilian markets.

2. Cade's jurisdiction to investigate conducts abroad and the effects theory

Article 2 of the Brazilian Antitrust Law states that its application is not restricted to anticompetitive conducts performed within the national territory, and expressly extends its applicability to conducts

[1] See also Article 36 of the Brazilian Antitrust Law.

carried out abroad that may produce effects in Brazil. Therefore, the Brazilian Antitrust Law adopted an effect-based approach, specifically providing for its extraterritorial applicability to conducts performed abroad that may have at least the potential of producing effects in the national territory. In order to ascertain its jurisdiction to investigate foreign conducts and to successfully prosecute and convict foreign violators, CADE must demonstrate that the conduct under investigation could have at least the potential of producing effects in Brazil.

CADE has developed this effect-based approach mostly in international cartel cases, but the same rationale may also be extended to unilateral conducts performed abroad that may have effects in Brazil. According to CADE's case law, international cartels may be classified as follows from the perspective of their possible effects in Brazil: (i) **international cartels with direct effects in Brazil**, where the cartel members had direct sales (i.e. export sales) in Brazil that were affected by the collusion; (ii) **international cartels with indirect effects in Brazil**, where the cartel members did not have direct sales in Brazil, but final products manufactured based on inputs supplied by the cartel members elsewhere and affected by the collusion ended up exported to Brazil; (iii) **international cartels for the allocation of markets that include Brazil,** where there is evidence that Brazil was also covered by the market allocation agreement, and (iv) **international cartels with no effects in Brazil**, where there is no evidence that the cartel produced or could produce effect in Brazil.

3. Cade's caselaw on international cartels investigations in Brazil

Until 2018, CADE analyzed over 25 cases involving allegations of international cartels.[2] The decision on the *Vitamins Cartel Case*,[3] in 2007, is considered the leading case on this matter in Brazil and paved

[2] SEI/CADE N. 0518637.

[3] Administrative Process N. 08012.004599/1999-18. Reporting Commissioner Ricardo Villas Bôas Cueva. Decided by the Tribunal on April 11, 2007.

the way for the investigation of other international cartels by CADE under the more efficient framework established by Law N. 12,529/11. The Brazilian investigation into this cartel started after the Brazilian authorities became aware of leniency and settlement agreements executed with foreign antitrust authorities, and of decisions rendered abroad. In its decision in this case, CADE analyzed many factors to verify the possible effects caused in Brazil and ultimately concluded that there was sufficient evidence that the cartel had effects in this country, because: i) the imported goods represented almost all of the Brazilian vitamins market and the defendants were responsible for supplying a significant amount of vitamins to Brazil; ii) the defendants' market shares in Brazil were almost identical to the "international budget" that they had divided among themselves in their anticompetitive agreement; and iii) it would not be logical for an international cartel for the allocation of markets, including the Latin American market, to exclude Brazil in the market division.

The *Vitamins Cartel Case's* decision established the standard approach for the assessment of effects in Brazil that would be followed by CADE in the next international cartel investigations, since most of the international cartel cases decided by CADE involved situations in which the defendants had direct sales to Brazil through exports. This was the case in the *Air Cargo Cartel Case*[4], in which CADE concluded that the cartel agreed to fix prices and dates for the implementation of a fuel surcharge for international air cargo transportation worldwide. CADE considered that the fact that the companies involved in the cartel controlled close to 60% of the Brazilian air cargo market in the period under investigation was a strong evidence that their agreement abroad affected the national territory.

On the other hand, the analysis of international cartels that could have indirect effects in the national territory has been proving to be much

[4] Administrative Process N. 08012.011027/2006-02. Reporting Commissioner Ricardo Machado Ruiz. Decided by the Tribunal on August 28, 2013.

more burdensome to CADE than those where defendants had direct export sales to Brazil. These situations required CADE to adopt a broader interpretation of the effects doctrine to assess possible effects in cases involving indirect sales in Brazil. In the *DRAM Memory Cartel Case*, CADE concluded that DRAM memory manufacturers had formed a bid-rigging cartel to fix prices and sales strategies in bids promoted by original equipment manufacturers – OEMs abroad. In assessing whether the conduct could have affected the Brazilian market, the CADE argued that the defendants were responsible for providing practically all the DRAM memory in the Brazilian market – most of which had entered the country equipped in other products –, considering that there was no domestic production for this product in Brazil. Sales of DRAM products used to be negotiated abroad, even in cases where these products were sent directly to Brazil by the defendants.

In the *Marine Hose Cartel Case,*[5] in addition to the fact that the cartel members had direct export sales to Brazil, CADE also considered that the cartel agreement involved the geographic allocation of markets that also included Brazil. According to CADE, Petrobras acquired marine hoses through certain procedures, in relation to which the competitors that participated in the conduct would have previously discussed and allocated results among themselves. The members of the cartel that were not awarded certain Petrobras' contracts proposed offers to cover the winning member's prices and were then compensated in other countries. This, in CADE's understanding, was a strong evidence that the cartel had effects in the Brazilian market.

As for international cartels with no effects in Brazil, in 2016, CADE concluded the judgement of the *Elastomers Cartel Case*,[6] deciding for the closing of the investigation due to the lack of evidence

[5] Administrative Process N. 08012.010932/2007-18. Reporting Commissioner Márcio de Oliveira Júnior. Decided by the Tribunal on February 25, 2015.

[6] Administrative Process N. 08012.000773/2011-20. Reporting Commissioner João Paulo de Resende. Decided by the Tribunal on August 31, 2016.

that the conduct could have affected the Brazilian market. The conduct consisted of meetings between competitors to fix prices for the Chinese and Hong Kong markets. According to the leniency applicant, these prices had possibly been used as reference prices worldwide, including for the national territory. Nevertheless, according to CADE, the confession from the leniency applicants that they also used the reference prices agreed upon with competitors as calculation basis for the prices practiced in the Brazilian market, and the assumption that other competitors behaved in the same manner, were not considered enough to conclude that the alleged conduct would have potentially affected the national territory.

The *Compressors Cartel Case*[7] deserves special notice, as CADE, in a non-unanimous decision, adopted an atypical approach. CADE's General Superintendent – GS had previously concluded that this case involved "two cartels": i) a national cartel involving the two local manufacturers; and ii) a foreign cartel that would not have affected the Brazilian market. According to the GS, it would not make sense for the foreign manufacturers to discuss the Brazilian market, as the compressors market was clearly a national market due to the high applicable import taxes and transportation costs, as well as the fact that the local manufacturers were able to supply the total local demand at a lower price. CADE's Tribunal, however, concluded that the evidence in the case files demonstrated that discussions abroad had mentioned the Brazilian market, and that the foreign manufacturers were present in the meetings in which Brazil was discussed by the national manufacturers. According to the majority of the members of the Tribunal, this aspect was considered enough to establish at least potential effects of the conducts in Brazil.

[7] Administrative Process N. 08012.000820/2009-11. Decided by the Tribunal on March 16, 2016.

In the recent *Color Picture Tubes Cartel Case*,[8] CADE established a relevant precedent regarding the defendants that may be investigated for international cartel practices in Brazil. According to this decision, since cartels are considered a multi-perpetrator offense, all companies that participate in a cartel are responsible for the possible effects that may be caused by this conduct. Thus, even if only one of the cartelized companies sells its products in Brazil, all of them may be prosecuted and convicted by the Brazilian antitrust authority for the possible anticompetitive effects of the practice in Brazil.

Finally, CADE has recently issued its decisions in the *Optical Disk Drives (ODD's) Case*[9] and *LCD Panel Case*[10] and, in both cases, CADE concluded that the fact that ODDs and LCD panels consumed in Brazil depended exclusively on the external market, would be sufficient to demonstrate that any collusion in these worldwide markets would necessarily affect the Brazilian markets. Therefore, the evidence that the defendants have colluded to fix prices and sales conditions abroad was considered sufficient to base the conviction of the defendants in Brazil.

4. Conclusion

The Brazilian Antitrust Law provides for an effect-based approach that expressly extends its application to conducts performed abroad and that may have at least the potential to produce effects in Brazil. An analysis of CADE's case law in international cartel cases reviews that this authority has adopted a very broad interpretation to establish this cause-effect connection between conducts abroad and their possible effects in the Brazilian markets, making use of indirect evidence

[8] Administrative Process N. 08012.002414/2009-92. Decided by the Tribunal on August 28, 2018.

[9] Administrative Process N. 08012.001395/2011-00**.** Decided by the Tribunal on January 30, 2019.

[10] Administrative Process N. 08012.011980/2008-12. Decided by the Tribunal on February 27, 2019.

and practically shifting to the defendants the burden of proof to demonstrate that certain international cartels would not have the potential of producing effects in Brazil. It is important that foreign companies be aware that possible anticompetitive conducts carried out abroad and that may produce effects in Brazil, may be subject to investigation and severe penalties in Brazil under the Brazilian Antitrust Law, even in case of companies that do not have any direct sales to Brazil.

WHAT ARE THE CRITERIA FOR THE CHARACTERIZATION OF HUB-AND-SPOKE CONSPIRACIES IN BRAZIL?

Daniel Douek
Felipe Pelussi
Ricardo Pastore [1]

1. Introduction

Over the past two decades, the Brazilian antitrust authority (Administrative Council for Economic Defense, or "CADE") has placed its efforts in developing an anti-cartel enforcement agenda in collaboration with other Brazilian government bodies and competition authorities in other jurisdictions. This agenda not only increased the number of domestic cartel investigations and settlements with firms and individuals involved in cartel practices, but also enabled CADE to investigate practices that may facilitate collusion between firms, one of them being hub-and-spoke conspiracies.

This article focuses on the criteria that CADE's General Superintendence (or "GS") has been using to characterize and evaluate hub-and-spoke conspiracies in Brazil in recent investigations, most of which are still ongoing and subject to review by CADE's Administrative Tribunal (the "Tribunal")[2]. In addition, to the extent possible, the chapter

[1] The authors thank Daniel Favoretto Rocha and Raíssa Leite de Freitas Paixão for their support and assistance with the research of the precedents discussed in this article.

[2] CADE's structure is composed by three departments, namely, the Administrative Tribunal (Tribunal), the General Superintendence (GS) and the Department of Economic Studies ("DEE"). The GS is the department responsible for investigating anticompetitive conducts. Upon conclusion of such investigations, the GS issues an opinion recommending that the Tribunal either

also evaluates whether these criteria are so far consistent with the case law of hub-and-spoke developed in other jurisdictions.

2. Hub-and-spoke conspiracies

2.1 General aspects

Hub-and-spoke conspiracies are a sort of 'hybrid cartel' in which a firm (the hub) organizes collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints[3]. These conspiracies are typically structured in two phases. In the first phase, there is a direct exchange of strategic and sensitive information between A (spoke) and B (hub). In the second phase, B (hub) discloses such information to one or more of A's competitors (e.g., C), and C (spoke) relies on this information and uses it[4].

As frequently noted, firms use hub-and-spoke arrangements to overcome three key problems involved in forming and maintaining cartels, namely (a) the problem of selecting and coordinating collusive strategies; (b) the problem of monitoring members and deterring defections; and (c) the problem of preventing entry or expansion of non-members[5]. In other words, through hub-and-spoke cartels, firms are able to seek collusive behavior by avoiding the need for direct horizontal coordination.

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dismisses the investigation or impose fines and other applicable sanctions on the defendants. The Tribunal, by its turn, is composed by seven Commissioners and is responsible for issuing final decisions on antitrust investigations. Finally, the DEE provides economic support to both the GS and the Tribunal.

[3] Vereecken, Bram, *Hub and Spoke Cartels in the EU Competition Law*, 2015, p. 27.

[4] Vereecken, Bram, *Hub and Spoke Cartels in the EU Competition Law*, 2015, p. 12.

[5] Orbach, B., *Hub-and-Spoke Conspiracies*, The Antitrust Source, 2016, p. 1.

Clearly, hub-and-spoke agreements pose an important policy issue to antitrust and other authorities, which is to separate unlawful conspiracy facilitated through vertical relationships from lawful vertical behavior that firms use in their relationships with multiple upstream or downstream trading partners. Overall, authorities in the US, UK and Europe have tackled this issue by adopting certain standards of proof. Such standards require proof of a contactless agreement between spokes (i.e., the "rim requirement" applied by US courts[6]) or the existence of an 'intentional element'[7] (as discussed in the UK) or a 'joint intention'[8] (as defined by European Commission) of two or more parties to influence

[6] Under this standard of proof, there needs to be a rim between competitors, in which, although they do not make direct contact with one another, they use their vertical relationship with the hub to make indirect contact between themselves, for collusive purposes. This is the plus factor or the "rim requirement". See e.g. Masonite, 316 US (1942); Dickson, 309 F.3d (2002); and PepsiCo, 315 F.3d (2002). US Courts infer that the rim exists when (i) two or more competing firms have agreements with a third party (e.g. an agent vertically related), (ii) such agreement is only beneficial when another competing firm is adopting the same conduct or following the same guidance, and (iii) the third party acts in a way that coordinates the competing firms (e.g. exchanging sensitive information). See e.g. Toys "R" Us, 221 F.3d (2000); Guitar Center, 798 F3.d (2015); Dickson, 309 F.3d (2002); Interstate Circuit, 208 US (1939); and the E-Book case, 791 F.3d (2015).

[7] Case CE/3094-03, *Dairy retail price initiatives* (2011); and Case 1188/1/1/11, *Tesco v Office of Fair Trading (2012) CAT 31*.

[8] According to the AC-Treuhand AG case, when the undertaking takes part of a vertical agreement where it "*should or at least could have known that its own unlawful conduct was part of an overall plan*", the line is drawn between a mere anticompetitive agreement and a part of a hub-and-spoke conspiracy. (European Commission, Case COMP/E-2/37.857 "*Organic Peroxides*", 10.12.2003, §321) When such arrangement occurs, the European Court of Justice understands that there is a joint intention for collusive purposes, regardless of the fact that one of the participant does not integrate the same relevant market. (European Court of Justice, AC-Treuhand AG v. European Commission, Case T-99/04, 08.07.2008, §122) In the same sense, see Case COMP/39.847 – E-books.

market conditions through information exchange between hubs and spokes.

2.2 CADE's case law

According to publicly available information[9], the GS has opened six (6) investigations dealing with hub-and-spoke cartels since 2014. As indicated in Table 1, the GS has recently dismissed one of these investigations and is now in the process of collecting evidence for other four. In addition, the GS has already issued its technical note recommending condemnation of another case, but this case has not been ruled by CADE's Tribunal yet.

Table 1 - Investigations concerning hub-and-spoke conspiracies

Case	Defendant(s)	Opening Date of Administrative Process	Relevant market	Current Status
Administrative Process N. 08012.007043/2010-79	Scheiner Solutions Comércio e Serviços Ltda. and others	03.18.2014	Interactive projectors and whiteboards	Fact-finding
Administrative Process N. 08700.008098/2014-71	Positivo Informática S/A and others	07.23.2015	IT materials and equipment	Fact-finding
Administrative Process N. 08700.009879/2015-64	Santa Catarina's Oil Products Retailers Trade Union (Sindipetro – SC) and others	10.02.2015	Distribution and resale of fuels	Review by CADE's Tribunal
Administrative	Liquigás	08.25.2016	Distribution	Fact-

[9] The authors note that this survey relies solely on public information available in CADE's website. The GS may have already opened other investigations dealing with hub-and-spoke conspiracies, but these investigations, if existent, are confidential or at least not fully available.

Case	Defendant(s)	Opening Date of Administrative Process	Relevant market	Current Status
Process N. 08700.003067/2009-67	Distribuidora S/A and others		and resale of LPG	finding
Administrative Process N. 08012.006043/2008-37	Federal District's LPG Transporters and Retailers Trade Union (Sindvargas/DF) and others	09.19.2016	Distribution and resale of LPG	Fact-finding
Preparatory Proceeding N. 08700.008318/2016-29	Uber do Brasil Tecnologia Ltda.	02.13.2017	Paid private transportation services for individual passengers	N/A (case dismissed by the GS)

CADE's Tribunal, which is responsible for adjudicating cases investigated and prosecuted by the GS, has not yet ruled a case involving hub-and-spoke conspiracies, much less expressed its view on the standards of proof applicable to this kind of collusion. Nevertheless, the information available in the cases mentioned above provide at least an indication on the criteria used by the GS to characterize and evaluate hub-and-spoke conspiracies.

The GS opened the cases listed in Table 1 based on evidence[10] collected in its own investigations or provided by third parties (such as the Prosecutor Office and regulators). In all of the cases, the firm acting as a hub operated in the upstream market, mostly as distributor of industrial (e.g., liquefied petroleum gas, or LPG) or consumer goods

[10] The GS considered the following elements as potential evidence of hub-and-spoke conspiracies: electronic communications (e.g., e-mails, electronic messages), wiretapped private phone calls between suspected cartel participants, due diligence reports, testimonies and cross-examinations, among others.

(e.g., computer devices), whereas firms acting as spokes operated in the downstream market as retailers of such goods. Also worth noting is that, in some of these cases, the firms acting as hubs were also present in the downstream market as direct competitors to retailers during the period under investigation[11].

In addition, in two of the cases listed above, the GS is probing alleged hub-and-spoke conspiracies involving manufacturers/distributors (hubs) and retailers (spokes) in public and private biddings. According to the information available, the GS suspects that, in both cases, the conspiracy involved three major steps. Firstly, a retailer would identify a new business opportunity from a client and inform its distributor, which would, then, confirm whether this retailer was the first to identify ('map') this business opportunity or if it was eligible to have this opportunity 'reserved' against other retailers. Secondly, after reserving the business opportunity for a specific retailer, the distributor would inform other retailers about the reservation and pressure these retailers to either leave the bidding or submit uncompetitive bids (cover bidding). Finally, the distributor would impose penalties on retailers that refused to follow its instructions[12].

Similar to antitrust authorities in other jurisdictions, the GS views hub-and-spoke conspiracies as a mean for competitors to exchange competitively sensitive information through a 'common partner' that is active in an upstream or a downstream market[13]. In the first cases opened

[11] Administrative Process N. 08700.008098/2014-71 and Administrative Process N. 08700.009879/2015-64.

[12] Administrative Process N. 08012.007043/2010-79 and Administrative Process N. 08700.008098/2014-71.

[13] The GS has already indicated, in specific cases, that firms acting as hubs in hub-and-spoke conspiracies may coordinate and organize cartels not only through competitively sensitive information exchange (i.e., receiving the information from a particular spoke and sharing it with other spokes), but also through vertical restraints. For instance, the GS noted that LPG distributors acting as hubs imposed resale price maintenance measures against retailers to

by the GS, it was assumed that hub-and-spoke conspiracies would only exist when (i) company A (spoke) discloses competitively sensitive information to company B (hub) with the aim of having this information used to influence market conditions; and (ii) the information is effectively passed by company B (hub) to other companies (spokes) competing with company A. According to this line of reasoning, the fact that other retailers used the information received through the hub to adjust anticompetitively their own prices would not be relevant for establishing a hub-and-spoke cartel. At most, this fact would only count as an aggravating factor[14].

More recently, however, the GS elaborated on this view by stating that a hub-and-spoke conspiracy shall only exist when there is an exchange of competitively sensitive information through a hub as well as an agreement between hub and spokes with the purpose of negatively influencing market conditions. Based on such criteria, the GS rejected cartel allegations against Uber on the basis that Uber does not operate as a mean of communication between drivers and there is no agreement between drivers or any clear intent to collude through Uber[15-16]. As also clarified by the GS, these criteria also differentiate hub-and-spoke cartels

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restrict competition and facilitate collusion in the downstream market. See Administrative Process N. 08700.009879/2015-64; Administrative Process N. 08700.003067/2009-67; and Administrative Process N. 08012.006043/2008-37.

[14] Administrative Process N. 08012.007043/2010-79 and Administrative Process N. 08700.008098/2014-71.

[15] Preparatory Proceeding N. 08700.008318/2016-29.

[16] CADE's General Attorney Office recently followed a similar line of reasoning in its opinion in Administrative Process N. 08700.009879/2015-64 by defending that one of the defendants (Ipiranga) should be acquitted of the cartel charges because it was not aware that one of its employees was acting as a hub of sensitive information between competitors in the downstream market. See Administrative Process N. 08700.009879/2015-64, General Attorney Office, Opinion N. 21/2018/CGEP/PFE-CADE-CADE/PGF/AGU, dated September 13, 2018.

from hard-core cartels (i.e., agreements between competitors) and other practices aimed at influencing the adoption of uniform or agreed business practices between competitors[17].

3. Conclusion

This article aimed to indicate the criteria that CADE has been using to characterize and evaluate hub-and-spoke conspiracies in Brazil, based on six investigations available in CADE's public records. The information available indicates that the GS has been evolving in the characterization of such practices over the last years to consider that a hub-and-spoke conspiracy exists when there is an exchange of competitively sensitive information through a hub as well as an agreement between hub and spokes with the purpose of negatively influencing market conditions. Although this understanding is vague and refers to ongoing investigations that will need to be confirmed by the Tribunal, it seems that the GS is trying to apply similar standards of proof for hub-and-spoke conspiracies as those developed in other jurisdictions.

[17] This includes any situation in which a firm in an upstream market coordinates commercial practices of competitors in a downstream market by its own initiative (*i.e.*, without any exchange of competitively sensitive information and, most importantly, any interest by competitors in the downstream market to collude). In the GS's view, this kind of practice amounts to a unilateral conduct (vertical restraint) within the meaning of the Brazilian legislation.

COLLABORATION AGREEMENTS AMONG COMPETITORS: WHEN CAN THEY RAISE ANTITRUST CONCERN?

Fabiana Nitta
Graziella Angela Tinari Dell'Osa
Sonia Marques Döbler

1. Introduction

The collaboration agreements among competitors can be defined as those where the companies conduct transactions to accomplish one or more joint activities that do not imply changes in their corporate structure.

These agreements have been made with several different purposes, such as, for the research development and technological innovation, marketing and commercialization of goods and services, sharing of structures, among others.

If they are executed under appropriate competition conditions, besides bringing more synergy between the companies, they allow their partners to act with a more efficient production scale, with costs reduction, investment increase, quality improvement of products and services, which, ultimately, reverts favorably to the market and to the final consumer.

Nevertheless, the collaboration may lead to the sharing of sensitive information between the parties, creating conditions for the adoption of collusive or discriminatory conduct towards third parties and causing or increasing the market power of the concerned economic agents. In these situations, likewise others to be mentioned in more detail in the following chapters, there may exist restriction to competition and, as a consequence, the involved ones may be subject to repression from

the Brazilian System for Protection of Competition - SBDC, if the conduct's unlawfulness is confirmed.

2. What are the types of control exercised by SBDC towards the collaboration agreements among competitors?

SBDC is empowered to supervise the competition rules, not only acting preventively (by the analysis of concentration acts prior to their conclusion – structural control), but also repressively (by the investigation of conducts that violate the economic order – conducts control). Whenever a collaboration agreement among competitors configures or may configure a violation to the economic order, it must be subject to the conducts control and, in certain cases, they will also be subject to the structural control.

According to the Brazilian Antitrust Law [1], some associative agreements – of which the collaboration agreements between competitors are species - can only be concluded after being submitted to and cleared by the Administrative Council for Economic Defense – CADE, because they can also have a "merger"[2] nature and, hence, shall be analyzed in advance by CADE, which can impose remedies to mitigate potential anticompetitive risks or, even, disapprove them.

It is worth pointing out that, whenever the notification of a collaboration agreement is mandatory, it cannot be concluded before it is analyzed by the SBDC ("gun jumping"), under pain of nullity and the application of a pecuniary fine that may range from sixty thousand Brazilian Reais (BRL60,000.00) to sixty million Brazilian Reais (BRL60,000,000.00), regardless the opening of an administrative proceeding to investigate the potential practice of an anticompetitive

[1] Article 90, IV of the Brazilian Antitrust Law.

[2] Forgioni, Paula A. Os Fundamentos do Antitruste. São Paulo. Revista dos Tribunais, 7 Ed., 2014, p. 40.

conduct. Besides, until the final decision about the transaction, it must be preserved the competition conditions among the relevant parties.

The situations that require mandatory and prior notification of the associative agreements are currently governed by Resolution CADE N. 17/2016, which represented an improvement in relation to the criteria established in the previous Resolution that regulated this subject (Resolution CADE 10/2014).

Resolution CADE 17/2016 demands the cumulative fulfillment of four (4) requirements: (i) have duration equal or higher than two (2) years; (ii) establish common undertaking for the exploitation of economic activity; (iii) have a provision of sharing the risks and results of the economic activity that constitutes its object; and (iv) when the parties are competitors in the relevant market object of the agreement. If one of these requirements is not met, then the obligation to notify the collaboration agreement to SBDC is dismissed.

Even though there may still be doubts with respect to some of the criteria set forth in Resolution CADE N. 17/2016, they serve as parameters to the economic agents involved in those agreements, since CADE, likewise the North-American and the European authorities, as better detailed below, signalizes the situations when the associative agreements do not raise antitrust concern, given that their notification is not even required. As a logical consequence, assuming that they do not pose anticompetitive risks, they would not have the ability to configure a violation to the economic order.

Nevertheless, in case of doubt as to whether the notification of a certain collaboration agreement is mandatory or not, especially because of some vague concepts of Resolution CADE N. 17/2016, it is recommendable to make the notification, avoiding, thus, the parties' exposure to heavy penalties.

Furthermore, it is important to note that, even if the collaboration agreement among competitors does not meet the requirements for its notification, in case it has as object an unlawful conduct and harmful to competition, it will be subject to the conducts

control made by CADE, grounded on the provisions of Article 36, Paragraph 3 of the Brazilian Antitrust Law, which contains a non-exhaustive list of conducts that may be characterized as violation of the economic order, provided that they produce or can potentially produce the following effects: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III - to arbitrarily increase profits; and IV - to exercise a dominant position abusively.

Therefore, in the event there is or potentially is an anticompetitive scope, the collaboration agreement among competitors will be subject to the conducts control by CADE, in investigative administrative proceeding, being safeguarded the defendants' right of defense.

2.1 Penalties for the violation of the economic order

It is worth emphasizing that, once the violation of the economic order is characterized, the ones responsible will be subject to several penalties, among which one can mention the application of fine that can achieve twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof. In addition, it may be imposed the penalty of the publication, in half a page and at the expenses of the perpetrator, in a newspaper indicated by the judgment, of the extract from the conviction, for a period of two (2) consecutive days for one (1) to three (3) consecutive weeks, which would cause a very negative exposure to the company. Finally, the company may be prevented from participating in biddings for not less than five (5) years, among others.

To the administrator, if he/she is directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, he/she will be subject to a fine of one percent (1%) to twenty percent (20%) of that applied to the company.

Therefore, the effects (actual or potential) resulting from a collaboration agreement among competitors must be carefully considered by the involved economic agents, in view of the risks in connection with the conviction that may result from a violation of the economic order, if characterized.

3. International Experience: United States and European Union

The Federal Trade Commission and the Justice Department of the United States ("US") created the "Antitrust Guidelines for Collaborations Among Competitors"[1], which defines some guidelines for the analysis of the collaboration agreements that require the antitrust authorities' attention[2].

Those Guidelines bring examples of contracts that have the capacity to restrict competition and that, therefore, deserve attention from the competent authorities. These examples may be used, by analogy, to identify relevant agreements under the antitrust standpoint, in Brazil, in light of the harmful effects to competition that may derive thereof. Among them, the following can be mentioned: (i) agreements for the joint production of goods, (ii) marketing agreements for the joint sale, distribution or promotion of goods and services, (iii) agreements for the joint purchase of goods; and (iv) research & development agreements.

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[1] https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf

[2] According to the Guidelines: *Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful. All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.*

The "Antitrust Guidelines for Collaborations Among Competitors" also defines what "safety zones" would be with respect to collaboration agreements, aiming at providing a certain level of safety as to the situations where the anticompetitive effects are so unlikely that the authorities assume that they are lawful. One of these "safety zones" is the absence of market share of the involved agents higher than twenty percent (20%) in the affected relevant market.

In the European Union ("EU"), there are the so-called "block exemptions" ("BE"), which rule the "exemptions" to certain anticompetitive practices listed in Article 101 (1) of the "Treaty of the Functioning of the European Union – TFEU"[3], provided that they contribute to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

4. Conclusion

Collaboration agreements among competitors have been shown to increasingly generate synergies and cause positive effects to the market and to consumers, when they are executed in compliance with the limits and requirements of the applicable laws.

However, despite all the improvements brought by Resolution CADE N. 17/2016 when compared to Resolution CADE N. 10/2014, there are some associative agreements that are not completely clear as to the need to submit to CADE's prior analysis and clearance, creating a grey zone.

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3 https://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN

Given the heavy penalties that may be applied if a collaboration agreement is not notified in case it is mandatory, if the parties involved in the transaction have any doubt as to whether or not they must submit the notification to CADE, it is advisable to proceed with the submission.

Besides, under no circumstance the agreement may cause (or potentially cause) the harmful effects defined in Article 36, Paragraph 3 of the Brazilian Antitrust Law. In this case, the unlawful conduct would be characterized and, as such, might become object of investigation by SBDC and application of penalties. That is why, in either case, caution is always highly recommendable.

CADE'S STATUTE OF LIMITATION FOR CONDUCTING CARTEL INVESTIGATIONS AGAINST COMPANIES IN BRAZIL: 5 OR 12 YEARS PERIOD?

Tiago Cortez
Marcelo Laplane
Danilo Orenga
Maria Wagner

1. Introduction

The purpose of this article is to discuss the possibility of the Administrative Council for Economic Defense ("CADE") applying the 12-year extended statute of limitation provided in the Criminal Code to investigate, verify, and convict legal entities for cartel formation.

Law No. 12529/2011 ("CADE Law"), in its article 46[1], sets forth the barring by the statute of limitation within five (5) years of the punitive actions of federal, whether direct or indirect, public administration, whose purpose is the investigation of antitrust violations, counted from the date of the violation or, in the case of a permanent or continued violation, from the day when the practice of violation ceases.

Upon reading of the provision, we notice that, when drawing up article 46, the lawmaker sought to reproduce the main provisions contained in Law no. 9783/1999, a law that specifically addresses the statute of limitation in the exercise of punitive action by the federal public administration. In other words, it brought the general rule of

[1] *"Art. 46. The punitive actions of federal, whether direct or indirect, public administration, with the purpose of investigating antitrust violations shall be barred by the statute of limitation within five (5) years counted from the date of the violation or, in case of a permanent or continued violation, from the day when the practice of violation ceases."*

counting the statute of limitation that falls on the federal administrative punitive claim for the exercise of CADE's police power.

As an exception to the general rule, the lawmaker also provided in paragraph 4 of article 46[2] the provision of the statute of limitation of the Criminal Code when the fact subject matter of the punitive action by the administration can also be deemed as a crime. This means that if an antitrust violation matches a crime under criminal law, CADE may use a broader period to investigate and administratively punish those responsible for the same criminal conduct.

However, the use of the statute of limitation provided in the Criminal Code by CADE requires caution and, as we will see below, year after year CADE has been applying the 12-year statute of limitation set forth in article 109, III, of the Criminal Code, for the investigation of cartel crimes against legal entities.

2. Administrative Statute of Limitation and its provision by CADE

The statute of limitation is a principle of public policy, which derives from the constitutional principle of legal certainty and consists in the loss of the right of action because it has not been exercised within the period determined by law. Its existence is justified by the understanding that any and all punitive claims, whether administrative or not, must be subject to a limitation period for its exercise, under penalty of violation of the legal certainty inherent to the Rule of Law[3].

Within the scope of the federal public administration, the lapse of time for a period exceeding five (5) years, counted from the date of the commission of the act or, in the event of permanent or continuous violation, the day on which it ceased, results in loss of the

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[2] *"Art. 46, paragraph 4. When the fact subject matter of punitive action by the administration is also a crime, the statute of limitation shall be governed by the term provided for in criminal law."*

[3] Osório, Fabio Medina. *Teoria do Processo Sancionador:* 5th edition, RT, page 457.

administration's right to apply any penalty on the offender[4]. Before CADE, the statute of limitation also restricts the temporal aspect of antitrust violations prosecution. This occurs because, despite being a special regime agency, CADE extrapolates the functions of a regulatory agency and operates as a single administrative body to judge individuals and legal entities that commit antitrust violations, therefore, it is unreasonable that its punitive claims perpetuate in time, permanently subjecting the economic agents to administrative inertia.

Thus, as a body that integrates the federal public administration, CADE is bound to the five-year statute of limitation to enforce its administrative proceedings, under the terms of art. 46 of CADE Law. However, there is an important exception in this same article, specifically paragraph 4th, which states that when the allegedly unlawful conduct is also liable to be classified as a crime, the statute of limitation set forth in the Criminal Code must be applied.

The intention of the lawmaker may seem noble; after all, for the most serious administrative wrongdoings that have a match in criminal law, a possible extended period of the Criminal Code would be justified. And as mentioned above, one of CADE's most arduous tasks is to conduct administrative proceedings for the investigation of conducts that are potentially harmful to competition, with particular reference to the offense of cartel, whose production of evidence seems to be complex in view of the evidentiary burden that is imposed on CADE, and also by virtue of the constitutional principles imposed on the agency that exercises a sanctioning function, such as legality, efficiency, and motivation.

3. Cartel conduct in CADE Law and Criminal Law

The CADE Law provides that the offense of cartel may be committed by legal entities, individuals, as well as by associations of

[4] Article 1 of Law no. 9873/99.

class or persons[5], which is why everyone will be subject to any administrative penalties imposed by CADE. However, the criminal law has a different understanding. Under articles 4 and 11 of the Criminal Code, the cartel crime may be committed only by individuals, without any provisions saying that the cartel crime may be committed by a legal entity. It is worth noting that a legal entity does not have a natural existence so it cannot practice the acts set forth in the Criminal Code and in the uncodified legislation. After all, the legal entity is not subject to the concepts of criminal capacity, conscience of unlawfulness, culpability, and, ultimately, of simply being the perpetrator of a crime.

Moreover, unlike other branches of law, criminal law does not allow an extensive interpretation of its normative scope, even if there is an amplitude of its literal expression. One must use the criterion of "mens legis", that is to say, the legal rule as something independent from the lawmaker's will, assuming its own meaning once expressed[6]. *In other words, if the lawmaker wanted to subject the legal entity to criminal sanctions, it would have expressly made it in law.*

4. The impossibility of CADE invoking the statute of limitation of the Criminal Code

As the formation of cartel by a legal entity is not defined as a crime in criminal law, the logical consequence is that the exceptional rule provided for in paragraph 4 of article 46 of the CADE Law cannot be invoked by CADE to extend from five (5) to twelve (12) years the deadline for the conduction and conclusion of administrative proceedings against legal entities for the determination of the offense of cartel formation.

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[5] *"Art. 31. This Law applies to individuals or public or private law legal entities, as well as to any associations of entities or persons organized by reason of fact or of law, even if temporarily, with or without legal personality, even if they perform an activity under the legal monopoly regime."*

[6] COELHO, Luiz Fernando. ***Lógica jurídica e interpretação das leis.***2nd Ed. Rio de Janeiro: Forense, 1981.

In CADE's view, since cartel is also characterized as a crime, the statute of limitation for the enforcement of the punitive claim would be twelve (12) years, as provided for in the Criminal Code (article 109, III), and not five (5) years, term specifically provided for punitive actions of the public administration (article 46 of CADE Law)[7]. It is undisputed that formation of cartel may be both an administrative offense, under the CADE Law, and a crime under criminal law. However, there is a basic assumption for the application of the exception provided for in paragraph 4 of article 46, which is the possibility of criminalizing the conduct. That is: it is necessary to have the definition of the crime that, as seen, does not exist. If there is no conduct characterized as a crime, there is no crime to be committed, much less to be subject to conviction.

It should be noted that it is not even necessary to discuss whether CADE is competent or not to determine that an administrative conduct may or may not be a crime. The discussion proposed in this article is previous and prejudicial to this matter, because if the legal entity does not have the means to commit a crime, and it cannot be subject to the respective penalties, it is not possible to justify the application of the statute of limitation of twelve (12) years, as provided for in art. 109, III, of the Criminal Code. Although it does not correspond to CADE's majority understanding, the application of the five-year statute of limitation for cartel formation has already been recognized on some occasions in the past[8], and has recently raised new discussions among CADE's members, at least on two occasions.

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[7] ""The legal text only requires that the fact under the punitive action of the administration is also a crime. It does not mention the necessity for a criminal proceeding to have already been installed, nor the necessity for the party that was sanctioned in the administrative sphere to be also subject to a criminal sanction" (...)". Technical Note 94/2015/SG/CADE, Administrative Proceeding No. 08012.005324/2012-59.

[8] Vote cast by the Reporting Commissioner Mr. Luiz Carlos Delorme Prado, on the trial by CADE's Board of Preliminary Investigation No. 08012.004842/2000-31 (gasoline resellers in the Municipality of Caxias do

In Opinion rendered within the scope of the trial of Administrative Proceeding 08012.004674/2006-50[9], the Commissioner Maurício Oscar Bandeira Maia stated, among other aspects, that it is not under CADE's jurisdiction to classify the fact subject matter of administrative investigation as a crime, being necessary the filing of the respective parallel criminal action on the same facts to enforce the exception of paragraph 4 of article 46 of CADE Law. He also pointed out that, even if there were a criminal action on the same facts that are subject matter of administrative investigation, the criminal statute of limitation should reach only the subjects covered by the complaint of the Prosecution Office. A similar discussion occurred in the trial of Administrative Proceeding 08700.001859/2010-31[10]. In this case, the Reporting Commissioner Paula Farani Azevedo also raised the issue of the five-year statute of limitation as preliminary on the merits, adopting a position similar to that of the opinion issued by the commissioner Bandeira Maia in the previous proceeding. In addition, she stated that it is not possible to have a crime in thesis in relation to legal entities, as there is no express provision in the legislation imputing criminal liability on them for this offense (except for environmental crimes).

5. Conclusion

In both cases, the aforementioned Commissioners' position did not succeed. However, even if their correct positions have not prevailed, they bring to light the fact that CADE is gradually recognizing that its interpretation of paragraph 4 of article 46 of CADE Law might be wrong. What is perceived with the unrestrained application of the said provision

Sul/RS). Vote of Commissioner Márcio de Oliveira Junior in Administrative Proceeding 08012.010932/2007-18 (Flexomarine).

[9] Proceeding for the investigation of alleged cartel in the market for flexible packaging.

[10] The purpose of this proceeding was to investigate the existence of an alleged cartel in the market for the distribution of taxi services by means of a telephone exchange center in the city of Curitiba and Metropolitan Region.

is that CADE seeks, in an attempt to camouflage a potential inefficiency in the prosecution of certain offenses, to buy time with the application of the statute of limitation established in the criminal legislation, without considering that criminal law does not allow criminal liability for cartel formation to legal entities due to lack of legal provision.

More than that, by ignoring the five-year statute of limitation and applying the criminal effects to an act not defined as a crime, CADE could be violating the principle of legality provided for in article 37, head provision, of the Federal Constitution, which subjects all public agents to the commandments of the law, no deviation allowed, under penalty of committing an invalid act and being subject to civil and criminal liability.