

**BRAZILIAN ANTITRUST LAW
(Law N.º 12,529/11): 5 years**

IBRAC
25 anos

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

Preliminary version

FOREWORD

Celebrating IBRAC's 25th anniversary, we have decided to put together a book with articles on several topics related to the first five years of application of Law No. 12,529, which came into force on May 29, 2012.

All of the articles were written by lawyers and economists who are associates of IBRAC, the majority of them with high experience in antitrust law in Brazil.

We have been honored to receive contributions about different areas of practice, such as merger control, conducts, cartels, unilateral conducts, private enforcement, compliance, interaction with corruption law, among others.

We are extremely proud of this high-quality work, prepared with enthusiasm, which we feel and expect will be helpful to bring more light to the discussions being held in the competition field in Brazil. 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.

April 2017

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GLOSSARY

Brazilian Antitrust Law - Law No. 12,529, enacted on November 30, 2011

CADE – Administrative Council for Economic Defense

CADE's Internal Regulation – Internal regulation approved by Resolution No. 1, enacted on May 29, 2012, as amended

GS – CADE's General Superintendence

SEAE – Secretariat of Economic Monitoring (Ministry of Finance)

Tribunal – CADE's Administrative Court or Tribunal

I. INTRODUCTION

CHAPTER 1 - THE INTERTWINING BETWEEN CADE AND IBRAC AND THE IMPROVEMENT OF THE ANTITRUST FRAMEWORK: A HISTORY OF SUCCESS

Eduardo Caminati Anders
Guilherme Teno Castilho Missali

1. Introduction

The aim of this chapter is to briefly outline the main highlights within the Brazilian Competition Defense System – SBDC in 2016. In a hindsight outlook, this chapter points the main institutional initiatives carried out by CADE. A multitude of actions were developed by the Brazilian antitrust body, and, in particular, we draw the attention to the publication of guidelines and resolutions that helped bring more transparency and legal certainty on important matters faced by the economic agents in the market.

In reality, CADE has been striving in promoting better environment for discussions on competition law with the society since the advent of the Law No. 12,529/11. As we will point out, since then there have been vital steps for the dissemination of the true meaning of competition. Under this scenario, there is a clear incentive to empower the players with respect to competition affairs, primarily in the wake of an increasingly complex global regulatory system.

In that vein, we note that CADE has been in the foreground by virtue of its leading initiatives in Brazil, which beef up its legitimacy under the lenses of the society. This fact reaffirms the watchword that says that institutions matter: CADE has been recognized as a solid and transparent institution under the national and international scope, carrying out effective and powerful measures to meet its objectives.

Taking a look at the main events in Brazil as regards business compliance in a variety of spectrums, it is undoubted to conclude how intense the year of 2016 was (and so will be the forthcoming years). Indeed, the circumstances, transactions, investigations, negotiations etc. posed a myriad of conundrums to the antitrust arena. From the merger control side, for example, one could notice puzzling transactions under the scrutiny of CADE, that in turn required a strong cooperation with its Department of Economic Studies – DEE to address intricate issues.

In addition, one could attest a hectic pace in the anticompetitive control strand, in which a number of investigations were launched and remarkable leniencies and settlements were successfully executed and negotiated,¹ noticeably shedding light on the so-called “Car Wash Operation”, that has shaken the dynamics national wide.

¹ In 2016, CADE achieved an unprecedented number of leniency and settlement negotiations in its history, reaching a record in terms of collection of pecuniary contributions.

In a context of turbulent waters in the political scene, CADE stuck steadily to its commitment of securing a sound antitrust environment in Brazil, being widely acknowledged by its competence. Accordingly, the initiatives carried out by CADE back in 2016 was part of an evolving action plan in terms of fostering compliance and enforcement and CADE took great strides to accomplish its mission.² In a correct manner, CADE sought to improve the awareness of the society as to the antitrust rules in a way to help build firmly such culture within the whole community.

Taking into consideration the foregoing, this chapter will also highlight the interplay between CADE and some non-governmental institutions (private institutions) whose focus is primarily on antitrust affairs. By means of critical debates, innovative measures and proactive reflections, such institutions play a pivotal role as to engender the dialogue between the public and private sectors, providing a fruitful environment for instilling the antitrust culture in Brazil, which we deem a formidable action *vis-à-vis* a country characterized by a past of strong state intervention in the economy.

For the purposes of this chapter, we will pinpoint the role of the Brazilian Institute for the Study of Competition, Consumer Affairs and International Trade – IBRAC,³ whose creation dates back 25 years. Over this period, IBRAC has been exerting a top notch work, being unanimously recognized by the society, in particular by the competent authorities, legal community, and scholars. Overall, we argue that the role of private institutions represents a cornerstone in a way to, among others, complement the advocacy activity performed by the antitrust authority, thus contributing to spur insightful debates on how to perfect the competition law and antitrust policies, so as to truly internalize the competition sense within the society.

2. CADE's Initiatives in 2016: a straightforward outlook

CADE took great strides in the institutional front, fulfilling some goals and objectives set out in the Multi-Annual Plan.⁴ Since the advent of Law No. 12,529/11 -- which was a watershed for the Brazilian antitrust culture *vis-à-vis* the relevant reframing of the SBDC --⁵, CADE has sought to introduce measures and develop mechanisms in a way to step up the enforcement as well as the

² The authors have already expressed their views on the compliance initiatives undertaken by CADE in the following article: ANDERS, Eduardo Caminati; MISSALI, Guilherme Teno Castilho. *Governance, Compliance and Competition Culture in Brazil: time for an effective change*. Available at: <<https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/GovernanceCompliance-final.pdf>>. Access on February 2, 2017.

³ Among other institutions that should be recalled in that context, one must also mention the following: (i) the Commission on Competition Studies and Economic Regulation (CECORE) of the Brazilian Bar Association - São Paulo Section (OAB-SP); (ii) Center of Studies of Law Firms (CESA), Competition and Consumer Relations Committee, São Paulo Section; (iii) Center of Studies on Economic and Social Law (CEDES); (iv) Economy Group of Infrastructure & Environmental Solutions of Fundação Getúlio Vargas etc.

⁴ The Multi-Annual Plan is a governmental planning instrument that establishes guidelines, goals and objectives of the federal public administration for expenses in general arising therefrom and for continued duration programs, with the purpose of enabling the implementation and management of public policies. More information is available at: <http://www.cade.gov.br/aceso-a-informacao/acoes_e_programas>. Access on February 2, 2017. (Portuguese version).

⁵ Generally, for details on the reframing and new structures of the SBDC, see: CARVALHO, Vinicius Marques de (org.). *A Lei 12.529/2011 e a Nova Política de Defesa da Concorrência*, 1 ed., São Paulo: Editora Singular, 2015; and CORDOVIL, Leonor et al. *Nova Lei de Defesa da Concorrência Comentada: Lei 12.529, de 30 de novembro de 2011*. 1 ed., São Paulo: Editora Revista dos Tribunais, 2012.

competitive culture concerning compliance. After nearly 5 years of the entry into force of the aforementioned law, and after mitigating some general concerns about its implementation, the competitive landscape in Brazil is clearly more mature and keen to sketch out and put forward compliance and enforcement actions.

In that respect, by way of reference, we depict below some of the main actions employed by CADE in 2016.⁶

2.1. Main Highlights

Firstly, it is important to make reference to new resolutions that were issued by CADE. Amongst other measures, they established, in short: (i) certain shifts in the CADE's Internal Regulation with respect to the provisions for negotiating Cease and Desist Settlement Agreements and also regarding some questions as to the leniency "plus" application (Resolution CADE No. 15);⁷ (ii) the setting of a 30 day fixed term for the analysis of Concentration Acts labeled as "fast-track" (i.e., eligible for a summary review);⁸ (iii) regulations addressing new thresholds for the notification of the so-called "associative agreements" (Resolution CADE No. 17)⁹, noticing, in particular, important efforts of the authority; for instance, CADE reconsidered the parameters of the then in force Resolution CADE No. 10 in view of the market dynamic and the critics of the practitioners, whose allegations were, in summary, the lack of consistence between the established criteria and the business reality.

Furthermore, it is worth noting (iv) amendments in Resolution CADE No. 3 by means of Resolution CADE No. 18 to promote, in theory, more proportionality with respect to calculation basis of penalties in view of the field of business activity (parametrization); (v) elaboration of a Memorandum of Understandings between CADE and the Prosecution Office of the State of São Paulo (task force in fighting cartels)¹⁰ to reinforce greater cooperation between these bodies; as well

⁶ For a historical overview on the CADE's statics regarding Concentration Acts, Anticompetitive practices, pecuniary fines on settlements, leniencies and institutional initiatives, refer to: CADE. *Balanço 2016*. Available at: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>>. Access on February 22, 2017. (Portuguese version).

⁷ The consolidated version of the CADE's Internal Regulation is available at: <http://www.cade.gov.br/assuntos/normas-e-legislacao/regimento-interno/ricade-sem-marcas_25_mai_2016_final-res-15.pdf/view>. Access on February 2, 2017.

⁸ Resolution CADE No. 13. It is available at: <<http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-ndeg-13-2015.pdf/view>>. Access on February 2, 2017. (Portuguese version).

⁹ Resolution CADE No. 17 is available at: <http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?ssjK4QTNM7ViqHpNE_48iLwuyZi8GbS8y0qA8QG-4hgSOtYmh59AA8GGKDFAgD1vCoXBwp2SQL6YqZEwffSBQA,,>>. Access on February 2, 2017. (Portuguese version). For a comparative analysis, the revoked Resolution CADE No. 10 is available at: <<http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-10-04-de-novembro-de-2014.pdf/view>>. Access on February 2, 2017. (Portuguese version). The authors have already written an article addressing the main changes introduced by the Resolution CADE No. 17. See: ANDERS, Eduardo Caminati; DA SILVA, Leda Batista; MISSALI, Guilherme Teno Castilho. *The New Rules of the Brazilian Antitrust Authority on Associative Agreements*. Available at: <<https://www.competitionpolicyinternational.com/wp-content/uploads/2016/12/Guilherme-Associative-Agreements-.pdf>>. Access on February 2, 2017.

¹⁰ Available at: <http://www.cade.gov.br/assuntos/programa-de-leniencia/memorando-de-entendimentos-sg-empfsp_tcc-e-acordos-de-colaboracao_15-03-2016.pdf>. Access on February 2, 2017.

as (vi) Joint Resolution between CADE and the Federal Prosecution Office to establish the rules for the activities of the Prosecution Office's representative in administrative process¹¹. In a nutshell, we argue that these kinds of cooperation measures within the governmental body (and not a rivalry relationship) are essential techniques to invigorate the legal framework, notably in view of the sensitive investigations concerning alleged cartel practices on the radar of the authorities.

Moreover, as to the institutional publications, one should mention the release of several guidelines encompassing hot topics in the antitrust arena, which we see as a keystone to orient and provide the economic agents with clarity when conducting its activities, setting credible and effective Competition Compliance Programs, weighing the pros and cons of engaging in settlement agreements, deciding on the application for leniency etc.

In line with the debates overseas, the guidelines released by CADE are a spearhead in a way to signalize legal certainty concerning CADE's understandings. Accordingly, in 2016, always preceded by a period of public consultation, the following guidelines were released: (i) Guidelines on Competition Compliance Programs;¹² (ii) Guidelines on Cease and Desist Settlement Agreement for cartel cases;¹³ (iii) Guidelines on CADE's Antitrust Leniency Program;¹⁴ and (iv) Guidelines for the Analysis of Horizontal Concentration Merger Acts.¹⁵ One should note that, regardless they are not a binding document, such guidelines are indeed reference tools in order to steer the economic agents on their day-to-day activities and in principle contributes to a sound comprehension of antitrust and compliance.

Still, during the public consultation period, CADE created a fertile room to debate the proposed changes with the interested parties. In this particular, the contributions stemmed from the non-governmental institutions were imperative for better shaping the documents, adding a fresh look from the business, practitioners and academic community.

As to the dissemination of antitrust rules, one should mention a growing movement in Brazil with respect to third parties' engagement in the proceedings, a phenomenon akin to mature jurisdictions. In sum, due to decisions that imposed stringent penalties and given sensitive investigations performed by CADE (overall, one may argue that in Brazil it would be possible to infer more recently a balanced combination of setting deterrence mechanism, penalties (pecuniary and non-pecuniary), leniency/settlements and measures for incentivizing compliance), apparently the society seems to be more attentive to and aware of the importance of complying with the rules and the underlying benefits arising from the fair and healthy competitive landscape.

¹¹ For further information, see the news available at: <<http://www.cade.gov.br/noticias/assinada-nova-resolucao-para-normatizar-atuacao-do-mpf-junto-ao-cade>>. Access on February 2, 2017.

¹² Available at: CADE. <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf>. Access on February 2, 2017. (English version).

¹³ Available at: CADE. <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf>. Access on February 2, 2017. (English version).

¹⁴ Available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf>. Access on February 2, 2017. (English version).

¹⁵ Available at: CADE. <<http://www.cade.gov.br/aceso-a-informacao/participacao-social-1/contribuicoes-da-sociedade/arquivos/guia-de-ac-horizontal.pdf>>. Access on February 2, 2017. (Portuguese version).

2.2. *Thoughts on Compliance and trends ahead*

It is worth mentioning that the key driver for the agent to comply with the rules should be the plethora of benefits resulting from a “compliance mindset”. Ultimately, in a multi-complex and risky environment worldwide, the benefits of the compliance behavior and the ethical mindset transcend the (mere) absence of infringement (i.e., no wrongdoing, then no penalty needed, as a plain cause and effect relationship).

In essence, the result is deeper, meaning that one can infer a number of competitive advantages for the players that stick to the rules. As such, we foresee incentives embedded in this “ethical behavior” linked, *inter alia*, to the corporate social responsibility (CSR),¹⁶ which in turn tend to give rise to positive outcomes as to reputational aspects (i.e., no moral concerns) -- for instance, when comparing to a ill company in terms of compliance adherence, the one that puts the compliance behavior in the forefront is far better positioned to grab investments, get good stock returns, attract admiration from the stakeholders and employees, besides being presumably in better conditions to meet the requirements to participate in public bids, whose parameters in terms of compliance and integrity have been revamped and elevated in Brazil.¹⁷

All in all, we claim that understanding the true meaning of competition rules, as well as the magnitude and nuanced factors embedded in the antitrust policies should be the starting point for any company (and its board and employees, not distinguishing agency cost) to comply with the legislation and then engage itself in the promotion of the competition culture (and, for such, any advice from the authority would be helpful). In reality, we see a synergy when it comes to the complementary approach that CADE and the economic agents can exert. That is, ideally, the public regulation should coexist with the self-regulation (autoregulation) in a spirit where enforcement and compliance are mutually complemented in a virtuous tone.¹⁸

In general terms, we recognize that the antitrust might not be a trivial matter for the society (what is more, one should also bear in mind that in some law universities in Brazil we notice – unfortunately – a relative lack of study in this field).¹⁹ Against this backdrop, we believe that CADE, along with non-governmental institutions, academia, practitioners etc. have a crucial role for promoting and incentivizing the (real) awareness when it comes to competition.

¹⁶ See: AGUILERA, Ruth V. et al. *Putting the S Back in Corporate Social Responsibility: a Multi-Level Theory of Social Change in Organizations* (July 2004). University of Illinois College of Business Working Paper No. 04-0107; Academy of Management Review, Forthcoming. Available at SSRN: <<https://ssrn.com/abstract=567842>>. Access on February 2, 2017.

¹⁷ Law No. 12.846/13 – Anti-corruption Law or Clean Company Act – may reflect the call for stricter requirements.

¹⁸ Such view is derived from the new modes of governance and some varieties of coexistences. See: TRUBEK, David M.; TRUBEK, Louise G. *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*. Columbia Journal of European Law, Summer 2007; Univ. of Wisconsin Legal Studies Research Paper No. 1047. Available at SSRN: <<https://ssrn.com/abstract=988065>>. Access on February 2, 2017.

¹⁹ Specifically, as regards the importance of discussing compliance nowadays (not only from the antitrust viewpoint), and, in that context, indicating some thoughts and also highlighting how supposedly ill structured are the law schools in general, refer to: SOKOL, D. Daniel. *Teaching Compliance* (February 10, 2016). 84 University of Cincinnati Law Review 399 (2016); University of Florida Levin College of Law Research Paper No. 15-6. Available at SSRN: <<https://ssrn.com/abstract=2616884>>. Access on February 2, 2017.

Assuming a growing and better comprehension of the competition rights throughout the society, we contend, for instance, that it would be easier (and even intuitive) for the affected party to grasp the negative consequences of a given wrongdoing (e.g., cartel) so as to file an antitrust damage action with a view to redressing the damages derived from the cartel practice.

In addition, given certain hot topics in the international arena, we glimpse fertile ground in Brazil for in-depth discussions related to the role of competition law from a public policy perspective with respect to societal issues, job promotions, small business preservation, limitation of foreign control over local assets etc. Whilst these matters might sound as “vexing questions” in Brazil at first sight, we understand that they should be faced in a sensible fashion.

Further, we encourage the intertwining of antitrust with other fields in order to set more comprehensive and stylized scenarios for analysis so as to strengthen the decisions of the antitrust authority. Broadly, we claim the need for a multidisciplinary approach with some (grey) areas spanning from Intellectual Property, Digital Economy (digitalization)²⁰ and Big Data, Arbitration, Judicial Recovery and Bankruptcy, Anti-corruption²¹ and public procurement etc. aiming at achieving a solid assessment that takes into account nuanced factors that permeate the competition analysis.

Obviously, the interface with economics is a key element to capture the specificities of the markets in any sort of scrutiny and we generally agree that the using of screening methods and econometric tools in the analysis of challenging and complex transaction,²² as well as under puzzling investigations, especially the ones that involve public bids, might be adequate to provide, in theory, a more precise assessment.²³

Also, the intergovernmental dialogue is a noteworthy point, i.e., we argue that dialogue and cooperation between different spheres (interstate level) is relevant to avoid misalignment in the decisions. In that particular, we underscore the growing cooperation between CADE and the

²⁰ See: MUNDT, Andreas. *Digitalization revolutionizes the economy – and the work of competition authorities*. Available at: <<https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/CPI-Mundt.pdf>>. Access on February 2, 2017.

²¹ See: FRAZÃO, Ana. *Direito antitruste e direito anticorrupção: pontes para um necessário diálogo*. In: FRAZÃO, Ana (org.). *Constituição, Empresa e Mercado*. Gecem. Brasília: Faculdade de Direito – UnB, 2017. Available at: <http://www.academia.edu/30978584/Responsabilidade_social_empresa_in_FRAZ%C3%83O_Ana_Org._Constitui%C3%A7%C3%A3o_Empresa_e_Mercado_Bras%C3%ADlia_FD_UnB_2017>. Access on February 2, 2017.

²² See: PITTMAN, Russell. *Three economist’s tools for antitrust analysis: a non-technical introduction*. Economic Analysis Group – Discussion Paper. January 2017. Available at: <<https://www.justice.gov/atr/page/file/925641/download>>. Access on February 2, 2017. (“[T]he importance of economics to the analysis and enforcement of competition policy and law has increased tremendously in the developed market economies in the past forty years. In younger and developing market economies, competition law itself has a history of twenty to twenty-five years at most – sometimes much less – and economic tools that have proven useful to competition law enforcement in developed market economies in focusing investigations and in assisting decision makers in distinguishing central from secondary issues are inevitably less well understood. While agencies and enforcers face a steep learning curve regarding these tools, companies and their attorneys and economic consultants are already using them to present agencies with sophisticated economic analyses purporting to demonstrate the lack of cause for concern regarding particular deals or practices.”).

²³ For more information concerning the use of screening mechanisms in antitrust analysis and also how Antitrust Compliance Programs can benefit from such approach, refer to: ABRANTES-METZ, Rosa M.; SOKOL, D. Daniel. *Antitrust Corporate Governance and Compliance* (April 8, 2013). Oxford Handbook of International Antitrust Economics, Roger D. Blair and D. Daniel Sokol, eds., Oxford University Press, Forthcoming; Minnesota Legal Studies Research Paper No. 13-18. Available at SSRN: <<https://ssrn.com/abstract=2246564>>. Access on February 2, 2017.

Prosecution Office, whereby these authorities have been acting in tandem in Brazil in many cartel investigations, as well as in the execution of settlements.

Last but not least, it is worth mentioning two documents that were recently released by CADE (2017): one under the general picture of compliance when it comes to guidelines in public procurements, and another showing a map of CADE's mission and objective for the years to come. Put it simply, the first document concerns CADE's contribution regarding the public bidding and ways to stimulate the diligence in this environment.²⁴ The second refers to a map of strategies that should be implemented by the authority throughout the upcoming years (2017-2020),²⁵ with a mission to ensure the maintenance of a healthy competitive environment in Brazil, with a view to being recognized as an institution that is essential to the proper functioning of the Brazilian economy.

3. Non-Governmental Institutions: IBRAC in the limelight

The non-governmental institutions play a critical role in the society when it comes to the advocacy strand, for example. Within the antitrust scope, the existence of entities that seek to spread the spirit of competition is a commendable asset, notably in view of a background marked by strong state intervention in the economy.

Accordingly, in the following lines we illuminate some activities lead by IBRAC inasmuch as this institution has been playing a vital and inspiring role since its creation, with a myriad of initiatives recognized by the quality and usefulness to aid the comprehension of the competition law, international trade and consumer law within the society. By doing so, IBRAC also contributes to better shaping and fine-tuning the legislations by means of study groups, publication of papers, comments to public consultations etc.²⁶

Amongst the main activities promoted by IBRAC, there is a recurring incentive against this backdrop to organize institutional meetings, seminars and workshops (inviting both the public and private spheres) with the intention of discussing and studying up-to-date subjects and controversial issues that are relevant to the dynamic of the market. With regard to competition law, in some cases IBRAC is consulted by CADE in a condition of a non-governmental advisor, showing the respectful position gained by IBRAC from the CADE's viewpoint.

That said, one can point out the close and legitimate cooperation of IBRAC in connection with CADE's actions. One of the well-known activities deployed by IBRAC is the monitoring of public consultation and the collaboration with insightful and constructive comments thereat. Moreover, in order for IBRAC to better align the studies and find enriching insights, this institution

²⁴ Available at: CADE. <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_licitacao.pdf/view>. Access on February 2, 2017. (Portuguese version).

²⁵ Available at: CADE. <http://www.cade.gov.br/aceso-a-informacao/institucional/planejamento_estrategico/mapa-estrategico-cade-2017-2020.jpg/view>. Access on February 2, 2017. (Portuguese version).

²⁶ For a full picture of the objectives of the IBRAC, refer to IBRAC's Bylaws, available at: <<http://www.ibrac.org.br/estatuto.htm>>. Access on February 2, 2017.

organizes itself into designated committees.²⁷ The way IBRAC carries out its activities might be interpreted as a sort of private advocacy that aims to assist the improvement of the regulatory field, engender a participative spirit among its members and the civil society. It should be mentioned that over the past 10 years IBRAC has collaborated with CADE on all public consultations launched by the authority.

In parallel, it is also opportune to highlight a leading initiative geared by IBRAC in 2016 when it comes to incentivizing a career plan to CADE. In other words, IBRAC mobilized itself, with meetings attended in the Chief of Staff Office in an attempt to build a career plan to CADE, in a way to empower the antitrust authority with greater personal and financial infrastructure, for example.

3.1. Activities in a nutshell

The intuitional activities performed by IBRAC are recognized within the society. By way of example, we convey below some highlights as regards the antitrust strand taking into account the year of 2016:

- 22nd International Competition Defense Seminar;²⁸
- Writing Award IBRAC-TIM 2016;
- Microeconomy Course Applied to Antitrust for Lawyers;
- Course on Competition law Theory and Practice: Cartels;
- Seminar on Updates and Challenges to Competition Defense in the European Union;²⁹
- IDP São Paulo – Course for Specialization in Regulation and Competition;
- 1st IBRAC Workshop of Antitrust Compliance Anti-corruption;
- Balance and Perspectives of the Competition Defense in Brazil; and
- IBRAC Meetings - Impact of the New Civil Procedure Code in the Administrative Process of CADE.

Furthermore, it is relevant to underscore some events that IBRAC held at the Faculty of Law of the University of São Paulo in a kind of flourishing partnership with the scholars. Also, in terms of publications, one should notice two annual editions of the IBRAC's Magazine, a traditional publication well-recognized within the legal arena given its academic seriousness and technical quality. In this respect, institutional publications depicting up-to-date and challenging issues are constantly being encouraged among its national and international associates. A successful example in that front was the publication of the Overview of Competition Law in Brazil and Overview of

²⁷ The following committees (broad sense) are currently operating: (i) Competition Committee; (ii) Consumer Affairs Committee; (iii) International Trade Committee; (iv) Regulation Committee; (v) Economic Affairs Committee; (vi) Compliance Committee; and (vii) Economic Litigation Committee. The IBRAC's activities unfold in meetings held in the cities of São Paulo, Rio de Janeiro and Brasília.

²⁸ This seminar constitutes an event of outstanding repercussion given the quality of the debates. It takes place on an annual basis and comprises discussions about controversial issues in antitrust law, attended by national and international audience.

²⁹ Event held by Emeritus Professor Law from King's College of London, Richard Whish.

Competition Law in Latin America, in 2015 and 2016, respectively.³⁰ The chapter at hand that comprises a new publication should be also read in that context.

As previously stated, for achieving meaningful discussions, IBRAC organizes itself into specific committees, which in turn compose study groups to investigate and address challenging matters. Not infrequently, CADE calls IBRAC in a way to hear from the IBRAC's associates and from the economic agents their views and opinions in order for the antitrust authority to calibrate some rules in light of the corporate reality. By doing so, it is more likely that CADE will achieve a more accurate perception as to corporate dilemmas; as a result, it can shape its policies and guidelines based on a realistic frame in the face of the business environment.

As to the events promoted by IBRAC, one can verify a democrat and energized environment that channels the discussions and stimulates the exchange of experiences. In that sense, IBRAC invites public and private players – antitrust authorities and other competent agents, practitioners, economists, scholars, players etc. –, in order to encourage an enlightening debate concerning, inter alia, the competitive dilemmas, pitfalls, legal gaps and loopholes in the light of the Brazilian landscape and overseas. With no hesitation, we argue that this type of event contributes to beef up a trustworthy relationship between the public and private agents, mirroring legal certainty in the market transactions.

Certainly, in view of the (positive) outcomes along its activities thus far, on top of the commendable feedbacks received in 2016, IBRAC will continue to strive and focus its efforts on the dissemination of antitrust affairs. In the antitrust field IBRAC will keep honing its actions to contribute in a solid way with the antitrust authorities and also with the society as a whole when exerting the advocacy role, in addition to leveraging the competition culture in Brazil. In 2017, that celebrates the 25th anniversary of IBRAC, we hope to see growing investment in the academic side as well, incentivizing a number of well-designed courses to strengthen the theoretical basis of the economic agents.

In the IBRAC's agenda there are also plans for cross border expansions. In other words, IBRAC will seek more engagement from its international associates so as to advance in relevant discussions under fresh outlooks. To move forward in that regard, for instance, IBRAC has already promoted two cocktail receptions in Washington DC when the occasion of the ABA Antitrust Law Spring Meeting, for the purpose of the launching and distribution of its international publications, as pointed above.³¹

What is more, IBRAC is keen to add more members in its framework in a way to see new perspectives under discussion. Likewise, IBRAC expects to issue reports on the activities performed by each of its committees as a way to fortify its institutional legacy, bringing more visibility to the community (one should emphasize that the meetings held by those committees are open to everyone and the agenda is available in the IBRAC's website).

³⁰ These publications are available respectively at: http://www.ibrac.org.br/UPLOADS/Livros/arquivos/Overview_of_Competition_Law_in_Brazil.pdf and http://www.ibrac.org.br/UPLOADS/Livros/arquivos/Overview_of_Competition_Law_in_Latin%20America.pdf. Access on February 2, 2017.

³¹ For the launching and distribution of the present publication, IBRAC will be also hosting a cocktail reception.

Lastly, an ongoing task of IBRAC is related to the development of its website. IBRAC has been pushing hard in this front to invest in the digital space. By doing so, IBRAC intends to expose and give transparency to its activities, encourage the involvement of the players in all relevant discussions, as well as to effectively reach the international players, in a way to be identified as one of the major focal points in connection with antitrust discussions in Brazil, positioning itself like a think tank.

4. Concluding Remarks

Overall, CADE has set its activities based on the golden premises of dialogue, cooperation and transparency. After nearly 5 years of the entry into force of Law No. 12,529/11, the Brazilian antitrust authority has been driving its actions in a way to create room for the empowerment of the society as to the antitrust rules, allowing for a better understanding on the advantages of the competition culture (it is important to recall that antitrust is not a trivial subject within the society, in addition to specificities of the local context, which should be taken into account by the policymakers and the authorities when designing the antitrust policies and guidelines and applying the law).

We understand that CADE has sought to encourage compliance in a general manner, whether through reshaping some of its policies, issuing new guidelines and resolutions, rendering its decisions and clarifying its line of thoughts³², with a readily available case dossier for consult (i.e., case laws), besides encouraging public events and so on.

With respect to the interplay between CADE and non-governmental institutions, we highlighted in this chapter the prominent role developed by IBRAC, whose activities are well-aligned with the CADE's ones when it comes to spurring the open dialogue with the society in order to step up both the compliance and enforcement, hence helping the agents in their self-regulation.

As a matter of fact, 2016 was a frantic year in the corporate field in terms of transactions, investigations, leniency, settlements etc. Surely there has been an ascending learning curve in the antitrust strand for all the involved parties. In order to better capture the nuances behind those events, the institutional interaction and cooperation between CADE and IBRAC function as a loadstar once it enables the rise of substantive thoughts to address some puzzling questions that come to discussion.

As a prospective remark on the horizon, bearing in mind the beginning of 2017, which has started busy indeed, we foresee interesting debates ahead. High-profile investigations, unprecedented issues and sensitive judgments concerning subjects and markets not yet fully explored by the antitrust authority will be an unavoidable reality. As always, those matters should be tackled seriously by CADE. And, as always, IBRAC will remain available to prepare studies,

³² Roughly speaking, one usually observes detailed opinions and decisions rendered by both the General Superintendence and the Tribunal when it comes to ordinary and/or complex cases under the merger control analysis. Clearly, that is positive to detail the relevant market definition and possible concerns of CADE so that the agents can anticipate and better assess and prepare themselves in case of a notifiable transaction, for example.

spread the competition culture within the society, organize events, discuss proposals on legal changes etc.

In conclusion, taking the considerations expressed herein firmly, we are confident to assert that the Brazilian antitrust policy has a lot to win in terms of quality and maturity, noticing inspiring news ahead and the strengthening in both the compliance and enforcement strands. Accordingly, the economic order and the society as a whole should benefit from a healthy competitive environment, with solid institutions that not by accident have captured international attention.³³

³³ In this way, one should mention some awards that CADE has already granted from the Global Competition Review – GCR (a prestigious international magazine on antitrust affairs). In 2015 CADE was awarded by GCR as the Agency of the Year in the Americas and currently is rated as a four-star antitrust authority (out of five stars), which is surely a good sign. For more information, we made reference to the highlights made by the former acting president of CADE, Márcio de Oliveira Junior, in a publication of the Global Competition Review entitled *The Antitrust Review of the Americas 2017 – Brazil: Administrative Council for Economic Defense*, August 30, 2016. Available at: <<http://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2017/1068704/brazil-administrative-council-for-economic-defence>>. Access on February 2, 2017.

More recently, CADE was cited in the World Economic Forum in Davos as one of the best antitrust agencies in the world. The reasons for such well performance were depicted by the former president of CADE, Vinicius Marques de Carvalho, in the following article *Por que o CADE foi para em Davos*. Valor Econômico – Feb 23, 2017. Available at: <<http://www.valor.com.br/legislacao/4878606/por-que-o-cade-foi-parar-em-davos>>. Access on February 25, 2017.

II. MERGER CONTROL

CHAPTER 2 - HOW DOES BRAZIL REVIEW MULTI-JURISDICTIONAL MERGER CASES? AN EMPIRICAL STUDY FROM THE COMPETITION AUTHORITY'S PERSPECTIVE

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1. Introduction

The confluence of the increasing number of cross-border M&A transactions along with the spread of antitrust merger review systems worldwide fostered the international academic debate on how competition authorities should deal with so many different systems. Today more than 140 jurisdictions adopt pre-merger control systems.¹ Despite the efforts for a more unified system, there is still no cohesive international merger control system and domestic regimes may still substantially diverge in terms of thresholds, procedures, rules and principles. On this, part of the literature focusses on possible solutions for this decentralized system, the burden carried by companies due to the multiplicity of mandatory notifications, and the problem of different outcomes arising from these jurisdictions.² However, they do not focus on the authorities' perspective.

In Brazil, concerns about the international character of merger cases seem to be relatively recent. Under the previous Competition Law (Law no. 8,884/94), CADE did not even have a designated international department, but only officers that would unofficially perform this activity. Only after the Law no. 12,529/11 came into force did the authority create an independent international department, the International Unit.³ Regarding international cooperation within merger review cases, CADE's 2015 Annual Report indicates that the authority participated in "16 merger cases with seven different foreign authorities" and "seven inquiries/studies involving 16 foreign authorities".⁴⁻⁵ CADE has undoubtedly put a great deal of effort in promoting cooperation with its international counterparts. Initiatives include the Memoranda of Understandings with foreign

¹ JOURDAN, Jérémie, GREGOW, Mina, SAHLIN, Sophie. The globe-trotter's guide to merger control: How to avoid falling into traps. In *Global Merger Control: Charting a rule to Port*. White & Case, 2015., available at: <<https://www.whitecase.com/sites/whitecase/files/files/download/publications/insight-global-merger-control-white-case.pdf>>.

² BECKER, Bruno Bastos. Decentralized Globalization: Possible Solutions for Multiple Merger Control Regimes in Cross-Border Transactions. *Revista do IBRAC*, São Paulo, v. 22, n. 1, p. 99-122, Jan 2016. See also SILVEIRA, Paulo B. Le contrôle des concentrations transnationales: perspectives comparées. *Revue Innovations*, n. 35, 2011, pp. 139-158).

³ According to Article 10, II of CADE's Internal Regulation.

⁴ CADE's Report 2015, available at: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-2015.pdf>>. Access on October 10, 2015.

⁵ CADE's 2016 Annual Report does not refer to multijurisdictional mergers in that year. See: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>>

authorities,⁶ and the organization of international events and workshops. Cooperation strategies have been vastly employed in the prosecution of international anticompetitive practices, and have most recently been used in merger control activities.⁷ Even though CADE's representatives indicate a broad international cooperation within merger review cases, it is not yet clear how this takes place.⁸

This chapter puts the CADE in the center of the debate and aims at answering the following question: how relevant and complex are multi-jurisdictional merger cases submitted to CADE? In order to answer this question, we did an empirical study to analyze 726 merger cases submitted to CADE in 2015 and 2016. We identified how many and to which other jurisdictions merger cases were also notified, and also the complexity of those cases. The main argument of the chapter is that, despite the significant number of multi-jurisdictional cases submitted to the Brazilian authority, this is not reflected in CADE's activities.

That said, it is important to define what this chapter is *not* about. It will not examine the overall complexity of multi-jurisdictional cases, considering all jurisdictions in which they were notified and their respective decisions. This chapter will focus solely on the Brazilian perspective. Also, it does not deal specifically on cross-border transactions, *i.e.*, deals involving two or more countries in which companies are active, but rather in the notification of a single transaction that, irrespective of the place and the origin of the parties that are involved, needs to be reported to more than one jurisdiction due to the extraterritoriality character of antitrust regulations⁹ – herein called multi-jurisdictional transaction.

2. Literature Review

Legal and economic scholars have put in efforts to better understand and propose solutions for the problem regarding the multiplicity of merger regimes around the world. There are two main areas of concern: (i) how to solve the problem under a systemic and international perspective, and (ii) how costly the system is for companies.

Regarding the first, OECD "*Recommendations of the Council for Merger Review*" from 2005 recognized the importance of coordination and cooperation among competition authorities regarding merger control,¹⁰ and these effort produced results.¹¹ Within the subject of cooperation, Alexandr Svetlicinii stated that bilateral agreements foster international acceptance of basic antitrust

⁶ According to OECD's *Annual Report on Competition Policy Developments in Brazil 2015 and 2016*, in 2014 CADE signed Memoranda of Understanding with authorities from Russia, Colombia, South Korea, French, Peru and China.

⁷ CARVALHO, Vinicius Marques; SILVEIRA, Paulo Burnier. International Cooperation in the Protection of Competition. *Brazilian Journal of International Law*, v. 10, n.1, 2013, pp. 97-104.

⁸ For instance, CADE's recently published Horizontal Merger Guidelines ("*Guia de Análise de Atos de Concentração Horizontal*") does not provide procedural guidelines of international cooperation involving multi-jurisdictional notifications.

⁹ KOVACIC, William E. *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, p. 3. Available at: <https://www.ftc.gov/system/files/documents/public_statements/303671/031210kovacic.pdf>

¹⁰ OECD. Recommendation of the Council on Merger Review (2005).

¹¹ OECD. Policy Roundtables – Remedies in Cross-Border Merger Cases (2013).

policies.¹² Similarly, Damien Geradin, Marc Reysen and David Henry highlight the role played by the U.S. and the European Union¹³ in this process. Due to the apparent insufficiency of bilateral agreements to solve the problem, scholars have proposed different institutional designs in order to create a multilateral system. As Anestis Papadopoulos indicates, these efforts date back to 1925.¹⁴ However, according to Fox, no proposal resulted in a cohesive system.¹⁵ Massimiliano Montini suggests that this is due to countries' industrial policy and the loss of sovereignty.¹⁶ Furthermore, Jörg Phiillip Terhechte also suggests the existence of substantial differences among authorities.¹⁷ And there are several proposed designs. For example, Poonam Singh proposed a supranational agency,¹⁸ while Oliver Budzinski developed a "multilevel system" theory¹⁹.

In the second area of concern, *i.e.*, the burden for the companies to comply with a multitude of regimes, Damien Geradin indicates that there are two especially critical situations: possible different outcomes and the costs involved in the procedure²⁰. Under the first, Paulo Burnier da Silveira indicates several cases that somehow resulted in different decisions among different competition authorities²¹. The most famous is the *GE/Honeywell* merger, in which the U.S. authorities cleared the transaction, while the European Competition Commission blocked it.²² Under the second, Alexandr Svetlicinii states that "merging undertakings encounter enormous difficulties with multiple compliance methods".²³ Regarding the costs, according to research conducted by PriceWaterhouseCoopers, transnational companies incur in high expenses for the

¹² SVETLICINII, Alexandr. EU-US Merger Control Cooperation: A Model for the International Antitrust? *Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia*, 2006, Vol. 11, No. III, pp. 113-126.

¹³ GERADIN, Damien; REYSEN, Marc; HENRYM David. Extraterritoriality, Comity and Cooperation in the EU Competition Law. In: GUZMAN, Andrew T. (Ed.) *Cooperation, Comity, and Competition Policy*. Oxford University Press, 2011, p. 39.

¹⁴ "The history of the attempts to adopt a multilateral agreement on competition law goes back to 1925 when the first international competition code was proposed in a study conducted under the aegis of the League of Nations" (PAPADOPOULOS, Anestis S. *The International Dimension of EU Competition Law and Policy*. Cambridge University Press, 2010, p. 205)

¹⁵ FOX, Eleanor M. Antitrust Without Borders: From Roots to Codes to Networks. In: GUZMAN, Andrew T. (Ed.) *Cooperation, Comity, and Competition Policy*. Oxford University Press, 2011, p. 268

¹⁶ MONTINI, Massimiliano. *Globalization and International Antitrust Cooperation*. International Conference Trade and Competition in the WTO and Beyond. 1999, p. 18 Available at: <<http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-069.pdf>>. Access on September 11, 2015.

¹⁷ *E.g.*, financial and personal resources, composition at the decisional level, independence and accountability (TERHECHTE, Jörg Philipp. *International Competition Enforcement Law: Between Cooperation and Convergence – Mapping a New Field for Global Administrative Law*. The University of Oxford Centre for Competition Law and Policy. Working Paper CCLP (L) 26.)

¹⁸ SINGH, Poonam. *Supranational Agency: A Solution for Conflict in International Mergers?* 2008, Available at: <http://ssrn.com/abstract=1094568> p. 23.

¹⁹ BUDZINSKI, Oliver. *An International Multilevel Competition Policy System*, Available at: <http://ssrn.com/abstract=927710>, p. 1.

²⁰ GERADIN, Damien. The Perils of Antitrust Proliferation: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. *Chicago Journal of International Law*, Chicago. 2009, p. 11.

²¹ SILVEIRA, Paulo B. Le contrôle des concentrations transnationales: perspectives comparées. *Revue Innovations*, n. 35, 2011, pp. 139-158

²² PATTERSON, Donna; SHAPIRO, Carl. *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*. ANTITRUST, Fall 2001.

²³ SVETLICINII, Alexandr. *Competitiveness and Competition: International Merger Control from the Business Prospective*. Economic Integration, Competition and Cooperation, 6th International Conference, Opatija, April 19-20, 2007, p. 2.

submission of multi-jurisdictional merger cases.²⁴ In 2005 the ICN published a thorough report regarding filing fees.²⁵

In sum, research until now has focused mainly on international perspectives, and burden and uncertainty for companies. However, the authorities' perspective – in the sense of how relevant are multi-jurisdictional transactions and how they influence in their activities – seems to be left uninvestigated. This is will be examined in the following sections.

3. Methodology

This chapter adopts the empirical method using publicly available information from merger review cases notified to CADE, in 2015 and 2016. Based on a list of cases provided by the authority,²⁶ we analyzed 726 merger review cases, 379 from 2015 and 347 from 2016.

In Brazil, parties are required to report in the notification form the countries, besides Brazil, where the transactions are or will be notified to other antitrust authorities.²⁷ Therefore, based on the list of cases provided by CADE, the research used two main sources of public information on CADE's website:²⁸ self-reporting information obtained in the public version of each case's notification form, and the report of the authority deciding on the case.

²⁴ Within 62 cross-border transactions, 382 notifications were submitted. The main jurisdictions were the U.S. (40 filings), European Union (32), Brazil (31), Germany (29), Canada (20), UK (16), Poland (16) and Austria (15) (PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews*. 2003, p. 15)

²⁵ INTERNATIONAL COMPETITION NETWORK. Merger Notification Filing Fees. 2005.

²⁶ On August 17, 2016, and January 17, 2017 upon requests under the Information Access Law (Law No. 12,527/2011). It is worth noting that according to CADE's 2015 Annual Report, available at CADE's website, 404 cases were submitted in that year. Conversely, CADE's website indicates only 305 cases notified in 2016, which differs from the number informed by the authorities. In view of this inconsistency, this work adopted the list provided by CADE on August 2016 and January 2017 which include the proceeding number of all cases. The 2015 Annual Report is available at: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-2015.pdf>>. The 2016 figures are available at "CADE in Numbers" (CADE em Números) section of the authority's website: <<http://cadenumeros.cade.gov.br/>>.

²⁷ Exhibits I (Ordinary Procedure Form) and II (Fast Track Procedure Form) of Resolution CADE No. 2/2012 have the same wording in item II.3: "Inform all other jurisdictions in which the transaction was or will be notified, as well as the date(s) of notification". (*free translation*)

²⁸ See

http://sei.cade.gov.br/sei/institucional/pesquisa/processo_pesquisar.php?acao_externa=protocolo_pesquisar&acao_origem_externa=protocolo_pesquisar&id_orgao_acesso_externo=0. Access on October 10, 2015..

4. How ‘international’ are the cases reviewed by the CADE?

4.1 Setting the scene

In 2015 and 2016, 726 transactions were submitted to CADE’s pre-merger review²⁹. Collected data shows that 203 of those cases –28% of the total – were also notified to antitrust authorities in different jurisdictions.³⁰ This suggests that transactions with competition effects in multiple jurisdictions account for a substantive share of CADE’s pre-merger review activities. From 2015 to 2016 there was a reduction of the overall number of merger cases, from 379 to 347; however, there was a slight increase in the number of multijurisdictional cases, from 98 (25.9%) to 105 (30.3%).

**Table 1: Number of multi-jurisdictional cases reviewed by the CADE
(2015 and 2016)**

Class	No. of Cases			%		
	2015	2016	Total	2015	2016	Total
Domestic only	275	236	511	72.6%	68.0%	70.4%
Multi-jurisdiction	98	105	203	25.9%	30.3%	28.0%
Information unavailable	6	6	12	1.6%	1.7%	1.7%
Total	379	347	726	100%	100%	100%

Source: Own elaboration based on public information available at CADE’s website.

The 203 multi-jurisdictional transactions were notified to 58 different jurisdictions. As **Figure 1** below shows, from all multi-jurisdictional cases, approximately 24% were filed to only one other authority, and, on average, multi-jurisdictional cases were filed in 5 different jurisdictions. But some cases stand out: 19 transactions were filed in more than 10 jurisdictions, reaching up to 14 countries in 2015³¹ and 25 countries in 2016 (including Brazil).³²

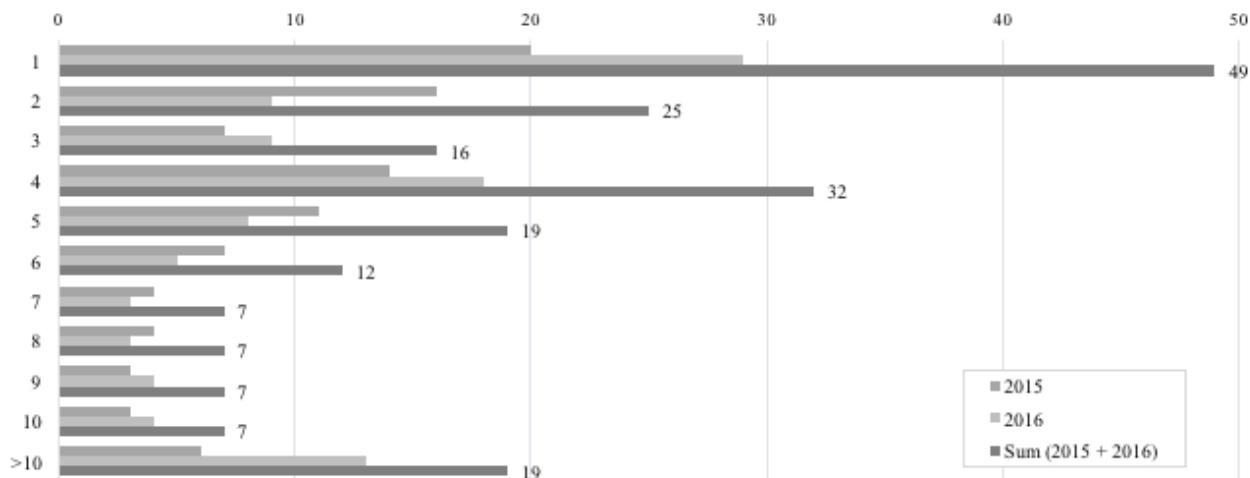
²⁹ See footnote no. 27

³⁰ From the 379 cases, in only 6 the information on other jurisdictions was not available. In only 3 cases the information was not publicly available.

³¹ Concentration Act no. 08700.008592/2015-17. Acquisition of control of American reinsurance company PartnerRe by Italian company Exor. Submitted on August 27, 2015 (under fast-track procedure) and approved by the GS on September 9, 2016.

³² Concentration Act no. 08700.005937/2016-61. Merger of American giants Dow and Dupont. Submitted on August 12, 2016 (under ordinary procedure), and, as of this date, has not yet been approved by CADE..

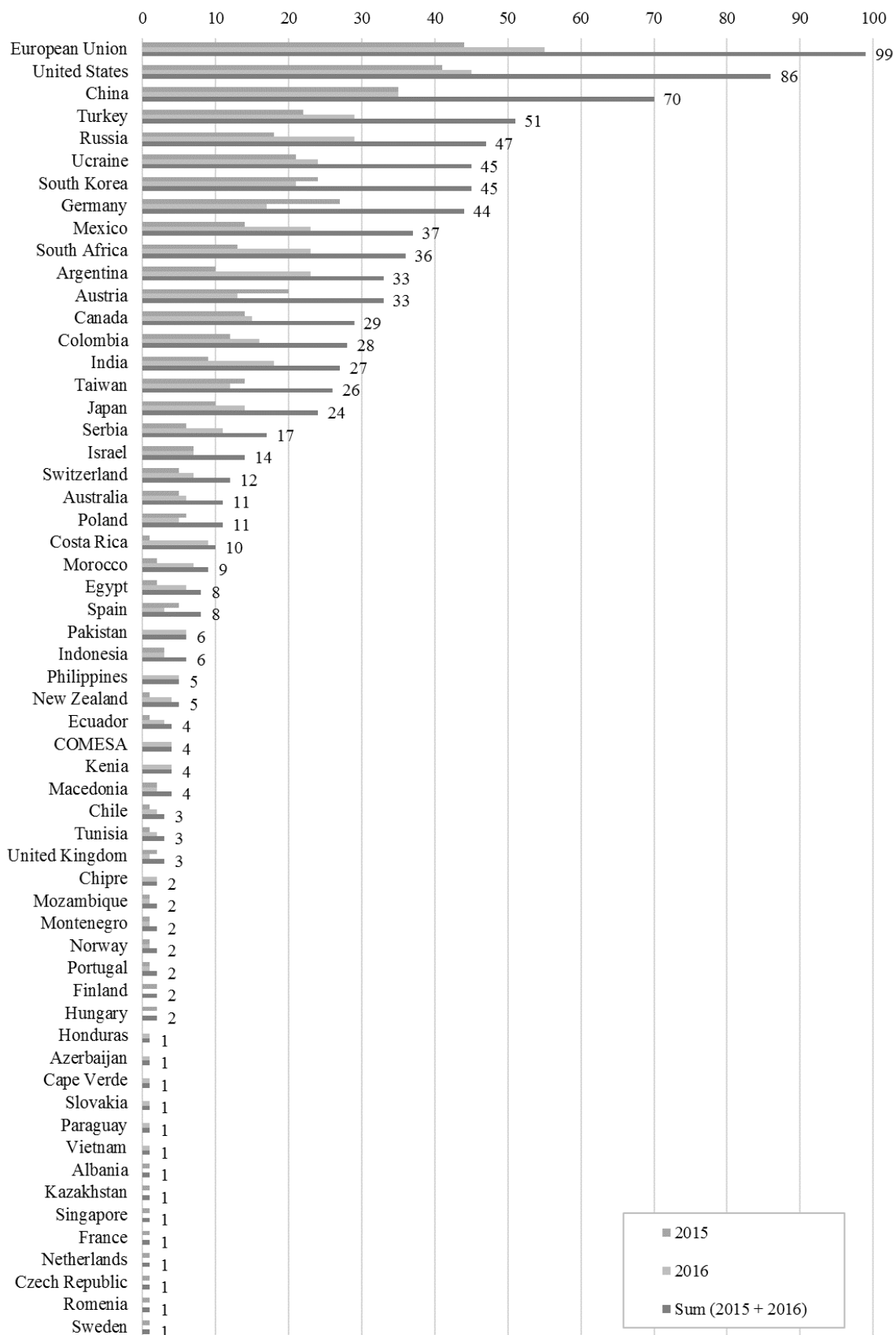
Figure 1: Number of jurisdictions subject to merger review in multi-jurisdictional transactions in Brazil (2015 and 2016, excluding Brazil)



Source: Own elaboration based on public information available at CADE’s website. Figures exclude the notification in Brazil. European Union counts as one jurisdiction. Unavailable notification forms are not considered (6 in both 2015 and 2016). Transactions where the countries are confidential counted as one (3 in 2015 and 12 in 2016).

As **Figure 2** below shows, the European Commission and the U.S. (both the Federal Trade Commission and the Department of Justice) are the leading jurisdictions: 99 cases submitted in the first, and 86 in the U.S. Followed by China (70), Turkey (51) and Russia (48). 30 jurisdictions received five or more notifications from cases submitted to the Brazilian merger-review. It is also worth noting some discrepancies among countries with relatively similar economic activity: while Ukraine, South Korea, Germany stand out with 40 or more cases each, France (1), the Netherlands (1), Portugal (2), and the United Kingdom (3) had very few notifications in 2016. Finally, some jurisdictions made their appearance in 2016 in some cases: Pakistan (6), Philippines (5), COMESA (4) and Kenia (4).

Figure 2: Number of cases notified in each jurisdiction (2015 and 2016)



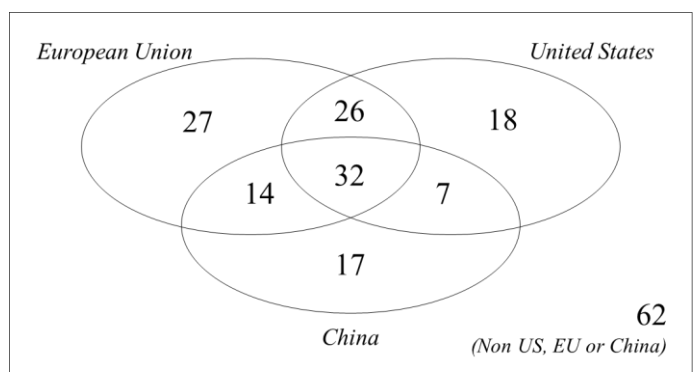
Source: Own elaboration based on public information available at CADE's website

4.2 Overlap among the three most notified countries

As mentioned above, U.S., European Union and China stand out as being the jurisdictions where most of the transactions are notified. Those three jurisdictions have intertwined economies, standing as each other’s main trading partners. While the U.S. and the European Union operate merger control systems since 1914, and 1989, respectively, China has just recently passed its antitrust law, and have been conducting merger control activities since 2008. So, in one hand, the U.S. and European Union represent the most traditional and significant merger control regimes, and in the other, China has been playing a prominent role in international law making and enforcement, bringing its antitrust authority, the Ministry of Commerce, to leading places in M&A regulation, alongside the American and European antitrust authorities.³³

Bearing in mind the concerns in the literature about possible different outcomes from these paradigmatic jurisdictions, it is important to verify overlaps among these three jurisdictions in the Brazilian merger cases. Data also shows a significant overlap between those jurisdictions. For example, from the 203 multi-jurisdictional cases, 58 cases submitted in Brazil, in the U.S. and the European Union; 39 cases submitted in Brazil were concurrently analyzed by the U.S. and Chinese authorities; and 46 cases were presented both in the European Union and in China. As **Figure 3** below shows, 141 transactions (70%) were submitted, at least, in one of the three jurisdictions (19.4% of all transactions notified in those years), and 79 transactions (39%) were submitted, at least, in two. Only 62 transactions (30%) were not submitted either in the U.S., the European Union or China. This confirms theories about the importance of the three jurisdictions in the system.

Figure 3: Overlap among U.S., European Union and China (2015 and 2016)



Total of 203 multi-jurisdictional cases

Source: Own elaboration based on public information available at CADE’s website

On the other hand, in only 21 cases U.S., European Union and China are – concurrently or individually – the only foreign jurisdictions (except Brazil) indicated in the notifications. In other words, most of the times notifications in those leading jurisdictions come accompanied by at least another one. This indicates that eventual cooperation strategies focusing exclusively on those three countries would not, necessarily, solve the issue.

³³ PAPAPANAGIOTOU, Maria O. *Merger Control in the US, EU and China: A Comparative Analysis*. Dissertation (LL.M), City University London, 2014, pp. xiv-xviii.

5. The complexity of multi-jurisdictional cases from the Brazilian perspective

An important part of the literature about multi-jurisdictional merger review focuses in the concern about different outcomes from each authority in a single transaction. *GE/Honeywell* case is the most paradigmatic³⁴ in this sense. After showing in Part 4 that multi-jurisdictional cases played an overall important role in the Brazilian merger review system in 2015 and 2016, this Part 5 aims at verifying how complex were the cases and, consequently, if there is reason for so much concern and efforts for unified and international systems. It is worth noting that this part does not intend to verify the overall complexity of the cases, but rather to assess the relative complexity of multi-jurisdictional transactions vis-à-vis domestic transactions assessed by the CADE.

Our assessment on the complexity of multi-jurisdictional cases will rely on three parameters: (i) type of procedure,³⁵ (ii) time of analysis, and (iii) the content of the decision.

5.1 Type of Procedure

According to CADE's 2016 Annual Report, in 2015 and 2016, the share of ordinary cases was 13.6% and 23.1%, respectively.³⁶ Taking into account only multi-jurisdictional cases, in 2015 ordinary cases played a lower importance (8.2%), but in 2016 this was compensated with a higher percentage (27.6%).

Table 2: Type of Procedure of Multi-Jurisdictional cases in Brazil (2015 and 2016)

Class	Cases			%		
	2015	2016	Total	2015	2016	Total
Fast-track	90	76	166	91.8%	72.4%	81.8%
Ordinary	8	29	37	8.2%	27.6%	18.2%
Total	98	105	203	100%	100%	100%

Source: Own elaboration based on public information available at CADE's website

This does not mean that multi-jurisdictional cases are less complex than the average of all cases notified at CADE. On the contrary, these figures may demonstrate that there is no significant difference among purely domestic (*i.e.*, non-multi-jurisdictional) and multi-jurisdictional cases. Furthermore, the research does not consider the complexity of cases in other jurisdictions. For instance, a case could be extremely simple from the Brazilian perspective, but raise considerable

³⁴ PATTERSON, Donna; SHAPIRO, Carl. *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*. ANTITRUST, Fall 2001.

³⁵ CADE adopts two review procedures for merger cases: (i) ordinary procedure, adopted in complex cases, usually resulting in higher market concentration; and (ii) fast-track procedure. According to CADE's Ruling no. 02/2012, the fast-track procedure applies to transactions that consists of (i) a joint venture; (ii) economic agent substitution, *i.e.*, when the buyer was not previously active in the relevant market; (iii) low market share (under 20%) with horizontal overlap; (iv) low market share (under 20%) with vertical overlap; (v) lack of cause between the transaction and the concentration levels in the relevant market; and (vi) other cases that CADE repute simple enough as to exempt the transaction from a more profound analysis.

³⁶ CADE's 2016 Annual Report, available at: < <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf> >. Access on February 20, 2017..

antitrust questions in other jurisdictions where it is also notified. Therefore, these multi-jurisdictional cases might be more complex abroad than they are in Brazil.

Another question that might arise regarding the type of procedure is whether there is any relationship between the number of jurisdictions notified and the complexity of the case. **Table 3** below shows that there is a slight tendency of ordinary cases being submitted to more jurisdictions. Furthermore, almost half of the cases in which there were ten or more jurisdictions were filed under the ordinary case. Thus, focusing on the type of proceeding, even though there could be inferred some relationship between the number of jurisdictions and the complexity of the case this is not statistical representative.

Table 3: Number of jurisdictions *vis-à-vis* the type of procedure (2015 and 2016)

# of Jurisd.	2015		2016		Total	
	Ordinary	Fast-Track	Ordinary	Fast-Track	Ordinary	Fast-Track
1		20	6	23	6	43
2		16	2	7	2	23
3		7	1	8	1	15
4		14	4	14	4	28
5	1	10	1	7	2	17
6	1	6	2	3	3	9
7	1	3	2	1	3	4
8	1	3	1	2	2	5
9		3	2	2	2	5
10	1	2	1	3	2	5
>10	3	6	7	6	10	12
Unavailable		3		3		6
Total	8	90	29	76	37	166

Source: Own elaboration based on public information available at CADE's website

5.2 Time of Analysis

According to CADE's 2016 Annual Report,³⁷ the authority took an average of 27.6 days to review a case in 2015 and 2016,³⁸ More specifically, for cases assessed under the fast-track procedure, the average review period was of 18 days in 2015 and 16 days in 2016, while for cases assessed under the ordinary procedure, it was of 84.7 days in 2015 and 73.8 days in 2016.

Our research shows that multi-jurisdictional transactions also do not substantially differ from domestic transactions in terms of time of analysis. While in 2015 there is a slightly longer analysis in ordinary cases (124 against 84 days), in 2016 it was faster (59 against 73 days). The

³⁷CADE's 2016 Annual Report, available at: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>>. Access on February 20, 2017.

³⁸ Considering the lapse between the notification date, and the date CADE's final decision is issued.

higher average for ordinary cases in 2015 is especially due to two specific cases that took 313³⁹ and 208⁴⁰ days. For fast track, the average was also lower and closer to the total average.

Table 4: Average time of analysis (2015 and 2016) in days

	2015		2016	
	Ordinary	Fast-Track	Ordinary	Fast-Track
All cases	84.7	18	73.8	16
Multi-jurisdictional	124.9	30.6	59.6	18.8

Source: Own elaboration based on public information available at CADE's website.

All cases based on CADE's 2016 Annual Report

Because of the low number of transaction in each category, it is impossible to infer any relationship between the number of jurisdictions and the time of analysis. Taking, for instance, the >10 jurisdictions transactions in 2016:⁴¹ two transactions took approximately 100 days, two approximately 75 days and one 50 days – the simple average does not inform this difference among cases.

Table 5: Number of jurisdictions vis-à-vis the average time of analysis (2015 and 2016) in days

# of Jurisd.	2015		2016		Total	
	Ordinary	Fast-Track	Ordinary	Fast-Track	Ordinary	Fast-Track
1		38.8	42.8	18.0	42.8	27.7
2		17.4	80.5	14.9	80.5	16.6
3		19.9	(*)	19.8		19.8
4		22.9	64.3	19.6	64.3	21.3
5	18.0	41.0	38.0	20.6	28.0	32.6
6	166.0	29.8	48.0	15.0	87.3	24.9
7	51.0	21.3	84.5	14.0	73.3	19.5
8	31.0	25.0	78.0	20.5	54.5	23.2
9		29.7	38.5	15.0	38.5	23.8
10	150.0	66.5	60.0	17.0	105.0	36.8
>10	194.3	49.0	59.4	25.7	99.9	37.3
Average	124.9	30.6	55.5	18.8	70.5	25.2

Source: Own elaboration based on public information available at CADE's website.

(*) The sole case was reproved by the authority.

³⁹ Concentration Act no. 08700.007191/2015-40, between Halliburton Company e Baker Hughes Incorporated, approved by the Tribunal on May 30, 2016 Reporting-Commissioner Cristiane Alkmin.

⁴⁰ Concentration Acts no. 08700.000206/2015-49, between Merck KGaA and SigmaAldrich Corporation, approved by the General Superintendence on August 10, 2015.

⁴¹ 5 transactions, since 2 were not decided by the time this work as published.

5.3 Content of the Decision

The last two sessions demonstrated that it is not possible to infer whether multi-jurisdictional cases are more complex than domestic ones based solely on number of jurisdictions, type of procedure and time of analysis. This session takes a step further and analyzes the content of all 203 multi-jurisdictional cases' decisions issued by CADE.⁴²

At first, it is worth comparing the outcomes in general vis-à-vis multi-jurisdictional cases. According to “CADE in Numbers” statistical tool,⁴³ in 2015 only one case was reprovved and seven were approved with restrictions implemented through agreements with the authority (the so called ACCs).⁴⁴ Among these eight cases with restrictions (reprovved and approved with restrictions), only one case was multi-jurisdictional (*Ball/Rexam* case described below).⁴⁵ In 2016, no case was reprovved, three were approved with restrictions, and tw through ACCs. None of those five cases was multi-jurisdictional.

Also according to 2015 Report, the authority cooperated with 7 different international authorities in 16 mergers.⁴⁶ However, this is not reflected in CADE's decisions: among 98 multi-jurisdictional cases, there were very few were the cases in which the decision made reference to the fact that a transaction was being notified in other jurisdictions, and even fewer were the cases in which CADE's decision expressly mentioned the review process of the same transaction in a foreign authority. Unfortunately, 2016 Report does not mention international cooperation – even though multi-jurisdictional cases were more representative in this year.

Looking at the content of CADE's decisions, as a rule, they do not mention the multi-jurisdictional character of transactions and deal with them as they were purely domestic. Out of the few cases where there is any mention to foreign filings, we could identify three different scenarios: (i) brief mention of foreign filings (mostly in the Transaction's description) without indicating the outcome abroad; (ii) mention and indication of outcome, and (iii) the specific reference to contacts with foreign authorities. **Table 6** below shows figures of each of these scenarios.

⁴² Both from the General Superintendency (SG) and the Tribunal, when applicable.

⁴³ Available at: <http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmero%20s.qvw&host=QVS%40srv004q6774&anonymous=true>. Access on February 20, 2017.

⁴⁴ CADE's 2016 Annual Report, available at: <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>. Access on February 20, 2017.

⁴⁵ Merger Case no. 08700.006567/2015-07, approved on December 9th, 2015. Reporting-Commissioner Gilvandro V. C. de Araújo.

⁴⁶ CADE's 2015 Annual Report, available at: <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-2015.pdf>.

**Table 6: Content of CADE’s decision regarding other jurisdictions’ outcome
(2015 and 2016)**

Content of Decision	2015		2016	
	# of cases	%	# of cases	%
No mention to other jurisdictions’ notification	70	71.4%	76	73.5%
Simple mention without indicating the outcome	20	20.4%	23	22.5%
Mention and indication of outcome	7	7.1%	4	3.9%
Reference to contacts with foreign authority	1	1.0%	0	0.0%
Total	98	100%	102	100%

Source: Own elaboration based on public information available at CADE’s website.

(*) 2016 figures includes 3 cases with pending approval.

In *Ball/Rexam*⁴⁷ - the sole multi-jurisdictional case that CADE imposed any restrictions in both years – the Reporting-Commissioner indicated that the content of the Applicants’ notification was confronted to information obtained in contacts made with the antitrust authorities in the U.S. and in Europe, where the case was also being reviewed.⁴⁸ It is worth noting, however, that, besides the U.S. and the European Union, the case was also submitted to competition authorities in Mexico, Russia, Serbia and Turkey, but it seems that CADE did not contact them.

Following we describe some features from the cases with high number of notifications in both years. In 2015, besides *Ball/Rexam*, *Merck/Sigma-Aldrich* (11) and *TNT/FedEX*⁴⁹ (18) were subject of several notifications. In 2016, there was a high number of multi-jurisdictional cases, and also the number of jurisdictions that a single transaction was subject of approval: *Denali/EMC*⁵⁰ (19), *Dow/DuPont*⁵¹ (24), *China National Agrochemical Corporation/Sygenta*⁵² (21), and *Boehringer Ingelheim/Merial Saude Animal*⁵³ (19).

⁴⁷ Concentration Act no. 08700.006567/2015-07, approved by the Tribunal on December 9th, 2015. Reporting-Commissioner Gilvandro V. C. de Araújo.

⁴⁸ According to the decision: “The content of the Applicants’ proposal was confronted to the information obtained by my office upon contacting parties who challenged the transaction and the American and European antitrust authorities (where the transaction was also notified). In this case, despite the antitrust review in different jurisdictions may differ from one another, there is no doubt that the data collected from the Federal Trade Commission and the European Commission were of great use to review the case and to negotiate the restrictions imposed” (*free translation*). In the original: “O conteúdo da proposta das Requerentes foi confrontado a informações obtidas pelo meu gabinete em contatos com impugnantes e com autoridades antitruste dos Estados Unidos e da Europa (onde a presente operação também foi submetida). Nesse particular, apesar de as análises concorrenciais nas diferentes jurisdições serem autônomas, sem dúvidas os dados trocados com a Federal Trade Commission e a Comissão Europeia foram extremamente importantes para a apreciação do caso e para a negociação do ACC.”.

⁴⁹ Concentration Act no. 08700.009559/2015-12, approved by the Tribunal on April 4, 2016. This case is not included in previous sections statistics, since it was not disclosed in the Notification Form.

⁵⁰ Concentration Act no. 08700.001012/2016-41, approved by the General Superintendence on April 5, 2016.

⁵¹ Concentration Act no. 08700.005937/2016-61, not decided by the time this work as published.

⁵² Concentration Act no. 08700.006269/2016-90, not decided by the time this work as published

⁵³ Concentration Act no. 08700.005398/2016-61, approved by the General Superintendence on September 26, 2016.

In *Merck/Sigma-Aldrich*,⁵⁴ which was notified to 11 other jurisdictions,⁵⁵ the Opinion issued by CADE's General-Superintendence described the restrictions applied to the transaction in Europe, indicating they were effectively to eliminate horizontal overlaps that could raise antitrust concerns in Brazil.⁵⁶ The *TNT/FedEx* case was filed to 18 jurisdictions.⁵⁷ The General-Superintendence suggestion to approve was contested by UPS, a main competitor in the market. At the end, CADE's Tribunal approved the transaction without restrictions – and without mentioning outcomes in foreign competition authorities.

In *Denali/EMC*,⁵⁸ the Opinion issued by the General-Superintendence briefly mentions the European Commission's decision.⁵⁹ On the other hand, despite being subject to other 19 jurisdictions, the *Boehringer Ingelheim/Merial Saude Animal*⁶⁰ decision does not mention any notification abroad.

Therefore, our findings diverge from CADE's annual report and it does not seem that there is much effort for a more intense cooperation among competition authorities around the world.

6. Conclusions

Based on the results of the research, it is possible to draw three main conclusions. First, multi-jurisdictional merger review cases represented in 2015 and 2016 a non-negligible share (28%) of all cases reviewed by CADE in 2015. The three most important jurisdictions (U.S., European Union and China) play an important role, for 70% of all multi-jurisdictional cases were submitted also in, at least, one of them. The pattern multi-jurisdictional model seems to be at least one of the three main jurisdictions plus one to three other random jurisdictions.

Second, according to the outcomes, there is no significant difference in complexity of domestic and multi-jurisdictional cases. With respect to both type of procedure and time of analysis, they do not differ from the average of domestic cases. Furthermore, the content of the decisions does not indicate more complexity regarding this issue.

⁵⁴ Concentration Act no. 08700.000206/2015-49, approved by the General Superintendence on August 10, 2015.

⁵⁵ European Union, US, China, Colombia, Israel, Japan, Russia, South Africa, South Korea, Taiwan and Ukraine.

⁵⁶ According to the decision: "in the only scenario in which problems were identified (...), the restriction imposed by the European Commission practically eliminates the overlap, because it brings room for a new competitor to enter the market with significant market shares. (...) Considering the relevance of the brand, the buyer of Flucka can explore the Brazilian market more intensively." (*free translation*). In the original: "no único cenário de mercado de inorgânicos em que verificou-se um possível problema (...), o remédio negociado pela Comissão Europeia praticamente extingue a sobreposição verificada, ao passo que possibilita que um novo concorrente adentre esse mercado já com market share significativo. (...) considerando a relevância dessa marca em outros países, o comprador do negócio da marca Fluka pode passar a atuar mais intensamente no mercado brasileiro".

⁵⁷ This information is solely available in the Reporting Commissioner's vote. At the moment of the approval at CADE, the transaction was also approved without restrictions in 14 other jurisdictions (U.S., European Commission, Australia, Chile, Colombia, Israel, Japan, Namibia, South Africa, New Zealand, Russia, Taiwan, Turkey, and Ukraine).

⁵⁸ Concentration Act no. 08700.001012/2016-41, approved by the General Superintendence on April 5, 2016.

⁵⁹ Information provided in the Legal Opinion is confidential.

⁶⁰ Concentration Act no. 08700.005398/2016-61, approved by the General Superintendence on September 26, 2016.

Third, despite CADE's declared enhanced international cooperation strategies,⁶¹ the research could not verify how contacts with foreign authorities are held and how they influence CADE's decisions. CADE's decisions rarely mention the existence of cooperation with foreign authorities and also do not consider the outcome from international authorities in its reviews.

⁶¹ See CADE's Report 2015, available at: <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-2015.pdf>>. Access on October 10, 2015.

CHAPTER 3 - ASSOCIATIVE AGREEMENTS UNDER BRAZIL'S CONTROL OF CONCENTRATIONS: THE SEARCH FOR MEANING

Ricardo Botelho
Patrícia Deluca

1. Introduction

Of the five main categories of transactions that lead to most controversies on their submission to mandatory antitrust notification,¹ the discussion regarding the so-called “associative agreements” in the Brazilian Antitrust Law encompasses two of them: **vertical agreements** and **horizontal collaborations**.²

On October 18, 2016, CADE issued a Resolution redefining the concept of “associative agreements” for the purpose of merger review, in an attempt to put an end to a debate that has lasted more than two decades in Brazil. Resolution CADE No. 17/16, which entered into force on November 25, 2016, intends to provide a better and more selective filter (by dismissing the filing of agreements with restricted relevance to competition), while being also more coherent with the spirit of the merger review system of the Brazilian Antitrust Law.

This paper briefly describes the evolution of CADE’s understanding on what constitutes an associative agreement as established by Article 90, IV, of the Brazilian Antitrust Law, summarizing the legal foundations and the main precedents that culminated in the new Resolution. It is divided into six sections: (i) this introduction; (ii) background; (iii) Resolution No. 10/14; (iv) Resolution No. 17/16; (v) first precedents under Resolution No.17/16, and (vi) conclusion.

2. Background

Brazilian Antitrust Law, which entered into force in May 2012, has restructured the merger review system. In addition to instituting the pre-merger regime,³ the “new” law redefined the very hypothesis of transactions subject to mandatory filing. Previously, under Law No. 8,884/94, transactions subject to mandatory filing explicitly included not only “acts aiming at economic

¹ They are: (i) vertical agreements; (ii) horizontal collaborations; (iii) acquisitions of minority shareholdings; (iv) acquisitions of assets, and (v) acquisitions of securities convertible into shares.

² As the defined by the U.S. authorities at the Antitrust Guidelines for Collaboration Among Competitors: “A “competitor collaboration” comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom” (available at <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>. Access on February 14, 2017).

³ According to the former competition law, the notification of a transaction to CADE was not suspensory and could be made up to 15 business-days after the execution of the first binding document between the parties (*i.e.*, a post-merger notification regime).

concentration” (Article 54, Paragraph 3), but also “any act, under any form, that has the potential to limit or restrain competition or result in market domination” (Article 54, *caput*).⁴

At that time, the boundaries of such broad notion was determined by CADE’s case law and included not only transactions entailing economic concentration⁵ – *i.e.*, transactions that lead to change in the structure of relevant markets, typically by means of lasting changes in the control of the parties concerned⁶ –, but also certain vertical agreements and horizontal collaborations. In other words, under the previous competition law, CADE’s preventive review was not “exclusively structural”, as it also included transactions with “potential to restrict competition” even if they did not lead to lasting changes in the structure of the relevant markets (or “economic concentration”).⁷

⁴ Provided that the economic groups of the parties registered annual revenues or held market shares superior to the legal thresholds.

⁵ Economic concentration differs from economic cooperation. While the former typically implies a lasting change in the structure of the parties concerned – *i.e.*, the undertakings will start to act in the market as a single player from the economic standpoint in all the activities performed by them, being subject to one single decision center –, the latter is characterized by promoting the behavioral alignment of independent players’, which start to act uniformly (or jointly) exclusively with regard to the aspects subject to the agreement executed between them, with no structural change in the parties’ control (see SALOMÃO FILHO, Calixto. *Direito Concorrencial*. São Paulo: Malheiros, 2013, p. 294 and 321). ICN clarifies: “*The degree of economic integration between the parties and the duration of the relationship (both subsumed in the notion of a “lasting structural change” under the EC Merger Regulation) are often utilized to distinguish qualifying “merger” transactions from mere collaborative arrangements, which are normally reviewed under competition laws that are primarily directed at anticompetitive agreements between independent undertakings*” (Defining “Merger” Transactions for Purposes of Merger Review. Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>>. Access on February 13, 2017).

⁶ The typical way to perform an economic concentration consists of transactions that promote structural changes in the relevant market by means of lasting changes in the **structures (control) of the parties**, for example, mergers and the acquisition of controlling stakes. In the European Commission Merger Regulation: “*it is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market*” (Council Regulation No. 139/2004 on the control of concentrations between undertakings. Available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN>>. Access on February 23, 2017). Notwithstanding, there are other situations that are also capable of altering the **market structure**, and, as so, entail an economic concentration, such as transactions constituting a new undertaking to perform an economic activity, even though they do not result in a complete integration of the parties (*e.g.*, the creation of a full function joint venture, as adopted by the European Competition Commission – see footnote No. 24 below), that is, a cooperation between the parties (once they do not totally integrate their activities), but with effects of economic concentration specifically in the relevant market where the new common undertaking operates (since the parties do not compete in this market). Regarding the notion of “typical economic concentration”, OECD, while examining how different jurisdictions define what transactions fall within the scope of their merger control, set the “core/fringe” explanation, stating that: “*All these differences [...] matter little for transactions that lie at the core of merger review laws. For example, an outright acquisition of all shares of a previously independent target will invariably be considered a merger transaction. There would be not much difference if the acquiring firm obtains an 80% interest rather than 100% ownership of the target, or substantially all of the target’s assets that are necessary to carry on the target’s business. Merger review laws also would typically apply when two firms combine previously independent lines of business into a newly formed and jointly controlled entity that becomes a new market player. But the more one moves from the core toward transactions at the “fringe”, the more apparent the differences among various jurisdictions become*” (Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review. Available at <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>>. Access on February 13, 2017).

⁷ For reference, the *Guidelines for the Economic Analysis of Horizontal Concentration Acts* issued by SEAE and the former Secretariat of Economic Law (SDE), according to Joint Ordinance No. 50/2001 (available at <http://www.cade.gov.br/assuntos/normas-e-legislacao/portarias/2001portariaconjunta50-1_guia_para_analise_economica_de_atos_de_concentracao.pdf>. Access on February 21, 2017), expressly provided that “*This Guidelines only covers acts of economic concentration. Article 54 of Law No. 8,884/94, however, applies*

With regard to **vertical agreements**, which include several types of typical commercial arrangements (such as distribution, supply or licensing agreements), CADE had established in precedents that they would have the “potential to restrain competition” (and, consequently, be subject to mandatory filing) if the following requisites were present: (i) existence of exclusivity arrangement; (ii) duration superior to five years, considering possible extensions; (iii) transfer of rights over assets relevant from competition standpoint or change in the corporate relationships between the contracting parties; (iv) impossibility of costless rescindment of the agreement, and/or⁸ (v) the object of the agreement covers at least 20% of the relevant market.⁹⁻¹⁰

With regard to **horizontal collaborations**, CADE considered them to be of mandatory notification, since, according to CADE, they would always have the potential to restrain competition, without any additional requisites demanded.¹¹

However, the definition of transactions subject to mandatory filing in the current Brazilian Antitrust Law is significantly different from the old one,¹² so that CADE’s jurisprudence under the latter is not perfectly adaptable to the hypothesis of the former. According to Article 88 of the Brazilian Antitrust Law, **only “acts of economic concentration”** are subject to prior notification, as long as the economic groups concerned meet the revenues thresholds.¹³ In addition, Article 90 of the Antitrust Law states that:

*also for the control of other acts that could limit or otherwise prejudice the freedom of competition, or result in the domination of relevant markets of goods or services, such as **agreements between competitors**”.*

⁸ Unfortunately, CADE’s case law was not very clear about whether all of the requisites should be present to give rise to a duty to file.

⁹ See President Arthur Badin’s vote in Concentration Act No. 08012.000182/2010-71 (notifying parties: Monsanto and Iharabras), considered of non-mandatory notification by the Tribunal on March 17, 2010.

¹⁰ See Commissioner Carlos Ragazzo’s vote in Concentration Act No. 08012.005367/2010-72 (notifying parties: Monsanto and Dow Agrosiences), considered of non-mandatory notification by the Tribunal on June 23, 2010.

¹¹ For instance, code share agreements between airlines were mandatorily filed to CADE – see Concentration Acts No. 08012.010260/2008-21 (notifying parties: TAM and Pluna), 08012.013004/2007-13 (notifying parties: TAM and United Airlines), 08012.011318/2007-73 (notifying parties: TAM and TAP), 08012.002635/2010-02 (notifying parties: Continental Airlines and TAM), 08012.004855/2010-62 (notifying parties: TAM and US Airways), 08012.011050/2011-56 (notifying parties: TAM and Aerovias de Mexico) and 08012.000062/2012-36 (notifying parties: TAM and Turkish Airlines), all of them approved without restrictions by CADE’s Tribunal. In this sense, Commissioner Fernando de Magalhães Furlan’s vote in *TAM/TAP*, decided on 07.09.2008, mentioned that “*There is some discussion on the need to submit code share agreements to antitrust authorities. [...] SDE, considering SEAE’s Opinion on the case, opt not to expend greater resources [on this matter] and concluded, conservatively, that the agreement is of mandatory notification*”. In addition, CADE also analyzed other horizontal collaborations, such as partnerships agreements. In Concentration Act No. 08012.002976/2009-36 (approved without restrictions by the Tribunal on July 08, 2009), Dow and Syngenta, competitors in seed and agricultural research and development segments, filed their agreement for conferring reciprocal and non-exclusive licenses for corn production. The transaction was considered of mandatory filing, based exclusively on the fulfilment of the revenues thresholds by the parties.

¹² Aligned with the implementation of a pre-merger review system, under which the authority’s analysis should be faster and, therefore, more selective.

¹³ Article 88 of Brazilian Antitrust Law, as amended by Ministry of Justice/Ministry of Finance Joint Ordinance No. 994/12, it shall be submitted to CADE by the parties involved in the transaction the acts of economic concentration in which, cumulatively: (i) at least one of the economic groups involved registered gross revenues in Brazil, in the previous year, equal or superior to R\$ 750 million, and (ii) at least another economic group involved registered gross revenues in Brazil, in the previous year, equal or superior to R\$ 75 million.

For the purposes of Article 88, an **act of concentration** is carried out when:

I - Two or more independent undertakings merge with each other;

II - One or more undertaking acquires, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks, or assets, whether tangible or intangible, by contract or by any other means, the control or parts of one or more undertakings;

III - One or more undertakings merge into another, or

IV - Two or more undertakings enter into an associative agreement, consortium or joint venture

A reasonable interpretation taken from the combined wording of Articles 88 and 90 above is that the existence of an economic concentration resulting from the transaction is essential for the duty to file. In other words, the hypotheses provided for in Article 90 are ways or modes of carrying out **economic concentration**, meaning that transactions (mergers, acquisitions of assets or shares, joint ventures etc.) are only subject to filing if they entail a lasting impact on the market structure.¹⁴ From this standpoint, the merger control performed by CADE could be correctly considered “**exclusively structural**” – the genuine “control of concentrations”, as explicitly named by the current law.¹⁵

Therefore, according to such perspective, associative agreements (as well as, logically, joint ventures and consortiums) will only be subject to merger control if they have a **concentrative impact on the market structure**.

However, CADE has, so far, never adopted such perspective. The enactment of the Brazilian Antitrust Law immediately generated an immense debate regarding the meaning of “associative agreement”, since it was a vague term that had never been used in Brazilian legislation before and had neither historic reference in antitrust practice nor represented a typical category of commercial agreement or transaction.

During the first years of enforcement of the Brazilian Antitrust Law (2012/2013), CADE indicated that it would interpret “associative agreement” as a broad category that includes all agreements considered to be notifiable under the old competition law but which did not have a specific provision in the new law. Therefore, with regard to vertical agreements, CADE explicitly indicated that it would continue to apply the above-mentioned requisites for mandatory filing

¹⁴ The understanding that the hypothesis of transaction described in Article 90 is only subject to filing when they bring about an economic concentration is already incontrovertibly (and almost “unconsciously”) being made at least in relation to the hypothesis of Article 90, III (“when an undertaking merger into another one”). It is indisputable that when an undertaking merger into another undertaking that is subject to the same controlling entity, there is no need to file the transaction with CADE, regardless of the revenue thresholds. The only logical reason for dismissing the filing of such transaction under the Brazilian Antitrust Law is the fact that it does not entail an economic concentration.

¹⁵ “Control of concentrations” is the title given of the Section of the Brazilian Antitrust Law that governs the merger review system. Although titles of sections of law are not legally binding, they are undoubtedly good reference for the interpretation of the section provisions as a whole.

established under the former law.¹⁶ In addition, CADE understood that “associative agreements” would also encompass any form of horizontal collaborations not perfectly qualified as a “joint venture” or a “consortium”.¹⁷ Those assumptions were insufficient and questionable, considering the significant differences between the “legal hypothesis” of the former and the current Antitrust Law.

The first attempt to define “associative agreements” for the purposes of Articles 88 and 90 came with Resolution CADE No. 10/14, which came into force in January 2015 (but is now revoked). The rules, however, were not satisfactory and created even further practical difficulties, as summarized below.

3. Resolution No.10/14

According to Resolution No. 10/14, any agreement with a term in excess of two years¹⁸ was considered “associative” if there were “horizontal or vertical cooperation or sharing of risk resulting in interdependence relationship between the contracting parties” (Article 2, *caput*).

The first Paragraph of Article 2 stated that “there is horizontal or vertical cooperation or sharing of risk resulting in an interdependence relationship” whenever:

- (i) In agreements where the parties are horizontally related (competitors) in the object of the agreement: the sum of their market shares in the relevant market affected by the agreement is equal or superior to 20%, or
- (ii) In agreements where the contracting parties are vertically related in the object of the agreement: one of them holds at least 30% or more of the relevant markets affected by the agreement, given that at least one of the following conditions are met: (a) the agreement

¹⁶ In Concentration Act No. 08700.009957/2013-69 (notifying parties: Raízen Energia and Novozymes), approved by the General Superintendence on December 13, 2013, the companies asserted that the notification of the supply agreement was not mandatory, pointing that the agreement did not allow to infer any associative relationship between the companies, and required that CADE considered the notification undue. CADE’s GS, however, considered that, in spite of “*the existence of some discussions in CADE’s case law related to the notification of supply agreements, depending on certain characteristics*” (in express reference to Commissioner Arthur Badin’s vote at Concentration Act No. 08012.000182/2010-71 - notifying parties: Monsanto and Iharabras), “*it is worth highlighting that, in all mentioned precedents, the existence of exclusivity clauses was considered a contractual element sufficient to determine the need to file*”.

¹⁷ Under the Brazilian Antitrust Law, code share agreements and other horizontal collaborations continued to be considered of mandatory notification. See, for instance, Concentration Acts No. 08700.010858/2012-49 (notifying parties: TAM and American Airlines), 08700.006488/2013-26 (notifying parties: VRG and Alitalia), 08700.009968/2013-49 (notifying parties: VRG, Aerolíneas Argentinas and Austral) and 08700.010625/2013-27 (notifying parties: VRG and Air France), all of them approved without restrictions by the GS. In Concentration Act No. 08700.003536/2013-24, which involved an agreement for the sharing of 4G network infrastructure between telecoms Claro and Vivo, the GS stated that the transaction was subject to the duty to file since (i) the agency had already decided on a similar case; (ii) the revenues thresholds were met, and (iii) “*as it represents a cooperation agreement between two direct competitors for the sharing of assets needed to their economic activities and in that, in thesis, in determined cases, could include restrictive clauses to competition, it demands precaution from the antitrust authority that should verify, on the merits, if the agreement is capable or not of producing restrictions to competition*”.

¹⁸ The hypothesis of the extension of short-term agreements was also object of Resolution CADE No. 10/14, which provides that they should be notified if the two years term is reached or surpassed.

establishes the sharing of revenues or losses between the parties, or (b) an exclusive relationship is derived from the agreement.

The first difficulty arising from the wording of the Resolution No. 10/14 was the lack of clarity around the essential elements of the definition of associative agreement, established in the *caput* of Article 2 (“horizontal or vertical cooperation or sharing of risk resulting in an interdependence relationship”). Instead of defining those elements, the first Paragraph of Article 2 in fact created other thresholds.

In practice, any kind of agreement with duration equal or superior to two years was subject to mandatory filing, provided that the parties met the minimum market share and revenue thresholds and, in the case of vertical agreements, the agreement sets forth exclusive relationship or mere sharing of results. Thus, in reality, the presence of “sharing of risks” or “interdependence relationship” was not truly assessed in order to deduce the need to file.¹⁹

Consequently, the definition of associative agreement established by Resolution No. 10/14 resulted in a rather broad and moderate selective notion, as it involves numerous agreements, including different types of typical commercial contracts, most of them with no major impact on competition. Moreover, such definition encompassed agreements that clearly did not result in longstanding and structural change in the relevant markets – in dissent (or, rather, contradiction) with the spirit of the merger review system under the Brazilian Antitrust Law, which is explicitly based on the notion of economic concentration.

As a result, the system brought about by the Resolution tended to be excessively costly both to companies, obliged to bear the non-negligible costs of communicating such agreements to CADE, and to the agency, which was overloaded with irrelevant transactions, compromising the efficiency and effectiveness of the structural control as a whole.

Curiously, however, the number of associative agreements filed with CADE since Resolution No. 10/14 entered into force was much smaller than expected. From January 2015 to November 2016 (when Resolution No. 10/14 was revoked), only 50 associative agreements were filed (less than 5% of total transactions filed in the same period), out of which 15 were considered non-mandatory notification. All other filed agreements were approved without restriction.

It is possible to speculate on the reasons for such a small number of agreements communicated to CADE, even in face of clearly almost non selective thresholds. Maybe the rule itself was not totally comprehended by the companies (what is evidenced by the high percentage of cases where the agreement notified was not considered mandatory – 30%). Notwithstanding that, this reduced number is not realistic: it is unlikely that in almost two years there have been more mergers than, for example, supply and distribution agreements containing exclusivity clauses. In other words, it would not be erroneous to assume that there was significant non-compliance with the obligation to file associative agreements under Resolution No. 10/14.

Another issue faced was the adoption of the market share criteria as a filter to define agreements subject to mandatory filing. Measuring market share frequently involves some level of

¹⁹ Under Resolution No. 10/14, 15 agreements notified to CADE were considered of non-mandatory file by the GS. In all the cases, the decision was based on the objective criteria established by the resolution: (i) the inexistence of a horizontal or vertical relation; (ii) the non-fulfillment of the market share thresholds, and/or (iii) when it refers to a vertical agreement, the inexistence of clauses that establish exclusive deal or the sharing of revenues and losses.

uncertainty, since relevant market definitions are many times complex and subject to controversies: to several markets, there is no consolidated position in CADE's case law and its delimitation accepts different methodologies and adaptation over time.

The need to file the renewal of agreements with less than two years term also caused some debate, being questioned if the effects of the agreements should be suspended during the CADE analysis period, since the system provides for pre-merger notification. This dynamics is, however, contrary to commercial practices where the interruption of the activities would incur in serious losses for the parties.

All those deficiencies distanced the concept brought by Resolution No. 10/14 from the best practices for the definition of transactions subject to merger review. ICN²⁰ and OECD²¹ have been recommending standards for such definition, including that: (i) the criteria should be clear and objectively quantified; (ii) the information needed for assessing whether the transaction is entitled to review should be readily accessible to the parties (*i.e.*, available within their normal activities course), and (iii) it should not imply unnecessary costs with transactions that do not represent antitrust concerns.

In sum, Resolution No. 10/14 was unclear in many aspects. Under the pre-merger regime the clarity of whether the transaction should be notified is especially relevant, as the non-compliance with the duty to file could lead to the application of severe penalties.²² In such context, the urge for a new concept was blatant, which led CADE to completely reformulate the definition of associative agreement in the new Resolution No. 17/16.

4. Resolution No. 7/16

After a long and well discussed process, which had the broad participation of the antitrust community (Public Consultation No. 02/16), Resolution No. 17/16 was finally set forth, defining new rules for the submission of associative agreements and revoking the former Resolution No. 10/14.

Under the new Resolution, it shall be considered "associative" any agreement whose duration is superior to two years and that establish a **common undertaking to perform an economic activity**, as long as, cumulatively: (i) it establishes the **sharing of revenues and losses** in

²⁰ ICN. *Recommended Practices for Merger Notification Procedures* (2005). Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>>. Access on February 13, 2017; *Defining "Merger" Transactions for Purposes of Merger Review* (2007). Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>>. Access on February 13, 2017; *Setting Notification Thresholds for Merger Review* (2008). Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>>. Access on February 13, 2017.

²¹ OECD. *Recommendations & Best Practices – Recommendation of the Council on Merger Review* (2005). Available at <<https://www.oecd.org/competition/mergers/40537528.pdf>>. Access on February 13, 2017; *Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review* (2013). Available at <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>>. Access on February 13, 2017.

²² If filing with CADE is mandatory, the closing (or any act of implementation) of the transaction must wait until CADE's final ruling. The violation of this duty (the so-called gun jumping) subjects the parties to the payment of fines ranging from R\$ 60 thousand to R\$ 60 million and the declaration of nullity of the acts performed until the moment, besides the possibility of opening a formal investigation for anticompetitive practice (Article 88, Paragraph 3, of the Brazilian Antitrust Law).

the economic activity that constitutes its object; (ii) the contracting parties are **competitors in the relevant market** that is the object of the contract. Agreements with duration inferior to two years or with indeterminate term should be notified only if the two-year period, counted from its execution, is achieved.

The new Resolution establishes the basis for significant changes in the rules for mandatory filing of both **vertical agreements** and **horizontal collaborations**.

Since Resolution No. 17/16 requires that the parties be competitors in the relevant market that is the object of the contract, in practice it **dismisses the need to file typical vertical agreements** – licensing, supply or distribution agreements, for instance, do not fall within the new concept. The exclusion of the need to file vertical agreements is not a minor step for CADE. Actually, it puts an end (or at least intends to) a long-term debate on *whether* and *in what circumstances* vertical agreements must be filed. From now on, a typical vertical agreement will be subject to CADE’s review only under the perspective of behavioral (or repressive) control, as an anticompetitive practice, if and when it may have the potential to significantly and unreasonably restrict competition. This change of approach is in line with most mature jurisdictions, including the United States and the European Union.²³⁻²⁴

As to **horizontal collaboration**, the concept provided for in Resolution No. 17/16 gives the basis for the interpretation that rule for mandatory filing only covers agreements that create a “new common undertaking”, which will perform an economic activity that is different from the remaining activities of the parent companies (*i.e.*, an entity with an autonomous presence in the market). In other words, from this perspective, only cooperation agreements that have a concentrative effect – *i.e.*, which indeed have structural, longstanding impact on the relevant market

²³ In both the U.S. and in Europe, there is no legal provision for the prior notification of vertical agreements with no concentrative effect. The analysis of these kind of agreements by the antitrust authorities occurs only when they may constitute an anticompetitive practice, under the behavioral control. In the European Commission, special rules to vertical agreements concerning the sale of all kinds of goods and services (exception made to motor vehicles) were set by the Block Exemption Regulation, which provides for a presumption of legality: agreements that meet certain requirements (with no hardcore restrictions and market share cap of 30% for both suppliers and buyers) normally do not infringe competition rules. This mechanism is distinct from the filing for purposes of merger review (structural control) – as in force in Brazil under the former competition law – since it refers to an exemption to the applicability of Article 101 (1) TFEU that prohibits agreements that prevent, restrict or distort competition (behavioral control). For reference, see: European Commission. *The competition rules for supply and distribution agreements (2012)*. Available at <<http://bookshop.europa.eu/en/the-competition-rules-for-supply-and-distribution-agreements-pbKD3211986/>>. Access on February 14, 2017.

²⁴ Horizontal collaboration agreements with no concentrative effect are also not subject to antitrust authorities’ scrutiny under merger control in those jurisdictions. For this matter, there are guidelines that set standards for the analysis of the antitrust regularity of such agreements: the Federal Trade Commission (FTC)/ Department of Justice (DoJ)’s *Antitrust Guidelines for Collaboration Among Competitors* (available at <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>. Access on February 14, 2017) and the *European Commission’s Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (available at <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)>. Access on February 14, 2017). In Europe, concentrative joint ventures (“full function joint ventures”) are subject to merger review, as it consists of a form of concentration (Article 3 (4) of the European Commission Merger Regulation – Council Regulation No. 139/2004 on the control of concentrations between undertakings. Available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN>>. Access on February 23, 2017).

by integrating the activity of the parties that is object of the agreement (while the other activities remain independent) – must be notified under CADE’s merger control.²⁵

To sum up, **although the establishment of a common undertaking to perform an economic activity always involves collaboration among the parties, not all horizontal collaboration agreements truly involve establishing a common undertaking to perform economic activity.** In this sense, the Resolution conciliates the concept of associative agreement with the notion of economic concentration provided for in the Brazilian Antitrust Law.²⁶

Unfortunately, however, the interpretation adopted by CADE’s Tribunal in the first cases decided under the Resolution No. 17/16 suggests that, in practice, the assessment of the need to file horizontal collaborations tends to continue to be based on the past, generic notion of “potential to restrain competition”, associated with an analysis of only the level of collaboration among the parties, as described below.

5. First Precedents under Resolution No. 17/16

The first case in which CADE applied the rules set forth in Resolution No. 17/16 was the **Concentration Act No. 08700.008484/2016-25** (ruled by the General Superintendence on January 16, 2017). CADE acknowledged that there was no common undertaking between Medley Farmacêutica Ltda. (“Medley”) and Aurobindo Pharma Limited (“Aurobindo”), both companies acting in the sale of pharmaceutical products, with regard to a **vertical agreement** for the distribution, license and supply of three generic medical products (not covered by patent rights). Therefore, the GS concluded that the agreement was not subject to mandatory review.²⁷ The GS

²⁵ In the European Union, for instance, a joint venture is defined as an undertaking which is jointly controlled by two or more other undertakings, encompassing, in practice, a broad range of operations. Therefore, the Commission elected the requirements that a joint venture must fulfil in order **to bring about lasting and structural changes**: the joint control and the structural change of the undertakings. Although in Europe it is necessary to meet the requisite of full-functionality, which is not needed under the Brazilian current Regulation, the essential idea regarding when cooperation agreements/joint ventures should be subject to merger review is similar: **only undertakings effectively capable of provoking a change in the market structure should be analyzed under merger control.** For reference, see: European Commission. *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.* Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>. Access on March 03, 2017.

²⁶ An example of a transaction notified to CADE that falls within this concept is the creation of an international alliance between supermarket store groups Dia and Casino for the provision of “on top services” to leading brands consumer good suppliers (Concentration Act No. 08700.003252/2016-81, approved without restrictions by the GS on August 05, 2016). Those services include the access to database with information about retail consume, intelligence market services based on the database, marketing and commercial support services executed at each retailer stores, and others. In this regard, Dia and Casino remain independent in the market for supermarket chains, but create a new common undertaking for the provision of “on top services”. Another example is the association among the open TV broadcasters SBT, Record and RedeTV! (Concentration Act No. 08700.006723/2015-21, approved with restrictions by the Tribunal on May 11, 2016). Its main purpose was to jointly commercialize the transmission (and license of their digital signal) of contents, TV programs and channels for cable TV providers. Similarly, those activities are not the core business of the companies, creating, in practice, a new player in the market. The concentrative effect occurs, thus, in the market for the commercialization of television contents for cable TV providers.

²⁷ In this case, there was also a discussion about which Resolution (No. 10/14 or No. 17/16) to be applied, as the agreement had been previously notified when Resolution CADE No. 10/14 was still in force, but the Concentration Act was dismissed due to the parties’ request. In the GS’s decision for the dismissal, the authority also determined that the agreement should be resubmitted in the event the companies decided to implement the transaction. For this reason,

stated that the agreement establishes only common obligations for the supply or the resale of products and that the parties will remain independent – they will **not coordinate, totally or partially**, their activities in the market. In practice, the contract would result in an additional distributor for Aurobindo’s products, without exclusivity. In addition, there were no provisions that could configure the sharing of risks and results, since the payment for the supply of the products would be set on usual basis.

With this decision, the GS confirmed the understanding that typical vertical agreements are not subject to mandatory filing anymore, even if between competitors, since it does not establish a common undertaking to perform an economic activity.

Later, the GS ruled on **Concentration Act No. 08700.000128/2017-44** (approved without restrictions on January 27, 2017), which involved an agreement executed between Monsanto Company (“Monsanto”) and Sumitomo Chemical Co. Ltd. (“Sumitomo”) for the collaboration in developing, registering and commercializing certain herbicide-tolerant seeds and the supply of flumioxazin based herbicides from Sumitomo to Monsanto. The GS considered the transaction to be of mandatory notification under Resolution No. 17/16, with no further comments on the presence of common undertaking or its economic activity.²⁸

Indeed, in our view, the fact that the parties will integrate their activities of developing, registering and, most of all, commercializing next generation herbicide-resistant seeds appears to be sufficient to qualify it as a cooperation with concentrative effects, in line with the new definition of associative agreement of Resolution No. 17/16, as commented above.

However, in the judgement of **Consultation No. 08700.008081/2016-86** (ruled on January 18, 2017), CADE’s Tribunal took a more expansive approach to Resolution No. 17/16. In that case, Hamburg Südamerikanische Dampschiffahrts-Gesellschaft KG (“Hamburg Süd”) and CMA CGM S.A. (“CMA”) asked CADE whether the Vessel Sharing Agreement (“VSA”) entered into between them and Nile Dutch Africa Line BV (“NDAL”), all of them competitors in the market for cargo maritime long distance shipping, constitutes an associative agreement under the Resolution No. 17/16. According to the VSA, as described in the Consultation, the parties would share vessels for the operation of a determined line: each company should provide a number of vessels and, then, would be entitled for the uses of a percentage of the spaces in the others’ vessels, proportionally.

Reporting Commissioner João Paulo de Resende concluded that the VSA constitutes an associative agreement under Resolution No. 17/16, due to the presence of the following four elements: (i) horizontal relation among the parties; (ii) duration superior to two years; (iii) common undertaking to perform an economic activity, and (iv) sharing of risks and results.

Medley and Aurobindo filed the agreement with CADE when it was concluded, although, by that time, it did not fall under Resolution CADE No. 17/16 rules. CADE agreed that Resolution CADE No. 17/16 should prevail.

²⁸ After that, CADE also approved an amendment to an agreement for the supply of clinker cement executed between InterCement Brasil S.A. and Companhia de Cimento da Paraíba – CCP (Concentration Act No. 08700.000761/2017-32, approved without restrictions by the GS on February 14, 2017). The amendment was submitted for review due to an obligation contained in the settlement agreement entered into with CADE under the Concentration Act No. 08700.003640/2015-81. No reference was made to Resolution CADE No. 17/16.

In relation to item (iii), the Commissioner focused on the assessment of whether the rendering of cargo crossing services²⁹ constitutes itself an economic activity, even if only in thesis. To the Commissioner, although the cargo cross activity is not rendered in isolation, separately in the market, the assumption that it is possible, even in thesis, to render it separately with economic purposes (*i.e.*, to obtain profits from this activity) was considered sufficient to meet the requirements of Resolution No. 17/16.³⁰

By doing so, the Reporting Commissioner avoided the view that, to qualify as “associative” under the new Resolution, it is necessary that the agreement establishes a common undertaking with its own economic activity (different from the remaining activities of the parties). It is worth mentioning that the consultants have expressly affirmed that the VSA involves the jointly operation of the maritime line, but did **not constitute a new business or new undertaking** for the sale or acquisition of goods or services in the market – which was not considered sufficient for the Commissioner to dismiss the filing.

As to the presence of “sharing of risks”, the Reporting Commissioner understood that: (a) certain risks and costs were shared – especially those representing “liquid operational economies”; (b) there were clauses setting preference to stop at terminals owned by any of the parties, whenever they are available at the ports, and the possibility to redistribute vessel space among the companies in the event their demand fluctuates, and (c) the operational matters jointly decided affect all the supply side of the market (as the parties jointly define relevant aspects of the volume and the quality of the services).

Commissioner Paulo Burnier da Silveira, in a separate vote, also concluded that the VSA is an associative agreement under Resolution No. 17/16, based mainly on the presence of a “**strengthened collaboration**” among the parties resulting from the agreement. According to him, different from a Slot Charter Agreement (“SCA”),³¹ which only provides for slot allocation, a VSA is more legally complex as it entails a distinct level of collaboration among the parties.³²

In summary, in this case, the mere existence of a collaboration among competitors (and not the presence of any concentrative effects), associated with an assessment of the level (or complexity) of the such collaboration, was the ground for the conclusion that the requisite of common undertaking was met.

²⁹ As explained by the consultants, the service for cargo maritime long distance shipping encompasses five steps: (i) the negotiation with the client; (ii) the placement of the cargo into containers owned by the shipper; (iii) discharging the container at the port of origin; (iv) the placement into the vessel and the cargo crossing (*i.e.*, the specific transportation); (v) discharging the container at the final port. The cargo crossing is, thus, only one of those steps (item iv) and is not a service provided separately by shipping companies.

³⁰ “It does not seem to me unreasonable to suppose that it is possible, in thesis, that a company perform only the cargo crossing, with its own vessel and crew, and charges a fixed amount from third parties, more specifically cargo transport dealers, to perform this service, even if this hypothetical company do not come to trade with final clients” (Reporting Commissioner’s vote, p. 6).

³¹ Previously, CADE’s Tribunal had already decided that SCAs were not subject to mandatory filing with CADE, under Resolution CADE No. 17/16 (Consultation No. 08700.006858/2016-78).

³² According to Commissioner Burnier’s vote (p. 40): “In the VSA, the line is jointly operated, while in the SCA there is only the remunerated assignment of the vessel space, without the need of cooperation to operate a line. Thus, as a result (the creation of a vessel regular line with weekly frequency between South America’s East Coast and South Africa’s West Coast), it depends on a cooperation that, in itself, is only possible due to the agreement, it is concluded that it fits in the concept of common undertaking referred to in Resolution CADE No. 17/2016”.

6. Conclusion

Since the enactment of the Brazilian Antitrust Law, in 2011, “associative agreements” constitutes one of the hypothesis of transactions subject to prior mandatory filing, although its precise meaning has always been far from consensus. Despite CADE has traditionally understood “associative agreements” as including vertical agreements and horizontal collaborations, the issue of whether and in what circumstances those contracts deserve the treatment of transactions subject to structural control (now named “control of concentrations” in the current law) is also a matter of considerable dispute.

Resolution No. 17/16 brought a new definition that represents significant advance in relation to the prior Resolution No. 10/14. The most relevant changes are the elimination of the need to file vertical agreements and the restriction of the duty to file to agreements that create a common undertaking for the performance of an economic activity for at least two years.

Indeed, vertical agreements are mainly typical commercial agreements, present in companies’ daily routine, that are unlikely to be relevant under antitrust perspective and, thus, should not be subject to the “control of concentrations”. With regard to collaboration among competitors, the new Resolution gives the basis for the interpretation that it only covers agreements that have also a concentrative effect, *i.e.*, which creates a “new common undertaking” to perform an economic activity different from the remaining activities of the parent companies.

The first precedents under Resolution No. 17/16 suggest that, although CADE appears to be committed to the understanding that typical vertical agreements are no longer subject to mandatory filing, it also tends to apply a broad approach to the new concept of associative agreement when assessing horizontal collaborations, requiring the filing of agreements that establish “strengthened collaboration” among the parties, irrespective of the presence of truly concentrative effects, especially the creation of a new common undertaking with its own economic activity, separate from the remaining activities of the parties.

CHAPTER 4 - THE NEW BRAZILIAN GUIDELINES ON HORIZONTAL MERGER ASSESSMENT

Fabiana Tito

1. Introduction

On July 27, 2016, CADE published the new version of its Horizontal Mergers Guidelines (*Guia de Análise de Atos de Concentração Horizontal*), also known as ‘Guia H’, whose update had been in preparation since 2007 and on which public consultations were held last year.

The first version of this handbook, known as ‘Guia SEAE’ and released in 2001, was developed in partnership with the former Secretariat of Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE). At the time, that original set of rules was an excellent compilation of the best practices in horizontal merger and acquisition analysis, which clarified and systematized CADE’s methodology. Its purpose was to make CADE’s analysis procedures more transparent and accessible, as well as to help market agents understand the stages, methods, and criteria adopted by the agency in its analyses.

Since 2001, however, other approaches, rather than those contained in Guia SEAE, have been discussed and employed in cases analyzed by CADE—very much in line with international precedents, especially from the U.S. and Europe—providing new insights into merger analysis. Thus, Guia SEAE gradually became outdated in some respects, and this created the need for its modernization and alignment with the good practices now prevailing among international antitrust courts and at CADE in their assessment of merger cases.

After years of discussion and improvement by the agency’s technical members, followed by comparative analyses with other legal systems—international guideline systems in particular—the new horizontal merger guidelines (Guia H) were released in 2016. CADE’s Department of Economic Studies “DEE” was the main drafter, which explains why the new code places considerable emphasis on economic and quantitative aspects.

Moreover, in line with the best practices adopted overseas, Guia H was based on the new Brazilian Antitrust Law (Law No. 12,529/11), which restructured the Brazilian Antitrust Regulation System and instituted the pre-merger review¹ in 2012.

¹ The new Law introduced four fundamental changes: (i) it redesigned the Brazilian Competition Policy System’s (BCPS) organization; (ii) it established the mandatory pre-merger notification system; (iii) it made new procedural provisions regarding the merger review and investigation, as well the adjudication of anticompetitive conduct and, (iv) it changed criminal sanctions for anticompetitive conduct. The most important change brought about by the new Law was the adoption of a pre-merger review system, which instituted a suspensory requirement prior to closing. This new legal framework altered the dynamics of the antitrust review process not only for the antitrust authority, which must now adhere to a deadline in merger case reviews, but also for companies, who must factor in the suspension of closing obligations for the duration of the merger review process. For more details see FARINA, Elizabeth; TITO, Fabiana – “New year, new law”, *Concurrences Review* N° 1-2012, February, 2012, Art. N° 41412.

The new guidelines outline CADE's jurisdiction over the assessment of horizontal mergers, reflecting new trends on the matter and bringing significant changes from the previous edition. These changes include, for instance: the fact that relevant market definition may not have the preeminence it had before, since alternative analyses can be adopted in parallel when trying to reach a conclusion in competition assessment; the introduction of new methodological techniques (counterfactual and simulation analysis, among others); and the inclusion of portfolio power, potential competition, maverick elimination, and partial acquisition analysis, all of which represent an important update in merger assessment and deepen the analysis of specific competition barrier issues.

The purpose of this essay is to emphasize the main aspects of the new horizontal guidelines and the changes they have brought about for merger analysts. To that end, following this introduction, a brief comparison between the old (Guia SEAE) and the new regulation (Guia H) will be drawn in the next section, while the main aspects of and the changes in CADE's new horizontal merger guidelines will be discussed in the third section, especially with regard to relevant market, quantitative analysis, and buyer and portfolio power. In the last section, some final considerations will be presented.

2. The Old Guidelines

The previous Brazilian Merger Guidelines (2001)² were heavily influenced by the 1992 U.S. Horizontal Guidelines³, and their purpose was to lay out the procedures and principles adopted by SEAE and the SDE in their merger analyses. To serve such a purpose, five main stages of analysis were stipulated: Stage I - Relevant Market Definition; Stage II - Market Share Calculation; Stage III - Analysis of Probability of Exercise of Market Power; Stage IV - Analysis of the Economic Efficiencies Generated by the Act; Stage V - Assessment of the Net Effects of the Merger.

The old guidelines focused primarily on relevant market definition, striving for a definitive conclusion on the matter. It also recommended the use of market share (setting the 20% threshold as a “yellow flag” or benchmark) to measure dominance and calculate the possibility of a significant decline in competition after the merger. As for the assessment of probability to exercise market power, if the entry proved sufficient, likely, and timely, when subjected to the sequential analysis, no rivalry analysis was necessary. Over time, these rigid concepts have been loosened, and now a body of both entry and rivalry evidence must be assessed to determine the likelihood of anti-competitive effects. More recently, the strict definition of relevant market has been relativized, especially in markets trading differentiated products, where an accurate market definition is always more complex and difficult to obtain.

² CADE – Guia SEAE - Guia para Análise Econômica de Atos de Concentração Horizontal. Available at (Portuguese only): < http://www.cade.gov.br/assuntos/normas-e-legislacao/portarias/2001portariaconjunta50-1_guia_para_analise_economica_de_atos_de_concentracao.pdf > Access on February.24,2017.

³ FTC – *Horizontal Merger Guidelines*, issued in April 1992 and revised in 1997. Available at < <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf> > Access on February.24,2017.

2.1 Motivation behind the new guidelines

A few factors motivated the review of the old set of regulations and the issue of a new one: (i) the awareness of a mismatch between Guia SEAE and the complex analyses currently undertaken by CADE; (ii) the need to disseminate the best practices developed and employed by foreign authorities and international institutions in recent years, and (iii) CADE's effort to make its activities more transparent, to assist market agents in their interaction with the agency, and to guide its staff in the analysis of merger cases.

This was because, since Guia SEAE was issued, other methodologies and techniques have been used in CADE's merger assessments in an attempt to adjust some aspects of the agency's course of action to international court precedents, especially those from the U.S. and Europe. Over the years, the use of techniques that were not in the old guidelines ultimately rendered the regulation outdated, even though enforcers continued to follow the same basic structure they provided. Therefore, they needed an update and an adjustment to the good practices prevailing in antitrust courts overseas and at CADE.

It took at least seven years of discussion and evaluation for the new guidelines to take shape. They relied on contributions from several CADE members, particularly from the DEE, whose many important inputs substantiated the insertion of economic and quantitative methodologies in the analysis. In addition, comparative analyses with other legal systems were also made, based, primarily, on international guideline manuals. It is worth pointing out that, in 2010, the Federal Trade Commission⁴ issued its own new set of guidelines, which, among other changes, placed less emphasis on the use of strict relevant market definition. This, along with changes in other jurisdictions, helped CADE develop its new guidelines, which reflects the growing experience of both agencies.

3. The New Guidelines

The last few years were of extreme relevance for CADE, as it gained distinction for both modernizing its system and rendering sophisticated analyses, as well as interacting with international agencies. As a result, Global Competition Review has listed it among the top antitrust agencies in the world⁵, behind only the authorities from France, Germany, U.S. (Department of Justice Antitrust Division and FTC), European Union, Japan, and Korea.

In terms of general antitrust policy, CADE released formal guidelines on gun-jumping in May 2015, issued additional compliance guidelines last year, and is expected to publish new regulation on remedies soon.

CADE has increasingly used economic analysis in more complex matters, expanded its cooperation with foreign authorities in the review of transactions that have an international component, and introduced new tools and mechanisms that were not commonly seen before.

⁴ FTC – *New Horizontal Guidelines*, issued in August 2010. Available at: < <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> > Access on February. 24,2017.

⁵ Available at: < <http://globalcompetitionreview.com/series/rating-enforcement> >. Access on February.24,2017.

The revamp in its set of regulations was thus needed for the sake of modernization and alignment with the leading international antitrust practices.

3.1 Comparison Between the Old Guidelines and the New Guidelines

The aspect that stands out the most when comparing the two sets of guidelines, is that the old one was based on structural analysis, focusing primarily on relevant market definition, which was the beginning of any competitive assessment. The new regulation, on the other hand, admits multiple ways to review a merger.

Even though it was referred to as non-binding (Guia SEAE, Paragraph 3), Guia SEAE was based on procedures, which were outlined in a five-step linear flow analysis (Paragraphs 9 and 25). Still, in CADE's unfavorable opinions, which followed the old guidelines' logic, the effects of the analyzed mergers on economic well-being would not match any of the following scenarios: (i) low market share in the relevant market; (ii) low probability of exercising market power, or (iii) existence of compensating efficiencies.

The new guidelines, on the other hand, recommend no strict sequence of steps. If the analyst of the antitrust body finds there is rivalry in the market, he does not need to discuss or exhaust the issue of barriers to entry, for example, to decide on the case.

However, and more importantly, while defining the relevant market allows agencies to identify market participants and measure market shares and market concentration, the accurate definition is not an end in itself, but rather an instrument to illuminate the merger's likely competitive effects. Accordingly, the analysis need not start with market definition, especially in complex cases (such as those involving differentiated products), where definition plays a tricky role in those measurements.

Furthermore, other methods could be employed, alternately or cumulatively, such as: (i) counterfactual and simulation analysis; (ii) assessment of potential competition (which does not generate HHI variation), and (iii) maverick elimination, to name a few.

3.2 Main Changes

The new guidelines is a lengthy document (59 pages), and it sets out to cover every possible aspect of competition. It has been structured into the following items: analysis; information sources; relevant market; concentration levels; unilateral effects; purchasing power; coordinated effects; efficiency gains; complementary and alternative methods; merger-related reorganization proceedings; and non-compete clause. It is important to note, however, that the methodology set forth by the document is not mandatory or binding, nor does it exhaust all possible methods of analysis available to CADE, which will always decide on a case-by-case basis.

Guia H incorporates the best practices on the subject of competition, including methodologies adopted in the U.S. and Europe. It also introduces new methods such as the counterfactual and potential competition analysis, the consideration of companies operating on different fronts in the same market, and the classic Structure, Conduct and Performance paradigm.

In addition to that, Guia H⁶ considers aspects relating to non-compete clauses and criteria pertaining to the analysis of completed mergers in cases where the company is facing reorganization, including guidance on applying the so-called ‘failing firm defense’, which were not included in the guidelines’ earlier edition.

Some aspects of the new manual are worth pointing out:

- It is more didactic
- It maintains a focus on classical analysis (five steps), but highlights the existence of alternative techniques and factors
- It adopts a non-binding methodology, which is based on the best international experiences, nonetheless
- It focuses on market tests and the various documents and information submitted by the parties—encouraging them to bring as much information as possible since the beginning (market studies, surveys, internal projections, business reports, product positioning, strategic planning, etc.), and
- It focuses less on relevant market definition (which is not an end in itself), stressing the construction of relevant market scenarios and the use of alternative techniques instead.

The Guia H proposal is structured in seven chapters. However, although its sections are arranged in a specific order (as stated in the flow of analysis in Annex I of Guia H), the new guidelines do not necessarily follow a series of sequential (or mandatory decision) steps as the old guidelines did. This approach follows a global trend, as also stated in the new FTC⁷ guidelines.

Although the new guide maintains a focus on classical analysis (five steps), it also addresses the existence of alternative techniques such as counterfactual and simulation analysis, among other factors discussed below. That is because market share is not the only instrument to be used in horizontal concentration assessment.

In the following sections, some critical aspects of the new guide will be shortly discussed.

3.2.1 Relevant Market

Defining the relevant market allows agencies to identify market participants and measure market shares and concentration. However, the new guidelines make it clear that a strict definition should not be an end in itself, but rather a useful tool in identifying the merger’s likely competitive effects. That is because evidence of competitive effects can be used in market definition, just as market definition can be informative about a merger’s competitive effects.

⁶ CADE - Novo Guia de Análise Horizontal, July 2016. Available at: < http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf >
Access on February.24,2017.

⁷ FTC – New Merger Guidelines, p. 4. “These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.”

In its new guidelines, CADE states that an open market definition may be used, especially when there is low market concentration in all possible scenarios of product and geographic delimitation. When such is the case, to delimit the relevant market does not bind, both because this is a mere instrument of analysis and because the market is dynamic. What's more, identifying potential competitive effects involves assessing constraints that are sometimes external to the pre-defined relevant market.

With regard to assessing relevant market delimitation, the main factors are still related to demand substitution, which is when the market's ability and willingness to replace one product by another in response to a price increase is examined. The main difference from the old guidelines is that now this has been highlighted and more fully described, with indications as to what should be observed when assessing this aspect.

Moreover, in line with international practices, CADE favors determining the relevant market from a demand standpoint and understands that supply-based substitutability considerations are then complementary in merger analysis.

With regard to assessing the relevant market, the new guidelines acknowledge the use of quantitative tools, such as critical loss and critical elasticity analysis, to implement the Hypothetical Monopolist Test. This analysis is designed to determine how much sales have to fall for the resulting price increase to render a business unprofitable.

Overall, Guia H enhances the concept of relevant market in some respects. For instance, it indicates more specific methodologies to help determine it, such as the qualitative approach (market test analysis⁸ or survey research) and the quantitative approach (critical loss analysis⁹, upward price pressure test [UPP]¹⁰, diversion ratio analysis¹¹, among others).

3.2.2 Concentration Assessment

Even though the Herfindahl-Hirschman Index (HHI) had been used in CADE's merger analyses before, only in these new guidelines was the concept formalized and were the benchmark values (HHI rule)¹² to assess causality and possible competitive issues pointed out.

⁸ Market test analysis consists in questions sent by the antitrust authority to players and customers of the merging companies regarding the product or geographic area in an attempt to understand the dynamics of the market at issue.

⁹ Critical loss analysis is an estimation of how much the hypothetical monopolist's sales would have to decrease for a 5-10% price increase in its product to be unprofitable. The critical loss analysis estimates the maximum level to which sales may fall in response to a price increase while making sure that profits do not decline—this is the point at which the two effects on profits cancel each other out.

¹⁰ The UPP test determines how high price of a good can rise and how low the marginal cost of producing that good can fall for the merger to be granted on the grounds of overall improvement in market welfare. The UPP test provides an insight into the effects of substitutions and mergers and is an element in the overall analysis of the market situation. It may not, however, replace a market definition.

¹¹ Diversion ratio is a basic tool used to simulate the effects of a merger between firms producing differentiated products, providing a rough estimate of post-merger price. A diversion ratio analysis complements but does not replace the merger modeling analysis.

¹² HHI rules are: (i) non-concentrated markets: those with HHI below 1,500 points; (ii) moderately concentrated markets: those with HHI between 1,500 and 2,500 points, and (iii) highly concentrated markets: those with HHI higher than 2,500. In addition to the absolute HHI value, the delta HHI is also used to infer causality nexus—a delta HHI below 100 points is non-problematic, but one higher than 200 points sounds an alert, depending on the absolute value.

According to the new guide, the "HHI rule" as indicative of causal nexus is an initial assumption, sensitive to other arguments. Therefore, it should be stressed that the HHI rule should not be used without restriction in markets that are very tiered and scattered.

3.2.3 *Quantitative Analysis*

The use of quantitative methods in merger assessment is pervasive in the new guidelines. It spans relevant market definition, introduction of the hypothetical monopolist test (via critical loss analysis, upward price pressure test [UPP], diversion ratio analysis, or other instrument), and assessment of the unilateral effects, by means of entry analysis (for which inference econometric models may be used) or rivalry analysis, when calculating the probability of a price increase with simulation models or a market share stability/instability test to find how market concentration develops over time.

As with all economic models, the correct approach depends on the data availability and the type of industry (homogeneous or differentiated goods) at issue.

As for the counterfactual analysis, valid conclusions can be drawn regardless of its strict definition of relevant market boundaries or the market share assessment for the agents involved in the operation. For that, CADE can compare different scenarios for evidence that demonstrates the competitive effects of the merger under review.

The simulation analysis, in turn, consists in a set of mathematical and econometric models that simulate the effects of the merger and which may or may not rely on the relevant market definition. This allows CADE to assess (i) the actual price level and profit margin enjoyed by the industry or agent in that market; (ii) the fraction of demand diverted to competitors because of price increases, and (iii) other factors that may have an impact on the level of competition and market profitability.

3.2.4 *Buyer Power and Portfolio Power*

Neither buyer power nor portfolio power was explicitly addressed in the old guidelines. The portfolio power theme is considered in CADE's analysis either when it is produced by the merger or when it may hinder the effective entry of new players into the market, reducing their ability to compete with established rivals or facilitating anticompetitive conduct.

Offering multiple products maximizes a company's brand exposure, and the larger its portfolio of products, the more effective its advertising efforts, seeing as, by marketing its brand, the company automatically promotes all of its products.

The concept of buyer power, in turn, was not addressed as before, since the analysis in Guia SEAE focused only on mergers between sellers, not on buyer concentration. There was, indeed, a mention to buyer power as a sign of efficiency when creating compensatory power, but only in the new regulation was the concept discussed in a little more detail.

An increase in buyer power could make the merger more likely to result in loss of competition and even produce monopsony power¹³.

3.2.5 Others

Other topics, such as failing firm defense and non-compete clause, were also formally addressed in Guia H.

The failing firm defense argument may be used when the applying company is facing a court-supervised or out-of-court reorganization process. In this case, it was stipulated that it is not enough to present the argument; CADE must also be notified of the status of all insolvency proceedings in order to preserve the coherence of government action.

A non-compete clause, for its turn, in order to be valid and have legal effects, must be collateral (subordinate) and ancillary to the core legal business (capable of producing efficiency gains that compensate for the imposed competitive constraint).

4. Final Remarks

The present chapter sought to discuss, however briefly, the most important methodological aspects of the changes made to Brazil's merger guidelines, and show how the old set (Guia SEAE) compare to the new one (Guia H).

The new horizontal merger guidelines are markedly different, in that they follow and reinforce the new trends and best practices that have been adopted internationally. The regulation is more accessible and transparent than before with regard to the analysis of horizontal mergers or acquisitions involving competitors.

All of these changes reflect a commendable effort by the Brazilian competition authorities to create an updated handbook that is in line with internationally recommended merger review practices.

¹³ Monopsony power is the buyer's market power to purchase inputs to the point of partly draining its suppliers' surplus.

CHAPTER 5 - EFFICIENCIES ANALYSIS IN MERGER CONTROL IN BRAZIL

Aurélio Santos
Andréa Cruz

1. Introduction

The objective of this Chapter is to assess how the Brazilian antitrust agency (CADE) has been conducting efficiencies analysis in the review of concentration acts under Law No. 12,529/11, through a quantitative and qualitative analysis of CADE's jurisprudence.

Since the introduction of a pre-merger control regime in Brazil by virtue of Law No. 12,529/11, which entered into force on May 29, 2012, CADE's review has become less comprehensive in terms of number of transactions reviewed, more expedite and transparent. In addition, a more sophisticated and rigorous approach is being adopted in connection to more complex transactions.

In brief, the assessment of CADE's precedents specifically with respect to consideration of efficiencies reveals that, in a context of faster and more rigorous merger review, the efficiencies analysis is usually suppressed and efficiency claims are constantly rejected by the Brazilian agency, in such a way that the parties' early engagement in demonstrating them becomes even more important.

Following this Introduction, Section 2 describes the basic Brazilian rules and guidelines governing efficiencies analysis in merger control, Section 3 presents an overview of CADE's merger review under Law No. 12,529/11, Section 4 contains the assessment of CADE's jurisprudence with regard to efficiencies analysis, and, finally, Section 5 presents the conclusions.

2. Basic rules

The rule of reason, which defines the underlying rationale behind the Brazilian merger control system, is based on the assumption that concentration acts produce, actually or potentially, both negative and positive effects on competition. Therefore, each case needs to be examined within its particularities, so that possible anticompetitive effects arising from the transaction should be analyzed *vis a vis* its potential efficiencies gains.¹

¹ SEAE and Secretariat of Economic Law (SDE). *Guidelines for the Economic Analysis of Horizontal Concentration Acts* (Joint Ordinance No. 50/2001). Available at:

<http://www.cade.gov.br/assuntos/internacional/legislacao/horizontal_merger_guidelines.pdf/view>. Access on March 3, 2017 (p. 4).

Indeed, according to the Brazilian Antitrust Law, a concentration act shall be prohibited if it results in substantial restriction of competition in the relevant market, unless it:

- (1) Increases productivity or competitiveness, improves the quality of goods or services, or fosters efficiencies and technological or economic development, and
- (2) A relevant portion of the benefits arising from the transaction is transferred to consumers.²

As a matter of reference, a comparative analysis between the current rule and the former Brazilian antitrust law (Law No. 8,884/94) reveals that CADE's discretion in the analysis of efficiencies derived from mergers has increased. This is because, pursuant to Law No. 8,884/94, the benefits of a transaction could only be accepted as efficiency claims if they were equally distributed between the parties to the transaction and consumers³ while the current law provides that it is only necessary that a relevant part of such benefits be passed on to consumers.⁴ At least in thesis, this should have been a factor capable of softening CADE's analysis with regard to efficiencies, thus allowing for its recognition more often. However, this does not seem to be the case, as presented in Section 4.

The Horizontal Merger Guidelines (Guidelines)⁵ is the non-binding manual issued by CADE, on July 2016, with the purpose of increasing transparency in relation to the methodology employed by the agency in assessing concentration acts among competitors.⁶ In a nutshell, it provides that, in a classical approach, CADE's analysis usually shall encompass the following steps:

- (1) Definition of the relevant market;
- (2) Analysis of the level of concentration in the relevant market;
- (3) Assessment on the probability of abusive exercise of market power;
- (4) In the case of market of inputs, assessment of the buyer power present in the market, and
- (5) Consideration of the efficiencies inherent to the concentration act.

In line with the Guidelines, CADE is neither obliged to follow all the five steps listed above nor the order in which they are presented – the analysis methodology varies in accordance with the complexity and the antitrust concerns raised by the specific case under analysis. With regard to the fifth step above, the Guidelines establish that CADE's function is to verify whether the efficiency gains of the transaction outweigh its actual or potential anticompetitive effects. The

² Article 88, Paragraphs 5 and 6, of Law No. 12,529/11.

³ Article 54, Paragraph 1, II, of Law No. 8,884/94.

⁴ CORDOVIL, Leonor et al. *Nova Lei de Defesa da Concorrência Comentada*. São Paulo: Editora Revista dos Tribunais, 2011 (p. 214).

⁵ CADE. *Horizontal Merger Guidelines* (July 2016). Available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf>. Access on March 3, 2017.

⁶ The Horizontal Merger Guidelines is a second version of the guidelines issued by Joint Ordinance No. 50/2001 (see footnote 1), pursuant to Law No. 12,529/11.

Brazilian antitrust authority shall approve only those concentration acts that result in a non-negative liquid effect on society's economic welfare.

Although not binding, the Guidelines do foresee certain criteria for the consideration of efficiencies by CADE. Firstly, especially in cases representing high risks of producing restrictions on competition, efficiency claims shall only be accepted by CADE if they relate to probable and timely benefits, that can be tangibly verifiable. In this respect, the Guidelines underline that generic and/or speculative efficiency claims will not be accepted by CADE. The Brazilian agency shall rely on predictions based on econometric-, mathematic- or engineering-based models, such as cost estimates and/or production functions resulting from the transaction.

Secondly, there should be a clear link of causality between the alleged efficiencies and the concentration act (i.e., the efficiencies shall be specific to the transaction under analysis) – if the same benefits can be reached by other means less restrictive to the competition, within a time period inferior to two years, then such benefits should not be considered for the purpose of outweighing potential anticompetitive damages.

Thirdly and lastly, as provided for by the Brazilian Antitrust Law itself, CADE's Guidelines also underline that an important part of the benefits deriving from the transaction must be profited by the consumers.

With respect to the database necessary, the Guidelines only state that CADE expects the parties to present, whenever possible, market studies, marketing reports, business plans and other documents, data, qualitative and/or quantitative studies in connection with the transaction filed, highlighting that sources and calculation methodologies must always be clearly informed. In a recent public pronouncement, however, members from the agency have stated that, specifically for the purpose of providing CADE with subsidies for the analysis of efficiencies linked to the concentration act, the parties should present technical studies that are as complete as possible as soon as possible – preferably even before CADE's formal request.⁷⁻⁸

Finally, in relation to what CADE understands as 'efficiency', the Guidelines do not go much further than the Brazilian Antitrust Law, presenting the following examples in a non-restrictive list: productivity and competitiveness increase, quality improvement of products, product diversity, and introduction of modern technology. 'Countervailing power'⁹ and 'positive

⁷ DANTAS, Iuri. *Estudo de eficiências agiliza trâmite de casos complexos, diz Cristiane Alkmin*. Available at <<https://jota.info/concorrenca/estudo-de-eficiencias-agiliza-tramite-de-casos-complexos-diz-cristiane-alkmin-20102016>>. Access on March 3, 2017.

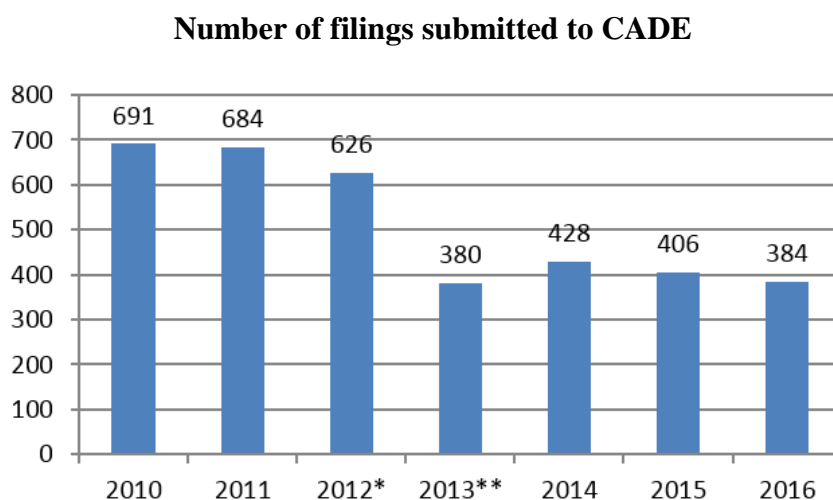
⁸ In this sense, see an extract of the vote of the Commissioner Cristiane Alkmin in the Concentration Act No. 08700.010790/2015-41, approved with restrictions by the Tribunal on July 8, 2016 (Notifying Parties: HSBC Bank Brasil S.A. – Banco Múltiplo, HSBC Serviços e Participações Ltda. and Banco Bradesco S.A.): "In fact, my discomfort in approving any kind of transaction involving the banking sector, when it comes to the four largest Brazilian banks is so big that – and already imagining that the widely publicized Citibank purchase will soon be brought to this Council – any acquisition in the banking sector should (...) b. Be notified together with the description of all the efficiencies inherent to the transaction, in such a way that it would not be possible for the parties to present them gradually. A second chance for the presentation of efficiencies could be allowed at the stage of the analysis by the General Superintendence, but, in the Tribunal, no other efficiency claim should be considered anymore, unless otherwise decided by the Reporting Commissioner" (free translation) (p. 4, paragraph 19).

⁹ According to the Guidelines, 'countervailing power' is the situation in which providers and/or consumers of a certain product/good or service come together to face a pre-existing market power (p. 42).

externalities'¹⁰ are also mentioned as factors that, depending on the case, could be considered as efficiencies.

3. Overview of CADE's merger review under Law No. 12,529/11

As a result of the introduction of new mandatory filing thresholds¹¹ by virtue of Law No. 12,529/11, there has been a significant reduction in the number of transactions submitted to CADE's review. While in 2011, 626 transactions were filed with CADE, in 2016, there were only 384 transactions notified to the agency, as shown in the graph below:



(*) Out of which 138 filed under Law No 12,529/11.

(**) As of 2013, only transactions submitted under Law No. 12,529/11 were accounted for.

Source: CADE's 2016 Annual Report (January 2017).

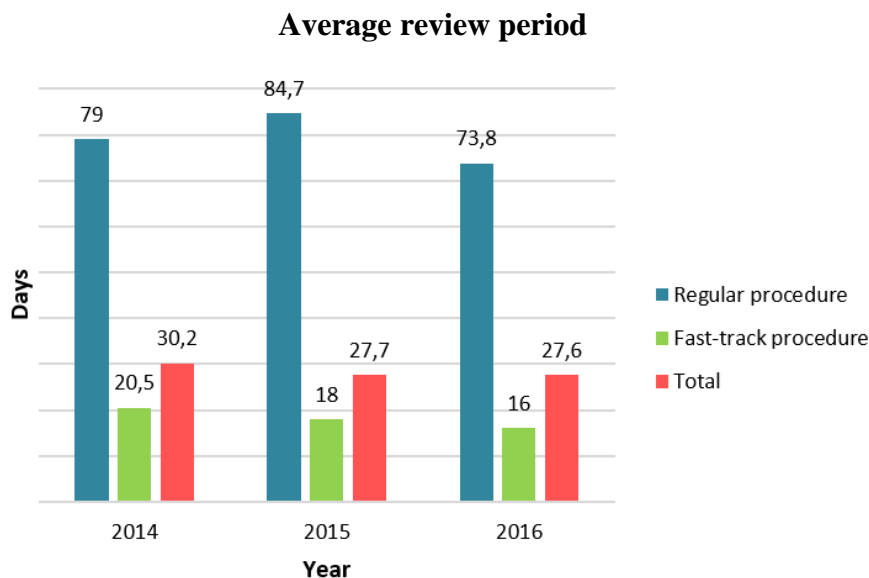
In addition, CADE's analysis of concentration acts has been more expedite as Law No. 12.529/11 prescribes maximum deadlines to be observed by the agency.¹² The chart below

¹⁰ According to the Guidelines, 'positive externalities' are the effects arising from a transaction, over which the parties have no control and which increase the welfare of third parties (p. 47).

¹¹ The Brazilian Antitrust Law provides for pre-merger mandatory filing if the parties involved in a transaction meet the following revenue thresholds: (i) at least one of the economic groups involved should record gross revenues in Brazil equal to or in excess of R\$ 750 million in the fiscal year immediately before the transaction; and (ii) at least one of the other groups involved should record gross revenues in Brazil equal to or in excess of R\$ 75 million in the fiscal year immediately before the transaction. The general definition of 'economic group' applicable for the purposes of calculating revenues in Brazil comprises: (i) the controlling entity; (ii) all entities subject to common control, and (iii) all entities in which any of the companies subject to common control holds, either directly or indirectly, 20% or more of the total share or the voting capital. Besides that, pursuant to Article 2 of Law No. 12,529/11, a 'concentration' shall only be subject to mandatory filing if it has actual or potential effects in Brazil.

¹² The analysis of concentration acts by CADE shall not take longer than 240 days, extendable up to 90 days, not renewable (Article 88, Paragraphs 2 and 9, II, of Law No. 12,529/11). Pursuant to CADE's Resolution No. 16/16, the General Superintendence shall issue its final decision regarding transactions subject to the fast-track procedure in 30 days – delays must be duly justified by the GS to the Tribunal and, in that case, the analysis of the delayed transaction shall become a priority. The deadline is counted as of the notification of the concentration act or its amendment (Article 88, Paragraph 2, of Law No. 12,529/11).

shows that, in 2016 reviews of transactions under the regular procedure (designed for more complex transactions from an antitrust standpoint) took on average approximately 74 days and reviews under the fast-track procedure (for non-complex cases which are less capable of harming competition) took only 16 days on average:



Source: CADE's 2016 Annual Report (January 2017).

For purposes of comparison, the analysis of a paradigmatic case related to the acquisition of four iron ore mining companies by Companhia Vale do Rio Doce – CVRD, which was submitted to CADE's review under the former regime, took more than five years.¹³ CADE's final ruling with regard to the acquisition of Garoto S.A. by Nestlé Brasil Ltda. was issued almost two years after filing of the initial submission.¹⁴

Furthermore, in the last few years, the Brazilian agency has taken action to increase transparency and legal certainty in relation to merger control. Notably, CADE issued guidelines concerning important subjects on this matter¹⁵ and promoted public consultations on proposals of new regulations.¹⁶

With regard to the merits of CADE's analysis, the overall perception of the Brazilian antitrust community is that the agency has been conducting more rigorous and sophisticated investigations and economic analysis, particularly in cases that are more complex. At the same time,

¹³ Concentration Act No. 08012.000640/2000-09, [approved with restrictions by the Tribunal on August 10, 2005](#).

¹⁴ Concentration Act No. 08012.001697/2002-89, rejected by the Tribunal on February 4, 2004.

¹⁵ Besides the Guidelines, launched on July 27, 2016, CADE also issued the Guidelines for the Analysis of Pre-Merger Coordination (Gun Jumping) on May 20, 2016.

¹⁶ Public Consultation No. 5/14 on a draft resolution regarding the procedure applicable to consultations filed with CADE (Resolution No. 12/15), Public Consultation No. 1/16 on a draft resolution which introduced the establishment of a 30 day-deadline for the review of concentration acts under the fast-track procedure (Resolution No. 16/16), Public Consultation No. 2/16 on a draft resolution which proposed new thresholds for the submission of associative agreements to CADE's review (Resolution No. 17/16).

the standstill obligation creates the necessary incentives for the parties to the transaction to provide the agency with all the information needed to a deeper and faster antitrust assessment of the case.

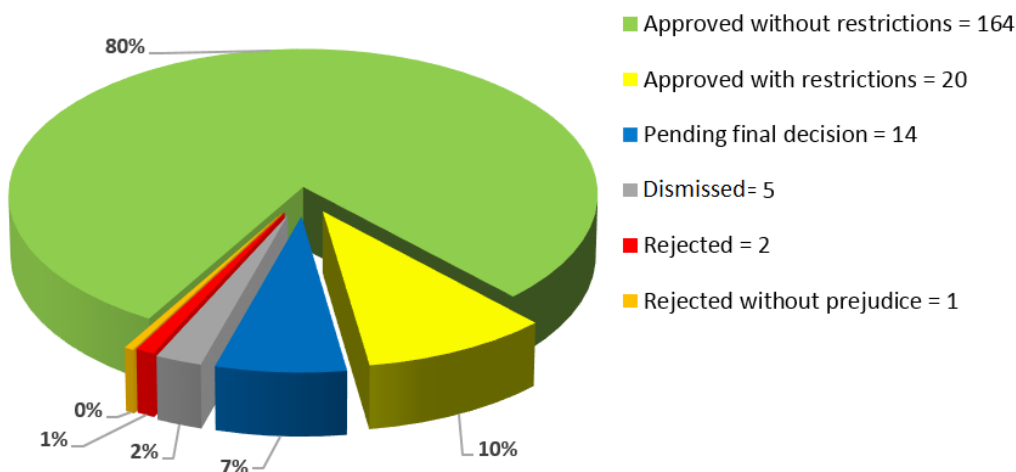
Within this context, the assessment of efficiencies poses a greater challenge and responsibility to the antitrust authority, which has less time to verify if the positive effects claimed by the parties are actually capable of outweighing potential competition damages. As shown in the following section, the result is that CADE has been focusing its efforts in identifying potential negative effects arising from concentration acts and negotiating remedies capable of satisfactorily addressing them, in such a way that efficiencies analysis are commonly suppressed and efficiency claims systematically rejected.

4. Assessment of CADE’s jurisprudence with regard to efficiencies analysis

Since the object of this Chapter is to better understand CADE’s analysis of efficiency claims during the term of Law 12,529/11, our survey encompassed only those concentration acts reviewed by the CADE under the regular procedure after the entry into force of the Brazilian Antitrust Law. This is because the consideration of efficiencies is subject to CADE’s attention in more complex cases that usually involve higher risks of harming competition. Our analysis was limited to public information available for consultation on CADE’s website.

The chart below summarizes the outcome of all transactions encompassed by the methodology adopted herein:

CADE’s final ruling on cases subject to the regular procedure



Source: authors.

Methodology: transactions subject to the regular procedure filed with CADE between May 29, 2012 and February 10, 2017.

Among the 206 cases analyzed, CADE actually engaged in efficiencies analysis in only 18 of them, as shows the table below:

Final decision	Cases	Efficiencies analysis	
		Yes	No
Approved without restrictions	164	4	160
Approved with restrictions	20 ^(*)	11	7
Dismissed	5	1	4
Blocked	2	2	0
Rejected without prejudice	1	N/A	
Pending final decision	14 ^(**)	N/A	
Total	206	18	171

Source: authors.

Methodology: qualitative analysis of CADE’s final and majority opinion on the case issued between May 29, 2012 and February 10, 2017.

(*) In two of the cases cleared with restrictions, the object of the settlement agreements between the parties and CADE was dedicated to deal with the failure to comply with the standstill obligation (gun jumping).

(**) Up to February 10, 2017, the analysis of efficiencies had already been conducted by CADE’s lower unit (General Superintendence) in five cases and in the other nine cases neither the GS nor the Tribunal had issued a decision.¹⁷

More specifically, CADE conducted efficiencies analysis in only 2.4% (4 out of 164) of the cases approved without restrictions, 61.1% (11 out of 18) of the cases cleared with restrictions (disregarding the cases in which the object of the settlement agreements was exclusively the occurrence of gun jumping) and 100% (2 out of 2) of the cases blocked included efficiencies analysis.

Thus, it should be highlighted that CADE rarely conducts efficiencies analysis in cases that do not encompass potential antitrust damages and that a substantial part (38.9%) of the transactions involving antitrust concerns (and which, therefore, required the imposition of remedies by the agency) did not comprise efficiencies analysis.

4.1 Transactions approved without restrictions

As aforementioned, among the 164 transactions approved without the imposition of any kind of restriction, only four involved efficiencies analysis conducted by CADE. The table below summarizes the efficiency claims accepted by the Brazilian agency in those cases:

¹⁷ CADE is composed by: (i) the Tribunal, integrated by 7 commissioners (one of whom act as chair), responsible for issuing final decisions on merger review cases that raise competition concerns and investigations regarding anticompetitive practices, (ii) the General Superintendence, responsible for the initial review of merger cases, issuing final decisions only when the transaction does not raise competition concerns, and (iii) the Department of Economic Studies, which provides technical subsidies to the other bodies, when necessary.

Efficiency claims accepted by CADE	Case
Countervailing power	Joint venture between the International Retail & Trade Services Sàrl, from Casino Group, and Dia World Trade for the negotiation of international on top services ¹⁸
Costs reduction due to the sharing of the distribution structures	Granting of Universal Studios Limited's exclusive rights on home entertainment equipment, in Brazil, to Sony Pictures Home Entertainment ¹⁹
Costs reduction due to the sharing of infrastructure	Term of commitment between TIM Celular S.A., Telefônica Brasil S.A. (Vivo), Claro S.A. and Oi Móvel S.A. for the evaluation of a joint procurement agreement among them that would enable the construction, installation and non-exclusive transfer of telecommunications infrastructure in closed spaces ²⁰
Scale economies due to the complementarity of the parties' activities	Acquisition control of TNT Express N.V. by Fedex Corporation ²¹

It is interesting to note that the TNT/Fedex case was the only one in which there has been a quantitative analysis of efficiencies. In the other cases, the analysis was merely qualitative. Furthermore, in none of the four cases listed above the efficiencies recognized by CADE were decisive for the approval of the transaction since the agency had already verified that an abusive exercise of market power was unlikely.

None of the concentration acts reviewed by CADE under the regular procedure since the enactment of Law No. 12,529/11 had their unconditional approval actually justified by the efficiencies arising from the transaction. In other words, during this period, CADE has never considered that potential antitrust damages of a merger could be completely outweighed by the transaction's efficiencies.

4.2 Transactions approved with restrictions

Among the cases approved with restrictions (18, disregarding those in which the object of the settlement agreements was exclusively the occurrence of gun jumping), 11 involved efficiencies analysis and CADE accepted efficiencies claimed by the parties in only 4 of them, as indicated below:

¹⁸ Concentration Act No. 08700.003252/2016-81, approved by the GS on August 5, 2016.

¹⁹ Concentration Act No. 08700.012062/2015-73, approved by the GS on February 12, 2016.

²⁰ Concentration Act No. 08700.010033/2015-77, approved by the GS on December 18, 2015.

²¹ Concentration Act No. 08700.009559/2015-12, approved by the GS on February 1, 2016.

Efficiency claims accepted by CADE	Case
Costs reduction due to access to cheaper electrical energy, scale economies and increase in supply	Joint venture between Saint Gobain do Brasil Produtos Industriais e para Construção Ltda. and SiCBRAS Carbeto de Silício do Brasil Ltda. for the manufacture of metallurgical silicon carbide ²²
Investment plan for the expansion of railway infrastructure (expansion of access to essential infrastructure)	Incorporation of ALL – América Latina Logística S.A. shares by Rumo Logística Operadora Multimodal S.A. ²³
Logistic gains, costs reduction, investments in Research & Development and vertical integration	Acquisition of Innova S.A. by Videolar S.A. ²⁴
Positive externalities (development of the Brazilian system for enrollment of good payers and expansion of the market for the concession of credit and financial inclusion)	Joint venture between Banco Bradesco S.A., Banco do Brasil S.A., Banco Santander S.A., Caixa Econômica Federal and Itaú Unibanco S.A. for the creation of a credit bureau ²⁵

These four cases reveal that CADE tends to consider efficiency claims properly substantiated by the parties, albeit only in qualitative terms, as strong arguments for the approval of concentration acts, even though they are not sufficient to exempt the imposition of remedies.

In this sense, in the case regarding the creation of a credit bureau among several competing financial institutions, CADE verified that the positive externalities related to the transaction would only be possible if the competition concerns identified were duly addressed by the agency.

Likewise, according to CADE, the investment plan presented by the buying group in the *ALL/Rumo* case would probably result in positive liquid effects on the competition in the long term. However, as it consisted of a future and uncertain project, and the scenario at the time of the antitrust analysis indicated that the concentration act had potential to produce severe competition restraints, CADE decided that it was the case for the imposition of remedies to address the concerns identified until the efficiency claims would actually materialize.

Besides that, in some cases, the efficiencies identified during the antitrust analysis can be helpful for the definition of the best remedies to address the competition concerns derived from the transaction.

In the *Saint Gobain/SiCBRAS* case, CADE imposed some conditions for the approval of the transaction precisely as a way to protect the efficiency gains consistent of increase in supply and scale economies from the antitrust risks related to the creation of the joint venture. It is worth noting that, in this case, the agency recognized the efficiency gains related to the transaction, even though acknowledging that a more detailed description of such gains as well as a rigorous demonstration of its specificity in relation to the concentration act would be desirable.

²² Concentration Act No. 08700.010266/2015-70, approved with restrictions by the Tribunal on April 13, 2016.

²³ Concentration Act No. 08700.005719/2014-65, approved with restrictions by the Tribunal on February 11, 2015.

²⁴ Concentration Act No. 08700.009924/2013-19, approved with restrictions by the Tribunal on October 1, 2014.

²⁵ Concentration Act No. 08700.002792/2016-47, approved with restrictions by the Tribunal on November 9, 2016.

Finally, pursuant to CADE, the *Innova/Videolar* case involved clear efficiency gains, but there was not enough evidence that such benefits would be passed on to consumers. Recognizing that the lack of proof in this regard was due to the fact that Videolar could not have access to Innova’s information due to the standstill obligation, CADE decided that, among other remedies necessary, Videolar would have to present a plan with a reasonable estimate of the benefits to be shared with consumers.

4.3 Transactions blocked

In the two cases blocked by CADE during the term of Law No. 12,529/11, the efficiencies claimed by the parties were entirely rejected by the Brazilian agency. Both these cases are indicated in the table below together with short extracts from CADE’s rulings that summarizes the reasons why such efficiencies could not be accepted:

Case	Reason for the rejection of efficiencies claims
Acquisition of Solvay S.A. by Braskem S.A. ²⁶	<i>‘From the calculations presented, the level of efficiencies necessary for the approval of this transaction is very high, and there is no assurance that the efficiencies promised may result in the alleged reduction of marginal cost. Moreover, the Plaintiffs claimed a series of efficiencies, but they did not show how such efficiencies affect its cost structure per ton produced, nor how they would be passed on to consumers’ (free translation)²⁷</i>
Acquisition of Condor Pincéis Ltda. Tigre S.A. ²⁸	<i>‘The alleged improvement of the society’s welfare has not been proven since it has not been demonstrated that potential gains would be passed on to consumers. This is because the Plaintiffs did not prove that the increase in market share would not result in a simple transfer of revenues between the parties to the transaction. (...) Therefore, the liquid effects of the present transaction are negative and they cannot be outweighed by efficiencies that can be quantifiable, measurable or transferable to consumers in the relevant markets.’ (free translation)²⁹</i>

These precedents indicate that CADE tends to be considerably rigid with regard to the standard of proof required for the acceptance of efficiencies when the concentration act involves high risks of anticompetitive damages. Notably, it seems that, in these cases, efficiency claims shall only be accepted by the authority when there is solid quantitative proof of its existence, as well as strong quantitative evidence of a non-negative liquid effect on society’s economic welfare.

²⁶ Concentration act No. 08700.000436/2014-27, rejected by the Tribunal on November 12, 2014.

²⁷ Vote of the Reporting Commissioner Gilvandro Vasconcelos Coelho de Araujo, paragraph 311, p. 128.

²⁸ Concentration act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015.

²⁹ Vote of the Reporting Commissioner Márcio de Oliveira Júnior, paragraph 448, p. 39.

4.4 Main reasons for the rejection of efficiency claims by CADE

In brief, the main reasons why CADE rejected efficiency claims in the 23 cases in which the agency conducted efficiency analysis were the following:

- (1) Lack of a causality link between the efficiencies alleged by the parties and the transaction (i.e., absence of specificity in relation to the transaction);³⁰
- (2) Lack of proof that the efficiencies would be passed on to consumers;³¹
- (3) Absence of quantification of the efficiencies claimed;³²
- (4) Unilateral presentation of efficiencies (no appropriate reference to sources and methodologies);³³
- (5) No indication of the period necessary for the efficiencies claimed to be reached;³⁴
- (6) Future and uncertain businesses plans,³⁵ and
- (7) Percentage of efficiencies inferior to the level necessary to neutralize pressures of price increase.³⁶

5. Conclusions

CADE's review of concentration acts has become more expedite, transparent and also more sophisticated from an economic perspective. Furthermore, CADE has adopted a very rigorous approach when it engages in efficiencies analysis and the standard of proof tends to be higher as antitrust concerns are greater. From the parties' standpoint, producing quantitative proof of efficiency gains can be expensive and risky, as it may depend on commercially sensitive information of the other party to the transaction and, therefore, trigger inquiries related to the occurrence of gun jumping.

³⁰ Concentration Act No. 08700.003462/2016-79, approved with restrictions by the Tribunal on September 14, 2016; Concentration Act No. 08700.010688/2013-83, approved with restrictions by the Tribunal on August 20, 2014, and Concentration Act No. 08700.006567/2015-07, approved with restrictions by the Tribunal on December 9, 2015.

³¹ Concentration Act No. 08700.003462/2016-79, approved with restrictions by the Tribunal on September 14, 2016; Concentration Act No. 08700.006567/2015-07, approved with restrictions by the Tribunal on December 9, 2015; Concentration Act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015; Concentration Act No. 08700.000436/2014-27, rejected by the Tribunal on November 12, 2014, and Concentration Act No. 08700.001437/2015-70, approved with restrictions by the Tribunal on November 25, 2015.

³² Concentration Act No. 08700.001437/2015-70, approved with restrictions by the Tribunal on November 25, 2015, and Concentration Act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015.

³³ Concentration Act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015, and Concentration Act No. 08700.006567/2015-07, approved with restrictions by the Tribunal on December 9, 2015.

³⁴ Concentration Act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015.

³⁵ Concentration Act No. 08700.006723/2015-21, approved with restrictions by the Tribunal on May 11, 2016.

³⁶ Concentration Act No. 08700.010790/2015-41, approved with restrictions by the Tribunal on July 8, 2016; Concentration Act No. 08700.009363/2015-10, approved with restrictions by the Tribunal on May 11, 2016, and Concentration Act No. 08700.001437/2015-70, approved with restrictions by the Tribunal on November 25, 2015.

In this context, both CADE and the parties to the transaction have strong incentives to start the negotiation of remedies without resorting to efficiencies analysis, as it is not a mandatory step of the antitrust analysis.

Nonetheless, the figures presented above show that even when a concentration act involves serious risks of harming competition, CADE is receptive to consider efficiency claims on a quantitative and/or qualitative basis as arguments favorable to the approval of the transaction and as important references for the purpose of designing the best remedies to address antitrust concerns at stake.

Therefore, in conclusion, it is advisable that the parties to more complex transaction present studies concerning the efficiencies linked to the concentration act, pursuant to CADE's Guidelines, as soon as possible. Efficiency claims shall be carefully described in the notification even if deprived of further quantitative analysis – as previously seen, even qualitative arguments shall be considered by CADE and positively impact the antitrust analysis conducted by the agency.

CHAPTER 6 - WHAT TO EXPECT [OR TO AVOID] WHEN YOU ARE EXPECTING: GUN JUMPING ISSUES AND CHALLENGES OF A PRE-MERGER CONTROL REGIME

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1. Introduction

When Law No. 12,529/11 came into full force and effect, on May 29, 2012, companies doing business in Brazil were naturally concerned about the implementation of a pre-merger control regime by CADE. Those concerns revolved not only around CADE's ability to review transactions at a reasonable clip, but also around the measures that could be taken and the information that could be shared with the other party of the deal until CADE was able to approve it.

After almost 20 years since the enactment of Law No. 8,884/94, the business community got used to the post-merger control regime in Brazil, which allowed a transaction to be closed before CADE's approval. In this context, rare discussions on the boundaries to be observed before CADE's approval for deals were held. The introduction of a pre-merger control regime, following a trend well established in most mature jurisdictions worldwide, was certainly the most important change introduced by the 2011 Brazilian Antitrust Law. On the authorities' side, this change represented new important challenges: How to deal with gun jumping issues? How to make sure that the companies involved in mergers, acquisitions and joint ventures would be able to avoid conducts that could be viewed as prohibited before consummation of the deals?

This chapter aims at evaluating how CADE has been dealing with gun jumping issues since the 2011 Brazilian Antitrust Law came into force. Section 2 addresses the legal aspects of the pre-merger review system and the general rules created to impede gun jumping in Brazil. Section 3 details the gun jumping guidelines issued by CADE after some investigations were conducted in this regard. Section 4 analyzes landmark decisions rendered by CADE in connection with some cases in which gun jumping issues were raised. Those sections will take us to the main conclusions and lessons learned during this initial period of implementation of the pre-merger control system, by CADE, hinting at the measures and conducts that companies doing business in Brazil should avoid before getting approval for their deals by CADE (Section 5).

2. Pre-merger control system and gun-jumping issues: general rules

The Brazilian Antitrust Law (Article 90) sets forth that a given transaction constitutes a concentration act and, as such, may be subject to pre-merger review when:

- i there is a merger between two or more previously independent companies;
- ii there is a direct or indirect acquisition, by one or more companies, of control or parts

of one or more companies, through purchase or leasing of shares, membership units, convertible securities, tangible or intangible assets, or by means of any kind of agreement;¹

- iii one or more companies absorb another company or companies; and
- iv two or more companies enter into an associative agreement,² consortium or joint venture³ (except when intended for participation in bidding procedures opened by the direct or indirect government authorities and for execution of the ensuing contracts).

The transactions indicated above must be notified and submitted to CADE's prior approval whenever they meet the following cumulative thresholds:⁴

- i at least one of the economic groups⁵ involved in the transaction registered gross revenues or volume of businesses in Brazil equal to or exceeding BRL 750 million in the fiscal year preceding the transaction, and
- ii at least one of the other economic groups involved in the transaction registered gross revenues or volume of businesses in Brazil equal to or in excess of BRL 75 million in the fiscal year preceding the transaction.

The main change in the merger review scenario was introduced by Article 88, Paragraph 3, of the Brazilian Antitrust Law, as further detailed by Articles 108 and 112, of CADE's Internal Regulations. Accordingly, transactions that are subject to mandatory filing with CADE cannot be consummated until the authorities render a final decision,⁶ on pain of breaching the law and incurring in the so-called gun jumping.

¹ Resolution CADE No. 2 provides for certain exceptions regarding the acquisition of shareholding interest, subscription of securities convertible into shares, and public offers of securities convertible into shares.

² Resolution CADE No. 17 regulates the events for notification of associative agreements.

³ According to the Brazilian Antitrust Law, acts intended for participation in bidding procedures opened by the direct or indirect government authorities and for execution of the ensuing contracts are not deemed concentration acts, and therefore are not subject to mandatory filing.

⁴ The threshold values were adjusted under Article 1 of Interministerial Ordinance No. 994/12.

⁵ According to Resolution CADE No. 2, for purposes of calculating revenues, an economic group means: (i) companies under common control, either internal or external; and (ii) companies in which any of the companies dealt with in item i owns, directly or indirectly, at least 20% of the capital stock or voting capital. For investment funds, the analysis should encompass: (i) the economic group of each shareholder that directly or indirectly holds at least 50% of the shares in the fund involved in the deal, whether individually or through any type of shareholders' agreement, and (ii) the companies controlled by the fund involved in the deal as well as those in which such fund directly or indirectly holds an ownership interest equal to or higher than 20% of the capital stock or voting capital. The gross revenues registered by an economic group are the sum of the entire gross turnover of such entities (and not pro rata) in the year preceding the transaction.

⁶ For transactions cleared by the General Superintendence, CADE's Internal Regulations also provide for a 15-day waiting period after the decision is rendered, which is the term for third-party appeals or requests for review by the Tribunal.

CADE's Internal Regulations⁷ establish that the parties to a reportable transaction must keep the physical structures and competitive conditions unchanged until CADE's final decision. CADE's Internal Regulations also prohibit transfers of assets or any influence of one of the deal parties over the other, as well as any exchange of competition-sensitive information not strictly necessary for execution of the formal binding instrument between the parties. This is meant to prevent possible irreversible losses to the market, thus preserving the public interest.

The wording in both the Brazilian Antitrust Law and CADE's Internal Regulations concerning practices that could or could not be considered a violation, however, is not specific as to determine which acts could be materially interpreted as consummation of a transaction. Thus, companies negotiating concentration acts in Brazil were exposed to a significant degree of uncertainty as to what type of information could be exchanged during negotiations and which acts could be carried out without being considered gun jumping. These concerns became much more relevant in light of the sanctions legally imposed for breaching the law.

Penalties for gun jumping practices in Brazil comprise fines ranging from BRL 60,000 to BRL 60,000,000, in addition to possible annulment of the acts performed by the parties before obtaining CADE's approval and commencement of an administrative investigation into potential anticompetitive conducts. Such penalties may be imposed by CADE at its own discretion, taking into consideration such aspects as the parties' good-faith, the extent of competitive harm, the parties' economic capacity, among others.

In view of the broad terms of the rules introduced in 2012, considering the peculiarities of the companies' needs when doing business in Brazil, and also due to the uncertainty in relation to the need to notify some transactions that were not reportable in the previous regime, CADE had soon to deal with gun jumping issues. As it will be further addressed below, from 2013 to 2015, CADE's General Superintendence identified gun jumping issues in five cases and decided to enter into settlement agreements with the companies involved. Under such settlement agreements, companies decided to pay contributions to CADE, after acknowledging that they had taken measures that were not allowed before obtaining CADE's approval for their deals.

In June 2015, aiming at providing more legal certainty to investigations on gun jumping issues, CADE issued Resolution No. 13, which sets forth specific administrative proceedings to scrutinize (i) reportable transactions that have been filed and were consummated before CADE's clearance, and (ii) reportable transactions that have not been filed and were consummated before CADE's clearance. Almost simultaneously, in May 2015, CADE launched the gun jumping guidelines ("Gun Jumping Guidelines")⁸ as a means of reducing conceptual uncertainties by laying down specific rules to prevent gun jumping practices. The main provisions of the Gun Jumping Guidelines will be detailed below.

⁷ Article 108, Paragraph 2.

⁸ CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA – CADE. Guia para análise da consumação prévia de atos de concentração. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/gun-jumping-versao-final.pdf (original Portuguese version); and at <http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf> (English version). February 16, 2017.

3. The Brazilian Gun Jumping Guidelines

The Gun Jumping Guidelines document is essentially divided into three sections: (i) details of activities considered to be gun jumping practices; (ii) procedures that may mitigate gun jumping risks, and (iii) penalties, which essentially resembles the wording of the Brazilian Antitrust Law.

3.1 Gun jumping practices

The first section of the Gun Jumping Guidelines divides the activities related to concentration acts that may raise certain concerns into three main groups: (i) exchange of sensitive information between market players; (ii) definition of contractual clauses that govern the relationship between market players, and (iii) activities carried out by the parties before and during implementation of the concentration acts.

3.1.1. Exchange of sensitive information

As for the first group, the authorities seek to prevent that commercially and competitively sensitive information be exchanged between the deal parties before antitrust approval. CADE recognizes that any pre-merger negotiation does imply a certain level of interaction between the parties, but defends that the extent and degree of such interaction should be carefully evaluated *vis-à-vis* the deal that is being negotiated.

According to the Gun Jumping Guidelines, competitively sensitive information relates to specific data about costs; capacity level and expansion plans; marketing strategies; product pricing (prices and discounts); main customers and secured discounts; payroll; main suppliers and contractual terms and conditions for the supply; non-public information about trademarks, patents and research & development; future acquisition plans; and competitive strategies.

3.1.2. Contractual Clauses

The second group focuses on the content of the rules that will govern the relationship between market players before a final decision is rendered by CADE. Again, it aims at maintaining the highest level of independence between the parties (and, by extension, the competitive environment as intact as possible).

Contractual provisions that may lead to gun jumping issues, as provided by the Gun Jumping Guidelines, include: full or partial advance payment of non-reimbursable consideration (except for typical down payments in business transactions, deposits in escrow accounts, or clauses dealing with break-up fees); clauses establishing that the contract effective date precedes its closing, implying some interaction between the parties; prior non-compete obligations; clauses providing for direct influence of one party on the strategic and sensitive business aspects of the other (such as prices, clients, commercial policies and other aspects that do not reflect a mere protection of the investment); as well as any clauses establishing activities that cannot be reversed at a later time or whose reversal would require significant expenditures.

3.1.3. Activities prior to clearance

The third and last group deals with activities performed by the parties before and during implementation of the transaction and that could be understood as total or partial consummation of the deal without prior clearance by CADE. In this specific regard, the Gun Jumping Guidelines document illustrates certain practices that could raise higher concerns: receipt of profits or other payments related to the other party's performance (ear-outs); transfer and/or usufruct of assets in general (including voting securities), exercise of voting rights or relevant influence over the other party's activities; development of joint sale or marketing strategies for products, characterizing joint management; integration of sales force; exclusive licensing of intellectual property to the other party; joint development of products; nomination of members for decision-making bodies, and interruption of investments.

3.2 *Mitigating the risks*

The Gun Jumping Guidelines document presents the main measures that companies could take to mitigate risks related to prohibited anticipatory practices. The recommendations -- which are quite common in other jurisdictions as well -- involve:

- i adopting an antitrust protocol, whereby specific procedures to be followed by the parties are detailed until a final decision is rendered by CADE;
- ii establishing clean teams and/or executive committees to deal with information that will be exchanged in connection with the concentration act;
- iii setting up the clean team as the only point of contact between the parties, and laying down an exclusive method for exchanging information;
- iv ensuring a confidentiality commitment by members of the clean team and of the executive committee;
- v guaranteeing that commercially and competitively sensitive information received by the clean team is disclosed to the executive committee on an aggregate and/or historical⁹ basis, and only to the extent strictly necessary for a seasoned decision about the negotiations;
- vi monitoring the discussions held by members of the executive committee about the transaction (parlor room), in order to ensure that no sensitive information is disclosed nor measures are adopted to interfere in each party's ordinary course of business.

⁹ The Gun Jumping Guidelines document recommends a period of at least three months from its occurrence.

3.3 Penalties

Finally, the Gun Jumping Guidelines document reiterates the penalties set out in the Brazilian Antitrust Law, and establishes that the application of monetary penalties (fines) will take into consideration the status of the transaction (whether and when it was notified and consummated), the nature of CADE's decision (rejected, or cleared with or without restrictions), the existence of horizontal overlaps or vertical integration between the parties, and their respective economic conditions. Further investigations may also be carried out by CADE to evaluate whether possible anticompetitive conducts arise from the post-merger integration of structures, while the annulment of acts performed by the parties may also be declared, depending on the severity of circumstances involving the conduct.

4. Selected cases involving gun jumping

As mentioned, since the Brazilian Antitrust Law came into effect almost five years ago, CADE has had the opportunity to examine some cases in which gun jumping issues emerged. Some of those cases definitely served as grounds for certain statements made by CADE in its Gun Jumping Guidelines. In this context, recent precedents do provide important additional clarifications on how the authorities interpret the companies' conducts and apply the specific provisions dealing with gun jumping.

It seems fair to state that the leading case related to gun jumping practices in Brazil is *OGX/Petrobras*,¹⁰ which essentially involved the acquisition, by OGX, of a 40% interest held by Petrobras in a concession agreement for exploitation, development and production of oil and gas. In its decision rendered in August 2013, CADE held that the agreement between the parties came into effect immediately after its signing, thus before CADE's approval. According to CADE, the agreement allowed the exchange of sensitive information between the companies; OGX participated in the decisions to be taken by Petrobras relating to the concession agreement; and OGX took part in meetings to discuss technical and operational aspects of the concession. Further, the agreement failed to establish that antitrust approval was a condition precedent to the closing. On the merits, the transaction was cleared. However, a BRL 3 million contribution had to be paid by the parties, which also had to acknowledge the gun jumping practice.

After *OGX/Petrobras*, CADE ruled on other cases¹¹ involving alleged gun jumping practices, and the main conclusions issued by the authority were compiled in the Gun Jumping

¹⁰ Concentration Act No. 08700.005775/2013-19. Notifying Parties: OGX Petróleo e Gás and Petróleo Brasileiro S.A.. Settlement agreement approved by the Tribunal on August 28, 2013.

¹¹ Concentration Act No. 08700.008289/2013-52. Notifying Parties: UTC Óleo e Gás S.A. and Aurizônia Petróleo S.A. Settlement agreement approved by the Tribunal on February 5, 2014; Concentration Act No. 08700.008292/2013-76. Notifying Parties: PotiÓleo S.A. and UTC Óleo e Gás S.A. Settlement agreement approved by the Tribunal on February 5, 2014. Concentration Act No. 08700.002285/2014-41. Notifying Parties: FIAT S.P.A. and Chrysler Group LLC. Settlement agreement approved by the Tribunal on May 14, 2014. In *Petrobras/Total E&P* (Concentration Act No. 08700.007899/2013-39 – Notifying Parties: Petróleo Brasileiro S.A. and Total E&P do Brasil Ltda.), CADE concluded that no gun jumping practices occurred and the transaction was approved by the Tribunal on April 9, 2014. In *JBS/Tramonto*, the parties contended that an antitrust filing was not mandatory in the context of a rental agreement involving cold storage facilities. CADE disagreed, ordered a merger notification, and imposed a fine for consummation of the transaction prior to antitrust clearance amounting BRL 388,718.45 (Procedure to Investigate Concentration Act

Guidelines. Within this context, CADE has held that the following acts constitute gun jumping if performed prior to antitrust clearance:

- Payment of the price, since it would alter the competitive dynamics amongst the parties in terms of profits and obligations;
- Effective participation of one party in the decisions to be taken by the other party, such as consolidation of management or interference in operational activities;
- Joint presentation of the companies before the public as if they were already one;
- Press releases to the media and investors publicizing the deal closing/consummation;
- Participation by the acquirer in the target company's costs and results;
- Sharing of information and decision-making power with regard to commercially and competitively sensitive matters;
- The absence of a clause in the agreement indicating that CADE clearance is a condition precedent for closing of the deal.

After the Gun Jumping Guidelines document was launched in 2015, and clearer recommendations to the parties involved in a transaction were thus in place, CADE ruled on three concentration acts that are worth mentioning here, since they provide additional clarification about the authority's understanding.

In *Reckitt/Hypermarcas*,¹² related to the acquisition of Hypermarcas' Brazilian condoms and lubricants business by Reckitt, the General Superintendence held that the parties incurred in gun jumping, because of a 20% down payment made by Reckitt. The Tribunal, however, disagreed with such view and ruled that the down payment was typical of businesses transactions and proportional in that specific case,¹³ thus falling into the exceptions provided by the Gun Jumping Guidelines. In addition, the Tribunal concluded that down payments and break-up fees could coexist in the same agreement and even compensate each other if the transaction under analysis were eventually rejected. However, the Tribunal was emphatic in the sense that such provisions should be taken as an exception to the general rule that prohibits advance payments prior to CADE's clearance.

No. 08700.007160/2013-27 – Parties: JBS S.A., Tinto Holding Ltda., Unilav Industrial Ltda., Flora Produtos de Higiene e Limpeza Ltda. and Tramonto Alimentos S.A., judged by the Tribunal on August 17, 2016). In Goiás Verde/Brasfrigo, CADE also ordered the deal notification after press releases about its content, ultimately concluding that the parties consummated the transaction before antitrust clearance (Concentration Act No. 08700.010394/2014-32. Notifying Parties: Goiás Verde Alimentos Ltda., Brasfrigo Alimentos Ltda. and Brasfrigo S/A. Settlement agreement approved by the Tribunal on April 22, 2015). In GNL/Gasmig, the transaction was filed with CADE almost one year after signing, and the authorities concluded that consummating acts, such as payments and rendering of services, were practiced before antitrust clearance (Concentration Act. No. 08700.000137/2015-73. Notifying Parties: GNL Gemini Comercialização e Logística Ltda. and Companhia de Gás de Minas Gerais. Settlement agreement approved by the Tribunal on June 24, 2015).

¹² Procedure to Investigate Concentration Act No. 08700.005408/2016-68. Parties: Reckitt Benckser (Brasil) Ltda. and Hypermarcas S.A.. Shelved by the Tribunal on August 17, 2016.

¹³ The Reporting Commissioner of the case mentioned that CADE should not establish a fixed amount for down payments, on grounds that each case has its own specificities.

The second case, *Technicolor/Cisco*,¹⁴ referred to the acquisition of Cisco's customer premises equipment (CPE) business by Technicolor, within a global transaction. The transaction was globally consummated made without CADE's approval, but the parties did inform CADE about the closing, arguing the urgent need to implement the deal and the absence of negative impacts on the Brazilian market. A specific aspect in this regard is that the Tribunal was called to voice its formal opinion on carve-out agreements, in which a jurisdiction (pending antitrust clearance) would be insulated from other markets to allow partial closing. The Tribunal rejected said arguments and stated that most competition agencies worldwide are reluctant to accept carve-out agreements to exclude or even mitigate gun jumping practices, considering the uncertainty of their effectiveness (especially regarding all the difficulties to control/impede the exchange of sensitive information). In other words, according to CADE's ruling, the parties should have awaited until CADE's approval and a carve-out agreement would not prevent the gun jumping characterization. A settlement was then negotiated between the Tribunal and the parties, ultimately resulting in the highest financial contribution in the context of gun jumping practices so far, BRL 30 million.

Finally, in *Blue Cycle/Shimano*,¹⁵ which referred to formation of a joint venture for exclusive distribution of Shimano's cycling products in Brazil, the Tribunal for the first time applied the annulment provision envisaged in Article 88 of the Brazilian Antitrust Law. Even though the transaction itself was not voided, the Tribunal imposed such sanction on the supply agreement associated with the joint venture until a final decision on the merits were ultimately issued.

5. Conclusion: Important Dos and Don'ts until clearance by CADE

After almost five years since the Brazilian Antitrust Law came into effect, CADE has indeed gone a long way in its efforts to identify what would constitute gun jumping and, thus, dispel the overall feeling of uncertainty by the parties to a deal.

In this regard, and following the criteria reflected by the Gun Jumping Guidelines, there are three main phases that should receive more attention by the parties to avoid possible gun jumping infringements:

- i *Negotiations preceding the deal*: during this phase it is important to ensure that any sensitive information to be exchanged by the parties is carefully evaluated and a protocol used to prevent possible misuse;
- ii *Drafting of contracts*: during this phase, in addition to the exchange of information issue, the parties should ensure that clauses are written in such a way that no interference between them is allowed until CADE's clearance.

¹⁴ Concentration Act No. 08700.011836/2015-49. Notifying Parties: Technicolor S.A. and Cisco Systems, Inc. Settlement agreement approved by the Tribunal on January 20, 2016.

¹⁵ Procedure to Investigate Concentration Act No. 08700.002655/2016-11. Parties: Blue Cycle Distribuidora S.A., RR Participações S.A., Douek Participações Ltda. and Shimano Inc. Settlement agreement approved by the Tribunal on July 27, 2016.

- iii *After signing, before clearance*: during this phase, and also in addition to the exchange of information issue, the parties should maintain their respective ordinary course of business without any influence by any of them over the others.

Obtaining prior approval for a concentration act under the mandatory filing regime is crucial to avoid irreversible losses to the market and to consumers. Therefore, if, on one hand, the parties should ensure that the market conditions are maintained in the meantime, then, on the other hand, the authorities should engage their best efforts to assure that an accurate analysis is carried out and a final decision is rendered in due time. CADE has definitely made very good progress in this area, as the guidelines and decisions in the cases mentioned here have shown.

CHAPTER 7 - CARVE-OUT ARRANGEMENTS IN CROSS-BORDER TRANSACTIONS AND BRAZIL'S MERGER CONTROL AFTER CISCO/TECHNICOLOR

José Carlos Berardo
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1. Introduction

Cross-border transactions subject to multiple merger control regimes are usually complex and involve a great deal of planning and coordination of filings in different jurisdictions, to ensure a smooth review process and clearance within a reasonable timeline. Considering the great number of countries with merger control systems with suspensory regimes, multijurisdictional merger filings might prove to be difficult to coordinate, especially with respect to timing of closing.

One of the questions that often arises when planning or coordinating multijurisdictional merger filings is whether the parties could close the transaction in jurisdictions where clearance has already been granted without engaging in gun jumping (early consummation of a transaction before clearance) in jurisdictions where approval has not yet been granted. To what extent would a local antitrust law with pre-merger control rules allow consummation of a cross-border transaction abroad before the elapse of the waiting period locally?

Accepted by some national antitrust laws, carve-out arrangements are sometimes appointed by practitioners as an alternative to mitigate gun jumping risks in multi-jurisdictional filings. These arrangements – when acceptable – enable parties to isolate the effects of the closing of a global transaction in jurisdictions where clearance has already been granted, thereby eliminating the risk of gun jumping in those ones where approval is still pending.

However, there is a wide reticence and suspicion of foreign antitrust authorities with regard to the use of carve-out agreements in the control of international mergers. Even in jurisdictions where these arrangements are accepted, there are strict requirements that must be met in order to carve-out the local assets from the global deal without infringing suspensory rules.

In Brazil, the issue was subject to CADE's analysis in the Cisco/Technicolor merger case. On January 20, 2016 CADE's Tribunal fined Cisco Systems Inc. and Technicolor S/A for gun jumping in an amount of R\$ 30 million; in its decision, CADE expressly rejected so-called "carve-out agreements". Although the parties had entered into a carve-out arrangement to exclude the effects of the closing in Brazil, the authority found that this arrangement was not sufficient to avoid gun jumping. In CADE's view, contractual arrangements intended to isolate the effects of the closing of a cross-border transaction in other jurisdictions, while the Brazilian "piece" is carved out and still pending merger control approval, are not acceptable.

Despite the incisive instance from CADE against carve-out arrangements, current pre-merger rules are silent about carve-out arrangements. Pursuant to such rules, the gun jumping

prohibition provides that merging parties cannot: (i) modify their physical structure or transfer or combine assets; (ii) influence the other party's business decisions, or (iii) exchange commercially sensitive information.¹

Until the *Cisco/Technicolor* decision, one could argue that, presumably, the gun jumping prohibition would not reach integration activities performed outside Brazil, provided that operating companies, assets and businesses in Brazil remain independent. This is because of the “effects doctrine” provided for by the Brazilian Antitrust Law. According to this doctrine, the law is only enforceable regarding transactions carried out in Brazil or that may produce effects in the Brazilian territory. Therefore, if the Brazilian part of a global transaction is successfully carved out from the transaction, closing in other countries would not produce effects in Brazil and, thus, no gun jumping infringement would take place locally.

Nevertheless, as the opinion in the *Cisco/Technicolor* decision acknowledges, carve-out arrangements are difficult to monitor and their effectiveness is highly questionable when it comes to avoiding the exchange of sensitive information between competitors. The argument is that parties to a global merger would not be able to prevent closing overseas from producing effects in Brazil, and for this reason decided to set a general prohibition to carve-out arrangements without further considerations about possible scenarios whereby these arrangements could effectively isolate Brazil from the closing taking place elsewhere.

The purpose of this paper is to critically assess the *Cisco/Technicolor* merger case, putting in perspective the view that carve-out arrangements are unlawful regardless of the actual effects of a closing in Brazil. We will also evaluate possible alternatives for transaction structuring that could successfully enable the carving out of the Brazilian part of the deal, as per the “effects doctrine” provided for by the Brazilian Antitrust Law.

2. Merger control and gun jumping in Brazil

2.1 General merger control rules

The most important modification brought forth by the current law was the adoption of a pre-merger control system, thereby incorporating a suspensory obligation prior to closing.

Article 2 of the Brazilian Antitrust Law defines its territorial applicability and, thus, CADE's jurisdiction. This provision sets forth that: (i) the law is applicable to practices or transactions wholly or partially performed in Brazil or which produce or may produce effects within the Brazilian territory, and (ii) a foreign company that conducts businesses or has branches, agencies, subsidiaries, offices, establishments, agents or representatives in Brazil will be deemed domiciled in Brazil.

Based on the “effects doctrine”, if a transaction is carried out abroad with no connection with the Brazilian market, it should not be subject to merger control review in Brazil. However, it may not be easy sometimes to assess whether a transaction has local effects, since there is no *de*

¹ Failure to comply with this standstill obligation exposes the parties to gun jumping fines ranging from R\$ 60,000 to R\$ 60,000,000; There is a debate as well as to which acts in this context could be declared void.

minimis rule providing guidance on the amount of sales into the Brazilian market to be deemed relevant to trigger CADE's jurisdiction. We will explore this issue further in the following sections of this paper.

2.2 Gun jumping: early consummation of reportable transactions

As mentioned above, reportable transactions under Brazilian law (subject to mandatory merger control review) may not be "consummated" before CADE's final clearance decision.

Pursuant to the Brazilian Antitrust Law and CADE's Internal Regulation, until the issuance of a final clearance decision, parties must keep structures and facilities separate and may not transfer assets or exercise any kind of influence over each other. Parties are also not allowed to exchange competitively sensitive information for purposes not specifically related with the evaluation (*due diligence*) of the target business and transaction planning. In short, parties must not close a reportable transaction and must refrain from modifying the competition conditions between them until the authority issues its final clearance decision.

These broad gun jumping rules generated legal uncertainty as to which pre-merger acts may be carried out by seller and buyer when performing due diligence and transaction planning until CADE's final clearance. Based on the few related cases decided by CADE in the first years that followed the enactment of the Brazilian Antitrust Law, CADE issued in 2015 the Guidelines for Prior Consummation of Economic Concentrations (the "Guidelines").

Although the Guidelines did not bring any substantial news but rather consolidated international standards and practices, they provide more transparency and legal certainty for parties to transactions subject to merger control in Brazil.

The Guidelines indicate the current position of the authority with respect to what a purchaser can do, or must avoid doing, before signing and closing of a transaction; the Guidelines outlines the authority's view of what "gun jumping" is and what actions are critical. Further, they also suggest best practices to minimize the risks of gun jumping.

According with the Guidelines, gun jumping is likely to exist if the parties to a transaction take any of the following actions:

- (a) exchange information, in particular, competitively sensitive information, such as costs, production capacity, marketing strategy, pricing information, commercial strategies, among others;
- (b) establish clauses in transaction documents that could indicate an earlier integration between the parties, such as, for instance, clauses that allow the buyer to exercise influence over the target's strategic business or clauses that require payment in advance; among others and
- (c) perform certain activities before CADE's clearance, such as the exercise of voting rights, joint development of products, transfer of assets, among others.

The Guidelines also provide recommendations to help parties to mitigate risks, such as the setting up of "clean teams" and "parlor rooms" for the purpose of processing sensitive information to prevent it from being accessed by the buyer's executives and commercial teams. These measures

are highly recommended in complex transactions that require a great deal of information exchange in due diligence proceedings and negotiations.

However, neither the rules contained in the Brazilian Antitrust Law and CADE's regulations nor the Guidelines, clarified whether or not carve-out arrangements in cross-border transactions would infringe the suspensory regime. Thus, in the absence of a clear guidance in that regard, one could assume that the gun jumping prohibition would not reach integration activities performed outside Brazil, provided that operating companies, assets and businesses in Brazil remain independent.

Based on this interpretation, if the Brazilian part of a global transaction is successfully carved-out, the closing in other countries would not produce effects in Brazil and, thus, no gun jumping infringement would occur in Brazil.

In the *Cisco/Technicolor* merger case, CADE expressly rejected “carve-out agreements” to mitigate gun jumping risks in global transactions. In this case, although the parties had entered into a carve-out arrangement to exclude the effects of the closing in Brazil, CADE found that this arrangement was not sufficient to avoid gun jumping, as further explained in Section 4 below.

Before discussing the peculiarities of the *Cisco/Technicolor* merger case, it is worth clarifying the concept and scope of the so-called “carve-out arrangements” in cross-border transactions and, more specifically, drawing up the relation between these arrangements and the “effects doctrine” provided for by the Brazilian Antitrust Law.

3. Carve-out arrangements in cross-border transactions and the “effects doctrine” under the Brazilian Antitrust Law

Brazilian Antitrust Law sets forth in its Article 2 that it is applicable based on an assessment of the possible local effects; as a result, CADE does not have jurisdiction over matters that cannot affect the local market.

The test whether a transaction or an infringement has “local effects” has traditionally been very comprehensive, given the open-ended wording of Article 2: the law “applies to the practices wholly or partially performed within the Brazilian territory or which produce or may produce effects therein”. As such, there is no clear-cut set of necessary and sufficient conditions that should be met in order to identify which foreign practices are within the jurisdiction of the Brazilian antitrust authorities.

There is no consistent and convergent line of precedents associated with this matter either; and, as a result, no general standard may be, until the present moment, safely inferred from the precedents. In view of this situation, if one is to adopt a more conservative approach, one should consider that the CADE has jurisdiction over practices (transactions or infringements) which could impact, even if indirectly, local consumers.²

² Several decisions concerning cartel investigations issued in 2016 seem to confirm this approach (see Administrative Processes No. 08012.005255/2010-11, 08012.005930/2009-79, 08012.000774/2011-74, 08700.009161/2014-97, 08012.000773/2011-20), even if there have been very few decisions which delved into the matter of Article 2 interpretation in merger cases.

A proper interpretation of the scope of Article 2 is essential for discussing the lawfulness of carve-out arrangements involving Brazil exactly because the absence of CADE's jurisdiction over a certain aspect of a merger is the legal basis to repeal a gun-jumping claim.

In other words, pursuant to the wording of Article 2, a carve-out arrangement would only run afoul of the local gun jumping rules if closing of the transaction elsewhere would affect, even if indirectly, local consumers.

4. CADE's ruling in Cisco/Technicolor

The case concerns the global acquisition of a wholly owned subsidiary of Cisco by Technicolor. The transaction was notified in Canada, U.S., Colombia, the Netherlands and Ukraine; in Brazil, it was filed on September 4, 2015 and the filing was only considered complete on October 16, 2015.

During the review, officials from CADE noticed a press release published on Technicolor's website whereby the parties announced the beginning of their joint activities as from that date; the press release also mentioned that the transaction was closed in all jurisdictions, except for Brazil and Colombia, where antitrust approval was still pending.

This public announcement led CADE to start an investigation to assess whether the parties engaged in gun jumping, in violation of the pre-merger control rules. As a result from the investigation, CADE's Tribunal found that the statement of the companies in their press release was sufficient evidence of gun jumping, regardless of the fact that the parties entered into a carve-out agreement to isolate Brazil from the effects of the closing.

4.1 CADE's considerations on carve-out agreements in cross-border transactions

After the public announcement of the closing abroad, the parties informed CADE that they had signed a carve-out agreement to isolate the Brazilian part of the transaction from the potential effects of the closing at global level.

In this regard, the Reporting Commissioner raised at least three arguments to sustain that such type of arrangement cannot be used to mitigate gun jumping risks in cross-border transactions under Brazilian law.

The Reporting Commissioner stressed that the majority of the antitrust authorities worldwide do not accept carve-out agreements as a means of excluding or mitigating the penalty for gun jumping; authorities from the U.S., Canada, European Union, Germany, Ukraine, India and Israel would share this view. The Commissioner emphasized international examples of convictions for gun jumping even when the parties enter into carve-out agreements, such as the €4.5 million fine imposed by Germany's Federal Cartel Office (FCO) against the U.S. companies Mars, Inc. and Nutro Products, Inc.³

³ *Bundeskartellamt*. "Fine imposed against Mars for violating the prohibition to put merger into effect". Available at: <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2008/15_12_2008_Mars_Vollzugsverb_0t.html>. Access on March 8, 2017.

Moreover, the Reporting Commissioner expressed his view that carve-out arrangements are difficult to monitor and the effectiveness of these arrangements is highly questionable when it comes to avoiding the exchange of sensitive information between competitors.

Based on the above, the Reporting Commissioner concluded that there is a wide reticence and suspicion of foreign antitrust authorities with regard to the use of carve-out agreements in the control of international mergers, even in jurisdictions where these arrangements are accepted.

4.2 Evaluation of the carve-out agreement presented by the parties

According to CADE's decision, the carve-out agreement presented by the parties was not sufficient to prevent the effects of the closing in Brazil and, therefore, was not sufficient as a means to mitigating gun jumping. His justifications were based on three reasons.

First, the nature of the transaction would make it difficult to isolate the effects of the closing, since the companies operate in global markets and the merger was structured as a single cash and share global transaction; that is, there was no separate transaction in Brazil or involving exclusively Brazilian-related assets.

Although the carve-out had prevented the transfer of contracts, assets and goods exclusively related with the Brazilian part of the transaction, this limitation was not sufficient, in the Commissioners' view, to prevent the effects of the closing at global level, which could result in the transfer of technology and intellectual property, the flow of documents related to marketing strategies, and the exchange of sensitive information.

Even though the Share Purchase Agreement indicated that the parties were supposed to avoid the exchange of commercially sensitive information, the Commissioner inferred that it would not be possible to monitor nor to prevent that the exchange of information abroad would not produce local effects. Therefore, CADE adopted a presumption that carve-out arrangements would never avoid leaking of sensitive commercial information to Brazil during the review of the merger filing.

Second, the Commissioners also discredited the carve-out agreement as a mitigating factor for gun jumping infringements because: (i) the carve-out was never mentioned before the closing; (ii) the carve-out was not mentioned in the Share Purchase Agreement submitted by the parties; and (iii) the parties did not discuss the carve-out with CADE in advance – prior to closing–, and the agreement was filed only after the publication of the press release about the closing.

Third, in order to create a clear precedent on the matter, the Reporting Commissioner made it clear that “*carve-out agreements will not be accepted in Brazil for the purpose of excluding or mitigating gun jumping penalty*” in cross-border transactions.

The parties settled the matter by (i) acknowledging the infringement, and (ii) paying a penalty of R\$ 30 million.

CADE justified why it did not impose the penalty of declaration of nullity of the acts performed to consummate the transaction, which is foreseen by Brazilian Antitrust Law as one of the possible sanctions for gun jumping. According to the Reporting Commissioner, this sanction was not applicable in this case because it would not be proportional in view of the lack of

anticompetitive effects of the transaction. Furthermore, the affected Brazilian market was small in relation to the total worldwide business.

5. Critic assessment of CADE's ruling in *Cisco/Technicolor*: prospects for the use of carve-out arrangements in cross-border transactions involving Brazil

CADE's decision in *Cisco/Technicolor* strongly suggests any carve-out arrangement involving Brazil is, according to the authority, *presumptively illegal* and thus raises gun jumping issues, regardless of an investigation in whether the consummation undertaken abroad may produce local effects, as per Article 2 of the Law.

Although this specific decision provides a general solution – that amounts in practice to an outright prohibition – to the issues raised by carve-out arrangements, it fails to observe the limits imposed to CADE's jurisdiction by the effects doctrine adopted by the Brazilian Antitrust Law. It is true that in acquisitions of control or of minority shareholdings of foreign companies with local subsidiaries or exports into the country, it seems difficult, if not impossible, to isolate Brazil (or any other jurisdiction, from that matter) from the effects of the closing. Article 2 rules concerning local effects, however, gives the parties the opportunity – and the burden, perhaps – to show that the legal structure of a given transaction is capable to effectively isolate the effects the closing abroad in Brazil, even if this is not a trivial task.

For instance, CADE's *Cisco/Technicolor* decision does not provide guidance on how the authority will treat other types of cross border deals that could contain effective carve-out arrangements – *e.g.*, transactions carried out abroad that could not possibly produce effects within the Brazilian territory – such as asset deals. The decision basically provides a one-size-fits-all solution for all types of multi-jurisdictional transactions, thereby putting share deals, asset deals and “associative agreements” in the same package, despite the different natures, features and structures of these transactions.

We explore below circumstances whereby carve-out arrangements could, at least in theory, work to isolate Brazil from the effects of the of a cross border transaction consummated abroad, given the effects doctrine set forth under Article 2 of the Brazilian Antitrust Law.

5.1 Acquisition of control and minority shareholding

As mentioned, carving out Brazil from a transaction involving acquisition of control or minority shareholding at the level of the parent companies of the groups involved is challenging. The *Cisco/Technicolor* decision rightfully asserts, then, that the nature of the transaction would make it difficult to isolate the effects of the closing in Brazil, since the companies operate in global markets and the merger was structured as a single transaction – acquisition of shares of a foreign company that had exports or local subsidiaries.

Indeed, it is clear that a transaction involving acquisition of equity between different economic groups at the ultimate level of the parent companies is likely to produce effects in all jurisdictions where these groups operate, either through local subsidiaries or through exports. No legal remedy appears to be available to support the view that an acquisition of control carried out

abroad, for instance, did not reach the Brazilian territory, even if local management remains unchanged.

Therefore, a carve-out arrangement would only work, in theory pursuant to Article 2, if the parties succeed in isolating local businesses from the effects of a closing carried out abroad. Based on the arguments CADE adopted to reject the carve-out agreements presented in the *Cisco/Technicolor* case, this would involve the following general guidance:

- I. Avoiding any transfer of contracts, assets and goods, including intellectual property, technology and know how, related with the Brazilian part of the transaction;
- II. Avoiding any exchange of commercially sensitive information from the parent companies involved in the merger to their Brazilian subsidiaries, including operating and marketing documents, commercial and pricing strategies, business plans, costs, client lists, supplier lists, purchase orders, among others;
- III. Preventing business decisions undertaken by the parent companies' governance bodies from interfering in the Brazilian subsidiaries and their respective business, which must remain independent until CADE's final clearance.

This set of steps ultimately results in a presumption that a carve-out arrangement in a share deal is unlawful, given that it is virtually impossible, from a legal and corporate law perspective, to adopt all of them in a share deal. As a result, the burden of proving that the carve-out does not result in gun jumping in Brazil lies on the applicants.

5.2 Asset deals structured as separate transactions

In Brazil, pursuant to Article 90, II, of the Brazilian Antitrust Law, acquisition of assets, either physical or intangible, must be submitted to CADE whenever the transaction entails acquisition of a business.⁴

Unlike global share deals, which are normally structured as a single cross border transaction, it is not uncommon that asset deals being structured as separate transactions in each jurisdiction or groups of jurisdiction. Even though there could be a master (asset purchase) agreement, there are usually separate local asset agreements for each jurisdiction where the groups involved have presence through local subsidiaries. This approach makes sense considering that the assets involved in the transaction are different from one jurisdiction to another. Indeed, facilities, equipment, IP, know how, regulatory licenses and permits, employees, customers, among other assets tend to be different in each jurisdiction depending on the industry. Therefore, one can infer that a global asset deal is only a means to structure and organize separate and independent asset transactions taking place in each jurisdiction where the parties are active.

The consummation of a local asset deal in a specific jurisdiction may not produce effects in other jurisdictions, considering that: (i) the assets are different and are located in each jurisdiction; (ii) transaction documents are structured based on the local features of the assets; (iii) there is no transfer of corporate control or minority shareholding which could provide the purchaser with powers to influence business decisions of the other party on a global level, and (iv) the parties and

⁴ Acquisitions of sparse goods or assets that are not sufficient to be deemed a business are not reportable.

their respective economic groups remain independent after the consummation of each local transaction.

It is common for asset deals to be structured as share deals by spinning-off the assets from the seller company to a newco incorporated for the sole purpose of the completion of the asset transfer and, as consequence, this newco is ultimately merged into or acquired by the purchaser. Even in this case there would be – or could theoretically be – separate transactions in each jurisdiction, without any transfer of control or shares at the parent companies level resulting dislocation of the decision making between the two groups involved, which would remain independent after closing.

As mentioned before, the *Cisco/Technicolor* ruling did not discuss these types of deals. In any case, there are good grounds to argue that the *Cisco/Technicolor* ruling is not applicable to asset deals structured as separate transactions and assets in each affected jurisdiction.

6. Final remarks

As shown above, CADE has made a clear statement in *Cisco/Technicolor* against the so-called “carve-out agreements” in cross-border mergers. Therefore, according to the authority, these arrangements are *presumptively illegal* and thus raise gun jumping issues, regardless of an investigation in whether the consummation undertaken abroad may produce local effects, as per Article 2 of the Brazilian Antitrust Law.

However, even though there is a clear presumption that carve-out arrangements are unlawful, the *Cisco/Technicolor* decision was structured to tackle a cross-border M&A transaction and should not be used as a one-size-fits-all solution for all types of multi-jurisdictional transactions. In future cases, CADE should rely upon the “effects doctrine” and stuck to the peculiarities of each case. It is clear that share deals, asset deals and other types of reportable transactions have different features and, in some cases, could be structured as separate transactions.

In cross-border share deals it is unlikely that the parties could manage to carve-out the Brazilian part of the transaction from the effects of the closing. Even if CADE relies upon Article 2 of the Brazilian Antitrust Law to evaluate the effects of a closing carried out abroad vis-à-vis a carve-out agreement to isolate Brazil, there would be almost impossible to avoid the transfer of contracts, assets and goods, and IP related with the Brazilian part of the transaction, as well as the exchange of commercially sensitive information from the parent companies involved in the merger to their Brazilian subsidiaries. It would also be extremely difficult to prevent business decisions by governance bodies at the parent companies’ level from interfering in the Brazilian subsidiaries and their respective business, even if local management remains unchanged.

Therefore, the burden of proving that the carve-out does not result in gun jumping in Brazil lies on the applicants; and this would be a very difficult evidence to be produced.

On the other hand, global asset deals are normally structured as separate transactions in each jurisdiction, since assets located in each jurisdiction are different and the parties and respective economic groups remain independent after consummation of each of these transactions. This is true even when asset deals are structured as share deals by spinning-off the assets from the seller

company to a newco incorporated for the sole purpose of the completion of the sale of the assets to the purchaser.

Considering the complexity of cross-border transactions and the necessary application of the “effects doctrine” in the evaluation of an occasion gun jumping, a case-by-case approach should be carried out by CADE to evaluate whether or not the Brazilian part of a given transaction has been successfully carve-out.

CHAPTER 8 - OVERVIEW ON MERGER CONTROL AGREEMENTS IN BRAZIL

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1. Introduction

The pre-merger control regime in Brazil that entered into force by means of Law No. 12,529/11 (the Brazilian Antitrust Law) in 2012 introduced some sophisticated features to the merger review process. In the recent past, CADE¹ has increased the use of economic analysis, and intensified the use of remedies in the context of complex transactions. In the context of transactions with an international component, there was an appreciable uptick in the cooperation with foreign authorities, especially to implement remedies negotiations in Brazil closer to those of antitrust enforcement agencies in other jurisdictions, in particular the European Commission and the U.S. antitrust agencies (to a lesser extent).

CADE has reviewed a number of complex² transactions since 2012. Accordingly, the negotiation of remedies with the Brazilian authority significantly evolved from both substantive and procedural perspectives since the approval of the first ACCs (*Acordos em Controle de Concentração* – Merger Control Agreements).³

The first five years of the Brazilian pre-merger control regime have shown a shift in the competitive concerns resulting from notified transactions. In addition, CADE is increasingly demanding more extensive and complex remedy packages. And despite of the lack of a formal detailed procedure or guidelines governing remedies negotiations, experience over the initial years of the Brazilian pre-merger control regime shows that CADE introduced new tools and mechanisms to engage in constructive negotiations towards positive outcomes, mirroring foreign experience.

As CADE shows a growing interest in the use of remedies as a tool to clear complex transactions, in the negotiation process the Brazilian authority also demonstrates an increased

¹ CADE has a unified structure, comprising (i) the General-Superintendence (SG), which is in charge of carrying out the initial assessment of any merger review and investigations involving alleged unlawful practices, and (ii) CADE's Tribunal, responsible for final administrative decisions on competition law related matters.

² Pursuant to Article 56 of the Brazilian Antitrust Law, CADE has to declare the case as complex in order to benefit from the statutory time extension in case it needs additional time to carry on the market text and competitive analysis. Note, however, that not necessarily CADE issues such declaration to every complex case.

³ Similarly to other antitrust authorities, CADE recognizes that consolidation in certain sectors can lead to significant synergies and thus may be beneficial to the marketplace and customers. The discrepancy between the number of ACCs negotiated and blocked transactions demonstrates a clear willingness of the Brazilian authority to find the means to allow mergers in general.

appetite to dive into the details of remedies offered by notifying parties with an unprecedented degree of granularity.

These factors significantly affect the duration of remedy negotiations, which combined with the suspensory⁴ nature of the Brazilian pre-merger control regime influence the time of analysis and the incentives for notifying parties.

In what follows, this chapter provides a brief overview of the current trends regarding remedies negotiation in CADE's practice, related procedural and substantive aspects and some comments regarding the implementation of remedies.

2. Competitive concerns and types of remedies negotiated with CADE

In the context of a merger case, CADE can either reject the transaction, approve it without any restrictions, or approve subject to restriction. Hence, the authority might unilaterally impose the restriction or negotiate remedies by means of an ACC. During the substantive analysis, in case the transaction raises concerns, CADE will reach the parties, who can either argue on the merits or engage in negotiations to overcome these issues.

It is worth noting that CADE not only makes its own assessment on the effects arising from the transaction, but also tries to address specific concerns mentioned by third parties⁵ (customers, suppliers and competitors) during the market text. As a matter of fact, CADE actually gives a great amount of attention to issues raised by customers. Thus, the authority makes an in depth review of these subjects, and tries, to the extent possible, find the means to allow the implementation of the transaction neutralizing potential competitive problems.

For this purpose, CADE can use structural and behavioral remedies, covering divestiture of assets (tangible⁶ or intangible⁷), licensing of intellectual property rights,⁸ prohibition of certain

⁴ Under the Brazilian merger control regime, transactions that are subject to mandatory filing in Brazil cannot be closed or implemented before obtaining clearance from CADE. This means that the parties must remain independent from each other until they are able to obtain CADE's final approval, but most importantly that timing became a very important issue for notifying parties. CADE has up to 330 days to issue its final decision on notified transactions. The formal review period can take up to 240 days, counted from the formal submission, which may be extended for an additional period of 60 days, if requested by the notifying parties, or for an additional period of 90 days by means of a reasoned order issued by CADE's Tribunal.

⁵ See, for instance, Concentration Acts No. 08700.005719/2014-65 (Notifying Parties: Rumo Logística Operadora Multimodal S.A. and ALL – América Latina Logística S.A.), approved with restrictions by the Tribunal on February 11, 2015; and 08700.000344/2014-47 (Notifying Parties: Bromisa Industrial e Comercial Ltda. and ICL Brasil Ltda.), approved with restrictions by the Tribunal on December 10, 2014.

⁶ See Merger Control Agreements in Concentration Acts No. 08700.006567/2015-07 (Notifying Parties: Ball Corporation and Rexam PLC), approved with restrictions by the Tribunal on December 9, 2015; No. 08700.005447/2013-12 (Notifying Parties: Kroton Educacional S.A. and Anhanguera Educacional Participações S.A.), approved with restrictions by the Tribunal on May 14, 2014; 08700.008607/2014-66 (Notifying Parties: GlaxoSmithKline and Novartis AG), approved with restrictions by the Tribunal on February 25, 2015; 08700.010688/2013-83 (Notifying Parties: JBS S.A., Rodopa Indústria e Comércio de Alimentos Ltda. and Forte Empreendimentos e Participações Ltda.), approved with restrictions by the Tribunal on October 18, 2016; 08700.000658/2014-40 (Notifying Parties: Minerva S.A. and BRF S.A.) approved with restrictions by the Tribunal on August 14, 2014; and 08700.009882/2012-35 (Notifying Parties: Notifying Parties: Ahlstrom Corporation and Munksjö AB), approved with restrictions by the Tribunal on May 22, 2013.

discriminatory practices,⁹¹⁰ prohibition of entering into specific acquisitions agreement during a period,¹¹ etc.

The decisional practice indicates that the authority has the intent to achieve an effective remedy, which must be adequate to be monitored, feasible, and must not create new issues. In this sense, CADE prefers structural remedies when possible, since there is less need for monitoring measures.

Although the practice shows a preference for structural remedies, some cases may be coupled with behavioral commitments. It is also worth noting that in cases involving vertical relationships, structural remedies may not properly address the competition issues related to the concentration act and CADE also applies behavioral remedies alone or in combination with structural ones. Even in cases with competition concerns related to horizontal overlaps, CADE can apply mainly behavioral commitments, since some structural remedies may not be applicable or appropriate to address the competition concerns to solve the problems.¹²

Even though this is more common in unilaterally imposed remedies, CADE may also ask that the ACC covers adjustments to specific agreements provisions to align the contracts to its decisional practice regarding some matters, especially as regards non-compete clauses, restricted grant back of intellectual property rights, etc.

In general, CADE targets remedies that specifically cover the competitive concerns. Nevertheless, some remedies may supersede the actual competitive problem to involve other

⁷ See Merger Control Agreements in Concentration Acts No. 08700.003462/2016-79 (Notifying Parties: Reckitt Benckiser and Hypermarcas), approved with restrictions by the Tribunal on September 14, 2016; 08700.006567/2015-07 (Notifying Parties: Ball Corporation and Rexam PLC) approved with restrictions by the Tribunal on December 9, 2015; 08700.001437/2015-70 (Notifying Parties: Dabi Atlante and Gnatus) approved with restrictions by the Tribunal on November 25, 2015; 08700.009731/2014-49 (Notifying Parties: Telefônica S.A., Assicurazioni Generali S.p.A., Intesa Sanpaolo S.p.A and Mediobanca S.p.A.) approved with restrictions by the Tribunal on March 25, 2015; 08700.009732/2014-93 (Notifying Parties: Telefônica Brasil S.A., GVT Participações S.A., Telefônica S.A. and Vivendi S.A.), approved with restrictions by the Tribunal on March 25, 2015; 08700.008607/2014-66 (Notifying Parties: GlaxoSmithKline and Novartis AG), approved with restrictions by the Tribunal on February 25, 2015; and 08700.010688/2013-83 (Notifying Parties: JBS S.A., Rodopa Indústria e Comércio de Alimentos Ltda. and Forte Empreendimentos e Participações Ltda.), approved with restrictions by the Tribunal on October 18, 2016.

⁸ See Merger Control Agreement in Concentration Act No. 08700.009924/2013-19 (Notifying Parties: Innova S.A., Petróleo Brasileiro S.A. and Videolar S.A.), approved with restrictions by the Tribunal on October 1, 2014.

⁹ See Concentration Act No. 08700.009363/2015-10 (Notifying Parties: Itaú Unibanco S.A. and MasterCard Brasil Soluções de Pagamento Ltda.), approved with restrictions by the Tribunal on May 11, 2016.

¹⁰ See Merger Control Agreements in Concentration Acts No. 08700.005719/2014-65 (Notifying Parties: Rumo Logística Operadora Multimodal S.A. and ALL – América Latina Logística S.A.), approved with restrictions by the Tribunal on February 11, 2015; 08700.000344/2014-47 (Notifying Parties: Bromisa Industrial e Comercial Ltda. and ICL Brasil Ltda.), approved with restrictions by the Tribunal on December 10, 2014; and 08700.009924/2013-19 (Notifying Parties: Innova S.A., Petróleo Brasileiro S.A. and Videolar S.A.), approved with restrictions by the Tribunal on October 1, 2014.

¹¹ See Merger Control Agreements in Concentration Acts No. 08700.010790/2015-41 (Notifying Parties: HSBC Bank Brasil S.A. and Banco Bradesco S.A.), approved with restrictions by the Tribunal on June 8, 2016; and 08700.009924/2013-19 (Notifying Parties: Innova S.A., Petróleo Brasileiro S.A. and Videolar S.A.), approved with restrictions by the Tribunal on October 1, 2014.

¹² See Merger Control Agreement in Concentration Act No. 08700.009924/2013-19 (Notifying Parties: Innova S.A., Petróleo Brasileiro S.A. and Videolar S.A.), approved with restrictions by the Tribunal on October 1, 2014.

activities of the parties in case this amounts to a necessary measure to render the remedy package as feasible as whole.¹³

3. The negotiation process

According to Article 88 of the Brazilian Antitrust Law, CADE has to complete the merger review of cases not subject to the fast-track procedure¹⁴ within 240 calendar days counted from the complete formal filing. The applicants can request a 60-day extension in order to submit additional evidence supporting their arguments for approval. In turn, the authority can extend the time of analysis by 90 days, upon a reasoned decision rendered by CADE's Tribunal, specifying the reasons for the extension, the period of the extension (which may not be further renewed), and the measures which are necessary for deciding the case.

After reviewing the transaction, the General Superintendence either issues an opinion approving the transaction or, in case it understands that the case should be blocked or remedies are needed for clearance, it challenges the case before the Tribunal. Therefore, the Tribunal has the last word on the scope and acceptance of the ACC.¹⁵

Once the case reaches the Tribunal, a Reporting Commissioner is randomly assigned to the concentration act, but all the others Commissioners must also vote. Therefore, in these cases, it is necessary to negotiate directly with the Reporting Commissioner and to convince all members of CADE's Tribunal.

The notifying parties can submit the proposal of merger control agreements anytime between the notification of the concentration act and 30 calendar days counted from the issuance of the General Superintendence's opinion that imposes remedies and forwards the case to the Tribunal.¹⁶ Therefore, except for the deadline to present the ACC proposal and the maximum time

¹³ See, for instance, some remedies applied in Concentration Act No. 08700.000344/2014-47 (Notifying Parties: Bromisa Industrial e Comercial Ltda. and ICL Brasil Ltda.), approved with restrictions by the Tribunal on December 10, 2014, as the commitments of adopting an open door policy to CADE and a compliance program.

¹⁴ Fast-track procedure only applies to transaction comprising or leading to (i) cooperative joint ventures; (ii) entries (substitution of players); (iii) overlaps with unquestionably low market shares (necessarily lower than 20%); (iv) vertical integrations in which none of the parties, or their economic groups, hold more than 30% of market share in the markets vertically integrated, and (v) minimal market share increases (HHI variation lower than 200 points), if the combined market share does not exceed 50%.

¹⁵ See Concentration Act No. 08700.009363/2015-10 (Notifying Parties: Itaú Unibanco S.A. and MasterCard Brasil Soluções de Pagamento Ltda.), approved with restrictions by the Tribunal on May 11, 2016; 08700.005719/2014-65 (Notifying Parties: Rumo Logística Operadora Multimodal S.A. and ALL – América Latina Logística S.A.), approved with restrictions by the Tribunal on February 11, 2015; 08700.005447/2013-12 (Notifying Parties: Kroton Educacional S.A. and Anhanguera Educacional Participações S.A.), approved with restrictions by the Tribunal on May 14, 2014; 08700.009198/2013-34 (Notifying Parties: Estácio Participações S.A. and TCA Investimento em Participações Ltda.), approved with restrictions by the Tribunal on May 14, 2014; 08700.004185/2014-50 (Notifying Parties: Continental Aktiengesellschaft and Veyance Technologies Inc.), approved with restrictions by the Tribunal on January 29, 2015; 08700.009924/2013-19 (Notifying Parties: INNOVA S.A.; Lírio Albino Parisotto; Petróleo Brasileiro S.A.; Videolar S.A.), approved with restrictions by the Tribunal on October 1, 2014; 08700.000658/2014-40 (Notifying Parties: Minerva S.A. and BRF S.A.), approved with restrictions by the Tribunal on August 14, 2014.

¹⁶ The Brazilian Antitrust Law and applicable regulation do not provide for specific procedural aspects concerning the negotiations of ACCs before the Tribunal when the General Superintendence approves the case, but third parties appeal or a Commissioner from the Tribunal requests the case for further review. There was just one case where this happened,

of review, there is no specific timeline that the General Superintendence or the Tribunal must follow to issue decision imposing restrictions or conditioning the approval to the terms of the ACC.

Experience shows that the merger control agreements negotiations rely on the timing of the proposal, the complexity of the transaction, and CADE's need for market tests related to the proposed remedies. Furthermore, CADE also may want to check the capability of the commitments addressing the authority's concerns (and possibly third parties' concerns), and if the ACC contains the standard provisions that CADE demands to assure the effectiveness of the agreement proposed.

Although not mandatory, direct and indirect negotiations with all CADE's levels effectively helps to streamline the work, facilitates the review process, and can save valuable time. Different instances and officials within CADE may review the proposed ACC (and the Tribunal necessarily needs to approve it) and can request amendments to its terms and scope. If the notifying parties propose the merger control agreement when the case is before General Superintendence review, they should try to check if the proposal addresses the concerns that the General Superintendent himself and Commissioners from the Tribunal might have.

The ability to negotiate the remedies with the GS in parallel (at least to a certain extent) with the Tribunal is key to secure a swift procedure.¹⁷ Experience shows that having some feedback from the Commissioners can assist in obtaining a quick homologation from the Tribunal as it can avoid unknown or unexpected demands at later stages, while give the parties the chance to anticipate such demands.¹⁸

Negotiations of remedies can take some considerable time, especially when the commitments do not provide a clear-cut solution, do not cover the entire overlap or demands behavioral measures. Hence, the parties should learn from the start the key procedural milestones to determine the optimal timeframe to present the remedies proposal.

In terms of timing, to engage negotiation with the GS tends to be a good strategy when the notifying parties expect the authority could impose restrictions on its own. In this connection, pushing hard to obtain unconditional approval could significantly delay the approval (and therefore closing). If the notifying parties leave the entire discussion for CADE's Tribunal, new officials will have to review the whole case and it may take additional time. The parties should also have in mind that there is no limitation for the submission of changes to the remedies initially proposed. CADE indicates its concerns and the applicants can propose remedies regarding these issues.

In the end of the day, negotiating remedies and the conditions of their implementation tends to allow the parties to enjoy from benefits in terms of time that they would not when CADE unilaterally imposes conditions.

i.e. See Concentration Act No. 08700.006723/2015-21 (Notifying Parties: TV SBT Canal 4 de São Paulo, Rádio e Televisão Record S.A. and TV Ômega Ltda.), approved with restrictions by the Tribunal on February 24, 2016.

¹⁷ See Merger Control Agreements in Concentration Act No. 08700.008607/2014-66 (Notifying Parties: GlaxoSmithKline and Novartis AG), approved with restrictions by the Tribunal on February 25, 2015; 08700.007621/2014-42 (Notifying Parties: Holcim and Lafarge), approved with restrictions by the Tribunal on December 10, 2014; 08700.002372/2014-07 (Notifying Parties: Cromossomo Participações II S.A. e Diagnósticos da América S.A. Grupo Edson Bueno), approved with restrictions by the Tribunal on July 15, 2014; 08700.009882/2012-35 (Notifying Parties: Munksjö AB and Ahlstrom Corporation), approved with restrictions by the Tribunal on May 22, 2013.

¹⁸ See, for instance, Merger Control Agreement in Concentration Act No. 08700.010790/2015-41 (Notifying Parties: HSBC Bank Brasil S.A. and Banco Bradesco S.A.), approved with restrictions by the Tribunal on June 8, 2016.

It is worth noting some insightful comments from CADE's Commissioners. For instance, former Commissioner Marcio de Oliveira Jr. has indicated in a recent decision that CADE has to pinpoint its concerns before formally refusing one concentration act.¹⁹ This statement came about in the context of a case approved by the General Superintendence, which was reviewed at CADE's Tribunal by another Reporting Commissioner, after third interested parties' appeal. In this case, Commissioner Marcio de Oliveira Jr. understood that the Reporting Commissioner had not allowed the parties to properly present an ACC proposal and, because of that, he voted for the approval of the case without restrictions.

Commissioner Paulo Burnier da Silveira made another important comment recently. He indicated that the notifying parties must present specific ACC proposal and not only mention their intention to reach an agreement. In this sense, Commissioner Paulo Burnier da Silveira said "(...) the mere expression of interest to enter into an ACC does not fulfill the material requirements established in art. 125 of CADE's Internal Rules, which expressly provides the 30 days period from GS' opinion for the applicants to provide the submission of a proposal."²⁰

In these last five years, there are also alternative solutions different from merger control agreements negotiated directly with CADE. In some cases the applicants addressed CADE's competitive concerns raised by third parties through private agreements between the notifying party and the third party.²¹ CADE specifically mentioned in its decision that the private agreement addressed the competitive concerns allegedly created by the transaction.

In other cases, remedies negotiated with some foreign competition authorities addressed CADE's competitive concerns and did not demand Brazilian specific remedies.²² In this sense, CADE's General-Superintendent highlights the "coordination between CADE and international antitrust authorities during common merger reviews, including the coordination of remedies".²³ Note, however, that CADE is not bound to such global divestments agreed with foreign authorities and can (and actually do sometimes) request an ACC over the same or similar object.

Regarding the implementation of the merger control agreement and the authorization for closing of the transaction, CADE has decided recently to suspend the closing of the transaction until the parties comply with some commitments. Commissioner Gilvandro Araújo de Vasconcellos

¹⁹ See Concentration Act No. 08700.006723/2015-21 (Notifying Parties: TV SBT Canal 4 de São Paulo, Rádio e Televisão Record S.A. and TV Ômega Ltda.), approved with restrictions by the Tribunal on February 24, 2016.

²⁰ See Concentration Act No. 08700.009363/2015-10 (Notifying Parties: Itaú Unibanco S.A. e MasterCard Brasil Soluções de Pagamento LTDA.), approved with restrictions by the Tribunal on May 11, 2016.

²¹ See Concentration Act No. 08700.010224/2014-58 (Notifying Parties: The Dow Chemical Company and Univation Technologies, LLC), approved by the GS on April 15, 2015.

²² See, for instance, Concentration Act No. 08700.000206/2015-49 (Notifying Parties: Merck KGaA and Sigma-Aldrich Corporation), approved by the GS on August 10, 2015

²³ RODRIGUES, Eduardo Frade. Questions & Answers In: ZARZUR, Cristiane; KATONA, Krisztian; and VILELA, Mariana. *Overview of Competition law in Brazil*. São Paulo: IBRAC/Editora Singular, 2015, p. 41 - 52: "Within relatively little time, competition policy related to mergers also achieved new, interesting and positive developments regarding challenged mergers: it is a notable feature that, with a single exception, all mergers challenged by CADE in the new system (approximately 16 from 2012 to 2014) resulted in settlements, as opposed to imposed restrictions or blockages. The new framework also incentivized greater interaction and coordination between CADE and international antitrust authorities during common merger reviews, including the coordination of remedies. At the same time, such interaction and experience has immensely improved the design and implementation of remedies by CADE in comparison to past precedents."

decided in a case related to the divestment of assets that the notifying parties could not close the transaction defining the buyer of the assets.²⁴

Finally, in two cases blocked by CADE in the last five years, CADE also stated that notifying parties need to effectively address the authority's concerns.²⁵ In one of those cases, CADE's former president, Vinicius Marques de Carvalho, said "[t]his is not a transaction that had to be blocked. (...) There could have been alternatives proposed that unfortunately were not". In this case, CADE's Tribunal indicated the need for structural remedies and the notifying parties tried to propose behavioral remedies. In the other case, according to CADE, CADE even presented to the notifying parties measures that should be added to the ones brought by them.²⁶

All these cases indicate that the process of negotiating remedies has improved in the past years, although there is considerable room for greater standardization, as mentioned by CADE's General-Superintendent.²⁷

4. Remedies implementation

Perhaps the most sensitive procedural change in connection with ACCs in Brazil relates to formalities surrounding the implementation of the obligations agreed by the parties. Not long ago, the ACCs did not have standardized language or even specific clauses. The actual documents were rather short and covered the main features of the remedies. Nowadays, CADE imposes consistent number of pre-set clauses and obligations ranging from the divestiture procedure, monitoring of interim covenants, trustees etc. It is fair to say that CADE has mirrored some of the standard features of the commitments the parties enter into with the European Commission.

If from one side these ancillary provisions do not effectively change the scope of the remedy, the excessive burden of complying with them can (and actually do sometimes) delay the negotiations and the effective implementation of the commitments.

Especially in behavioral commitments, the ACC usually entails monitoring measures allowing the authority to check the enforcement of its decision. There are different monitoring mechanisms negotiated with CADE: the use of monitoring and divestiture trustees, provisions

²⁴ See Concentration Act No. **08700.006567/2015-07 (Notifying Parties: Ball Corporation and Rexam PLC)**, approved with restrictions on December 9, 2015.

²⁵ See Concentration Acts No. **08700.009988/2014-09 (Notifying Parties: Tigre S.A. – Tubos e Conexões and Condor Pincéis Ltda.)**, reproved by the Tribunal on September 2, 2015; **08700.000436/2014-27 (Notifying Parties: Braskem S.A. and Solvay S.A.)**, reproved by the Tribunal on November 12, 2014.

²⁶ See CADE's press release "Cade blocks merger between Condor and Tigre" "available at: <http://en.cade.gov.br/press-releases/cade-blocks-merger-between-condor-and-tigre>

²⁷ RODRIGUES, Eduardo Frade. Questions & Answers In: ZARZUR, Cristiane; KATONA, Krisztian; and VILELA, Mariana. *Overview of Competition law in Brazil*. São Paulo: IBRAC/Editora Singular, 2015, p. 41 - 52: "Still in the mergers field, in its current position in the national and international spheres, the Brazilian competition authority cannot afford to stay behind the main antitrust agencies in the world when it comes to delivering proper quality analysis of mergers and applying adequate remedies. A policy of constant and increasing training, updating and interaction with international counterparts is necessary, and there is a concrete will to further improve the quality of merger assessments. Converging with an eventual regulation of merger remedies, there is no doubt that although the content and procedure regarding remedies (especially through settlement) has greatly improved in the past years, there is considerable room for greater standardization, transparency, predictability and speediness of remedies procedures, negotiation and construction."

regulating situation when CADE can decide that the transaction must determine the unwound of the transaction, sending periodic documents with audited reports, open door policies, etc. CADE also usually establishes penalties for remedies' breaches ranging from fines to other sanctions.

During the enforcement of remedies, in exceptional circumstances, the notifying parties may request CADE to review specific obligations if they prove themselves as excessively burdensome and ineffective for the ACCs objective. Usually, the ACC itself provides specific review clauses that allow the parties to request an adjustment or modification of the remedies. On this sense, CADE can authorize the modification of a remedy based on a formal and justified request by the applicants that can, for example, ask for the change from a behavioral remedy into a structural remedy. Nevertheless, if CADE rejects this request, there is no legal provision preventing the parties from requiring judicial review of the remedies.

It is also worth noting that, when notifying parties execute an ACC with CADE, they hardly have reasons for challenging the remedies or the terms of the agreement. On the other hand, although there are no precedents of requests of judicial review of ACC by third parties, they may be entitled to require judicial review of the ACC.

5. Key takeaways

Since the introduction of the premerger control regime, CADE has successfully implemented a quite sophisticated approach in negotiations, resulting in more agreements than unilateral decisions imposing restriction, if compared with CADE's enforcement in merger reviews before the current merger review regime.

CADE has strived to achieve appropriate remedies through multilateral negotiations, better assessment of remedies proposals by the notifying parties, including running market tests for some features, and giving appreciable relevance for third parties opinions. The new premerger system also allowed the Brazilian authority to improve its coordination with international antitrust authorities.

As regards future developments, CADE will issue guidelines for the remedies, establishing a specific procedure for the negotiation and providing further guidance to the applicants. This document will show a great advance in CADE's practice, as it will organize and consolidate the authority's opinion on an issue that has impacts on the merger review timing. Therefore, issuing formal guidelines brings more transparency and speed to the negotiations of remedies, providing parties with greater predictability.

CHAPTER 9 - CADE'S REMEDIES PRACTICE IN VERTICAL INTEGRATION CASES

Adriana Giannini
Lorena Nisiyama

1. Introduction

This article aims to set out CADE's practice regarding remedies applicable to transactions with competition concerns resulting from vertical integration.

CADE's remedy practice outlined in this article considers the transactions notified under Law No. 12,529, which introduced a premerger control regime in May 2012.

For the purposes herein, we will analyse CADE's practice in cases that resulted solely in vertical integrations (the "vertical integration cases") as well as CADE's practice in cases that resulted in a mix of vertical/horizontal overlaps (the "hybrid cases")

2. CADE's remedy practice: vertical integration cases

Since the beginning of its activities in 1994, CADE's review of transactions raising solely vertical concerns resulted in the imposition of behavioural remedies, exclusively¹ -- except for one case, which involved a structural undertaking.

Under Law No. 12,529 in particular, CADE has imposed remedies in three decisions in which the concerns involved solely vertical relations. The main concerns identified in such decisions were: (i) market foreclosure, (ii) refusals to supply, and (iii) anticompetitive price discrimination to limit competition in a downstream or upstream related segment.

When such exclusively vertical concerns were identified, CADE's remedies intended to: (i) reduce the parties' ability to limit competition, by imposing long-term obligations to supply or direct interventions on price adjustments, and/or (ii) limit the parties' potential for market foreclosure, by prohibiting additional acquisitions in the affected markets.

The relevant cases are summarized below:

¹ CABRAL, Patrícia Semensato. Remédios em Atos de Concentração: uma análise da prática do CADE (convenience translation: "Remedies in Merger Review: analysis of CADE's practice"), Available at <<http://seae.fazenda.gov.br/premio-seae/edicoes-anteriores/edicao-2014/ix-premio-seae-2014/tema1-1lugar-patricia.pdf>>. Access on March 14, 2017. The conclusions of the cited paper covered cases from 1994 to 2013, and was supplemented by our own review of cases under the Law No. 12,529.

2.1 *Oxiteno/American Chemical*² concerned the proposed acquisition of American Chemical (active in the downstream sodium lauryl ether sulfate - SLES - production) by Oxiteno (active in both the upstream production of ethoxylated lauryl alcohol - ELA - and the downstream SLES production).

(i) Vertical concern: the strengthening of the vertical integration between the production of ELA and SLES resulted in market foreclosure concerns, in particular with respect to the supply of ELA to SLES competitors in Brazil -- even though CADE's Tribunal understood that the vertical integration was pre-existing the imports of such input were feasible.

(ii) Behavioural Remedies: parties undertook to supply ELA to competing SLES producers under normal price conditions. CADE defined price ranges that were to be considered "normal" for the acquisition of ELA.

2.2 *ICL/Fosbrasil*³ concerned the proposed acquisition, by ICL, of the interest held by Vale in Fosbrasil S/A, a joint venture that produces purified phosphoric acid and raw materials for fertilizers.

(i) Vertical concern: CADE found that the transaction would result in vertical integration between the production of phosphoric acid and the phosphate salt produced by ICL, and could increase the probability of unilateral effects, including price increases or refusals to supply phosphoric acid.

(ii) Behavioural Remedies: the behavioural remedies implemented included ICL (on behalf of Fosbrasil) committing to offer long-term supply contracts of phosphoric acid to all producers of phosphate salts located in Brazil for a period up to 8 years and a limitation on price adjustments for Fosbrasil's products.

2.3 *Cromossomo/DASA*⁴ concerned the acquisition of control by Cromossomo (part of EB Group) over DASA.

(i) Vertical Concern: the transaction would deepen a prior vertical integration between health insurance and supporting services for diagnostic medical services. In a previous case involving DASA, CADE understood this vertical integration could lead to market foreclosure, preventing entry from a new competitor if a player had a significant position in either market – and in that previous occasion, CADE had imposed a divestiture remedy of part of the Target business in the markets in which the vertical integration was considered critical.

(ii) Behavioural Remedies: parties undertook to refrain from carrying out any transaction/acquisition in some diagnostic supporting services markets for 2/3 years, and to notify CADE of any transaction in these markets, even if its premerger control threshold had not been met, for an additional 2 years. These remedies aimed to reinforce the

² Concentration Act No. 08700.004083/2012-72. Notifying Parties: American Chemical I.C.S.A and Oxiteno S.A Indústria e Comércio. Approved with restrictions by the Tribunal on November 26, 2013.

³ Concentration Act No. 08700.000344/2014-47. Notifying Parties: Bromisa Industrial e Comercial Ltda., Vale Fertilizantes S.A. and ICL Brasil Ltda. Approved by the Tribunal with restrictions on December 10, 2014.

⁴ Concentration Act No. 08700.002372/2014-07. Notifying Parties: Cromossomo Participações II S.A and Diagnósticos da América S.A. Approved by the Tribunal with restrictions on July 7, 2014

behavioural remedies imposed in the previous case, extending them to DASA's shareholders.

2.4 The only case where CADE identified solely vertical concerns but imposed a structural remedy was *Monsanto/Bayer*⁵, but this seems to have resulted from a very specific provision contained in the licensing agreement. *Monsanto/Bayer*⁶ concerned an agreement in which Monsanto would grant Bayer the license for development, production and commercialization of soybean seeds with a certain technology.

(i) Vertical Concern: the agreement could grant Monsanto the ability of unduly controlling and influencing Bayer's activities in the soy market, due to the existence of a clause granting Monsanto preference rights in the event of an acquisition, by Bayer, of related companies in the soybean market. CADE concluded that this provision would unduly raise Monsanto's market power in transgenic soy by interfering on Bayer's business with competitor licensees.

(ii) Remedy: the transaction was conditioned upon the modification of certain clauses, including the preference right provision.

3. CADE's remedy practice: hybrid cases

In a number of other cases, the vertical concern arose in the same transaction where a horizontal concern was also identified. In such cases, CADE either imposed a hybrid solution -- a combination between structural and behavioural remedies -- or a behavioural remedy exclusively. Nonetheless, such structural remedies came up to tackle a strong concern with the horizontal overlap (*see e.g., GVT/Telefónica/Vivendi*), and did not refer to the vertical relation in particular.

The vertical concern more frequently identified in such hybrid cases was the possibility of market foreclosure and the incentives for discrimination at the upstream or downstream levels. In such cases, the same behavioural remedies were adopted: (i) a general commitment not to discriminate, (ii) obligation to keep existing contracts, and/or (iii) obligations to keep the quality levels of the services/products.

However, in four of these hybrid cases, CADE was also concerned with the potential access to information from a competitor (either between the parties of the joint venture or from a competitor active in a related market). In such cases, the behavioural remedies put in place mostly involved corporate governance measures aimed at precluding access to information or the exercise of any sort of influence in the activities of the merged entity.

These hybrid cases raising both horizontal and vertical concerns are summarized below:

3.1 *All/Rumo*⁷ concerned the merger between two logistics operators active in Brazil. The transaction would result in horizontal overlap in port terminals operating vegetable bulks, and

⁵ Note that this case refers to a licensing agreement, and not to the merger between Monsanto and Bayer.

⁶ Concentration Act No. 08700.004957/2013-72. Notifying Parties: Monsanto do Brasil Ltda and Bayer S.A.. Approved by the Tribunal with restrictions on January 23, 2014.

⁷ Concentration Act No. 08700.005719/2014-65. Notifying Parties: Rumo Logística Operadora Multimodal S.A and ALL - América Latina Logística S.A. Approved by the Tribunal with restrictions on February 12, 2015.

vertical relations between train transportation and (i) production and distribution of sugar, (ii) distribution of fuel, (iii) logistic services for sugar and other vegetable bulks, and (iv) storage and handling of vegetable bulks.

(i) Vertical concern: CADE found that the transaction could potentially (i) increase the risk of market foreclosure, (ii) favour discriminatory conduct and bundling, and (iii) facilitate access to competitors' sensitive information such as volume, prices and cost structures (those that use the merged entity rail transportation).

(ii) Remedies: The remedies implemented included the new company committing to (i) enter into individualized agreements for the provision of each service, to preclude the possibility of bundling, (ii) meet objective parameters for pricing the services provided to all customers, avoiding discrimination against competitors, (iii) keep the level of capacity utilization by parties related to the merged entity stable, thus reducing incentives for refusal to supply the railroad services in the event of capacity shortage, (iv) adopt corporate governance mechanisms to reduce the incentives for discrimination with respect to the provision of services, pricing and quality (creation of independent committee to monitor the adherence to the non-discriminatory provisions, approval of sensitive measures by 90% of the shareholders not related to the controlling group of the merged entity, position of supervisor to monitor quality levels, paper trail of the monitoring activities), (v) additional transparency measures regarding the quality level of services and the equal treatment of customers requesting authorization to invest in the railroad assets of the merged entity, and (vi) prohibition of interlocking directorates to avoid that commercially sensitive information from competitors using the merged entity's rail services is passed to related entities that compete in vertically related markets.

3.2 *JBS/Forte/Rodopa*⁸ concerned the leasing of three cattle slaughtering units by JBS from competitors. The transaction would result in horizontal overlaps in some markets, including fresh meat and cattle for slaughter, which was formed in its majority by small players.

(i) Vertical Concern: CADE concluded that the transaction strengthened the existing vertical integration, and that this would reduce the degree of rivalry from players that were not vertically integrated -- but this was not a major concern of the authority.

(ii) Remedies: the remedy package was confidential, but included the sale of assets, including a brand, and refraining from buying/leasing certain assets.

3.3 *GVT/Telefonica/Vivendi*⁹ concerned the acquisition by Telefonica of the totality of the shares owned by Vivendi in GVT, and the spin-off of Telco -- granting direct participation of Telefónica in Telecom Italia.

⁸ See Concentration Act No. 08700.010688/2013-83. Notifying Parties: JBS S.A., Rodopa Indústria e Comércio de Alimentos Ltda and Forte Empreendimentos e Participações Ltda. Approved by the Tribunal with restrictions on August 20, 2014.

⁹ See Concentration Act No. 08700.009731/2014-49 and 08700.009732/2014-93. Notifying Parties: Telefônica Brasil S.A., GVT Participações S.A. Telefonica S.A., Assicurazioni Generali S.p.A., Intesa Sanpaolo S.p.A., and Mediobanca - Banca di Credito Finanziario S.p.A.. Approved by the Tribunal with restrictions on March 25, 2015.

(i) Vertical Concern: the Latin American transaction would result in several horizontal overlaps and two vertical integrations on telecommunication markets, and with respect to the vertical integrations, CADE's decision refers the concern of market foreclosure resulting from GVT's wholesale activities. Concerning the horizontal overlaps, some of the combined market shares reached almost 80% -- and that was the major concern to CADE.

(ii) Remedies: The parties committed to divest certain shareholdings in view of the concerns arising from the significant horizontal overlaps. Behavioural commitments were also adopted, but they seemed devised to tackle the horizontal concerns, such as (i) not reducing the geographic coverage of the services, (ii) keeping the supply of services and bundled offers of the such services, (iii) keeping the services rendered by GVT to its current clients at the same contractual conditions, except if otherwise requested by the clients; (iv) keeping the average broadband speed at the levels found during the negotiation of the remedies. Additional behavioural obligations were also required by CADE, including measures on voting rights, appointment of officers and election of Board members -- these will be further detailed in Section 2 below, as they intended to address the possibility of access to competitor information. CADE also adopted specific monitoring measures, such as the obligation to submit periodic reports and an open door policy, which gives the right to CADE to visit the parties' premises upon previous notice.

3.4 *Itaú/Marstercard*¹⁰ concerned the formation of a joint-venture between bank Itaú Unibanco and MasterCard Brasil for purposes of issuing a new credit card brand business.

(i) Vertical Concern: CADE concluded that the transaction created horizontal concerns arising from the fact that Itaú was also active in the credit card market. The vertical integration, on the other hand, resulted in incentives for Itaú to discriminate between credit card brands and to issue more Mastercard cards (because contractually this would reduce the service fee for processing Itaú's credit card transactions). It also resulted in incentives for the joint venture -- the new credit card company -- to discriminate amongst the accrediting institutions, since Itaú also controlled one of them.

(ii) Remedies: CADE imposed the following remedies to solve the competition concerns: (i) prohibition to use the existing Itaú and Mastercard brands on the credit cards, to avoid the forced migration of clients to the new credit card brand; (ii) corporate governance measures, by means of which Itaú (ii.a) should lose its veto power over the joint venture decisions and (ii.b) forego the appointment of two Itaú members to the board, which should be replaced by independent members, if the joint venture reaches 15% market share, (iii) shortening of the term of the joint venture, from 20 to 7 years, so that CADE had the chance to reassess the market within a shorter timespan, and (iv) the obligation to treat the other accrediting institutions under non-discriminatory terms and make its service fee for them transparent.

3.5 *Saint Gobain/SiCBRAS*¹¹ concerned a joint venture resulting from the acquisition of 50% interest, by Saint Gobain, of a company belonging to SiCBRAS. The joint venture would be

¹⁰ Concentration Act No. 08700.009363/2015-10. Notifying Parties: Itaú Unibanco S.A. and MasterCard Brasil Soluções de Pagamento LTDA. Approved by the Tribunal with restrictions on May 17, 2016.

active in the production of silicon carbide to be supplied exclusively to the JV parents, both already active in silicon carbide (SiC) production.

(i) Vertical Concern: CADE concluded that there was a vertical integration, since Saint Gobain would have the capacity and incentives to discriminate against competitors in the abrasive and refractory products market -- or even refuse to supply them. This was so because, due to the joint venture, Saint Gobain would supply Black Crystal Silicon Carbide, a product used by Saint Gobain itself for the production of abrasive and refractory materials. The transaction also raised horizontal concerns since both the joint venture partners already produced SiC.

(ii) Remedies: CADE's remedies were significantly more concerned with the risks of information exchange between the parents of the joint venture, and the coordinated effects arising from the reduced incentives to compete. These remedies will be looked into more detail in Section 2, dealing with measures to avoid access to competitor information.

3.6 *Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco*¹² concerned a joint venture formed by Brazilian banks for the creation of a credit bureau.

(i) Vertical Concern: there was a vertical integration between the banks' loan offers and the joint venture's activity of collecting credit information. CADE concluded that banks could foreclose the credit information market to other financial institutions, preventing them from receiving the necessary information – and could also foreclose the market for other independent credit bureaux.

(ii) Remedies: parties agreed on behavioural remedies, such as (i) accepting a general obligation not to discriminate against other credit bureau, (ii) to keep any existing contracts with them, (iii) not to advertise the bureau, (iii) keeping the JV independent from the banks' activities and structures and (iv) and some efficiency obligations. Several corporate governance measures were also put in place to preclude access to information from competing banks and any influence amongst them.

4. Conclusion about the remedies used by CADE to address vertical concerns

CADE's remedy practice indicates that the agency has preponderantly adopted behavioural remedies to address concerns arising from vertical integration.

Where the case involved solely a vertical integration, remedies were essentially limited to behavioural commitments (with the exception to the Monsanto/Bayer case mentioned above) aimed to (i) reduce the parties' ability to limit competition, by imposing long-term obligations to supply or direct interventions on price adjustments, and (ii) limit the parties' potential for market foreclosure, by prohibiting additional acquisitions in the affected markets.

¹¹ Concentration Act No. 08700.010266/2015-70. Notifying Parties: Saint-Gobain do Brasil Produtos Industriais e para Construção Ltda. and SICBRAS Carbetto de Silício do Brasil Ltda. Approved by the Tribunal with restrictions on April 19, 2016.

¹² Concentration Act No. 08700.002792/2016-47. Notifying Parties: Banco Bradesco S.A.; Banco do Brasil S.A.; Banco Santander (Brasil); Caixa Econômica Federal; Itaú Unibanco S.A. Approved by the Tribunal with restrictions on November 17, 2016.

With respect to hybrid cases, the vertical concern more frequently identified in such hybrid cases was the possibility of market foreclosure and the incentives for discrimination at the upstream or downstream levels. In such cases, the same behavioural remedies were adopted: (i) a general commitment not to discriminate, (ii) obligation to keep existing contracts, and (iii) obligations to keep the quality levels of the services / products.

However, in four of these hybrid cases, CADE was also concerned with the potential access to information from a competitor (either between the parties of the JV or from a competitor active in a related market). In such cases, the behavioural remedies put in place mostly involved corporate governance measures aimed at precluding access to information or the exercise of any sort of influence in the activities of the merged entity.

CHAPTER 10 - MERGER REMEDIES: GUIDING PRINCIPLES AND THE BRAZILIAN EXPERIENCE

Bernardo Gouthier Macedo
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Anna Olimpia de Moura Leite

1. Introduction

Brazil has accumulated substantial experience in the negotiation and design of remedies by antitrust authorities as conditions for approving complex mergers and acquisitions. In recent years there have been several important cases, including the formation of one of the world's largest food companies, BRF, and the consolidation of one of the largest groups in the education sector, which emerged from Kroton's takeover of Anhanguera. This case won an international award from *Global Competition Review*¹ as a major landmark in antitrust analysis.

Based on this experience, CADE (Brazil's competition authority) is preparing to publish a Merger Remedy Guide, which will make the negotiation process more predictable and transparent, so that the remedies imposed should become more effective. Other principles also need to be pursued, such as accurate identification of the competitive concerns raised by the transaction being analyzed to ensure that the remedies designed will be not just effective but also proportionate to the problems identified. To this end, the parties to the transaction and the competition authority can make use of different ingredients, from restrictions involving divestiture to behavioral remedies involving undertakings of limited duration.

This chapter discusses some of the key issues involved in the negotiation and design of merger remedies. The first section provides an overview of the principles that should underlie remedy design. The second section looks at some important cases that have enriched Brazilian antitrust jurisprudence.

2. Merger remedy principles and classification

2.1 Merger remedy principles

The central purpose of merger remedies is to guarantee that the efficiencies and other benefits of the transaction occur without substantial harm to competition due to the merger – in other words, that the net effect of the transaction is not negative in terms of economic wellbeing.

Remedy packages required as a condition for approval of a merger or acquisition should follow certain principles in order to be effective and efficient. The literature on this topic is vast and

¹ 2015 Global Competition Review Awards: Merger of the Year – Americas.

a more exhaustive summary can be found in Mattos (2011) and Cabral & Mattos (2016).^{2,3} In this section, we focus on the principles presented in the *2016 Merger Remedies Guide* published by the International Competition Network (ICN)⁴, a multilateral organization that has compiled the guidelines used in jurisdictions around the world.⁵

The first principle described by the organization is the identification of the **need for remedies**. The antitrust authority must decide whether approval of the transaction it is analyzing may impair the maintenance of competition in the markets involved. This entails pinpointing the nexus of causality between the transaction and competitive harm to the market. In other words, the harm must not pertain to the competitive conditions prevailing before the transaction takes place but must derive from the transaction that is being analyzed (Mattos, 2011).⁶

Next, it must specify the harm – its nature (impact on prices typically, but not only), scope and magnitude. This identification must be transparent, so that it can be shared with the parties involved, be they the firms applying for approval, interested third parties or society in general.

Once the nexus of causality has been identified and the competitive harm deriving from the transaction has been specified, the next step is to evaluate the practicality of remedies. This may seem obvious, but it is far from straightforward. A transaction may cause harm that cannot be remedied because its magnitude would be too great in terms of its impact on the relevant market.

If approval of the merger with restrictions is found to be feasible, the next step is designing the remedies to be applied. Depending on the harm identified, the parties to the merger are typically required to propose remedies they consider adequate.

The remedies chosen should be **proportionate** to the competitive harm foreseen (ICN, 2016).⁷ Thus the magnitude of a remedy should be no more than is sufficient to neutralize the net negative effect, so that efficiencies and other benefits resulting from the transaction are guaranteed. Moreover, remedies should be confined to the relevant markets with competitive problems (Lévêque, 2001, apud Cabral & Mattos, 2016).⁸

² Mattos, C. “Remédios em atos de concentração: a experiência internacional e o Brasil”. In: Ruiz, R. M. & Oliveira, A. F. (eds.) *Remédios antitruste*. São Paulo: Singular, 2011.

³ Cabral, P. S. & Mattos, C. “Remédios em atos de concentração: teoria e prática do CADE”. *Revista de Defesa da Concorrência*, v. 4, n. 1, 2016. Available at: <<http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/247>>. Last visited: Feb. 14, 2017.

⁴ According to its website, “The ICN is a specialized yet informal network of established and newer agencies, enriched by the participation of non-governmental advisors (representatives from business, consumer groups, academics, and the legal and economic professions), with the common aim of addressing practical antitrust enforcement and policy issues. By enhancing convergence and cooperation, the ICN promotes more efficient and effective antitrust enforcement worldwide to the benefit of consumers and businesses.” Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>>.

⁵ ICN. 2016 Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

⁶ Mattos, C. “Remédios em atos de concentração: a experiência internacional e o Brasil”. In: Ruiz, R. M. & Oliveira, A. F. (eds.) *Remédios antitruste*. São Paulo: Singular, 2011. p. 62.

⁷ ICN. 2016 Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

⁸ Cabral, P. S. & Mattos, C. “Remédios em atos de concentração: teoria e prática do CADE”. *Revista de Defesa da Concorrência*, v. 4, n. 1, 2016. Available at: <<http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/247>>. Last visited: Feb. 14, 2017. p. 60.

However, there are cases in which it is not possible to delimit the object of remedies so precisely as to guarantee proportionality, and cases in which regulatory or even productive issues recommend the application of more far-reaching restrictions. In such situations, it is inadvisable to require remedies that reduce or eliminate the efficiencies and other benefits of the transaction (ICN, 2016).⁹ Otherwise both the transaction and the remedies cease to make economic sense.

The third principle is **effectiveness**: remedies should be implemented by the firm resulting from the merger promptly and with a minimum of intervention by the competition authority, so that it may be necessary to design an incentive mechanism capable of guaranteeing compliance with the measures agreed by the parties involved. In addition, clear and easily executable parameters and objectives should be established by means of a precise description of the assets to be divested and/or the obligations to be discharged, avoiding ambiguity and facilitating monitoring by the antitrust authority. Also, in order to shield the effectiveness of remedies from changes in market circumstances, it is advisable that the measures be flexible and have an immediate effect (ICN, 2016).¹⁰ As a whole, ensuring that remedies obey the principle of effectiveness minimizes the risk of failure to eliminate or avoid competitive harm.

Last but not least, the design and implementation of remedies should be **transparent** and **consistent**. This principle is important to assure the predictability of the restrictions established by the antitrust authority. One way to apply the principle is to publish regularly updated merger remedy guidelines with a description of the established practices and criteria typically used in the jurisdiction concerned (ICN, 2016).¹¹ This will avoid conveying the wrong signals to the market and discouraging efficient mergers or encouraging anticompetitive transactions (Joskow, 2002).¹²

In addition, transparency in the process of designing restrictions helps make remedies more effective, which turns the dialogue between the investigating competition authority and the merging parties even more relevant. If the authority communicates its concern regarding the potential harm arising from the transaction, it will increase the probability that remedies will be more appropriate and effective. It will also be in a better position to appraise the functionality and effectiveness of remedies if the merging parties provide reliable information on the market conditions in which any remedies would be applied (ICN, 2016).¹³

In sum, the multilateral organization highlights the following four principles: (i) the need for remedies; (ii) proportionality, (iii) effectiveness, and (iv) transparency and consistency. Mattos (2011) discusses the difficulty of complying with all these requirements in a consistent manner, concluding that in practice the choice will depend on the competition authority's assessment of the merging parties' business propositions and of any potential trade-offs between the principles.¹⁴ In

⁹ ICN. 2016. Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

¹⁰ Idib.

¹¹ Idib.

¹² Joskow, P. *Transaction costs economics, antitrust rules and remedies*. Journal of Law, Economics & Organization, Abril, 2002.

¹³ ICN. 2016. Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

¹⁴ Mattos, C. "Remédios em atos de concentração: a experiência internacional e o Brasil". In: Ruiz, R. M. & Oliveira, A. F. (eds.) *Remédios antitruste*. São Paulo: Singular, 2011. p. 66

this sense there are cases that simply cannot be remedied because the merging parties see the business as unviable after the application of remedies.

The next section illustrates the use of these principles in cases already judged by CADE, and in which it required a range of different types of remedies.

2.2 Classification of merger remedies

Merger remedies are conventionally classified as either structural or behavioral (the latter can be also referred to as non-structural). Structural remedies are intended to maintain or restore the competitive structure of the markets involved in the merger and typically require the sale of brands, physical assets or other property rights, while non-structural remedies specify operating rules designed to prevent the use of anticompetitive practices by the merged firm (ICN, 2016).¹⁵ Behavioral remedies can also be defined as the restrictions on the exercise of property rights, whereas structural remedies change the allocation of property rights, as elucidated by Motta (2004).¹⁶

According to the multilateral organization, competition authorities generally prefer structural remedies in horizontal mergers, especially divestiture. The ICN (2016)¹⁷, European Commission (2004)¹⁸ and DOJ (2011)¹⁹ argue that structural remedies provide a direct and lasting solution to the expected competitive harm, as well as being less costly to monitor because their effects are immediate. Thus, in theory structural remedies comply better with the principle of effectiveness. If divestiture is the remedy, for example, the assets to be divested by the firm resulting from the merger must permit the creation of an effective rival, offsetting any potential competitive harm that may arise from the transaction.

However, structural remedies may not always be possible or desirable. There are cases in which divestiture is not feasible owing to a lack of suitable purchasers, either because the competitors are not strong enough to mitigate competitive concerns or because of a high risk that the potential buyers would not be in a position to keep the business going once acquired (ICN, 2016).²⁰ This type of remedies have also other limitations, such as information asymmetry between the competition authority and the merging firms, or the risk of excessive intervention by the authority, which could result in significant foregone efficiencies (Cabral & Mattos, 2016).²¹ In some cases divestiture can increase the risk of collusion, especially where purchase of an asset heightens

¹⁵ ICN. 2016. Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

¹⁶ Motta, M. *Competition policy: theory and practice*. Cambridge University Press, 2004, p. 265.

¹⁷ ICN. 2016. Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

¹⁸ European Commission. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) N° 802/2004. Official Journal of the European Union, 2008, p. 267.

¹⁹ U.S. Department of Justice. Antitrust Division Policy Guide to Merger Remedies. 2011, p. 6.

²⁰ ICN. 2016. Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

²¹ Cabral, P. S. & Mattos, C. “Remédios em atos de concentração: teoria e prática do CADE”. *Revista de Defesa da Concorrência*, v. 4, n. 1, 2016. Available at: <<http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/247>>. Last visited: Feb. 14, 2017. p. 60.

the symmetry between competing firms. Thus, although antitrust authorities prefer structural remedies in horizontal mergers, each case must be analyzed on its individual merits in order to choose the most suitable remedies. As asserted by the European Commission: “the question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis”.²²

Behavioral remedies are effective in vertical mergers, since structural remedies tend to entail significant foregone efficiencies in this type of transaction. This type of remedies are appropriate in horizontal mergers when (i) they preserve the specific efficiencies resulting from the merger whereas these could be lost by structural remedies; (ii) the competitive harm is expected to be short-lived (typically the case in dynamic markets whose structure is constantly changing); (iii) structural remedies need to be complemented, at least until divestitures are fully operative; and (iv) they involve measures relating to a regulatory system, so that the monitoring function can be undertaken by a regulatory agency, reducing cost for the competition authority. However, there are factors that should be taken into account where behavioral remedies are chosen, such as the high implementation costs associated with ongoing monitoring and enforcement, and the risk that intervention may cause market distortion or impose an inefficient situation on the merged firm (by requiring minimum supply obligations, for example). As a whole, behavioral remedies may be useful in certain cases but should be used parsimoniously (ICN, 2016).²³

Regarding the use of behavioral remedies, McFarland (2011, apud Cabral & Mattos, 2016) found the Department of Justice’s 2011 merger remedy guidelines more favorable to the use of behavioral remedies than the 2004 version, noting the competition authority’s change of mind in recognizing their utility when structural remedies may impair efficiency gains from the merger.²⁴

It should also be noted that there are hybrid remedies, such as licensing, which can be classified as structural or behavioral depending on the situation (ICN, 2016).²⁵

The next section discusses emblematic cases judged by CADE and involving both structural and behavioral remedies. These examples clearly show that the design of remedy packages depends on a case-by-case analysis taking all specifics into account.

2. The Brazilian experience

In Brazil, CADE has acquired a great deal of experience in negotiating and implementing remedies for the approval of complex mergers. The creativity and diversity of these remedies,

²² European Commission. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) N° 802/2004. Official Journal of the European Union, 2008, p. 267.

²³ ICN. 2016 Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

²⁴ Cabral, P. S. & Mattos, C. “Remédios em atos de concentração: teoria e prática do CADE”. *Revista de Defesa da Concorrência*, v. 4, n. 1, 2016. Available at: <<http://revista.cade.gov.br/index.php/revistadedefesadaconcorrenca/article/view/247>>. Last visited: Feb. 14, 2017. p. 70.

²⁵ ICN. 2016 Merger Remedies Guide. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>>. Last visited: Feb. 14, 2017.

especially those of the behavioral type, can be sensed from the following discussion of emblematic cases judged in recent years.

Important remedies were designed even for mergers submitted before the new law entered into force in 2012.²⁶ One of these emblematic cases approved under the old law²⁷ was the merger between Sadia and Perdigão that gave rise to BRF, one of the world's largest food companies.²⁸ This merger was intensely debated, given the high levels of concentration in certain markets and competition-limiting conditions such as barriers to entry associated with brand predominance and extensive distribution networks. After a long process of negotiation the merger was approved with both structural and behavioral remedies. The structural remedies included the sale of brands and plants, while among the behavioral remedies required it is worth noting the suspension for a limited period of time of the Perdigão and Batavo brands for certain products. Although this restriction can be considered formally behavioral, in practice it was structural because for a period the market was to operate as if the brands did not exist, and this was expected to facilitate the strengthening of the merging parties' competitors in the markets concerned.

The merger resulting from DASA's takeover of MD1,²⁹ judged in 2013, also entailed a long process of analysis and negotiation of remedies, including innovative behavioral clauses. High concentration in certain markets, especially Rio de Janeiro, and barriers to entry, some of which were brand-related, gave rise to competitive concerns, so that approval of the transaction was conditional upon compliance with a package of remedies. In addition to structural remedies, such as the sale of laboratory units and brands, the behavioral remedies included a "no takeover" clause prohibiting any further acquisitions by the merged firm for a certain period.

Also in 2013, the merger of Oxiteno and American Chemical,³⁰ with impacts on the market for chemical feedstocks used to make cleaning and personal hygiene products, was approved with restrictions, in this case strictly behavioral and designed to prevent market closure and abusive price discrimination. One of the clauses involved pricing policy and is worth highlighting: it required the merged firm to undertake to keep prices within a specified band, an unusual kind of merger remedy but appropriate to the conditions for competition and negotiation existing at the time in that segment of the chemical industry.

Another important case that involved a package of exclusively behavioral remedies was Videolar's takeover of Innova in the petrochemical industry.³¹ Given the expectation of competitive harm in the polystyrene segment,³² the remedies agreed in 2014 were designed to address problems arising from high market concentration, given that only one competitor (Unigel) would remain to contest any attempts to exercise market power. Despite high post-merger concentration, it was concluded that the remaining rival would have the production capacity to compete in this market, and that it would be sufficient to mitigate competitive harm with a package of strictly behavioral

²⁶ Law N.º 12,529/11.

²⁷ Law N.º 8,884/94.

²⁸ Concentration Act N.º 08012.004423/2009-18, approved by CADE with restrictions on 07/13/2011.

²⁹ Concentration Act N.º 08012.010038/2010-43, approved by CADE with restrictions on 12/04/2013.

³⁰ Concentration Act N.º 08700.004083/2012-72, approved by CADE with restrictions on 11/20/2013.

³¹ Concentration Act N.º 08700.009924/2013-19, approved by CADE with restrictions on 10/01/2014.

³² Polystyrene is a plastic resin with a vast array of applications including disposable products (razors, cutlery etc.), packaging, home appliances and consumer electronics.

remedies. Besides a “no takeover” clause, another hitherto unusual restriction was the obligation to keep production at pre-merger levels or higher.

Also in 2014, CADE judged one of the most important cases that have come before it since Brazil’s new antitrust law was passed – Kroton’s acquisition of Anhanguera in the higher education sector.³³ The analysis of possible remedies involved a discussion of local effects on face-to-face education as well as the impact of the merged firm on the national market for distance education. Because divestiture of specific courses in certain localities was impossible for regulatory reasons, the remedy eventually agreed was a demanding one in that it was extensive to other markets and included the sale of Uniasselvi to create a new competitor in the distance education market. According to Reporting Commissioner Ana Frazão, this structural remedy addressed competitive problems in some of the cities concerned, so that the remedy package also included some complementary behavioral remedies. These included quality targets and a cap on the number of places offered by the merged firm designed to limit its expansion and make room for growth by competitors. In other words, this is also an example of a behavioral restriction with a structural effect on the market.

Another merger approved with a package of strictly behavioral remedies was Bradesco’s acquisition of HSBC’s banking operations in Brazil.³⁴ In addition to a thirty-month “no takeover” clause, the parties agreed to measures designed to enhance the quality of customer service, among others.

Another emblematic case judged in 2016 and involving strictly behavioral remedies was the joint venture between SBT, Record and Rede TV,³⁵ among the largest of Brazil’s national broadcast TV networks. The joint venture was set up to negotiate jointly the licensing of the three networks’ digital signals to pay-TV operators. The transaction was approved on the basis of the compensatory power argument, whereby the joint venture was presented as a countervailing agreement among competitors to offset asymmetric power relations with pay-TV operators. CADE required compliance with a package of behavioral remedies with two main vectors. The first was again an undertaking on prices: the joint venture would be obliged to negotiate in accordance with a specific pricing rule in order not to harm the smaller pay-TV operators. The second was the obligation to invest the revenue earned by the joint venture in an extension of its operating scope to include the creation of new content, which the parties were required to broadcast on their networks, thereby increasing the efficiency gains arising from the transaction.

Although less frequent, there are mergers approved with exclusively structural remedies in Brazil. An example is the acquisition of the brands Olla, Jontex and Lovetex from Hypermarcas by Reckitt Benckiser (RB), which already owned the brands Durex and K-Y, judged in 2016.³⁶ Two markets were affected by this transaction: the markets for male condoms and the market for intimate lubricants. Competitive concerns in the latter market were due to the fact that the merged firm would own the leading brands, and the remedy imposed was the sale of K-Y, the number one sexual lubricant brand in Brazil.

³³ Concentration Act N° 08700.005447/2013-12, approved by CADE with restrictions on 05/14/2014.

³⁴ Concentration Act N° 08700.010790/2015-41, approved by CADE with restrictions on 06/08/2016.

³⁵ Concentration Act N° 08700.006723/2015-21, approved by CADE with restrictions on 05/11/2016.

³⁶ Concentration Act N° 08700.003462/2016-79, approved by CADE with restrictions on 09/14/2016.

These are only some of the most emblematic examples of the experience accumulated by CADE in recent years, but even so they are sufficient for a few conclusions to be drawn. As noted earlier, in theory competition authorities tend to prefer structural remedies, based on the argument that behavioral commitments are more costly to monitor and less efficient in preventing deleterious effects. However, the empirical evidence shows that in fact almost all cases of greater complexity involve behavioral remedies and that these are sometimes sufficient to address competitive problems, so that they are not accompanied by structural remedies.

Despite the possible cost, it should be borne in mind that there are also advantages in applying behavioral remedies.

If remedies should be tailored to the expected competitive harm, in accordance with the principles of proportionality and effectiveness advocated by the ICN, it follows that the remedies prescribed should be proportionate to the competitive problems identified. To this extent, the characteristics and magnitude of the undertakings agreed in exchange for approval of a transaction are not arbitrary, and the package to be applied can contain various available ingredients, which may be structural, behavioral or hybrid.

To digress briefly, it is worth discussing the suitability of this nomenclature. In theory, every remedy should have structural effects: in other words, every remedy should be capable of influencing the competitive structure of the market affected so as to restore pre-merger conditions. For example, an obligation that represents even temporary elimination of a barrier to entry is classified as behavioral yet must be designed to make the entry of a new competitor feasible and hence will restore the market's competitive dynamics in a structural manner.

In these authors' view the term structural should be reserved solely for remedies that entail divestiture. Divesting means reducing market share for the merging parties in favor of one or more competitors. In antitrust analysis, however, the identification of market structure and market shares is only the first step. The consensus is that high concentration alone should not be considered harmful to competition, and that it is essential to investigate competitive dynamics in greater detail, including entry conditions, rivalry and efficiencies, among other aspects. Thus a remedy may be tied to these competitive conditions and even if it is temporary it will induce structural changes that offset any competitive harm arising from the transaction.

Moreover, behavioral remedies are more flexible, allowing for possible adaptations along the way if deemed necessary to address the competitive problem identified more efficiently. Thus one of the possible reasons for the high frequency with which behavioral restrictions are imposed is the capacity demonstrated by antitrust authorities – and in this respect CADE is no exception – to design specific obligations for each case, in negotiation with the parties, and thereby with each case to extend the range of available remedies from which to choose.

This underscores the importance of determining with clarity the nature and scope of the competitive harm in order to design the most appropriate remedy package, bearing in mind that each case has its own peculiarities and should be remedied in accordance with its specificity. Consistency demands that the costs and harm to competition be weighed up not only in the analysis of the transaction, but also in the evaluation of the remedies to be imposed.

Conclusions

Brazil's experience in negotiating and designing merger remedies is so rich that it can already be crystallized in the form of merger remedy guidelines recommending best practices and key elements that should be present in the negotiation of remedies for antitrust approval of transactions. CADE is currently preparing this Guide, which will bring more transparency, predictability and legal certainty to the process of remedy negotiation and implementation, in line with the principles advocated by the ICN.

In addition to dialoguing with these principles, it will be important for the Guide above all to move toward increasing the transparency with which merger remedies are applied. This means assuring that before the effective start of negotiations with the merging parties, the competition authority should clearly specify the nature and extent of the transaction's effects on competition, so that the remedies can be proportionate and as low-cost as possible, and so as to guarantee the preservation of efficiency gains. Indeed, in our view only with a precise characterization of the potential competitive harm will it be able to design remedies that effectively neutralize the competitive impact of the transaction. Divestiture is a classic ingredient of horizontal mergers, but *a priori* there are no grounds for competition authorities not to use all the various ingredients at their disposal.

CHAPTER 11 - ANTITRUST ENFORCEMENT OF THE PROHIBITION OF EXERCISING SHAREHOLDERS' POLITICAL RIGHTS

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1. Introduction

The prohibition of exercising political rights of shareholders is an antitrust rule applied by CADE to address concerns arising from ownership stakes. The authority is commonly applying this rule in two scenarios: (i) following a legal provision, as a measure to avoid Gun Jumping in reportable transactions involving Tender Offers or acquisition of shares in the stock market, and (ii) as a remedy in the Merger Control Review.

As said, the first scenario follows a provision established in the Brazilian Antitrust Law, according to which the parties must voluntarily abdicate of exercising the political rights of the correspondent shares acquired through a Tender Offer or in the stock market before CADE's final clearance, subject to the imposition of gun jumping pecuniary penalties and the potential annulment of all acts practiced until then.

In theory, the rationale behind the antitrust rule is not to have the merger review assessment affecting the immediacy and agility of the stock market. However, since the precise concept of political rights in the Brazilian Antitrust Law is unclear – and, consequently, the limits of such prohibition - there is a significant level of legal uncertainty towards reportable transactions involving the stock market in Brazil.

In practical terms, parties tend to avoid the first scenario by submitting to CADE such type of transactions at an early stage, based, e.g., on a letter of intent or MOU, committing themselves to perform a Tender Offer under certain conditions¹. However, such strategy has its challenges, such as confidentiality (since publicity is of the essence in the Brazilian pre-merger regime) and timing for clearance (in case of a non-fast track analysis).

In the second scenario, CADE has used such rationale as an antitrust remedy, imposing the prohibition of exercising political rights of shares to address concerns, although not bringing a clear concept or precise definition of such affected rights.

Likewise, the doctrine in Brazil also does not provide a clear definition of political rights from an antitrust perspective, and the limits of such prohibition arising from an antitrust decision.

¹ For example, the Concentration Act 08700.008541/2015-95 involved a tender offer for the acquisition of 100% of the share capital from Tempo, by two funds from affiliated companies of the Carlyle Group (CSABF e FBIE II). However, the transaction was submitted to CADE based on a letter of intent issued before the release of the tender offer. Approved without restrictions by the GS on September 09, 2015.

Therefore, the goal of this chapter is to assess a potential definition on political rights and degree of such prohibition, based on not only CADE's rules and case law, but also other Brazilian laws in which the concept may be described.

2. Definition of Political Rights

2.1 Brazilian Antitrust Law

The Brazilian Antitrust Law does not bring a clear definition of “political rights” that an investor may held – or be prevented to exercise - when acquiring shares. In fact, Law. No. 12.529 does not even mention the term, which is only described in Article 109, first Paragraph of CADE's Internal Regulation, as transcribed below:

“Article 109 - In compliance with the provision of Article 89, sole Paragraph, of Law No. 12.529, transactions of public offer of shares may be notified as of their publication and do not depend on the previous approval of CADE for their consummation.

§1º Article 109. Without prejudice of the provision of the main section of this article, the exercise of political rights related to the interest purchased through the public offer shall be forbidden until the approval of the transaction by CADE.”²

As we can see, despite introducing the concept of political rights, CADE's Internal Regulation is unclear regarding its definition. CADE's case law is in the same direction, not offering a safe harbor understanding. Indeed, in the few cases in which the discussion was brought, CADE has not faced it, limiting the analysis to the correspondent competition assessment.

Therefore, and as a proxy to establish a potential definition, one should refer to other laws in Brazil in which the institute may be described.

2.2 Corporate Law

The main reference for shareholders' rights in Brazil is the Law No. 6.404 (“Corporate Law”), which shall be used as a primary source for this analysis.

The Corporate Law – per se – does not bring a clear definition of political and economic rights when ruling the institute of shares, reason why one should also refer to the corporate doctrine to build up the concept.

Generally speaking, this classification, largely used by the doctrine, is a direct consequence of the purpose of the investor with the acquired shares. Investors who are willing to have a certain degree of influence over the invested company would target shares with political rights and those who are aiming to have a higher financial gain would target shares whose rights are limited to the protection of the investment made.

² Free translation.

Accordingly, this is the main rationale of the Corporate Law when allowing companies to divide its capital stock between ordinary and preferred shares. Indeed, and as a rule, ordinary shares are granted with voting rights and preferred shares with financial advantages,³ assuring equity to the different shareholders.

This is the direction taken by Article 17 of the Corporate Law, as transcribed below:

Preferences or advantages of preferred shares may include:

I – priority in the distribution of fixed or minimum dividends;

II – priority in the reimbursement of capital, with or without premium; or

III – the accumulation of the preferences and advantages provided for in items I and II.⁴

As we can see, the two core rights of the preferred shares are targeting a financial purpose, and are not linked to the management of the target company. In other words, there is a clear supremacy of economic rights over political ones, when comparing to ordinary shares, whose main characteristic are voting rights. Therefore, it would be safe to classify voting rights, in the sense they are linked primarily to ordinary shares, as a political right, as concluded by RIBEIRO:

The voting right is political. It can even protect economic rights, but it is essentially political. If the purpose of voting rights was to protect economic interest or the participation on the social capital, every share would contemplate voting rights, as note VIANDER, *la notion d'associé, Paris: LGDI, 1978, p. 177.*⁵

Notwithstanding the above, would it be safe to state that voting rights are the only political ones that could be held by a shareholder? The discussion does not end so simply, and the Corporate Law helps us again to broaden the concept.

Indeed, the Corporate Law, in its Article 18, allows the assignment of further rights to preferred shares, as transcribed below:

Article 18. The bylaws may provide for one or more classes of preferred shares to have the right to elect one or more members of the administrative bodies by separate ballot.

Sole Paragraph. The bylaws may require that specific statutory amendments be approved at a special shareholders' meeting by the shareholders of one or more classes of preferred shares.⁶

³ Please see (i) COSTA E SILVA, F. As ações preferenciais na Lei n. 10.303, de 31.10.2001: proporcionalidade com as ações ordinárias; vantagens e preferências. In: LOBO, J. (coord). *Reforma da lei das sociedades anônimas*. Rio de Janeiro: Forense, 2002, p. 138.; and (ii) PENTEADO, M. *Ações preferenciais*. In: Idem, p. 184.

⁴ Translation provided by Securities and Exchange Commission of Brazil (“CVM”) available at: <http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf> access on March 20, 2017.

⁵ Free translation from RIBEIRO, R. *Direito de voto nas sociedades anônimas*. São Paulo: Quartier Latin do Brasil, 2009, p. 158.

⁶ Translation provided by CVM available at:

Thus, the mentioned article disciplines 2 (two) additional rights which can be granted to preferred shares and are clearly related to the management of the target company: (i) the right to elect at least one member of administrative bodies, and (ii) the right to approve specific statutory amendments.

In other words, shareholders of such special class of shares could potentially veto decisions related to statutory amendments and elect at least one member of administrative bodies regardless of the percentage held (since the election has to take place through a separate ballot).

In such specific scenario, this special class of preferential shares would exceed ordinary ones not only from an economic perspective but also from a political standpoint,⁷ leading us to the statement that such additional rights could also be classified as political ones, together with the voting rights.⁸

As a conclusion, based on the analysis of the institute of preferred shares – which have an economic purpose by nature - and the additional rights that could be attributed to them, it would be fair to state that political rights, from a corporate perspective, are essentially: (i) voting rights; (ii) veto rights, and (iii) rights to elect one or more members of the company's administrative bodies. In other words, rights affecting the management of the target company.

3. The Antitrust Relevance of Political Rights

Following the concept of political rights presented above, which is based on the Corporate Law and doctrine, it is key to understand the relevance of such rights to the antitrust enforcement, since both the Brazilian Antitrust Law and case law seem to be targeting the political advantaged of shares.

As anticipated above, CADE's Internal Regulation specifically prevents, in certain situations of the pre-merger review, the exercise of political rights of shares before the antitrust clearance. Likewise, the same rationale was already used by CADE when addressing antitrust remedies in concentration acts.

Therefore, the reason why political rights can negatively affect competition is the key answer to be addressed, and a recent decision from CADE on a merger review case – although not linked to a remedy or the mentioned legal provision - can help us to build up the concept from an antitrust perspective.

http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf access on March 20, 2017.

⁷ “(...) the law of 1976, when allowing the creation of a preferred class of shares with the non-derogable right of electing a member of the administration bodies and veto for specific statutory amendments, allows to occur preferred shares with a double privilege.” (CARVALHOSA, M. Comentários à lei de sociedades anônimas. 1º volume. São Paulo: Saraiva, 2002, p. 234, free translation).

⁸ PENTEADO, M. Ob. Cit., p. 204.

Indeed, in the Concentration Act 08700.012339/2015-68,⁹ which related to a transaction through which Vale was exercising a call option to acquire all the preferred shares owned by JFE in the company Minas da Serra Geral S.A. (“MSG”), CADE performed an analysis of not only the specific rights acquired by Vale but also the governance structure of the target company.

The assessment was relevant since Vale already held 50% of the total shares of MSG, and depending on the controlling rights’ analysis, the jurisdictional threshold would not be met, following the exemption provided in Article 9º, sole Paragraph of CADE’s Resolution No. 02.

And this was exactly the outcome of the assessment. Although the preferred shares contemplated rights that could be seen, *prima facie*, as political ones according to the Corporate Law and doctrine,¹⁰ the GS verified that they were not sufficient to influence the management of MSG or affect its commercial decisions when analyzed the full governance structure of the company. The GS has so concluded that Vale was already the controlling shareholder of MSG (in opposition to a presumable joint-control scenario).

It is interesting to point out that with respect to voting rights held by JFE, the GS concluded that they were more linked to the protection of the economic investment made by the shareholder. Even in the specific circumstances in which JFE’s could vote in equally conditions with Vale, the GS noted it was a clear measure to protect the investment in MSG, as ensured by the Corporate Law.¹¹

Regarding the appointment of the Commercial Director by JFE, the GS recognized its potential relevance per se, but considering that Vale was entitled to appoint the two other directors (out of three), and that decisions were taken by simple majority of votes, JFE, in the end, could not influence the management of JFE.

As a conclusion, one could state that CADE, more recently, has been considering not only the political rights of a given company, but also the governance structure of the target company, at least for the purposes of the jurisdictional thresholds - which, in theory, would be more linked to a straightforward approach based on equity percentage.

4. Enforcement of the Prohibition under Article 109, Paragraph 1 of CADE’s Internal Regulation

Considering the recent precedent in which CADE analyzed the effects of political rights for the purposes of jurisdictional thresholds, it would be fair to questions if CADE is following the same approach when enforcing the prohibition established in Article 109, Paragraph 1º of CADE’s Internal Regulation.

⁹ Vale S.A. (“Vale”) and JFE Steel Corporation (“JFE”). The transaction was not accepted as a concentration act by the GS on February 23, 2016.

¹⁰ JFE’s rights in the corporate governance of MSG were the following: (i) indicate one Commercial Director; (ii) voting rights in specific matters (delay in the payment of dividends, amendments in the corporate object and rights related to preferred shares; capital increase, issuance of debentures convertible into shares, amendments of the Bylaws in relation to certain matters, among others).

¹¹ Article 111, Paragraph 1.

Initially, there are very few cases in which the provision was effectively analyzed by the authority, and the most effective one seems to be the Concentration Act 08700.003843/2014-96, involving Forjas Taurus S.A. (“Taurus”) and Companhia Brasileira de Cartuchos (“CBC”).¹²

Such concentration act related to the acquisition, by CBC, of up to 18% of Taurus’ total shares through the stock market (tender offer), which was followed by the subscription of new shares to be issued by Taurus, as part of a capital increase of the company. As a result of the transaction, CBC would hold 52.51% of Taurus’ total capital stock. Prior to the transaction, CBC already held 2.55% of Taurus’ common shares and 0.2% of the preferred shares.

The transaction was submitted to CADE as a concentration act in May 2014. In June 2014, CBC requested a waiver to the authority to exercise the political rights acquired as part of the tender offer, arguing that the board election related to Taurus would occur, and that the company was facing a financial crisis, reason why it would be essential for CBC to participate in the relevant event.

CADE, however, when answering the request, argued that CBC was already aware of the sensitive economic situation of Taurus when it acquired the shares through the tender offer, and of the legal prohibition established in the antitrust regime. Therefore, CADE denied the request, and limited CBC’s rights on Taurus to those linked to the initial participation it held in the company (2.55% of Taurus’ common shares and 0.2% of the preferred shares).

The Concentration Act was finally cleared by CADE in January 2015, when CBC recovered all the rights linked to the new acquires shares.

The question is whether CADE could have taken this opportunity to build up the concept of political rights from a governance perspective. In other words, CADE was much focused on the percentage acquired – blocking in theory the correspondent rights related to that percentage – rather than performing a real assessment on whether such rights, if exercised during the antitrust review, could effectively affect the management of Taurus, as followed by the recent precedent identified in the beginning of our analysis.

CADE’s Internal Regulation brings indeed a clear cut prohibition for transactions performed in the stock market, but this *per se* analysis seems not to be consistent with the rule of reason approach taken by the Brazilian Antitrust Law, meaning that the effects of such rights are the real concern that CADE may face when applying the mentioned prohibition. Therefore, a governance analysis is the expected approach to meet the rational of our regime.

5. Enforcement of the Prohibition as a Remedy in the Merger Control Review

The approach taken by the authority when using the prohibition of political rights as a remedy was slightly different than the clear cut approach taken in the prior topic, as further detailed in this section.

Indeed, the discussion came up in the analysis of the Concentration Act 08012.009198/2011-21,¹³ which relates to successive acquisitions made by CSN through the stock

¹² Forjas Taurus S.A. (“Taurus”) and Companhia Brasileira de Cartuchos (“CBC”). Approved without restrictions by the GS on January 26, 2015.

market to acquire Usiminas' shares, leading CSN to hold 17.43% of Usiminas' capital stock at that time.¹⁴

During the antitrust assessment, CADE was particularly concerned with the fact that both companies were competitors in the Brazilian steel market, and CSN, although holding a minority position in Usiminas, could boost the risk of coordination, as part of the rights to be granted as a shareholder.

As a remedy to decrease the concern, CADE decided to sign with CSN a Performance Commitment Agreement ("TCD"), through which (a) CSN committed to divest a specific amount of the acquired shares; and (ii) it was determined a prohibition for CSN to exercise the political rights it would hold in the corporate capital of Usiminas.

CADE was so artificially amending the corporate structure of Usiminas to characterize CSN as a mere financial investor of the company, targeting mainly to block CSN accessing sensitive information from Usiminas and so avoiding the concern of antitrust coordination in the affected market.

However, there was not – again - a substantial analysis on whether the decision could affect the investment made, in the sense that political rights could be relevant from an investing perspective without effectively affecting the governance structure of the target company.

Recently, though, CSN requested CADE to soften the terms of the TCD, to allow the company to participate and vote in the General Shareholder's Meeting in which two members of the Board of Directors and one of the Audit Committee were to be elected.

CADE granted the request, partially, allowing CSN to participate in the meeting and also to indicate two independent members for the election. However, as a precondition for the authorization, CADE determined CSN to evidence that: (i) the potential members would be in compliance with the isonomy standards established in the rules of BM&FBovespa New Market, and (ii) there would be no exchange of competitively sensitive information from Usiminas to CSN through the election of such independent members.

This recent decision was a good example of how antitrust concerns and corporate investments can coexist and that a creative outcome is possible when targeting the real purpose of a given conflict of law.

¹³ Companhia Siderúrgica Nacional ("CSN") and Usinas Siderúrgicas de Minas Gerais S.A. ("Usiminas"). Approved by the Tribunal in April, 2014. Although submitted under the revoked regime, was ruled under the new regime.

¹⁴ On September 8, 2011, SDE became aware of the acquisitions of shares made by CSN, opening the APAC 08012.009198/2011-21. After the investigation, the SDE concluded that the notification of the transaction was mandatory and CSN was fined due to the late submission of the transaction.

6. Conclusion

The prohibition of the exercise of political rights related to the acquisition of shares is established in one only situation covered by CADE's Internal Regulation, which is the acquisition of shares through the stock market/tender offer.

However, and in practical terms, the coexistence of corporate rights and antitrust concerns was boosted by the complexity of the transactions submitted to CADE's review, gaining a relevance that is crossing the legal provision. As seen, the subject of political rights also appeared as merger remedies and in the analysis of minority thresholds and joint/sole control definition.

In the absence of a clear definition of political rights under an antitrust perspective, the clear cut approach that was being taken by CADE in the recent past when dealing with the analysis of political rights seems to be overcome by a more precise analysis focusing on the governance structure of the target company to address concerns.

That said CADE is developing the institute, which moves quickly as the dynamic of the stock market. At one side, investors are always looking for financial gains and, at the other, the authority aiming to avoid antitrust concerns. Within such context, CADE needs to find a way to allow investors to protect the investment made through the exercise, at a certain degree, of the political rights linked to shares and simultaneously avoid damages to competition – which is not an easy task.

A case-by-case analysis seems to be the key approach for the institute. A *per se* understanding, which focus only on the precise percentage of shares acquired and blocks the correspondent political rights would not be consistent with the rational of the antitrust regime in Brazil, which targets the effects of an action to evaluate concerns.

As a conclusion, irrespective of any possible definition that could be applied to political rights, CADE needs to focus on the effects that the rights may grant to an investor as part of an analysis targeting the governance structure of the company. This is the approach that meets the rule of reason concept established by the Brazilian Antitrust Law and also allows both investors and antitrust concerns to coexist.

Therefore, we encourage the authority to continue developing the institute in the way it has been doing in the more recent precedents, with creative solutions targeting the effects of political rights to be suspended with a positive outcome to the market.

CHAPTER 12 - IMPACT OF CADE'S DECISIONS ON THE MARKET VALUE OF MERGING FIRMS: BEFORE AND AFTER THE NEW LAW

Ricardo R. G. Avelino
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1. Introduction

Companies engaged in horizontal mergers and acquisitions are usually thought to benefit from the increasing market power of the resulting firm, which allows it to reduce the price paid to suppliers or charge a higher price to consumers, and from the redeployment of the combined assets of the two firms toward higher-valued uses. To the extent that, in an efficient market, the price of a security reflects the present value of its expected future cash flows, any event that influences the future prospects of a firm, such as mergers and acquisitions, will impact stock prices. Several researchers have investigated the effect of the announcement of the transaction and of merger control decisions on stock prices. See, *inter alia*, Eckbo and Wier (1985)¹, Kim and Singal (1993)², Aktas et al. (2004)³, Duso et al. (2007)⁴ and Duso et al. (2011)⁵. These studies, however, have focused on the U.S. and EU jurisdictions.

This paper assesses the impact of the Brazilian antitrust authorities' decisions on the bidders' stock prices before and after Law No. 12,529/11 based on a sample of 16 mergers and acquisitions from October 2006 to April 2013 in which both the acquirer and the target were listed on the BM&FBovespa. We rely on the traditional event study methodology introduced by Fama et al. (1969)⁶. For a good review of the event study methodology, the reader is referred to MacKinlay (1997)⁷.

The assessment of the strength of Brazilian antitrust authorities' decisions is motivated by the existing debate in the literature about the effectiveness of merger control institutions. Kim and

¹ Eckbo, B. and Wier, P. (1985). Antimerger Policy under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis. *Journal of Law and Economics*, 28 (1), 119-149.

² Kim, E. and Singal, V. (1993). Mergers and Market Power: Evidence from the Airline Industry. *American Economic Review*, 83 (3), 549-569.

³ Aktas, N., de Bodt, E. and Roll, R. (2004). Market Response to European Regulation of Business Combinations. *Journal of Financial and Quantitative Analysis*, 39 (4), 731-757.

⁴ Duso, T., Neven, D. and Röller, L. (2007). The Political Economy of European Merger Control: Evidence using Stock Market Data. *Journal of Law and Economics*, 50 (3), 455-489.

⁵ Duso, T., Gugler, K. and Yurtoglu, B. (2011). How Effective is European Merger Control? *European Economic Review*, 55 (7), 980-1006.

⁶ Fama, E., Fisher, L., Jensen, M. and Roll, R. (1969). The Adjustment of Stock Prices to New Information. *International Economic Review*, 10 (1), 1-21.

⁷ MacKinlay, C. (1997). Event Studies in Economics and Finance. *Journal of Economic Literature*, 35, 13-39.

Singal (1993)⁸, for example, argue that they are too lenient and allow anticompetitive mergers to go through, while Aktas et al. (2004)⁹ stress that they destroy synergistic efficiencies by unnecessarily intervening in the marketplace. This raises the question of the appropriateness of the remedies proposed by the antitrust authorities to deter anticompetitive mergers and to restore competition.

After the selection of an event of interest and of the event window, we calculate the abnormal return of the security over this interval, given by the difference between the actual return and the predicted return (constructed from the parameter estimates of the market model in a period prior to the event window). Then we aggregate these abnormal returns over time and across securities, giving rise to the average cumulative aggregated abnormal return, which is the basis for the statistical tests. Under the null hypothesis of no impact, the cumulative abnormal return should be statistically indistinguishable from zero over any interval around the event of interest.

Our findings suggest that the market anticipates the announcement of Brazilian mergers and acquisitions and that they have a sizable impact on security prices. This impact is basically concentrated in the seven days prior to and including the announcement date. The average cumulative abnormal return over this period rises roughly 7.3% and it is statistically positive at any conventional level of significance.

The results also provide evidence that CADE's final affects stock prices. The empirical estimates point to a gain of 7.3% over the 41-day period centered at the event date under Law No. 8,884/94, which indicates that the market interprets the end of uncertainty and the consequent approval of the transaction, even with provisions, as good news. The absence of a negative correlation between abnormal returns around the announcement of the transaction and around CADE's decision suggests that the restrictions do not impose significant economic constraints on the acquirer's behavior or that most benefits accruing to the merging firms are due to synergistic gains.

The impact of the announcement of CADE's decision is more than 50% greater under Law No. 12,529/11, exceeding 12% over the 41-day period centered at the event date. This preliminary evidence (based on two mergers submitted to the approval of the antitrust authorities) indicates either that market participants revised the odds assigned to the rejection of a transaction by CADE or that the apparent greater impact might be a consequence of movements in stock prices unrelated to CADE's decision.

It must be stressed that this is not the first paper that applies the event study methodology to study the effect of Brazilian mergers and acquisitions on security prices. Camargos and Barbosa (2006)¹⁰, for instance, analyze whether the information contained in the merger announcement is immediately incorporated into stock prices. Patrocínio et al. (2007)¹¹ examine the relationship between intangibility, measured by the book to market ratio, and the gains from corporate acquisitions. Nevertheless, neither of these papers addresses the effectiveness of merger policy in Brazil and their impact on security returns.

⁸ Kim, E. and Singal, V. (1993). *Op. cit.*

⁹ Aktas, N., de Bodt, E. and Roll, R. (2004), *Op. Cit.*

¹⁰ Camargos, M. and Barbosa, F. (2006). Eficiência Informacional do Mercado de Capitais Brasileiro Pós-Plano Real: Um Estudo de Eventos dos Anúncios de Fusões e Aquisições. *Revista de Administração*, 41 (1), 43-58.

¹¹ Patrocínio, M., Kayo, E. and Kimura, H. (2007). Aquisição de Empresas, Intangibilidade e Criação de Valor: Um Estudo de Evento. *Revista de Administração*, 42 (2), 205-215.

The remainder of this paper is organized as follows. Section 2 sets forth the methodology employed to measure the impact of the events of interest on security returns. Section 3 describes the dataset used in this paper. Section 4 presents the empirical results, highlighting the estimates of the abnormal and cumulative abnormal returns around the merger announcement and CADE's decision. Finally, Section 5 presents the conclusions.

2. Event Study Methodology

First, let us define some notation to facilitate the measurement and analysis of abnormal returns, following MacKinlay (1997). Returns are indexed in event time by τ . Denote by $\tau = 0$ the event date, let $\tau = T_1 + 1$ and $\tau = T_2$ represent the event window and $\tau = T_0 + 1$ and $\tau = T_1$ form the estimation window. Thus, $L_1 = T_1 - T_0$ and $L_2 = T_2 - T_1$ are, respectively, the length of the estimation and of the event window.

Further, define R_{it} as the continuously compounded return of security i at time t , for $i = 1, \dots, N$ and $t = T_0, \dots, T_2$, and, analogously, R_{mt} as the market return at time t . The market model assumes that R_{it} and R_{mt} are related through the following specification

$$R_{it} = \alpha_i + \beta_i R_{mt} + \varepsilon_{it} \quad (1)$$

where ε_{it} is a mean-zero uncorrelated error term with constant variance, i.e.,

$$E[\varepsilon_{it}] = 0, \quad \text{Var}[\varepsilon_{it}] = \sigma_{\varepsilon_i}^2$$

and α_i and β_i are unknown parameters, estimated using the estimation window.

The abnormal return for security i is computed using the event window as the difference between the actual return and the return predicted by the market model, that is,

$$\hat{AR}_{i\tau} = R_{i\tau} - \hat{\alpha}_i - \hat{\beta}_i R_{m\tau}, \quad \tau = T_1 + 1, \dots, T_2$$

where $\hat{\alpha}_i$ and $\hat{\beta}_i$ are the ordinary least squares estimates of α_i and β_i .

Under the null hypothesis that the event does not affect the security return, the abnormal return has mean zero and variance given by

$$\sigma^2(\hat{AR}_{i\tau}) = \sigma_{\varepsilon_i}^2 + \frac{1}{L_1} \left[1 + \frac{(R_{m\tau} - \hat{\mu}_m)^2}{\hat{\sigma}_m^2} \right]$$

where $\hat{\mu}_m$ and $\hat{\sigma}_m^2$ denote, respectively, the mean and variance of the market return over the estimation window.

MacKinlay (1997) points out that the market model represents an improvement over the constant mean model since it removes the portion of the variation of the security return that is related to the index. As a result, the variance of abnormal returns is reduced, improving the ability to detect event effects. Obviously, the higher the R^2 of the regression in (1), the greater is the reduction in the variance and the larger is the gain from the use of the market model.

To assess the impact of the event over a window of several days, the individual abnormal returns must be aggregated through time. Define the cumulative average abnormal return for security i from τ_1 to τ_2 , where $T_1 < \tau_1 \leq \tau_2 \leq T_2$, as the sum of the individual abnormal returns over this interval, namely,

$$\hat{CAR}_i(\tau_1, \tau_2) = \sum_{\tau=\tau_1}^{\tau=\tau_2} \hat{AR}_{i\tau}$$

Under the null hypothesis, $\hat{CAR}_i(\tau_1, \tau_2)$ has also mean zero and asymptotic variance (as L_1 increases) given by

$$\sigma_i^2(\tau_1, \tau_2) = (\tau_2 - \tau_1 + 1)\sigma_{\varepsilon_i}^2$$

In order to draw overall conclusions, we have to further aggregate the cumulative abnormal return across securities, such as in (2), and work with averages instead:

$$\overline{CAR}_i(\tau_1, \tau_2) = \frac{1}{N} \sum_{i=1}^N \hat{CAR}_i(\tau_1, \tau_2) \quad (2)$$

The corresponding variance can be expressed as

$$Var(\overline{CAR}_i(\tau_1, \tau_2)) = \frac{1}{N^2} \sum_{i=1}^N \sigma_i^2(\tau_1, \tau_2)$$

and the null hypothesis can be tested using the standardized CAR statistic

$$\frac{\overline{CAR}_i(\tau_1, \tau_2)}{Var(\overline{CAR}_i(\tau_1, \tau_2))^{1/2}}$$

which converges to the standard normal distribution as L_1 increases.

3. Description of the Data

The starting point for the construction of the dataset used in this study is a sample of 19 mergers and acquisitions between October 2006 and April 2013 in which both the acquirer and the target were listed on the BM&FBovespa. We selected from this initial sample only those transactions for which the market value of the target in the quarter prior to the announcement date was at least 10% of the market value of the acquiring firm.

Table 1 lists the final sample of 16 mergers and acquisitions analyzed in this paper, in conjunction with the announcement dates of the merger and of CADE's final decision and the market values of the firms in the quarter prior to the announcement of the acquisition. We see that there is a huge variation in the market values of the acquirers and of the targets, which range, respectively, from R\$ 1,398 billion to R\$ 93,830 billion and from R\$ 436 million to R\$ 31,604

billion. The acquirers' mean market value equals R\$ 12,465 billion and is approximately twice as large as that of R\$ 6,064 billion for the targets.

Table 1 – Dates of Announcement of the Acquisitions and of CADE’s Decision and Market Values of the Acquirer and of the Target in the Quarter Prior to the Merger Announcement

Companies	Merger Announcement	Market Value (R\$ billions)		Cade’s Decision
		Acquirer	Target	
Net/Vivax	11/10/2006	5,021	1,314	12/12/2007
BMF/Bovespa	25/03/2008	16,173	16,684	09/07/2008
Oi/Brasil Telecom	25/04/2008	15,731	11,940	20/10/2010
Totvs/Datasul	22/07/2008	1,398	658	05/08/2009
Gafisa/Tenda	01/09/2008	3,581	1,795	15/04/2009
Brascan/Company	10/09/2008	1,579	853	21/01/2009
VCP/Aracruz	15/09/2008	8,681	14,430	24/11/2010
Itaú/Unibanco	03/11/2008	93,830	31,604	18/08/2010
Perdigão/Sadia	18/05/2009	5,938	2,522	13/07/2011
Pão de Açúcar/Ponto Frio	08/06/2009	7,289	799	17/04/2013
Duralex/Satipel	22/06/2009	1,777	436	29/06/2011
Amil/Medial	19/11/2009	3,466	757	17/04/2013
Braskem/Quattor	22/01/2010	12,299	1,746	04/05/2011
Drogasil/Raia	02/08/2011	2,000	1,612	23/05/2012
Cosan/Comgás	03/05/2012	13,730	5,118	12/09/2012
Kroton/Anhanguera	22/04/2013	6,954	4,750	14/05/2014
Mean		12,465	6,064	

4. Empirical Results

In this section, we examine to what extent the announcement of the acquisition and of CADE's decision influence the returns of acquirers' stocks. We take the Ibovespa as the market benchmark and consider a pre-acquisition period of 250 days and an event window of 41 days centered on the event date. For those companies that have common and preferred stocks listed on BM&FBovespa, we pick the preferred stock, which is more actively traded.

4.1. Merger Announcement

Table 2 presents the average abnormal and cumulative abnormal returns around the announcement date, from day -20 to day 20, along with the corresponding standard errors. For most abnormal returns, it is not possible to reject the hypothesis that they are statistically equal to zero in favor of the hypothesis that they are positive adopting the conventional level of significance of 5%. There is evidence that they are greater than zero only on days $t=-19$, $t=-5$, $t=-3$ and $t=0$. These positive abnormal returns of 2.159%, 0.455%, 1.704% and 2.307% have associated t statistics of 3.450, 2.325, 2.724 and 3.687.

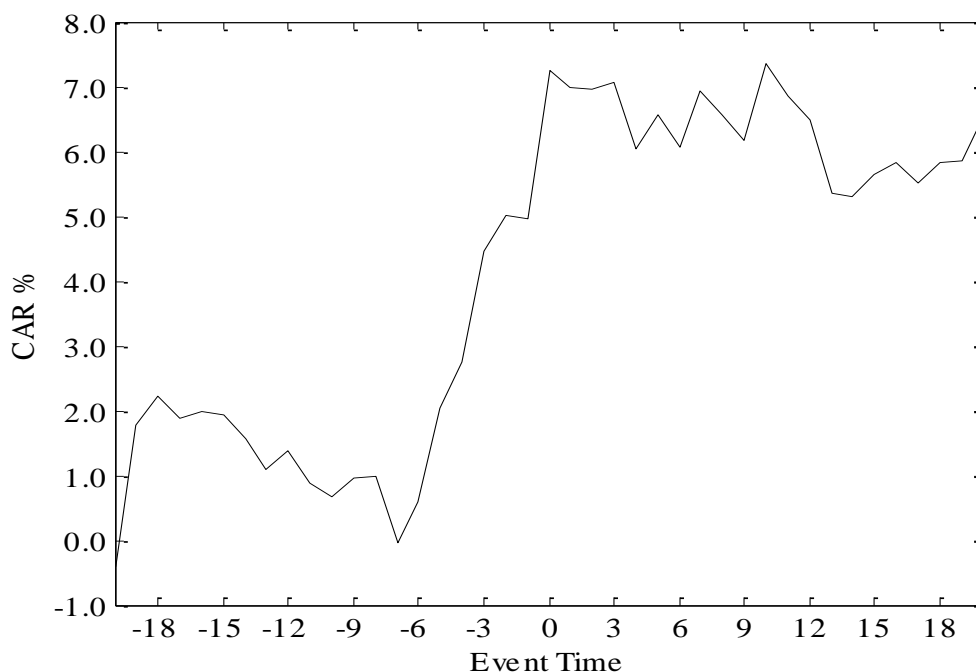
The cumulative abnormal returns depicted in Figure 1 suggest that the market anticipates the forthcoming announcement. The average CAR sharply increases from day $t=-7$ to day $t=0$, varying from -0.032% to 7.257% over this period. Even if we focus on the CAR from day -20 to day 0, we can safely reject the hypothesis that it is equal to zero, as indicated by the t statistic of 2.532. We also observe that in the days after the announcement and before day $t=-7$, the CAR is relatively stable, as would be expected.

Table 2 – Aggregated Abnormal and Cumulative Abnormal Returns around the Merger Announcement

Event Day	AR _t %	t-stat	CAR _t %	t-stat
-20	-0.395	-0.631	-0.395	-0.631
-19	2.159	3.450	1.765	1.994
-18	0.450	0.719	2.214	2.043
-17	-0.326	-0.521	1.888	1.509
-16	0.091	0.145	1.979	1.415
-15	-0.041	-0.066	1.938	1.265
-14	-0.378	-0.604	1.560	0.943
-13	-0.460	-0.735	1.100	0.622
-12	0.291	0.466	1.391	0.741
-11	-0.504	-0.806	0.887	0.449
-10	-0.206	-0.330	0.681	0.328
-9	0.284	0.454	0.965	0.445
-8	0.019	0.030	0.984	0.436
-7	-1.016	-1.625	-0.032	-0.014
-6	0.619	0.990	0.587	0.242
-5	1.455	2.325	2.042	0.816
-4	0.703	1.124	2.745	1.064
-3	1.704	2.724	4.449	1.676
-2	0.562	0.898	5.010	1.838
-1	-0.060	-0.096	4.950	1.770
0	2.307	3.687	7.257	2.532
1	-0.258	-0.413	6.999	2.385
2	-0.047	-0.075	6.952	2.317
3	0.117	0.187	7.069	2.307
4	-1.037	-1.655	6.032	1.928

5	0.546	0.872	6.578	2.062
6	-0.518	-0.827	6.060	1.864
7	0.878	1.402	6.938	2.096
8	-0.367	-0.586	6.571	1.950
9	-0.398	-0.637	6.173	1.801
10	1.196	1.910	7.368	2.115
11	-0.519	-0.829	6.849	1.935
12	-0.375	-0.599	6.474	1.802
13	-1.112	-1.777	5.362	1.470
14	-0.061	-0.098	5.301	1.432
15	0.338	0.540	5.639	1.502
16	0.182	0.291	5.821	1.530
17	-0.301	-0.482	5.520	1.431
18	0.301	0.481	5.820	1.490
19	0.030	0.047	5.850	1.478
20	0.718	1.146	6.568	1.639

Figure 1 – Cumulative Abnormal Return for Merger Announcement from Event Day -20 to Event Day 20



The impact of the merger documented in Table 3 is larger than those previously reported in the literature for the U.S. Malatesta (1983)¹², for instance, provides an estimate of 0.80 for the average cumulative abnormal return of a sample of 256 successful bidding firms over the public

¹² Malatesta, P. (1983). The Wealth Effects of Merger Activity and the Objective Functions of Merging Firms. *Journal of Financial Economics*, 11, 155-181.

announcement month. Eckbo (1983)¹³ also reports a moderate average gain of 1.58% for 102 acquirer firms from twenty days before through ten days after the announcement. Asquith (1983)¹⁴, based on a sample of 196 successful bidding firms, finds an even smaller CAR of only 0.20% from nineteen days before through the first public announcement.

4.2. CADE's Decision

4.2.1. Empirical Evidence under Law No. 8,884/94

Table 3 presents the abnormal and cumulative abnormal returns around CADE's decision. Only three abnormal returns, on days, $t=-1$, $t=6$ and $t=9$, are individually greater than zero at the 5% level. Nevertheless, taken together, all abnormal returns provide strong evidence that CADE's decision does matter.

We observe in Figure 2, which plots the evolution of cumulative abnormal returns, and in Table 3 a delayed reaction to CADE's decision. The cumulative abnormal return sharply increases a few days after the approval of the transaction. From day $t=5$ to $t=12$, for example, it jumps from 2.575% to 7.509%. In the subsequent days, the CAR slightly decreases, reaching 7.300% on day $t=20$, with a corresponding t statistic of 1.648. The gain over the 41-period interval around CADE's decision is comparable to the gain of 7.257% over the seven-day period prior to and including the day of the merger announcement.

There is no evidence that anticompetitive rents generated by mergers and acquisitions are dissipated by the antitrust authority decision. In the case of effective antitrust decisions, one should expect a negative correlation between security prices around the merger announcement and security prices around CADE's decision, something that we do not observe in the data. Thus, it seems that the restrictions imposed by CADE to approve the operations are too weak if the benefits predominantly stem from the increasing market power of the resulting firm.

Alternatively, one may posit that the gains are mainly attributable to economies of scale or scope, increases in managerial efficiency or other synergistic gains. In this scenario, one should not observe any correlation between security prices around the merger announcement and around CADE's decision if the market anticipates that the antitrust authority will correctly identify the sources of the gains.

We are left, therefore, with a puzzle. If the market is efficient and CADE rarely blocked a transaction under Law No. 8,884/94, we would expect investors became aware of the final outcome. If this is the case, the price of the security should incorporate almost all benefits from the merger/acquisition at the time of the announcement. Of course there was always a probability that the operation be rejected and the market, as a result, would assign a value to a positive resolution of the uncertainty. But the small probability of rejection does not seem compatible with an abnormal price run-up of 7.3% around CADE's decision, which is of the same order of magnitude as that of the stock price increase around the merger announcement.

¹³ Eckbo, B. (1983). Horizontal Mergers, Collusion, and Stockholder Wealth. *Journal of Financial Economics*, 11, 241-274.

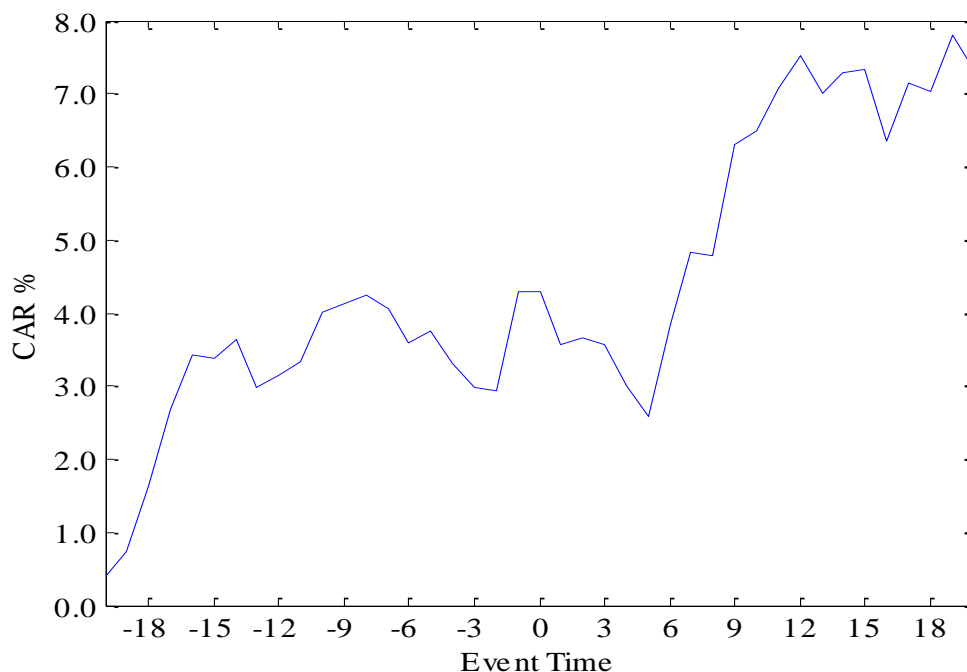
¹⁴ Asquith, P. (1983). Merger Bids, Uncertainty and Stockholder Returns. *Journal of Financial Economics*, 11, 51-83.

Table 3 – Aggregated Abnormal and Cumulative Abnormal Returns around CADE’s Decision

Event Day	AR _t %	<i>t</i> -stat	CAR _t %	<i>t</i> -stat
-20	0.414	0.641	0.414	0.641
-19	0.326	0.505	0.740	0.810
-18	0.894	1.383	1.634	1.460
-17	1.043	1.614	2.677	2.071
-16	0.747	1.157	3.424	2.370
-15	-0.046	-0.071	3.378	2.135
-14	0.267	0.413	3.645	2.132
-13	-0.666	-1.031	2.979	1.630
-12	0.160	0.247	3.138	1.619
-11	0.202	0.312	3.340	1.635
-10	0.680	1.053	4.020	1.876
-9	0.115	0.178	4.135	1.848
-8	0.122	0.188	4.256	1.827
-7	-0.187	-0.289	4.070	1.684
-6	-0.479	-0.741	3.591	1.435
-5	0.153	0.237	3.744	1.449
-4	-0.430	-0.666	3.314	1.244
-3	-0.338	-0.523	2.976	1.086
-2	-0.034	-0.052	2.942	1.045
-1	1.347	2.084	4.289	1.485
0	0.015	0.023	4.304	1.454
1	-0.744	-1.152	3.560	1.175
2	0.101	0.156	3.660	1.181
3	-0.104	-0.161	3.556	1.124
4	-0.559	-0.866	2.997	0.928
5	-0.421	-0.652	2.575	0.782
6	1.267	1.961	3.842	1.144
7	0.982	1.520	4.824	1.411
8	-0.039	-0.061	4.785	1.375
9	1.515	2.344	6.299	1.780
10	0.194	0.300	6.493	1.805
11	0.592	0.916	7.085	1.939
12	0.424	0.657	7.509	2.023
13	-0.510	-0.790	6.999	1.858
14	0.276	0.427	7.275	1.903
15	-0.513	-0.753	7.322	1.755
16	-0.965	-1.416	6.357	1.504
17	0.800	1.174	7.156	1.671
18	-0.126	-0.184	7.030	1.621

19	0.779	1.142	7.809	1.779
20	-0.509	-0.748	7.300	1.648

Figure 2 – Cumulative Abnormal Return for CADE’s Decision from Event Day -20 to Event



Day 20

4.2.2. Empirical Evidence under Law No. 12,529/11

Only two acquisitions that were submitted for approval under the new antitrust Law satisfy the conditions employed to construct the sample used in this paper. Based on this limited evidence, we evaluate whether under the new legislation CADE’s decision impact stock prices.

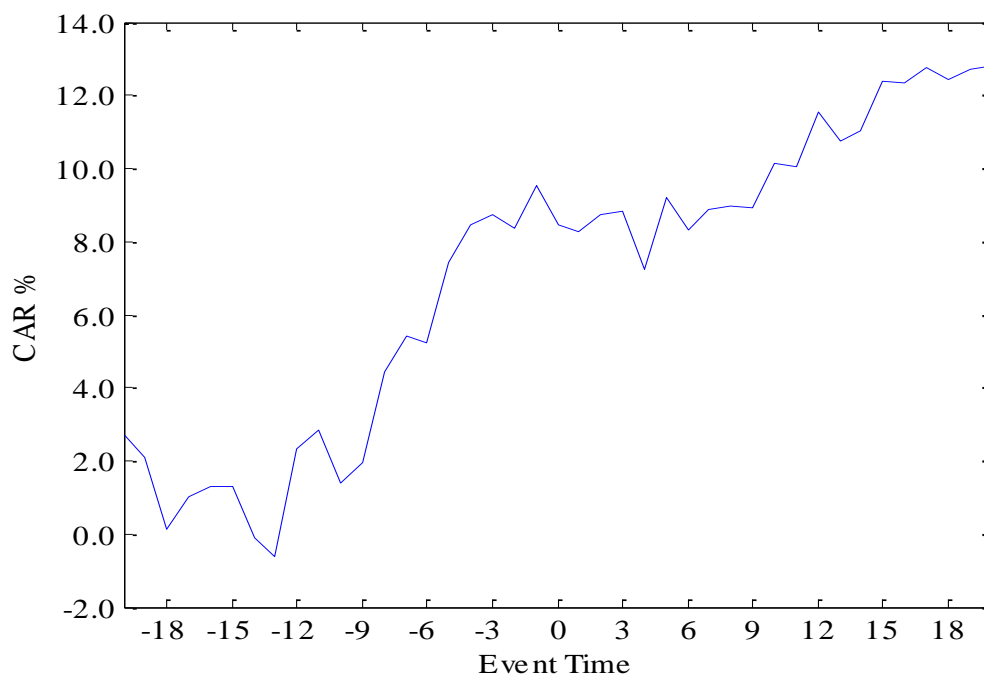
Table 4 presents the abnormal and cumulative abnormal returns around the antitrust authority decisions along with the associated t statistics. We observe that five individual abnormal returns are statistically greater than zero. Four of them are prior to the event date, on days $t = -20$, $t = -12$, $t = -8$ and $t = -5$. We also see that the t statistic associated with the CAR on day $t = 20$ equals 1.786. Thus, the null hypothesis of no effect is rejected in favor of the alternative of a positive effect at the conventional level of significance of 5%.

Table 4 – Aggregated Abnormal and Cumulative Abnormal Returns around CADE’s Decision under Law No. 12,529/11

Event Day	AR _t %	t-stat	CAR _t %	t-stat
-20	2.717	2.427	2.717	2.427
-19	-0.639	-0.571	2.079	1.313
-18	-1.969	-1.757	0.110	0.057
-17	0.885	0.791	0.995	0.444
-16	0.309	0.276	1.304	0.521
-15	-0.003	-0.003	1.301	0.474
-14	-1.407	-1.257	-0.106	-0.036
-13	-0.491	-0.438	-0.597	-0.189
-12	2.943	2.630	2.346	0.699
-11	0.508	0.454	2.854	0.806
-10	-1.456	-1.301	1.398	0.377
-9	0.534	0.477	1.932	0.498
-8	2.486	2.219	4.419	1.095
-7	1.008	0.901	5.427	1.296
-6	-0.191	-0.171	5.236	1.208
-5	2.169	1.937	7.404	1.654
-4	1.040	0.929	8.444	1.830
-3	0.294	0.263	8.738	1.840
-2	-0.357	-0.319	8.381	1.718
-1	1.159	1.035	9.540	1.906
0	-1.092	-0.976	8.448	1.647
1	-0.156	-0.139	8.292	1.579
2	0.440	0.394	8.733	1.627
3	0.096	0.085	8.828	1.610
4	-1.609	-1.437	7.220	1.290
5	2.003	1.790	9.222	1.616
6	-0.891	-0.796	8.331	1.432
7	0.538	0.480	8.869	1.497
8	0.087	0.078	8.955	1.486
9	-0.039	-0.035	8.916	1.454
10	1.220	1.090	10.136	1.626
11	-0.103	-0.092	10.033	1.585
12	1.521	1.358	11.554	1.797
13	-0.787	-0.703	10.767	1.650
14	0.280	0.250	11.048	1.668
15	1.337	1.195	12.384	1.844
16	-0.033	-0.030	12.351	1.814
17	0.431	0.385	12.782	1.853
18	-0.365	-0.326	12.417	1.776
19	0.308	0.275	12.725	1.797
20	0.073	0.065	12.798	1.786

Figure 3 plots the evolution of the cumulative abnormal return over the event window. There is a clear upward trend and we see that most of the effect is concentrated before the event date. The CAR rises from 2.717 on day $t = -20$ to 9.540 on day $t = -1$ and then increases to 12.798 on day $t = 20$. The impact is numerically more than 50% greater than under Law No. 8,884/94.

Figure 3 – Cumulative Abnormal Return for CADE’s Decision under Law No. 12,529/11 from Event Day -20 to Event Day 20



We point out that this preliminary evidence must be viewed with caution, since it is based on only two acquisitions. It might be a consequence of a change in the odds assigned by market participants to the rejection of a transaction by CADE, triggered by the new antitrust law. Law No. 12,529/11 established the need for CADE's prior approval of concentration acts, which undeniably eliminated the difficulties inherent in fully unwinding a transaction in which the parties were already effectively operating in an integrated manner.

Alternatively, it is possible that the results might have been driven by an upward trend in Kroton stock price unrelated to CADE’s decision. With a moderate sample size, the idiosyncratic shocks tend to average out. But this is not the case in a sample of two observations. The small variability of Kroton returns explained by the market returns, indicated by the low R^2 in the regressions, is consistent with this hypothesis. In this scenario, we expect the CAR around CADE’s decision under Law No. 12,529/11 to converge to the numbers in Table 3 as more observations become available and the precision of the estimates is increased.

5. Conclusion

This paper applied the event study methodology to a sample of 16 mergers and acquisitions in Brazil between October 2006 and April 2013 to evaluate the impact of merger announcement and of merger control policy on the market value of the acquirers before and after the new antitrust law. The results suggest that there is a positive abnormal return of approximately 7.3% around the announcement of the transaction, concentrated in the seven days prior to and including the day of the announcement.

The results also suggest that CADE's final decision does influence stock returns. The average cumulative abnormal return over a 41-day period around the final decision equals 7.3% under Law No. 8,884/94 and has roughly the same magnitude of the gains accruing to the shareholders of the merging firms around the announcement of the acquisition.

To the extent that rents generated by mergers and acquisitions are not subsequently dissipated by CADE's decision, the results are consistent with the view that the remedies proposed by CADE to approve anticompetitive mergers and to restore competition are too weak or with the notion that the rents accruing to the parties are predominantly due to synergistic gains. The sizable positive abnormal return around the final decision is nonetheless puzzling, even if we recognize that the market attaches a value to the resolution of the uncertainty. It is difficult to reconcile the magnitude of the gain around CADE's decision with the fact that the antitrust authority seldom blocked a merger under Law No. 8,884/94.

The impact of CADE's decision under Law No. 12,529/11 equals 12.8% and is more than 50% greater than under the old law. We pointed out that the small sample size does not allow us to discriminate between a situation in which this greater impact resulted from a revision in the odds assigned by market participants to the rejection of a transaction by CADE and another in which the greater impact is a consequence of movements of the stock price of a particular company unrelated to CADE's decision.

III. CONDUCTS

CHAPTER 13 - DUE PROCESS OF LAW AND THE BRAZILIAN ANTITRUST AUTHORITY

Pedro Paulo Salles Cristofaro
Luisa Shinzato de Pinho

The Brazilian Antitrust Law is primarily enforced by the CADE. This role confers the necessary powers to impose penalties for violations against the economic order, such as cartel formation and abuse of dominant position. CADE is a governmental entity subject to the Federal Executive Power (in fact, it is an agency linked to the Ministry of Justice) and is responsible for investigating and prosecuting anticompetitive practices (especially incumbent upon the General Superintendence) and for applying the penalties provided by the law (by the Tribunal, comprised of a President and six Commissioners). In certain cases, some conducts may also be subject to criminal sanctions for the individuals involved. Those are, however, not applied by CADE, but by the Brazilian Judiciary Courts. This chapter refers only to administrative sanctions and proceedings under the Brazilian Antitrust Law.

The investigation, prosecution and application of administrative penalties are subject to an administrative process conducted by CADE according to its internal regulations and the Brazilian Antitrust Law. The decision issued by the Tribunal is final and with no chance of appeal to a higher administrative court or authority. Therefore, it may only be challenged in a judicial process.

Notwithstanding the administrative nature of this process and resulting decision, it must also abide by the constitutional guarantees that ensure the right of full answer and defense and compliance with the due process of law. Despite some questioning in the past concerning the application of such terms in administrative processes, nowadays the Brazilian Constitution expressly sets forth that “parties in judicial and administrative processes, and defendants in any and all processes, are entitled to a full answer and defense and an adversary system with the means and resources inherent therein.”¹

This was also stated by the Brazilian Federal Supreme Court referring to the right of full answer and defense in “all legal processes, judicial or administrative.” At that time, the Supreme Court also made it clear that the right of full answer and defense guaranteed by the Constitution “involves not only the right to question allegations and to obtain information, but also the guarantee that such questioning and defense will be considered by the ruling authority” and also that “full exercise of the adversary system is not limited to guaranteeing presentation of a timely and effective defense against the alleged facts; it also implies the possibility of being heard concerning legal matters”.²

The due process of law is highly regarded by the Brazilian legislation and the Federal Constitution itself contains more than one provision concerning such guarantee. In addition to the

¹ Article 5, LV. Free Translation.

² Writ of Mandamus No. 24.268, decided by the Brazilian Supreme Court on May 2, 2004. Free translation.

aforementioned Article 5, LV, special emphasis should be given to Article 5, LIV, according to which no one shall be deprived of its liberty or its goods without due process of law. It is regarded as a condition of effectiveness of decisions issued by governmental authorities and as an essential element of the rule of law due to the assurance that public authorities' acts and proceedings are restricted to legal boundaries.³

Sure enough, CADE is subject to due process of law and consequential provisions. This has been duly acknowledged by CADE in more than one opportunity. Even though such guarantees are applicable to all CADE proceedings, including merger control, this paper highlights some of the most essential aspects of due process of law in punitive proceedings, as follows:

Material Truth

Extensive Fact-Finding Phase

Adversary System

Full access

Motivation

Loyalty and Good Faith

1. Material Truth

First of all, due process of law requires that the imposition of penalties by CADE be based on proven facts and applicable legal provisions. With regard to CADE's decisions concerning economic agents' behavior in a particular case, the law does not give CADE room to decide whether an act constitutes a breach of the economic order or not. The recognition of a cartel or the qualification of an act as abuse of dominant position is not an act of political choice for CADE. The definition of the wrongdoing arises from the law and application of a certain penalty is a necessary consequence of the unlawful act. The decision is, therefore, strictly bound by the law and subject to judicial review. Thus, CADE must pursue the so-called "material truth", which is the veracity of the alleged facts, as a condition for the application of a penalty.

In light of this, CADE's administrative processes require a stricter search for the material truth than, e.g., a judicial process regarding civil matters. Civil processes are mainly concerned about rights that may be negotiated by the parties. In a civil proceeding, the judge must decide based on the evidence included in the docket and the burden of producing this evidence is shared by the parties. On the other hand, the antitrust authority is required to pursue evidence to sustain its allegations and take all necessary measures to obtain an accurate account of the parties' behavior. CADE's processes require a thorough investigation of the alleged facts and confirmation that the material truth gives cause to the attributed sanctions. If the produced evidence is not enough for the authority's conviction, due process of law requires the defendant's acquittal.

On this matter, it is important to note that for a long time prevailed in Brazil the understanding that a certain conduct would only be considered a violation upon assessment of its

³ MELLO, Celso Antonio Bandeira de. *Procedimento Administrativo in Direito Administrativo na Constituição de 1988*. São Paulo: Revista dos Tribunais, 1999. p. 26.

effects and damages to the market. However, in recent cases CADE did not strictly follow this understanding and convicted economic agents based on the assumption that certain conducts would be considered violations regardless of the actual assessment of its true damages to the economic order. That was the case, for example, when CADE convicted a Brazilian company for establishing minimum resale prices in the *SKF* case⁴. In this opportunity, CADE ruled that after assessment of an agreement executed by the company establishing minimum resale prices, unlawfulness of such conduct could be presumed. Thus the defendant should bear the burden of proof and dissuade the authority from considering such conduct a violation. In theory, this decision may give rise to questions as to its conformity to the principle of material truth and, consequently, with the due process of law.

2. Extensive Fact-Finding Phase

As stated above, CADE must always strive for the material truth in its administrative processes. And the path for obtaining the material truth necessarily requires a detailed assessment of the facts, by means of an extensive fact-finding phase. Accordingly, the defendant is entitled to present and have access to all relevant evidence concerning the facts under discussion that may possibly influence the proceeding's outcome. Even though this right should be unlimited to the defendant, it must be restricted to evidence pertaining to the facts assessed in the process. Production of unnecessary evidence that could potentially delay the proceeding's conclusion must be avoided. In any case, however, it is important to note that CADE's primary duty is to prove the alleged violation, and the lack of evidence as to the actual perpetration will determine the defendant's acquittal.

Evidence produced by the defendant must be specified upon filing of its defense and is subject to the General Superintendence's approval. In fact, the General Superintendence has at the same time the powers and the legal duty to determine the production of evidence that might influence CADE's judgment and thus guarantee the exercise of the right of full answer and defense.

An interesting issue concerning this matter is the legal provision that establishes that the defendant may indicate up to 3 (three) witnesses, according to Article 70 of the Brazilian Antitrust Law. At first, this provision may seem harmful to the defendant, since the absolute limitation on the number of witnesses could represent a restriction to the right of full answer and defense, especially when the accusation relates to multiple facts and conducts. In such cases, making an analogy from Article 357, Paragraph 6, of the Brazilian Code of Civil Procedure, it is possible to sustain that this limitation would apply to each of the alleged facts. On the other hand, since the Brazilian Antitrust Law allows the Reporting Commissioner to determine production of complementary evidence, new relevant evidence presented by the parties and deriving from such complementary proceedings should be granted.

The right to an extensive fact-finding phase is comprised of the right to present evidence as well as to keep track of the production of such evidence. This follow-up, however, does not prevent the use of the so-called "borrowed evidence", that is, evidence lawfully obtained from another administrative or judicial proceeding. It is customary for CADE to make use of evidence obtained

⁴ Administrative Process No. 08012.001271/2001-44, decided by the Tribunal on January 30, 2013.

in criminal processes. This has been confirmed by the Brazilian Courts more than once, even by the Federal Supreme Court. However, the defendant shall have the right to question the use of such borrowed evidence, due to his/her right to an adversary system, as will soon be explained.

In any case, evidence used by CADE must be obtained according to the law. The Federal Constitution expressly establishes that "the evidence obtained through illicit means is unacceptable".⁵ Thus, any evidence obtained in a manner that does not comply with the legal terms is not effective and affects the decision issued by the Tribunal, since it will be based on unlawful evidence. Such was a recent ruling of the Brazilian Federal Justice annulling a decision issued by CADE in an administrative process grounded on evidence that was illegally obtained in a criminal process:⁶

I - The decision issued by CADE in an administrative process convicting a company manager in the industrial and medical gases sector for cartel formation is null and void, given that it was based on evidence produced within the scope of a criminal proceeding, which was considered unlawful by the Superior Court of Justice.

II - This evidence cannot be considered independent since it was borrowed from the criminal process and constituted essential evidential basis for CADE's administrative process. In addition, the alleged mitigation of the unlawful evidence based on the theory of inevitable discovery is not applicable. It is not clear that the existence of the aforementioned cartel would be fatally proven without the information derived from the telephone interceptions presented before the court in the course of the criminal proceeding. On the contrary: evidence of anticompetitive practices that CADE possessed was not enough to lead to an administrative conviction for violations against the economic order.

III – The theory of the fruits of the poisonous tree according to Article 157 Paragraph 1 of the Code of Criminal Procedure is not applicable, but rather item LVI of Article 5 of the Federal Constitution, which prohibits the use of evidence obtained by unlawful means in any judicial or administrative process to guarantee the due process of law, since conviction imposed by CADE is based on evidence declared null in said criminal process. Precedent.

3. Adversary System

As explained above, the right for an extensive fact-finding phase implies the defendant's right to question all evidence presented in the process. This is guaranteed by another relevant principle CADE is subject to: the right to an adversary system, which is not restricted to the right to be heard and question allegations. This right also guarantees that the defendant is able to question CADE's allegations in a timely manner and in a way that influences the authority's judgment. It also requires that CADE specifies the accusations addressed to the party as a way to ensure his/her defense for specific and well-defined allegations instead of generic ones. As stated by Article 41 of the Brazilian Criminal Procedure Code, allegations must provide detailed description of the alleged

⁵ Federal Constitution, Article 5, LVI. Free Translation

⁶ Civil Appeal No. 0050545-45.2010.4.01.3400/DF, decided by the Brazilian Federal Justice (TRF 1) on November 16, 2016. Free translation.

facts. This rule also applies to administrative processes in CADE's scope. The Technical Note that initiates the process⁷ must detail the conduct of each of the defendants and provide the circumstances in which each one participated in the investigated fact, as stated by Commissioner César Costa Alves de Mattos:⁸

"It should be noted that the lack of description of individual conducts goes against Article 41 of the Criminal Procedure Code, which is based on the right of full answer and defense set forth by the Federal Constitution in Article 5, item LV. (...) In view of the divergences between the produced evidence and the administrative proceeding's allegations, it is demonstrated that, since the parties' individual conducts were not provided, there has been damage to the proceeding's course".

This was also ruled by the Brazilian Federal Courts in 2011, when a federal judge declared a decision issued by CADE to be null and void due to lack of individual description of each one of the defendants.⁹ Upon provision of a detailed description of the defendant's conduct in CADE's Technical Note, the party will be able to question the alleged facts and legal provisions applied by the authority. Once proceeding is in course, the terms described by the Technical Note may only be altered upon a new opportunity for the parties to question such amendment.

An essential aspect of the right to an adversary system is the right to be notified of the proceeding's initiation and so have the opportunity to participate during its course. According to the Brazilian Antitrust Law, notification must be sent by mail with return receipt or by any other means able to guarantee the defendant's knowledge of the process. If the defendant cannot be notified by such means, then he/she must be notified by means of publication in the Official Gazette or newspaper of wide circulation in the state which he/she resides.

4. Full Access to the Process

The right to an adversary system and an extensive fact-finding phase are meaningless if the defendant does not have access to the proceeding's records. That is why the parties must have access to all information that may be useful or necessary for their defense. In this sense, CADE's Internal Regulation sets forth that in compliance with the principles of the right to an adversary system and full answer and defense, the defendant shall have access to all documents considered by CADE for the imposition of sanctions for violations to the economic order.

Strictly speaking, defendants' right of access to evidence must go beyond the information and documents considered in CADE's decision. Defendants must have access to all documents presented in the proceeding. In certain cases, evidence not considered by CADE, or considered of minor relevance, may be considered by the defendant as necessary to his/her defense.

The law also sets forth that, as a general rule, documents produced in CADE's proceedings are not confidential and may be accessed by anyone. However, this right may be restricted in light of the preservation of legitimate interests, as stated by Article 49 of the Brazilian Antitrust Law, and

⁷ As per Article 69 of the Brazilian Antitrust Law

⁸ Administrative Process No. 08012.004989/2003-54 decided by the Tribunal on August 18, 2010. Free translation.

⁹ Proceeding No. 2007.34.00.043978-7, decided by the 4th Court of the Federal Justice on December 09, 2011.

Article 50 of CADE's Internal Regulation. This rule is compatible with the principle of publicity of procedural acts set forth by the Brazilian Federal Constitution, according to which "the law may only restrict the publicity of procedural acts when the defense of privacy or social interest so require"¹⁰.

5. Motivation

As stated before, conviction for violations to the economic order should never be discretionary and, furthermore, in principle it should not be based on presumptions, except where the law itself establishes that presumption.¹¹ It is CADE's responsibility to present actual evidence of the alleged violations and also point out which legal provisions have been infringed. The explanation must be clear and coherent, consistent enough to allow even the judicial assessment of the decision's effectiveness and possible amendment, as decisions with insufficient reasoning are considered null and void.

Motivation as an essential element of any decision issued by CADE also stems from Law No. 9.784/99, Article 50, which sets forth that all measures taken by public authorities be motivated and mention facts and legal provisions that support the decision, as well as from Article 93, 9, of the Federal Constitution, which establishes the principle of motivation of judicial decisions also applicable to administrative processes.

In order to comply with the principle of motivation, CADE's decisions must identify the conduct of each of the defendants, applying the same principles applicable to the Technical Note that initiates the administrative process. In the case of decisions rendered by the administrative authority, individualization of the defendant's conduct is essential to allow a possible discussion of the validity of this decision before the Judiciary.

CADE's duty to present a proper motivation has also been recognized in court. In 1996, CADE imposed a fine equivalent to 5% of a company's gross sales for violations to the economic order based on six aggravating circumstances set forth by the Brazilian Antitrust Law. The company questioned such ruling before the Federal Courts and proceeded to overturn it. The court understood that the antitrust authority did not provide enough facts and legal grounds to account for application of some of the aggravating circumstances. Due to the lack of proper motivation, the fine was reduced.¹²

Consequently, the duty of motivation entails the application of all other elements referred to before: express motivation and unrestricted access to documents in the proceeding allows the defendant to question CADE's ruling and ensures the right to an adversary system; an extensive fact-finding phase provides for proper motivation and thus the achievement of material truth. It also accounts for the application of rule *in dubio pro reo* in CADE's scope. According to Article 386 of the Brazilian Criminal Procedure Code, no one should be convicted unless there is enough evidence grounding such conviction. In essence, if investigation does not provide facts and legal grounds for

¹⁰ Article 5, LX. Free Translation.

¹¹ For example, the law presumes the existence of a dominant position where a party holds more than 20% of a relevant market (Article 36, Paragraph 2, of the Brazilian Antitrust Law).

¹² Civil Appeal No. 2004.34.00.013282-7/DF, decided by the Brazilian Federal Justice (TRF 1) on September 18, 2012.

proper motivation of the defendant's conviction, *in dubio pro reo* must prevail and the defendant, acquitted. This has been applied more than once by CADE's Commissioners where uncertainties regarding confirmation of the parties' conduct led to their acquittal.¹³

6. Loyalty and Good Faith

Among other principles that constitute the due process of law, one can mention loyalty and good faith, derived from the principle of morality set forth by Article 37 of the Federal Constitution. As per this provision, public authorities must conduct themselves loyally towards its citizens.

The principles of loyalty and good faith bring consequences not only to the course of the proceedings, but also to the defendant's conduct during the proceeding and to the effectiveness of CADE's roles as prosecutor (by the General Superintendence) and as judge (by the Tribunal). In both situations, the antitrust authority must act fairly, respect the defendant's rights and comply with all principles that guarantee the due process of law.

Additionally the Tribunal must also pay attention to the effects of its own decisions. As explained before, the Tribunal is composed of a group of Commissioners that changes from time to time. It is, then, expected that decisions and legal understandings issued by the agency undergo modifications, either because of the Commissioners' particular understanding or because of changes in opinions concerning legal or economic matters. On the other hand, CADE's decisions guide economic agents' behavior in the market, especially regarding compliance of their conduct with the law. Sudden changes of understanding could bring about uncertainties concerning application of legal provisions and result in sanctions to economic agents whose behavior was based on the Tribunal's former understandings.

Concerning this matter, Supreme Court Justice Luis Roberto Barroso stated that even Brazil's highest court (the Supreme Court) must weigh in the consequences that changes of interpretation on a given matter could bring and preserve any acts practiced in accordance with the previous understanding. According to him, precedents are not enduring, but cannot be changed lightly. When the court decides to overcome a consolidated understanding, it cannot and should not do so regardless of legal certainty and the people's expectations. The Brazilian Courts are not prevented from changing their understanding on a particular issue; they are allowed to either adapt to new facts or simply overcome previous interpretation. In doing so, however, authorities are bound by the constitutional principle of legal certainty, by virtue of which the legal condition of individuals who proceeded according to the previous understanding should be protected.¹⁴

7. Conclusion

In light of the above, the Brazilian Federal Constitution assures the parties the right of full answer and defense, granting them all the guarantees of the due process of law. Ergo, the Brazilian

¹³ Administrative Process No. 08012.006241/97-03, decided by the Tribunal on October 7, 2009; and Administrative Process No. 08012.004086/2000-21, decided by the Tribunal on September 23, 2005.

¹⁴ BARROSO, Luis Roberto. *Temas de Direito Constitucional*. Tomo IV. Rio de Janeiro: Forense, 2009.

Antitrust Law and CADE's Internal Regulation set forth compatible rules aiming to comply with the constitutional provisions and to grant the parties the right to an adversary system and the opportunity to produce and have access to all presented evidence.

Since the enactment of the current Brazilian Antitrust Law, CADE has complied with the due process of law and acknowledges it as essential to the effectiveness of its decisions, especially because proceedings that do not comply with these terms are subject to annulment. In addition, it is important to mention that the antitrust authority's final decision will always be subject to reversal by the Brazilian Courts, as it is the responsibility of the Judiciary, in the system of checks and balances established in the Brazilian Federal Constitution, to examine the administrative decisions' lawfulness whenever they are challenged and to guarantee the strict observance of the due process of law.

According to a study prepared and presented in a meeting organized last year by IBRAC's Economic Litigation Committee, directed by Dr. Bruno Drago and coordinated by Dr. Bruno Lana Peixoto, 18% (eighteen per cent) of the lawsuits filed against CADE's decisions questioning issues related to compliance with the due process of law resulted in changes to the antitrust authority's ruling. This shows the relevance of the issue. CADE has been increasingly active in its role to ensure the constitutional principles of free competition, freedom of initiative, consumer protection and prevention of the abuse of economic power, especially concerning cartel formation. And, in attention to the outlined constitutional guarantees, CADE has consistently sought to assure the parties the right to a full answer and defense and the Brazilian Courts remain attentive to the compliance of such guarantees by CADE and all other governmental authorities.

CHAPTER 14 - EXCHANGE OF SENSITIVE INFORMATION BETWEEN COMPETITORS

Camila Pires da Rocha
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1. Introduction

Exchange of information among competitors is a common practice in the current information age. From indirect information exchange mediated by market intelligence aggregators, class associations and government agencies to unilateral research conducted by private companies, there is a constant flow of relevant data permeating the ongoing business practice.

The purposes of information gathering are multifaceted. It is well established that obtaining information regarding the state-of-the-art practices of the market leader is a salutary method for improving the competitiveness and general welfare.¹ Likewise, aggregated market data such as total consumer growth can help companies to guide their investment decisions and be prepared to meet the demand of potential customers.²

On the other hand, information sharing among competitors can be both a powerful incentive for coordinated practices and an indispensable tool for monitoring such practices. Antitrust authorities universally recognize that exchange of sensitive market data among competitors has a vital importance on the implementation and stabilization of price fixing, market allocation and other conducts generally considered as anticompetitive. In fact, some jurisdictions consider that some types of information sharing can be characterized as price-fixing agreements in their own right.

It is therefore imperative that companies have orientation from the antitrust authorities to guide their gathering and sharing of information.

This chapter intends to investigate CADE's current position on the matter of information exchange among competitors. Section 2 provides a brief description of the international experience on the theme. Section 3 examines CADE's precedents under both Law No. 8,884/94 and Law No. 12,529/11, emphasizing cases currently under CADE's analysis that, judging from an external perspective, could provide a good opportunity to establish guidelines regarding data sharing practices. Lastly, Section 4 summarizes the main conclusions.

¹ WHISH, Richard. *Competition Law*. 6th ed., Oxford University Press, 2009, p. 525.

² EUROPEAN COMMISSION. European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements., p. 110. Available at <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)>. Access on March 20, 2017.

2. International practice

It is important to distinguish among the different modalities of information exchange to provide a meaningful analysis of their treatment by antitrust authorities worldwide. A useful approach is provided by WHISH and is summarized as follows³:

- (i) Exchange of information in support of an anticompetitive practice;
- (ii) Discussions about current and future prices, apt to be characterized as price-fixing agreements in their own right, and
- (iii) ‘Pure’ exchanges of information.

There is a practical consensus in the international practice and literature regarding the illegality of the first two categories. Usually, the factual determination of future prices discussion at a specific case analysis is considered as sufficient evidence of anticompetitive agreements.⁴ The core of the discussion proposed by this chapter is related to the third kind of data sharing mentioned above: “Pure” exchanges of information, not involving future price discussion.

The European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements dated 14 January 2011 (“E.U. Guidelines”)⁵ emphasizes the ambiguity of potential data sharing effects. While this behavior can result on efficiencies ranging from mitigation of information asymmetry to development of internal efficiencies within the companies, it is also known to stimulate hardcore anticompetitive agreements between competitors, via reduction of communication barriers.

The main policy guideline provided by the EU Guidelines is summarized by its item 60: “*The information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings*”.

According to such standard, information exchange agreements are not considered *per se* infractions under European Law; they must be inserted on the context of a concerted practice, the object of which is to substitute the risks of competition for practical cooperation between competitors.⁶

The E.U. Guidelines continuously remark that the analysis of potential effects of the information exchange agreement must be assessed on a case-by-case basis, according to specific market characteristics. The nature of the shared data also plays an important role and should be investigated on axes such as market coverage (completeness of information), level of aggregation

³ WHISH, Richard. *Competition Law*. 6th ed., Oxford University Press, 2009, pp. 523-525.

⁴ “[P]rivate exchanges between competitors of their individualized intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities”, European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, item 59

⁵ EUROPEAN COMMISSION. European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Available at <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)>. Access on March 20, 2017.

⁶ “In *Asnef-Equifax v Ausbanc* the ECJ referred to both the *John Deere* and the *Thyssen Stal* judgements when it said that: ‘According to the case-law on agreements on the exchange of information, such agreements are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted’. WHISH, Richard. *Op. cit.*, p. 526.

and age. The object of the individual analysis is to investigate the probable effects to competitive conditions originating from such behavior.

There has been some criticism regarding the context-heavy analysis determined by the Guidelines. As mentioned by PAPP, “*the assessment of information exchanges is necessarily so context-specific that the guidance provided in the Guidelines is of very limited value. With a grain of salt, the Guidelines state that the exchange of information between competitors may be problematic whenever the information has any strategic value, and that there are no safe harbours*”.⁷

The E.U. Guidelines place a distinctive importance on the emergence of market efficiencies resulting from the information exchange. The Guidelines admit the existence of markets in which certain data sharing among competitors could result on added benefits to both consumers and competitors, which would outweigh the potential for added stimuli to collusion⁸.

The Antitrust Guidelines for Collaborations Among Competitors issued by the U.S. Department of Justice and the Federal Trade Commission dated April 2000 (“U.S. Guidelines”)⁹ present a similar case-by-case approach.¹⁰

The U.S. Guidelines express that “*the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations*”, and recognize that “*the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared*”.

⁷ PAPP, Florian Wagner-von. *Information Exchange Agreements*. SSRN Electronic Journal, March 2012, available at https://www.researchgate.net/publication/228322816_Information_Exchange_Agreements. Access on March 20, 2017.

⁸ The European literature on the theme also emphasizes the necessity for preserving market efficiencies resulting from appropriate data sharing: “[S]ome undisputedly pro-competitive or efficient arrangements necessarily involve an exchange of information as a ‘side effect’. Increasing transparency for consumers almost certainly also brings the information to the attention of competitors. Nearly all legitimate cooperation between competitors involves some information exchange. Too restrictive an approach to the exchange of information could chill these pro-competitive or efficient ventures.”. PAPP, Florian Wagner-von. Op. Cit. See also WHISH, Richard. Op. Cit., p. 525.

⁹ Available at <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>. Access on March 20, 2017.

¹⁰ The overlap between the E.U. Guidelines and case law and its U.S. counterparts is highlighted at OECD’s “Policy Roundtables: Information Exchanges between competitors under Competition Law” dated 2010, which summarizes the points generally analyzed by antitrust authorities as follows: “*Competition agencies have identified a number of factors that they examine when assessing the legality of information exchanges. These relate to the (i) structure of the affected market, (ii) characteristics of the information exchanged and (iii) the modalities in which the information exchange takes place. (...) The structure of the market and levels of concentration is an important factor in determining how anti-competitive information exchanges are, given that achieving and sustaining collusion is easier in more concentrated markets with a small number of players (...) The nature of the information exchanged is another crucial factor in competitive assessment because not all information has the same collusive potential or necessarily has to be exchanged in order for the benefits of increased transparency to be reaped. In this respect, competition agencies in their assessment distinguish between the various characteristics of the information exchanged, such as the subject matter, the information age and level of aggregation (...) The way in which information is exchanged is also generally considered by competition agencies in their assessment. Companies can exchange information either directly, through third parties or they may establish public information sharing schemes*” Available at <<http://www.oecd.org/daf/competition/cartels/48379006.pdf>>. Access on March 20, 2017.

The criticism regarding the broadness of the E.U. Guidelines is applicable to the U.S. Guidelines. There are no safe harbors for the companies to rely on in order to build their information exchange policies. The U.S. Guidelines provide solely general remarks on the nature of the information shared, highlighting that some data (e.g., current and future market information) are more sensitive than others (e.g. historical information).

The U.S. case law on the matter presents more solid orientation to the market, albeit on a very strict basis; as described by the ABA's Antitrust and Associations Handbook, for example, sets forth "*an antitrust safety zone for an information survey that meets certain criteria: - the survey is managed by a third party, such as a purchaser, government agency, industry consultant, academic institution, or trade association; - the information provided by survey participants is based on data more than three months old; and; - there are at least five providers reporting data upon which each disseminated statistic is based; no individual provider's data represents more than 25 percent on a weighted basis of that statistic; and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider*". The narrowness of such instructions reduces their value as an effective guide to market agents.

Analyzing U.S. case law, FOX remarks that "[w]hen information exchanges involve certain kinds of data, and certain modes of exchanging it, the dangers of oligopolistic price coordination and ultimately a real price-fixing conspiracy may be high. Risky subjects of data exchange include: current practices, costs and output; plans for future prices and output; predictions or advice for future and output for one's firm or for the industry. The riskiest mode of exchange is direct personal contact with competitors. Because of the anticompetitive dangers, antitrust lawyers frequently advise that competitors should never exchange facts or predictions about current or prospective price, cost and output. Further, they should never exchange industry information by direct personal contact with competitors, except that they may discuss common economic problems and trends. Discussion of economic problems common to the industry frequently takes place at trade association meetings".¹¹

Especially regarding the role of associations, FOX states that: "Trade associations frequently compile industry data, including price and production information, and distribute it to their members. Antitrust precautions include the following: 1. Gather information as to past transactions only; 2. Use an independent person (not an employee of any of the members) to receive and compile the data, so that no member sees the raw data of its competitor; 3. Disseminate the information in aggregated form only, so that members cannot attribute information to individual firms".¹²

Besides the U.S. and E.U. Guidelines and case law, it is worth mentioning the directions provided by the OECD's Policy Roundtable and COFECE's (Mexico's antitrust authority) Information Exchange Guidelines as references in this matter. These documents have been cited by CADE, as described in Section 3 below.

¹¹ FOX, Eleanor M. Cases and Materials on U.S. Antitrust in Global Context. 3rd Ed., West, 2012, p. 531.

¹² FOX, Eleanor M. Op. Cit., pp. 531-532.

3. CADE's precedents

It is remarkable that, during CADE's early precedents under the previous Brazilian Antitrust Law (Law No. 8,884/94), there has been no consideration of information exchange behavior as an autonomous violation.¹³

It is, however, worth mentioning that the former Secretariat of Economic Law, the administrative "prosecutor" of antitrust violations under Law No. 8,884/94, has provided the market with an orientation document ("Combate a Carteis em Sindicatos e Associações" dated 2009, hereafter referred as "Guidebook")¹⁴ which contains guidelines on the nature of the information exchange which could potentially be considered harmful.

The Guidebook instructs companies and associations to preferably provide information under the conditions that the data: (i) refers to historical information; (ii) is presented in an aggregated manner; (iii) is collected by independent parties ("black box"); (iv) is provided at no cost, and (v) is publically disclosed to the association's members and non-members alike. Such orientation is similar to what is recommended in the U.S. and E.U. Guidelines.

Since the enactment of Law No. 12,529/11, which substituted Law No. 8.884/94 as the main Brazilian antitrust law source, did not provide any innovations on the treatment of the matter, we believe that the dispositions exposed by the Guidebook are still applicable under the current law.

In an attempt to provide helpful guidance to the public, CADE has published, over the past years, a few guidelines, including one that concerns the analysis of previous consummation of merger transactions ("Gun Jumping Guideline").¹⁵

In such paper, CADE indicates what sort of information is regarded as competitively-sensitive and, therefore, should not be exchanged among competitors: "*In general, competitively-sensitive information (therefore deserves of parties' special attention) is specific (e.g. non-aggregated) and directly related to the performance of the economic agents' core business. Such information may contain specific data about: a) costs of the companies involved; b) capacity level and plans for expansion; c) marketing strategies; d) product pricing (prices and deductions); e) main customers and deductions ensured; f) employees' wages; g) main suppliers and the terms of the contracts signed with them; h) non-public information on marks and patents and Research and Development (R&D); i) plans for future acquisitions; j) competition strategies, etc*".

Although the Gun Jumping Guideline constitutes specific orientation for the assessment of information exchange in pre-merger scenarios, it gives an important indication for what, according to CADE's interpretation, consists sensitive data. Its content is quite similar to the Guidebook's.

¹³ "[D]ata sharing has currently a subsidiary character, as an additional element to configure other illicit behaviour (cartel), or even in cases of collaborative mergers, not existing any precedents from CADE in which the behavior has been analyzed as a potential autonomous anticompetitive practice independent from the occurrence of cartel, even if such behavior is absent or not subject to proof" MONTEIRO, Alberto Afonso. Troca de Informações entre Concorrentes: limites e possibilidades da configuração de prática anticoncorrencial autônoma. Revista do Ibrac, São Paulo, v. 20, No. 23, p. 97–114, jan./jun., 2013.

¹⁴ Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_leniencia.pdf>.

¹⁵ Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf>. Access on March 20, 2017.

CADE's case law in the past five years is not set in stone regarding information exchange. This may be related to the fact that in earlier cases CADE has not properly distinguished the pure exchange of information from hardcore cartels. Apparently (and hopefully) this situation has been changing. Various technical notes that initiated administrative proceedings in the last months have a general indication that the exchange of information will be analyzed, from now on, according to a fixed criteria and in an independent fashion.

The exception in CADE's case law is the investigation against the Associação Brasileira dos Fabricantes de Brinquedos ("ABRINQ") and its former president, initiated in 2006¹⁶ and decided in 2015.

Contrary to previous CADE's votes on the case, in 2015, CADE's President Vinícius Marques de Carvalho¹⁷ and Commissioner Paulo Burnier¹⁸ understood that ABRINQ acted beyond its rights and in a potentially anticompetitive manner by impelling its members, which were competitors, to share and discuss sensitive data.

Besides analyzing facts and findings, Commissioner Paulo Burnier devoted a whole section of his ruling to establish his understanding about what type of information should not be shared and discussed among competitors.

Likewise the guidelines referred in previous sections, he stressed that it is advisable, in order to avoid antitrust risks, for competitors and associations only to share aggregated data. He adverted that information like prices and quantities discussed among competitors are usually considered sensitive and may raise concerns.

¹⁶ Administrative Process No. 08012.009462/2006-69, Reporting Commissioner Olavo Zago Chinaglia, decided by the tribunal on August 19, 2015. Although this administrative proceeding was initiated during the validity of Law No. 8.884/94, making it the applicable provision, it will be analyzed in this section once the final ruling was taken only in 2015, that is to say, after the enactment of Law No. 12.529/11.

¹⁷ "The case is that this is not ABRINQ's prerogative, nor it was delegated to it at any time by SECEX, and it couldn't even be delegated to it since it regards an extremely sensitive theme from an antitrust perspective, and which must be treated individually by the companies on the sector – their joint discussion could reveal internal data from the companies' competitive strategies. Suggesting an average price to the government, even if it is still a legitimate prerogative from the association and can be understood as such as sector lobbying, cannot result on sharing of confidential and competitively sensitive information between players – and this would exactly be the consequence of ABRINQ's behavior. How much each domestic company sells, as well as how much each importer procures internationally, should not be available to competitors, since the possibilities of coordination and collusion that result from the sharing of such data are many, especially in a context such as a meeting". Excerpts extracted from items 60 to 62 of President Vinícius Marques de Carvalho's vote.

¹⁸ "The case files show that ABRINQ encouraged an open and transparent discussion regarding the quantities imported by the companies present in the meeting. The allegation that the companies were sharing publicly information must be weighted with the fact that they were being discussed in the presence of various competitors. It seems sensitive to me from the antitrust viewpoint (...) [A]n association's board, as per request of its members, could be empowered to collect data of the members, in an individual and confidential fashion, in order to, afterwards, use them aggregated (...). That would avoid the sharing of sensitive information between the members of the association (...) Evidently the information exchange is a common activity for the associations, because it can result in important benefits for their members. For example, periodic reports on potential changes in the political scenario, technological innovations that allow reduction in the production costs or legislative alterations with impact on taxes. Notwithstanding, the sharing of information between competitors should always be parsimonious in such a way to avoid the interchange of competitively-sensitive pieces of information, such as prices in general, discount policies and customer portfolio". Excerpts extracted from Commissioner Paulo Burnier's vote, items 58 to 62.

He also highlighted that some information exchange is considered notably problematic when held in a forum attended by top executives with powers to implement commercial policies and strategies in their respective companies.¹⁹

The analysis of the Gun Jumping Guideline and the leading case on the matter shows that CADE still resorts to the rationale contained in the Guidebook elaborated back in 2009 to assess information exchange.

4. Pipeline cases: what we can expect

Albeit there is no strong case law concerning information exchange between competitors that can be used as a solid guidance by society, there are some interesting cases in the pipeline that can be used by CADE as a platform for indicating to the business community what kind of data sharing is safe and therefore will be admitted by the antitrust agency.

In this new batch of administrative proceedings,²⁰ CADE has been including a standard section explaining that information exchange will be specifically addressed in these cases.

In this section, CADE expressly recognizes the potential benefits resulting from certain data sharing for the market and even for consumers. As mentioned on section 2 above, CADE also recurs to OCDE roundtable and to the Guidelines on Information Exchange between Competitors by COFECE to list all the aspects that have to be taken into consideration when assessing the lawfulness of the information sharing: *Regarding the potential pro-competitive effects of the information sharing among competitors, there are gains related to the reduction of the informational asymmetry, as long as benefits can be passed on to the consumers (...)* Besides that, such increase in transparency could also promote an improvement for companies' performance that, by means of the access of certain market information, would be able to adopt more efficient strategies. *Regarding the anticompetitive effects, it is understood that the data sharing can facilitate collusion (...)* In order to verify the possibility of anticompetitive outcomes the following aspects shall be considered, according to OCDE and COFECE: a) the character of the information (...); b) the market's structure (...); c) by which means the information is exchanged (...)"

¹⁹ "Indeed, the argument espoused by the Defendants – that they only discussed prices per kilogram imported – partially mitigates the risks of such behavior. Nevertheless, it seems important to question whether it would be convenient to discuss price information among so many competitors, particularly taking into account the profile of the representatives of the companies that attended this meeting. The individuals that were present hold decision-making powers in their respective companies, including the design of internal policies and commercial strategies. Prima facie, the sharing of price information among top executives does not seem to be healthy through the antitrust perspective. The possibility of price parallelism or even a collusive behavior – tacitly or expressly – among competitors raises concerns (...)" Excerpt extracted from page 11 of Commissioner Paulo Burnier's vote, items 49 to 51.

²⁰ E.g. Administrative Process No. 08700.008182/2016-57, which investigates determinate behavior on the Brazilian onshore exchange market, and Administrative Process No. 08700.006386/2016-53, regarding communications between participants of the car parts industry.

5. Conclusions

As noted above, CADE has not established yet a comprehensive orientation regarding the sharing of information among competitors. The business and antitrust communities are, until now, in need of more comprehensive instruction on what kind of information can be shared among competitors (and by which means) without raising antitrust concerns.

CADE is expected to enact orientation to market agents through its decisions. The new approach in the opening technical notes addressing specifically the information exchange is a step forward on the fulfilment of such objective; in order to further establish a consolidated case law on the matter, it is also necessary that CADE assesses the information exchange behavior independently from hardcore cartel behavior (unless the data sharing is a part of the cartel behavior and, thus, is absorbed by it) and analyzes thoroughly all the aspects pointed out above.

The development of a reasoning that follows all these steps is indispensable for the agency to conclude that the investigated behavior has the potential to harm competition and, therefore, regard it as anticompetitive.

Only well-founded decisions will be able to build a hefty orientation to the market and will be sustainable before the courts.

Such need was already stressed by Commissioner Paulo Burnier: *“I believe CADE’s judgement sessions can serve as a discussion forum, drawing on the cases to signal the private sector which would be some ‘safe harbors’ on the fields of associative behavior, such as done at the ABAV/RJ case indicating the presumption of illegality of price charts. This is the main reason for this ‘signaling’ section, regarding specifically Exchange of information in the context of associations, without prejudice of other associative activities that could also result in competitively illicit behavior and deserve all attention from antitrust authorities, such as price charting, standard setting organizations, among others”*.²¹

It is also important to notice that the shelved cases are as relevant for guidance as the ones that result in convictions. That is because it is fundamental for the agents to fully understand when and why an investigated information sharing behavior is not considered anticompetitive.

Based on such considerations, we expect that CADE, in the next five years, besides carefully reasoning conviction decisions, also devotes time and resources to justify meticulously the decision of shelving an accusation, exploring in detail all the motives that led the authority to the conclusion that the behavior is not harmful to the market.

The delivery of rigorous and attentive decisions is the only manner of establishing a solid understanding on the matter and providing guidance to the antitrust and business communities.

²¹ Excerpt extracted from the vote of Commissioner Paulo Burnier on the Administrative Process No. 08012.009462/2006-69, decided by the Tribunal on August 19, 2015, item 66.

CHAPTER 15 - FIVE YEARS OF ANTI-CARTEL ENFORCEMENT UNDER THE NEW BRAZILIAN ANTITRUST LAW: HOW CHANGES IN THE COMPETITION REGULATORY FRAMEWORK BALANCED THE DECISION MATRIX IN FAVOR OF COOPERATIVE SOLUTIONS

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Michelle Machado
Frederico Donas

1. Introduction

The fight against anticompetitive practices in Brazil has undergone several major changes over the last two decades. Law No. 8,884, enacted in 1994, was amended in 2000 to provide the Brazilian antitrust authorities with the necessary legal tools to create a leniency program and to carry out judicially authorized dawn raids.¹ With the execution of the first leniency agreement in 2003,² fighting anticompetitive practices³ became a top priority in Brazil.

The enactment of Law No. 12,529, dated November 30, 2011, reinforced CADE's authority to investigate and prosecute cartels.⁴ CADE has increased its cooperation with other Brazilian authorities engaged in prosecuting cartels, which has changed the way CADE investigates, prosecutes, and punishes cartel practices. The result was an increase in the number of cartel investigations, as well as in the number of leniency agreements and settlements executed with companies and individuals involved in such practices.

The changes that began in 2000 and were accentuated with the enactment of the Brazilian Antitrust Law had a direct impact on the factors to be taken into account by companies and individuals investigated for cartel in Brazil when developing the case strategy. The purpose of this paper is to analyze how these factors were influenced by the changes in the competitive regulatory framework, and how they affect the defendants' decision-making process.

¹ At the time, Law No. 8,884 was the statute dealing with antitrust violations at administrative level in Brazil. The changes were made by Provisional Measure 2,055-4, which was later became Law No. 10,149. During the term of Law No. 8,884, there were three competition authorities in Brazil: (i) SEAE focused in the analysis of the merger reviews, (ii) the Secretariat of Economic Law ("SDE") was responsible for investigating anticompetitive practices, and (iii) CADE decided the different cases.

² Administrative Process No. 08012.001826/2003-10, decided by CADE on September 21, 2007.

³ CARVALHO, Vinícius Marques. *et al. Defesa da concorrência no Brasil: 50 anos*. Brasília: CADE, 2013, p. 89.

⁴ Law No. 12,529 unified and consolidated the functions of judgment and investigation on CADE, which is comprised of the Administrative Tribunal for Economic Defense, the General Superintendence, and the Department of Economic Studies. The SDE was extinct and the role of the SEAE became limited to the promotion of competition in other government agencies.

2. Key factors affecting the case strategy

The first and most important decision a company or individual facing an antitrust investigation has to make is whether to defend or settle the case. This is not a one-time decision either; it is an iterative process instead, which is refined and redefined during the course of each stage of the investigation. The optimal strategy for defendants is one that minimizes or eliminates their exposure to the risks associated with a conviction.

The analysis of the nature of the conduct investigated, the characteristics of the allegedly affected market, and the volume and kind of evidence presented is a starting point to assess if a case can be successfully defended. Obviously the weaker the evidence and liability of the defendant, the greater the chances of success of the defense. On the other hand, the clearer and more compelling the defendant's liability, the greater the incentives to settle.

Other factors come into play and their relative importance varied greatly before and after the Brazilian Antitrust Law came into force: the duration of the investigation; the conclusion of agreements by other defendants and their willingness to cooperate with the investigation; levels of administrative, civil and criminal sanctions against and individuals involved in the illegal conduct; the cooperation between CADE and other enforcement authorities.

2.1. Duration of the investigation

A recurring criticism of CADE's performance has always been the long duration of administrative processes. Before the entry into force of the Brazilian Antitrust Law, the Brazilian antitrust authorities were hobbled by an inefficient merger review process that was slow and occupied too many resources.⁵ More than 600 operations were notified annually to CADE every year, with average processing time exceeding 150 days.⁶ This large volume of transactions to be reviewed, coupled with the shortage of qualified professional staff and high turnover took their toll on the ability of the Brazilian authorities to close investigations.

When the Brazilian Antitrust Law came into effect in May 2012, CADE had more than 800 cases in backlog; more than half of these cases were conduct investigations.⁷ The 2010 OECD peer-review report indicated that the fact-finding phase of the investigations alone varied between two and six years,⁸ and even such long period was frequently exceeded. Table 1 shows the total elapsed time from the beginning to the end of the most relevant cases dealt by the Brazilian antitrust authorities in the past 16 years.

⁵ Until the entry into force of the Brazilian Antitrust Law, Brazil was one of the few countries that still adopted a post-merger filing regime in which parties were allowed to implement the transaction merger before CADE's approval.

⁶ CADE. Balanço de 4 anos da Lei 12.529/2011. Available at <www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-4-anos-nova-lei-1.pdf/view> Access on March 2, 2017.

⁷ In May 2012, there were 444 conduct investigations in backlog, of which 320 were still in the fact-finding phase and 124 awaited judgment by CADE's Tribunal (ibid.).

⁸ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. Competition Law and Policy in Brazil: A Peer Review (2010). Available at <www.oecd.org/daf/competition/45154362.pdf>. Access on March 2, 2017.

Table 1 – Elapsed time in CADE’s most relevant cases

Year	Case	Elapsed time
2000	Anesthetist Association	2 years and 11 months
2001	Shipyard Cartel	1 year and 1 month
2002	Carbon Dioxide Resale	4 years and 9 months
2003	Fuel Resale in Minas Gerais	4 years and 8 months
2004	Microsoft/TBA ⁹	5 years and 4 months
2005	Steel Bars	6 years and 6 months
2006	Driving Schools	1 year and 5 months
2007	Security Guard Services	4 years and 7 months
2008	Sand Extraction	3 years and 5 months
2009	“Tô Contigo” Case ¹⁰	5 years and 2 months
2010	Industrial Gases	6 years and 9 months
2011	Fuel Resale in Guaporé	9 years and 2 months
2012	Peroxide	8 years and 6 months
2013	Air Cargo	8 years
2014	Cement	8 years and 10 months
2015	Fuel Resale in Vitória	8 years and 8 months
2016	Orange Juice	17 years ¹¹

The consolidation of the antitrust enforcement functions into one agency by the Brazilian Antitrust Law allowed CADE to concentrate efforts to reduce the backlog of cases. At first, the focus was to conclude the review of all transactions submitted under Law No. 8,884. The objective was to release resources to be devoted to illegal conduct cases, thereby reducing the time required for the final disposition of cases.

CADE’s efforts have paid off: the backlog of investigations fell by almost half between 2012 (444 cases) and 2016 (257 cases). There is now a balance between the number of open cases and closed by CADE’s General Superintendence.¹² Investigations have also become more agile.

⁹ Tying and bundling investigation.

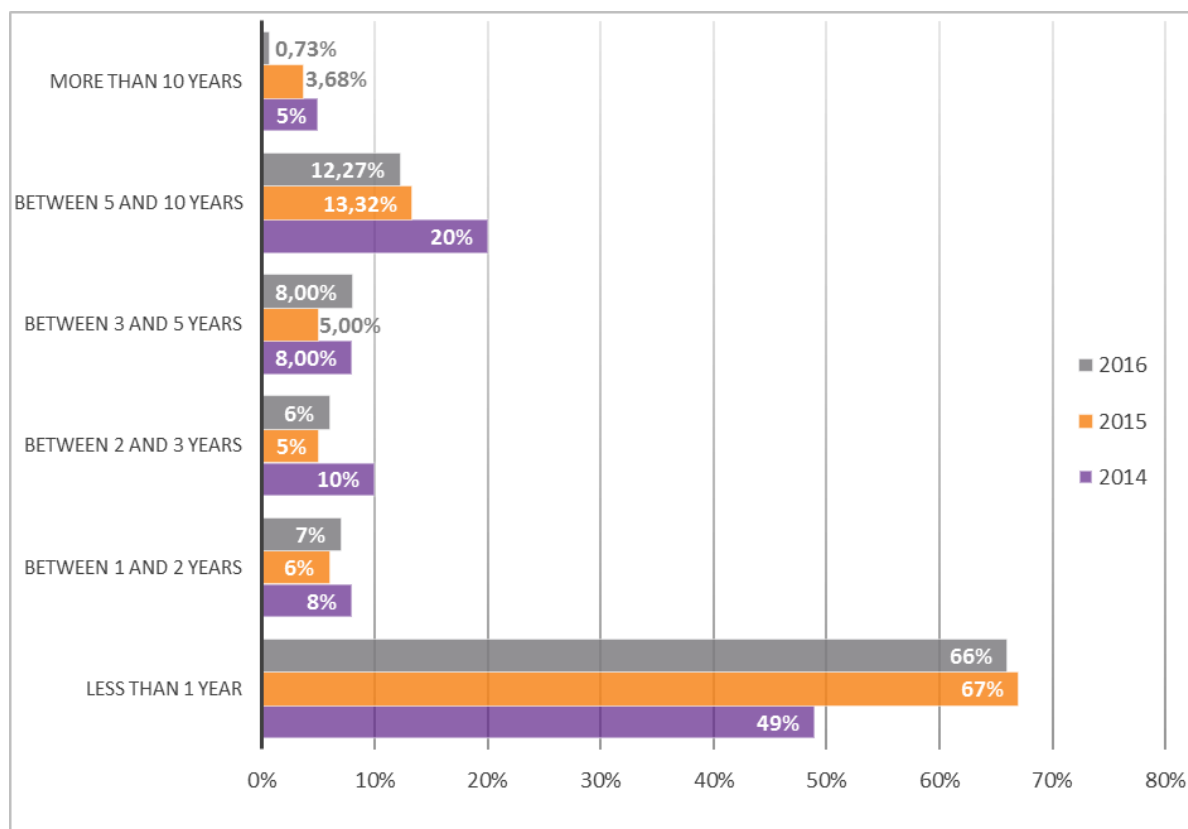
¹⁰ Investigation of abuse of dominance by Ambev, Brazil’s largest beer producer.

¹¹ CADE’s investigation was not concluded until all the defendants had entered into agreements with the authority.

¹² CADE’s General Superintendence opened 248 new cases in 2016, while 258 cases were closed and the matters sent to CADE’s Tribunal.

Chart 1 below shows the result of the effort put in by the General Superintendence in reducing the duration of conduct cases.¹³

Chart 1 – Time of processing of the cases by CADE’s General Superintendence



2.2. Leniency and settlement programs

CADE’s developments in the fight against cartels can be directly traced to the undisputed success of the leniency and settlement programs. Both instruments have proven to be very effective tools to prevent and punish cartels.

Leniency agreements confers the applicant full or partial immunity from applicable penalties. Full immunity is only possible when the applicants contact the authorities before they have any knowledge about the conduct. Otherwise, the applicant would only be conferred partial immunity, and the applicable penalty could be reduced by one to two-thirds. The Brazilian leniency program also contains a ‘leniency plus’ provision, by which any co-participant in a cartel who comes forward with evidence regarding another collusive conduct still unknown to the CADE will be granted a reduction of one-third on the penalties imposed in the original investigation, and full immunity for the second practice (for which it was the first-in).

¹³ CADE. Balanço 2016. Available at <www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf/view> Access on March 2, 2017.

Other companies of the same economic group as the applicant also benefit from the leniency agreement, as well as current and former employees that also sign the agreement.¹⁴ The leniency agreement also shelters these individuals from criminal suits and sanctions, as the Public Prosecution's Office cannot file a criminal suit against such individuals. An important innovation of the Brazilian Antitrust Law is that the immunity conferred by the leniency agreement now relates to all cartel related crimes, including bid rigging.¹⁵

The applicant must report and confess the wrongdoing, commit to cease the illegal conduct and to cooperate with the investigations in order to be entitled to the immunity conferred by the leniency agreement. A major breakthrough brought about by the Brazilian Antitrust Law is that the head and leader of the cartel can now benefit from the leniency accorded by the authority. Two reasons motivated this change: first, because it was difficult to determine which of the cartel participants was a leader; second, because denying leniency to a leader had the effect of precluding access to a party that probably has the most information about the cartel.

Leniency agreements are used with increasing frequency in Brazil. Since the first leniency agreement was executed in 2003, CADE has entered into 70 leniency agreements¹⁶ with companies and individuals that had engaged in cartel activity.

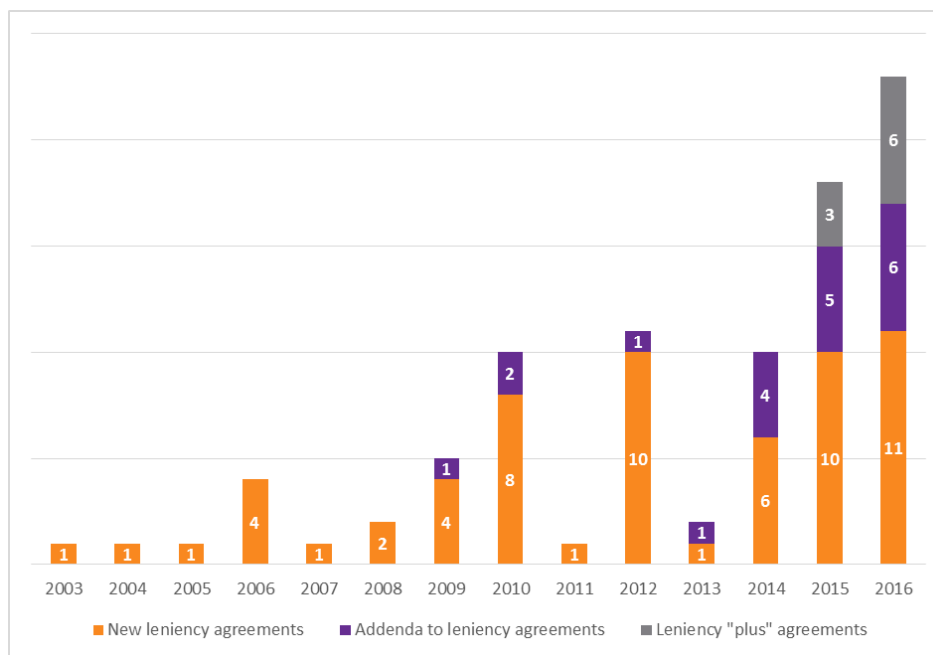
Chart 2 shows the evolution of the number of leniency agreements negotiated and concluded by CADE from 2003 to 2016.

¹⁴ Individuals and companies of the same economic group can execute the agreement together with the company or by an addendum to the original leniency agreement.

¹⁵ Under Law No. 8,884, a grant of leniency currently extends to criminal liability under Law No. 8,137, enacted in 1990 ("Brazilian Economic Crimes Law"), but not to other possible crimes under other criminal statutes, such as bid rigging.

¹⁶ This number includes both "regular" leniency agreements and leniency "plus" agreements.

Chart 2 – Leniency agreements (2003 to 2016)



CADE’s settlement program has also undergone major changes in recent years. In a settlement with CADE, defendants are required to cooperate with the investigation providing information and evidence that could lead to the conviction of the remaining defendants, and pay a fine that will never be lower than the minimum applicable fine provided by law.

CADE's Internal Regulation establishes predetermined levels of discounts that may reach 50% of the expected fine depending on the order in which defendants submit their proposals and the degree of expected cooperation. If the General Superintendence is still carrying out the investigation, defendants are entitled to the following discounts: (i) 30 to 50 percent of the applicable fine to the first defendant to settle, (ii) 25 to 40 percent of the applicable fine to the second defendant to settle, and (iii) 25 percent of the expected fine to subsequent settlements. If the General Superintendence has already concluded its investigation and the case is pending with CADE’s Tribunal, the maximum fine reduction available is 15 percent.

The obligations of the defendant to acknowledge its involvement in the conduct under investigation and to cooperate with the investigation were introduced after the entry into force of the Brazilian Antitrust Law,¹⁷ in a clear attempt by CADE to overcome the “pay-to-go” settlement model that was hitherto predominant. The linkage of the maximum and minimum discounts to the order in which defendants submit their proposals was as a way of encouraging a race for the best discounts, as defendants now have incentives to settle the investigation sooner rather than later. The fact that settlements in Brazil are a “one-shot game” furthers CADE’s interest of securing a settlement that is as comprehensive as possible.

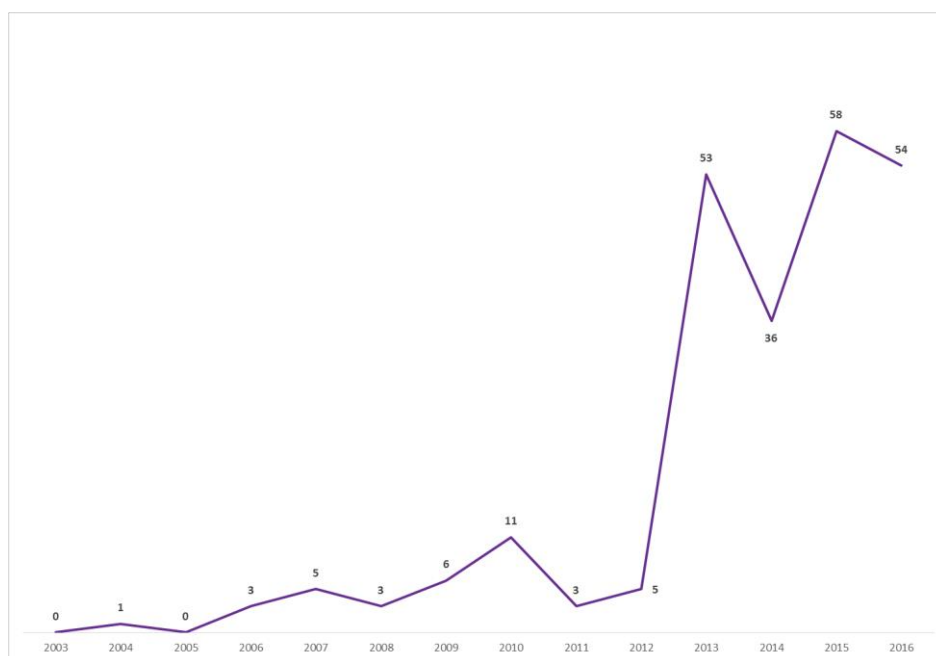
Unlike leniency agreements, CADE’s settlement program does not shelter individuals from criminal prosecution. Nonetheless, individuals involved in anticompetitive conduct may enter into plea bargain agreements with the Prosecution’s Office at any stage of the criminal prosecution.

¹⁷ Before these changes were made in 2013, the settling party was only required to acknowledge its involvement in the conduct under investigation in cases that were initiated through leniency agreements.

Pursuant to Law No. 12,850/2013, in exchange for his/her full and voluntary collaboration in providing relevant information that may lead to more convictions, the individual may be granted a judicial pardon, a reduction by up to two-thirds of the applicable prison sentence, or a substitution of this sentence for other less restrictive sanctions.

Like the leniency agreements, the number of settlement agreements has also grown substantially in recent years. Between 2003 and 2016, CADE negotiated and concluded 238 settlement agreements, raising more than R\$1.5 billion in monetary contributions. The vast majority of these agreements were negotiated and concluded after the entry into force of the Brazilian Antitrust Law and, mainly, after CADE amended its rules on cartel settlements. Chart 3 below illustrates this trend.

Chart 3 – Settlement agreements (2003 to 2016)



2.3 Standard of proof

Under the Brazilian Antitrust Law, the finding of an antitrust violation does not require evidence that the conduct at issue effectively produced negative effects competition. It is sufficient to show that the conduct has the potential of harming competition by excluding competitors from the market or allowing players to charge supra-competitive prices. Potential effects may be shown based on the analysis of factors such as the structure of the relevant market, the market power of the alleged wrongdoers, barriers to entry, characteristics of the product or service concerned, and price elasticity of demand, among others.

According to CADE's precedents, in cartel cases it is not necessary to conduct a detailed market analysis in order to show that the conduct at issue has the potential of harming competition. This is because the harmful effects of cartels are so clear that it should not be necessary for the competition authorities to expend resources on an exhaustive inquiry into them. Cartels are

presumed to produce negative market effects,¹⁸ and it is up to the companies involved in the alleged practice to prove otherwise.

A finding of antitrust violation may be supported either by direct or indirect evidence, including e-mails, letters, minutes of meetings, depositions of witnesses, or telephone tapping.¹⁹ The notion of direct evidence encompasses all kinds of evidence that demonstrate the facts under investigation, while indirect evidence means evidence of other facts from which it is possible to infer the occurrence of the facts under investigation. Penalties based solely on indirect evidence may be imposed whenever CADE deems that they are sufficient to establish the existence of an unlawful conduct and the participation of certain undertakings in such conduct.

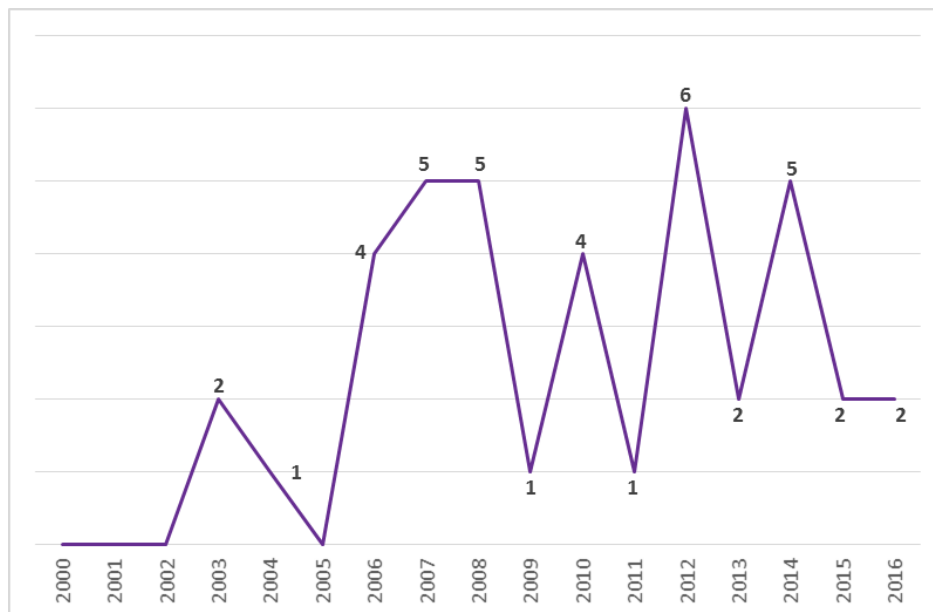
Considering the punitive nature of CADE's actions and its implications to businesses and individuals, an infringement must be proved based on a preponderance of evidence. This standard requires that the party bearing the burden of proof show that it is more probable than not that it has met the standard of proof it bears. Evidence of an antitrust violation can be collected by the different investigative tools available to CADE, or by a leniency agreement or settlement agreements executed between the authority and individuals or companies involved in the antitrust violation.

During its investigation, the General Superintendence has broad powers, including the power to search companies' premises and to seize documents or other materials, as it may deem necessary. The Brazilian Antitrust Law gives the General Superintendence the power to conduct dawn raids without prior notice, provided a court order is granted. CADE has already carried out 40 dawn raids since 2000 (see Chart 4 below). Without a court order, CADE may carry out inspections at a company's offices, facilities and headquarters, during the course of and in the interest of an ongoing investigation, as long as the company under investigation is notified in advance of the place, date, and the purpose of the inspection.

¹⁸ Administrative Process No. 08012.002127/2002-14, decided by CADE on July 13, 2005. CADE's Tribunal has repeatedly confirmed this position in several other decisions.

¹⁹ The Brazilian Antitrust Law does not establish rules on which pieces of evidence on antitrust violations are acceptable at administrative level. This matter is governed by Law No. 13,105, enacted in 2015 ("Brazilian Civil Procedural Code"), which applies to administrative processes pursuant to Article 115 of the Brazilian Antitrust Law.

Chart 4 – Number of dawn raids carried out by CADE (2000 to 2016)



Because of the use of more aggressive investigative tools, CADE has been able to build stronger and more compelling cases against defendants.

2.4. Level of fines

Corporate defendants are subject to fines for anticompetitive behavior ranging from 0.1 percent to 20 percent of the gross revenues registered by the company, group, or conglomerate in the fiscal year prior to the launching of the investigation in the line of business in which the infringement occurred. A regulation was issued in 2012 setting out a list of lines of business intended to guide the authorities when imposing fines for antitrust infringements.²⁰ This list includes “lines of business” that are often broader than the traditional concept of relevant market or the market affected by infringement concepts, which usually gives rise to a debate between defendants and CADE concerning the correct basis for calculating the applicable fine.²¹ The issue has not been clearly resolved by the CADE’s Tribunal, which has decided in both ways.²²

²⁰ CADE’s Resolution No. 3, dated May 29, 2012.

²¹ On November 23, 2016, CADE issued Resolution No. 18 allowing the the specificities of the conduct to be taken into account in the definition of the basis of calculation of the fine whenever the “line of business” established by CADE’s Resolution No. 3 is clearly disproportionate.

²² In the Administrative Processes No. 08012.010215/2007-96 and No. 08012.004472/2000-12, CADE followed strictly the list of lines of business set out in Resolution No. 3. CADE’s Tribunal decided both cases on March 6, 2013. A similar belief was expressed by Commissioner Márcio de Oliveira Júnior in the the Compressors case (Administrative Process No. 08012.000820/2009-11, decided by CADE’s Tribunal on March 16, 2016). In the Air Cargo case, in contrast, Air France/KLM reached a settlement with CADE that involved the payment of a fine calculated based on their cargo revenues only. If CADE had strictly followed Resolution No. 3 in this case, it should have added the parties’ passenger revenues (Administrative Process No. 08012.011027/2006-02, decided by CADE’s Tribunal on August 28, 2013).

Since January 2000, investigations have resulted in the conviction of companies and individuals to pay over R\$7.3 billion in fines. Nearly 60% of this amount – R\$4.3 billion – was obtained after the entry into force of the Brazilian Antitrust Law, which shows CADE’s hardening stance against companies engaged in anticompetitive behavior. In fact, CADE has been increasing the fine percentages applicable to cartel cases, with minimum fines starting at 15 percent.

To date, the record fine imposed by CADE to a single company was R\$1.5 billion in the Cement Case.²³ In addition to the fine, for the first time ever the companies were ordered to sell off assets in order to reduce their market share. This matter also holds the record for the highest fine ever levied to a single individual more than R\$15 million. Table 2 below provides a summary of the most relevant fines imposed by CADE in the past years:

Table 2 – Most relevant fines (2000 to 2016)²⁴

Case	Company	Individuals
Anesthetist Association	R\$ 127,692.00	N/A
Carbon Dioxide Resale	R\$24 million	N/A
Fuel Resale in Minas Gerais	R\$267,300.00	R\$24,300.00
Steel Bars	R\$ 345 million	N/A
Driving Schools	R\$ 127,692.00	N/A
Security Guard Services	R\$ 40.8 million	R\$ 6.8 million
Sand Extraction	R\$ 2.9 million	N/A
“Tô Contigo” Case	R\$ 352.6 million	N/A
Industrial Gases	R\$ 2.94 billion	R\$10.8 million
Fuel Resale in Guaporé	R\$ 7.2 million	R\$1.2 million
Peroxide	R\$ 133.6 million	R\$14.2 million
Air Cargo	R\$ 288.4 million	R\$4.8 million
Cement	R\$ 3.1 billion	R\$26 million
Fuel Resale in Vitória	R\$ 62 million	R\$5.2 million

The Brazilian Antitrust Law also provides for non-pecuniary sanctions, such as debarment from government procurement procedures for up to five years, and the publication of the administrative decision in major newspapers, amongst others. Bid rigging may have other

²³. Administrative Process No. 08012.011142/2006-79, decided by CADE’s Tribunal on May 28, 2014.

²⁴ CADE ordered the companies involved in the Shipyard Cartel to pay fines of 1 percent of their gross revenues (Administrative Process No. 08012.009118/1998-26, decided by CADE on June 27, 2001). Microsoft and TBA were respectively fined 7 and 10 percent of the value of their gross revenues in the tying and bundling investigation (Administrative Process No. 08012.008024/1998-49, decided by CADE on August 25, 2004). The final value of none of these fines is publicly available, so the cases were not included in Table 2.

administrative implications. Pursuant to Law No. 8,666, enacted in 1993 (“Brazilian Public Bidding Law”), the Public Administration and state-owned companies may investigate and punish companies involved in any kind of bid rigging (including cartels). Penalties may include fines, compensation for damages, and debarment for a period up to five years.

2.5. Cooperation with other authorities

CADE cooperates with foreign antitrust authorities, and the exchange of information in cartel cases is increasing. Waivers are usually granted in the context of leniency applications and the exchange of information based on waivers and cooperation agreements. CADE has cooperation agreements with several foreign competition authorities, including Argentina, Canada, Chile, China, Ecuador, European Union, France, Peru, Portugal, Russia, and the United States. Bilateral cooperation includes exchange of information, experience and best practices on competition law and policy. CADE is also engaged in international multilateral cooperation by participation in various events dedicated to competition law and policy, such as the ones promoted by ICN, OECD, BRICS, UNCTAD, MERCOSUR, among others.

CADE is also increasingly cooperating with other Brazilian authorities engaged in prosecuting cartels. In particular, CADE and the anti-corruption enforcement agencies – notably the Office of the Comptroller General (“CGU” in its acronym in Portuguese) and the Federal Auditing Tribunal (“TCU” in its acronym in Portuguese) – have been working hand-in-hand to exchange data on public tenders in order to identify and prevent bid rigging. CADE and the Brazilian anti-corruption enforcement agencies have executed cooperation agreements under which they commit to exchange relevant information obtained during their respective investigations on potential fraudulent activities. They have also agreed to reciprocate technical assistance, and to provide technical advice in cases of potential mutual interest.

2.6. Civil and criminal prosecution

In addition to antitrust violations, cartels are also a criminal offense in Brazil under the Brazilian Economic Crimes Law, which sets forth two types of penalties for individuals involved in cartel: (i) imprisonment from two to five years, and (ii) a fine.²⁵ The sanctions vary according to the economic gains obtained by the wrongdoer and his/her financial status. The same is true with respect to bid rigging. The Brazilian Public Bidding Law, provides that the commission of fraud in a bidding proceeding by any means (including cartels) is punishable by imprisonment from two to four years, and a fine.

State and Federal Prosecutions Offices are vested by the Brazilian constitution with the power to bring criminal charges, and to pursue criminal and civil cases in court. They are also in charge of supervising police work and police investigations. Among other activities, state and federal prosecutors offices may bring lawsuits based on the Brazilian Antitrust Law and the Brazilian Economic Crimes Law, including requests for damages and for the application of

²⁵ Criminal sanctions applicable to cartel offenses were modified by the entry into force of the Brazilian Antitrust Law. Under Law No. 8,884, cartel offenses were punishable by (i) imprisonment from two to five years, **or** (ii) a fine. The practical effect of this amendment is that criminal cartel cases can no longer be settled.

penalties contemplated in these laws. In the past few years, CADE is increasingly cooperating with the public prosecutors. This cooperation also allows authorities (both administrative and criminal) to exchange expertise and technical support in their respective investigations.

This trend, which was in place before but became more intense after enactment of Law No. 12,846, dated August 1, 2013 (“Brazilian Clean Company Law”), has changed the way the Brazilian authorities investigate, prosecute, and punish cartel practices. The result was an increase in the number of high profile cases, such as the subway cartel case in 2014 and the ongoing “Car Wash” investigations,²⁶ as well as in the number of leniency agreements and settlements executed with companies and individuals involved in such practices.

Criminal prosecution of cartel members has increased substantially over the last few years. Over 350 individuals have been prosecuted for taking part in cartels in Brazil, and more than twenty executives were sentenced to jail. These decisions indicate a change in the perception of Brazilian courts, which have come to regard cartels as a more serious violation.²⁷

Companies and individuals involved in anticompetitive practices are also subject to civil prosecution in Brazil. The affected entities or individuals may recover the losses they sustained because of a violation, apart from obtaining an order to cease the illegal conduct. State and Federal Prosecutions’ Offices may also file a lawsuit on behalf of consumers that may have experienced damages arising from the anticompetitive or corrupt practices. In both cases, plaintiffs may seek compensation for pecuniary damages and moral damages.

In December 2016, CADE submitted to public consultation a draft proposal of a resolution aimed to encourage private antitrust damage claims in Brazil.²⁸ The draft resolution set out new rules for third party access of documents and information gathered through leniency agreements, settlement agreements and dawn raids. In addition to the proposed resolution, CADE also suggested an amendment to the Brazilian Antitrust Law to reconcile the incentives for antitrust damage claims with those of the Brazilian leniency program.

The initiative follows the recent ruling by the Brazilian Superior Court of Justice (“STJ”) that limited the confidentiality of leniency agreements entered into with CADE and decided that third parties should be granted access to leniency materials at the end of the investigation phase, and before a final decision is rendered by CADE on the case. The STJ decision goes against CADE’s hitherto position not to make public leniency and settlement agreements and related documents. CADE believes that to grant indiscriminate access to the leniency materials would risk investigations and the Brazilian leniency program.

²⁶ Brazil’s biggest corruption scandal, the so-called “Car Wash” investigation is directed to uncover alleged corrupt practices and cartel affecting the state-owned oil company Petrobras. The investigation included the enforcement of over 200 arrest warrants, the indictment of 260 people, and request for reimbursement in the total of R\$38.1 billion). To date there are 125 convictions, totaling 1,317 years and 21 days of jail sentences (MINISTÉRIO PÚBLICO FEDERAL. *A Lava Jato em números*. Available at <www.lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros-1>. Access on March 3, 2017.

²⁷ MARTINEZ, Ana Paula; ARAUJO, Mariana Tavares. Anti-cartel enforcement in Brazil: status quo & trends. In: ZARZUR, Cristianne. *et al.* (org.). *Overview of competition law in Brazil*. São Paulo: Editora Singular, 2015, p. 257-273.

²⁸ The draft resolution and legislative proposals were open to contributions from the public until March 8, 2017.

2.7. Possibility of judicial review of CADE's decisions

Defendants are also entitled to challenge CADE's decision before Brazilian courts.

In order to challenge the fine, defendants are required to file a suit for the annulment of CADE's ruling before a federal court. To suspend the effects of CADE's ruling, defendants have to post a bond guaranteeing the payment of the fine should the lawsuit be unsuccessful. The most accepted types of bonds are escrow deposits, letters of guarantee or insurance bonds.

Alternatively, defendants may try to obtain an injunction from the judge assuring that the payment of the fine will not be required before the end of the discussion. The chances of obtaining an injunction without posting a bond are very small, and CADE has been very successful in overturning these decisions in higher courts.

Courts in Brazil are not legally prevented from conducting a full review of CADE's decisions, and, are therefore allowed to review findings of fact, legal assessments, as well as penalties. While some defendants have successfully overturned CADE's rulings, such cases still represent a small percentage of all cases challenged before Brazilian courts.²⁹ In most cases, courts are still deferential to CADE and only occasionally modify its decisions. The perceived complexity of antitrust issues usually causes Brazilian courts to avoid re-examining the merits of CADE's decisions; this review traditionally happens when there are gross procedural errors.

Defendants may challenge any adverse ruling issued by the federal court of first instance before a court of appeal. Likewise, they may also challenge the ruling issued by the court of appeal before the Brazilian Superior Court of Justice or the Brazilian Supreme Court. Appeals to the Superior Court of Justice must demonstrate a violation of the federal law, given that this court is entitled to establish the uniform interpretation of the law. Conversely, appeals to the Brazilian Supreme Court should necessarily involve a constitutional issue, since this court is responsible for assuring the efficacy of the Brazilian Federal Constitution.³⁰

3. Decision matrix used by defendants

As seen in section 2.2 above, the number of settlement agreements has increased significantly since 2013, which shows the growing interest of defendants in discussing settlements in anticompetitive investigations in Brazil. These impressive numbers also attest to the success of CADE's settlement policy. However, it was not always so.

The long duration of investigations coupled with the poor quality of evidence gathered by the Brazilian authorities and the relatively low levels of fines contributed to the perceived impunity of antitrust offenders in Brazil, a view that was reinforced by the lengthy judicial review process of CADE's decisions. Furthermore, the lack of certainty and transparency about the criteria used in the

²⁹ CADE boasts a success rate of 70% in court cases that question decisions handed down by the authority (CADE. Balanço 2016. Available at <www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf/view>. Access on March 2, 2017.

³⁰ Although there have been decisions issued by judges in the first instance and in court of appeals, there is still no final decision handed down by either the Brazilian Superior Court of Justice or the Brazilian Supreme Court in any case that judicially challenged CADE's decisions.

evaluation of proposed agreements in the early 2000s furthered the perception that discussing settlements with CADE was not particularly advantageous. As result, defendants showed a clear preference for litigating even cases with little chances of success.

Table 3 below lays out the different criteria considered by defendants when deciding whether to defend or settle an antitrust investigation before the Brazilian Antitrust Law came into force. A relative weight was assigned to each criterion based on its importance. The “defend” alternative was used as a baseline against which the “settle” alternative was evaluated scoring it worse (-1), same (0) or better (+1) in meeting the criteria.³¹ The alternatives’ ratings was calculated by adding the products of the multiplication of each criterion’s score with its importance weight.

As Table 3 shows, the “settle” alternative had a lower score than the “defend” alternative in the scenario before the Brazilian Antitrust Law.

Table 3 – Decision matrix before the Brazilian Antitrust Law

Criteria	Importance	Defend	Settle
Duration of the investigation	1	0	+1
Agreements concluded by other defendants	3	0	0
Evidence collected by the authorities	5	0	+1
Value and enforcement of fines	5	0	-1
Cooperation between different authorities	2	0	0
Likelihood of civil or criminal liability	1	0	-1
Likelihood of CADE's decision being overturned	2	0	-1
	Totals	0	-2

The changes in the competition regulatory framework discussed in section 2 have created a favorable environment for the adoption of negotiated solutions for anticompetitive investigations in Brazil.

Improvements in the evidence collection process have enabled CADE to build stronger and more compelling cases against defendants. In this context, the conclusion of agreements by other defendants with the mandatory obligation to cooperate with the investigation has come to assume a much greater importance. The same happened with the cooperation between CADE and other authorities, given the great potential for sharing information and evidence. Increased levels of administrative, civil and criminal sanctions against companies and individuals involved in cartels helped to reduce – if not end – the perception of impunity, balancing the decision matrix in favor of cooperative solutions.

Table 4 shows the decision matrix taken into account by defendants after changes in the competition regulatory framework brought about by the Brazilian Antitrust Law. The relative

³¹ This technique is known as the Pugh matrix, and was chosen because it provides a simple approach to considering multiple factors when reaching a decision.

weight of each criterion was revised to reflect the new circumstances of the fight against cartels in Brazil. In this new scenario, the “settle” alternative has a much higher score than the “defend” alternative in the scenario before the Brazilian Antitrust Law.

Table 4 – Decision matrix after the Brazilian Antitrust Law

Criteria	Importance	Defend	Settle
Duration of the investigation	1	0	1
Agreements concluded by other defendants	5	0	0
Evidence collected by the authorities	5	0	1
Value and enforcement of fines	5	0	1
Cooperation between different authorities	3	0	1
Likelihood of civil or criminal liability	3	0	-1
Likelihood of CADE's decision being overturned	1	0	-1
	Totals	0	10

4. Conclusion: challenges ahead for the Brazilian Settlement Program

The institutional changes brought by the enactment of the Brazilian Antitrust Law have allowed Brazilian authorities to allocate more time and resources to the prosecution of anticompetitive violations. The ensuing prioritization of caseload has allowed CADE to reduce the backlog and to focus on cases that have an impact on the economy.

There is no doubt that the success experienced by CADE was only possible through the structuring, implementation and improvement of the Brazilian leniency and settlement programs. Both instruments have proven to be very effective tools to prevent and punish cartels. This is not to say that such programs cannot be perfected. Quite the opposite.

One of the main challenges faced by the Brazilian programs has always been the perceived lack of certainty and transparency about the criteria used in the evaluation of proposed agreements. The publication in 2016 of CADE’s guidelines regarding leniency and settlement programs³² was an important step forward to predictability in Brazilian anti-cartel enforcement.

However, such guidelines should be viewed as non-binding directives on settlement agreements negotiated and concluded with the Brazilian antitrust authorities. Their purpose should be to ensure consistent processing of CADE’s settlement agreements, allowing the necessary flexibility to adapt the legal provisions to the reality of the case.

³² English versions of the guidelines are available at <www.en.cade.gov.br/topics/publications/guidelines>. Access on March 6, 2017.

The levels of discounts to which the settling parties are entitled should be limited not only by the order of submission of the proposals, but mainly by the effectiveness of the defendant's cooperation with the investigation. The race for the discount should not be motivated solely by the need to get there first, but mainly by the need to cooperate more.

That is not what has been happening. Currently, the discount has been limited to that granted to the defendant who entered into an agreement earlier, even if the party who arrived later brought more information and documents to assist in the investigation. CADE should not shy away from the possibility of granting higher discounts to late comers if they are able to make an important contribution to the investigation.

Perhaps the biggest challenge faced by the Brazilian settlement program is the uncertainty as to the criterion to be used to calculate the fine due by the settling parties. The lack of clarity of CADE's Resolution No. 3 as to the appropriate definition of the "line of business" was not resolved by the introduction of Resolution No. 13, which still faces resistance from the authorities.

On the other hand, some Commissioners of CADE's Tribunal have been very vocal critics of the agency's calculation of fines. They believe that fines should be based on an estimate of the advantage obtained or envisaged by the colluding companies during the duration of the alleged cartel, an opinion that is not shared by many of the other Commissioners.³³

The fact is that calculating the advantage obtained by the investigated companies is very troublesome and time consuming. This would certainly discourage many companies to try to settle cartel investigations. In other words, changing the calculation method for cartel penalties not only poses a serious threat to the credibility of the Brazilian settlement program, but it could also result in new and unwarranted court disputes.

Overall, the Brazilian anti-cartel enforcement program has developed in the right direction under the new Brazilian Antitrust Law. Once CADE manages to deal with the challenges discussed herein, the competition regulatory framework will be even more prone to cooperative solutions.

³³ Lack of consensus on the subject has already produced negative outcomes. At least one settlement agreement has been rejected by CADE's Tribunal because the fine was not calculated according to the methodology usually adopted by CADE, which takes into account the companies revenues. *See* Settlement Proposal No. ° 08700.006535/201684, decided by CADE's Tribunal on February 1st, 2017.

CHAPTER 16 - INTERNATIONAL CARTELS AND THEIR EFFECTS IN BRAZIL: AN OVERVIEW OF CADE'S RECENT CASE LAW

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1. Introduction

Can anticompetitive conducts practiced abroad and by companies that are not located in Brazil be subject to investigation in Brazil by CADE, the Brazilian antitrust authority? The short answer is yes, as long as these conducts may produce effects in Brazil. Nevertheless, establishing a cause-effect relationship between conducts practiced abroad and the Brazilian market is not always an easy task and may present challenges in the absence of direct evidence in this regard. The purpose of this chapter is to review the development of CADE's recent case law involving international cartels and the approaches adopted by CADE to assess this cause-effect connection between conducts abroad and the Brazilian market, based on the final decisions rendered by CADE's Tribunal and also on non-binding opinions issued by CADE's General Superintendent and by CADE's General Attorney's Office in international cartel investigations.¹

The Brazilian Antitrust Law provides that its application is not limited to conducts practiced within the Brazilian territory, but also extends to conducts practiced abroad and that produce or may produce effects in Brazil.² The Brazilian Antitrust Law establishes that any act that has the object or that may produce the effect of limiting competition is an antitrust violation, even if such effect is not achieved.³

Therefore, the Brazilian Antitrust Law adopted an effect-based approach, expressly providing for its extraterritorial application to conducts practiced abroad, as long as such conducts have at least the possibility of producing effects in the Brazilian territory. In order to ascertain its jurisdiction to investigate foreign cartels and to successfully prosecute and convict foreign violators, CADE must confirm that the conduct under investigation had at least the potential of producing effects in Brazil.

From the perspective of their possible effects in the country, international cartels may be classified as follows: (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)

¹ The GS is the investigative authority within CADE's structure, responsible for the fact-finding stage of the investigations. After concluding the fact-finding in administrative procedures, the GS renders a non-binding opinion and forwards the case to CADE's Tribunal, which is the decision-making authorities that will render a final decision on the investigations. CADE's General Attorney's Office also issues non-binding opinions on investigations and provides legal assistance to the GS and to the Tribunal.

² Article 2 of the Brazilian Antitrust Law.

³ Article 36 of the Brazilian Antitrust Law.

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.

The following section of this chapter provides an overview of CADE's case law on international cartel cases, and discusses how CADE has applied this "effects in Brazil" test in such cases. The third section delineates a brief comparative analysis of how the authorities of the United States of America and the European Union have applied the effects doctrine in comparison to CADE. Finally, the fourth section concludes this assessment, suggesting a prognostic of what could be expected in future decisions involving international cartel investigations in Brazil.

2. CADE's Case Law on International Cartels Investigations

According to our research,⁴ at the time of writing, CADE had issued final decisions in nine international cartel cases since the enactment of Law 8,884/94 (the previous Brazilian Antitrust Law that was replaced by Law 12,529/11), of which eight have been decided after Law 12,529/11 entered into force.⁵ It is noticeable that cartel investigations started to move on a faster pace in Brazil following the major changes introduced by Law 12,529/11 in the competition enforcement framework in Brazil. Particularly, the consolidation of investigative and decision-making powers into one single enforcement agency, and the introduction of a modern merger control system enabled CADE to be more efficient, and to devote more resources to cartel investigations.

It is worth noting that the only significant international cartel case decided by CADE before the enactment of Law 12,529/11 was the *Vitamins Case*⁶ in 2007. This decision became the leading case on this matter in Brazil, and paved the way for the investigation of other international cartels by CADE under the more efficient framework established by Law 12,529/11.

2.1 The Vitamins Case Decision: CADE's Leading Case on International Cartels

On April 11, 2007, CADE concluded the judgement of the first international cartel investigated by Brazilian authorities, the *Vitamins Case*, and, by a majority decision, concluded that there was enough evidence of cartel practices that had effects in the Brazilian territory.

The *Vitamins Case* decision became Brazil's leading case on the discussion of whether conducts practiced abroad could have effects in the Brazilian territory, and has been referred in all opinions and decisions involving international cartels thereafter.

⁴ Please refer to the table of cases at the end of this chapter, which lists the cases of international cartels judged by CADE's Tribunal, and the main ongoing investigations before CADE that are pending judgement. This list is not intended to be exhaustive and may not include all ongoing investigations currently under analysis by CADE.

⁵ Law 12,529/11 was enacted in 2011 and entered into force on May 29, 2012.

⁶ Administrative Process No. 08012.004599/1999-18. Reporting Commissioner Ricardo Villas Bôas Cueva, decided by the Tribunal on April 11, 2007.

The Brazilian investigation into the cartel started in 1999, after Brazilian authorities became aware of leniency and settlement agreements executed by the involved companies with foreign antitrust authorities, and of decisions rendered abroad. According to CADE's decision, the decision rendered by U.S. authorities and by the European Commission thoroughly documented the existence of the cartel. CADE used these decisions and respective evidence to demonstrate the existence of the cartel, concluding that the defendants divided markets and fixed prices worldwide.

Having established the cartel practice, CADE then proceeded to evaluate whether the conduct could have had effects in Brazil. CADE concluded that imported goods represented almost all of the Brazilian vitamins market, and that the defendants were responsible for supplying a significant amount of vitamins to Brazil. This, in CADE's understanding, was an indication that the conduct would most likely have caused effects in Brazil.

Moreover, in reviewing the Brazilian market, CADE concluded that the defendants' market shares in Brazil were almost identical to the "international budget" that they had divided among themselves in their anticompetitive agreement. Another argument used by CADE to sustain that the cartel would have caused effects in Brazil was the corporate structures and decision-making processes of the defendants. According to CADE, the Brazilian subsidiaries of the defendants responded directly to their headquarters' abroad, who were responsible for the price definition in Brazil. In CADE's understanding, this would mean that the price fixing agreements with competitors by the headquarters would have been replicated in Brazil almost automatically.

CADE also argued that it would not be logical for an international cartel for the allocation of markets, including the Latin American market, to exclude Brazil from the agreement. In doing so, CADE reversed the burden of proof, and concluded that the defendants would have to present legitimate and reasonable justifications to demonstrate that Brazil had not been included in the market division.

According to CADE, there was sufficient evidence to conclude that the cartel had effects in Brazil; however, CADE highlighted that it would not have to prove, in future cases, that conducts actually had effects in Brazil: rather, CADE would only have to show that conducts could potentially affect the Brazilian territory, although the criteria to define when a conduct "could potentially" affect the Brazilian territory were not developed in the decision.

The *Vitamins 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.

2.2 CADE's Case Law Under the Current Brazilian Antitrust Law

Since the Brazilian Antitrust Law came into force in 2012, CADE's Tribunal has decided seven cases involving international cartels, and other cases are under analysis by CADE's GS or pending decision by CADE's Tribunal. In all cases decided so far, CADE's Tribunal has referred to the approach adopted in the *Vitamins Case* to assess the possibility of effects in Brazil, even though several cases differed significantly from the arrangements and dynamics identified in that case. We have classified these cases according to their potential effects in Brazil, as follows: (i) international cartels with direct effects in Brazil; (ii) international cartels with indirect effects in Brazil; (iii)

international cartels for the allocation of markets that included Brazil, and (iv) international cartels that did not affect Brazil. At the end of this section, we will also analyze the *Compressors Case*,⁷ a case that presented a very singular situation in which CADE's Tribunal, in a non-unanimous decision, adopted an atypical approach to assess the potential of effects in Brazil.

2.2.1 International Cartels with Direct Effects in Brazil

Most of the international cartel cases decided by CADE involved situations in which the defendants had direct sales to Brazil through exports (export cartels), as was the case in the *Vitamins Case*. In these decisions, CADE usually followed a pattern in establishing how the conduct could potentially affect the Brazilian territory: first, CADE evaluated whether the conduct represented a hardcore cartel; if affirmative, CADE then indicated how a general agreement to fix prices would have affected the Brazilian territory, considering the existence of direct sales by the companies to Brazil.

In the case of the *Air Cargo Case*,⁸ CADE became aware of the international cartel through a leniency agreement entered into with one of the companies involved in the conduct and its respective employees. According to CADE, 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 indication that their agreement abroad affected the Brazilian territory.

In the *Marine Hoses Case*,⁹ CADE resorted to decisions rendered by foreign antitrust authorities, combined with other evidence, to determine the existence of a cartel to fix prices and sales conditions, and allocate market shares geographically, similarly to the approach adopted in the *Vitamins Case*. The decision by CADE's Tribunal referred to previous international cartel cases with effects in Brazil, such as the already mentioned *Vitamins Case* and the *Air Cargo Case*, and follows the same line of thought in determining that the conduct could have affected Brazil. In this case, CADE identified that the main target of the cartel was Petrobras, the biggest buyer of marine hoses in Brazil, concluding that the international illegal agreement between the defendants had direct effects on sales to a Brazilian company.

The *Graphite Electrodes Case*¹⁰ is another example of international cartel investigation in Brazil that deserves to be mentioned, even though CADE's Tribunal dismissed the case due to a nullity of procedure and did not render a decision on the merits.¹¹ According to the GS's opinion, the defendants jointly held over 90 percent of the Brazilian market for graphite electrodes in the period under investigation, and one defendant in particular had local presence in Brazil.

⁷ Administrative Process No. 08012.000820/2009-11. Reporting Commissioner Márcio de Oliveira Júnior, decided by the Tribunal on March 16, 2016.

⁸ Administrative Process No. 08012.011027/2006-02. Reporting Commissioner Ricardo Machado Ruiz, decided by the Tribunal on August 28, 2013.

⁹ Administrative Process No. 08012.010932/2007-18. Reporting Commissioner Márcio de Oliveira Júnior, decided by the Tribunal on February 25, 2015.

¹⁰ Administrative Process No. 08012.009264/2002-71. Reporting Commissioner Gilvandro Vasconcelos, decided by the Tribunal on October 14, 2015.

¹¹ CADE's Tribunal identified the existence of a formal nullity in the proceeding, declaring the whole proceeding void.

Additionally, the GS indicated that, during the period of activity of the cartel, the prices for graphite electrodes were increased significantly (approximately 30 percent); and the prices dropped sharply after the cartel was dismantled abroad. The GS argued that these facts were sufficient to conclude that the conduct had effects in Brazil, but it went further and also analyzed how the division of markets by the defendants would have affected the Brazilian territory.

In the *Sodium Perborate Case*,¹² CADE also took into account decisions rendered by antitrust authorities abroad to determine that the cartel existed. According to CADE, the defendants agreed to fix prices, and divided certain markets among themselves, establishing which company should sell in each jurisdiction. CADE's Tribunal affirmed that the Brazilian market was directly affected by the conduct, considering that almost all of the sodium perborate sold locally was imported, and that the defendants supplied over 90 percent of the product sold in Brazil. Additionally, CADE's Tribunal stated that the cartel agreement between the defendants expressly referred to Brazil, leaving no margin to defend that the conduct would not have affected the Brazilian territory.

In the *Cathode Ray Tubes Case*,¹³ CADE once again resorted to foreign decisions as the basis to demonstrate that an international cartel existed – along with other evidence. Having confirmed the existence of the cartel abroad, CADE proceeded to review the defendants' direct sales to Brazil, to conclude that the price fixing abroad would have affected the Brazilian territory. It is worth noting that, in this case, CADE's Tribunal expressly stated that it would hold all members of an international cartel liable, regardless of the fact that some of them may not have had direct export sales to Brazil, if CADE concludes that the cartel in general could have affected the Brazilian territory.

2.2.2 International Cartels with Indirect Effects in Brazil

The analysis of international cartels that could have indirect effects in the Brazilian territory has proven to be much more burdensome to CADE than those where defendants had direct export sales to Brazil. In any case, based on CADE's recent decision in the *DRAM Memory Case*¹⁴ and on the opinion rendered by the GS on the optical disc drives - *ODD Case*,¹⁵ which is still pending a final decision by CADE's Tribunal, it is possible to conclude that CADE has been applying a broad interpretation of the effects doctrine in these cases.

In the *DRAM Memory Case*, CADE concluded, based on foreign decisions and on documents presented by settling defendants, that DRAM memory manufacturers had formed a bid-rigging cartel to fix prices and sales strategies in bids promoted by original equipment

¹² Administrative Process No. 08012.001029/2007-66. Reporting Commissioner João Paulo Resende, decided by the Tribunal on February 24, 2016.

¹³ Administrative Process No. 08012.005930/2009-79. Reporting Commissioner Gilvandro Vasconcelos, decided by the Tribunal on November 9, 2016.

¹⁴ Administrative Process No. 08012.005255/2010-11. Reporting Commissioner Márcio de Oliveira Júnior, decided by the Tribunal on November 23, 2016. Dynamic random-access memory (DRAM) is a type of memory equipped in computers, laptops, cellphones, etc.

¹⁵ Administrative Process No. 08012.001395/2011-00. Reporting Commissioner João Paulo Resende, pending judgement. Optical Disc Drive (ODD) is a disk drive used for reading or writing data to or from optical discs that is equipped in computers, Blu-ray/DVD/CD players, video games etc.

manufacturers (OEM) abroad. In assessing whether the conduct could affect the Brazilian market, CADE's Tribunal argued that the defendants were responsible for providing practically all the DRAM memory in the Brazilian market, considering that there was no domestic production for this product. However, sales of DRAM products were negotiated abroad, and even in cases where the defendants sent the product directly to Brazil, the sales negotiation happened abroad. Most of the DRAM memory that entered Brazil was equipped in other products, such as personal computers, laptops, cellphones, etc.

As usual in cartel investigations, CADE's General Attorney Office issued a non-binding opinion, and concluded that the evidence in the case files did not demonstrate that the conduct could have affected the Brazilian territory. According to the General Attorney Office, CADE should adopt a more restrictive interpretation of Article 2 of the Brazilian Antitrust Law, to investigate only conducts that had an effective connection with the Brazilian territory. The General Attorney Office sustained that, if CADE does not adopt stricter standards, it would end up asserting its jurisdiction over any cartel practiced abroad that could potentially affect the Brazilian territory, even if only hypothetically.

Despite the General Attorney Office's opinion, CADE's Tribunal understood that the DRAM memory cartel caused direct and indirect effects in the Brazilian territory. The leading vote concluded that the Brazilian Antitrust Law did not provide for any restrictions as to the interpretation of its extraterritorial application established in its Article 2, which CADE should interpret broadly, to encompass any anticompetitive conducts that in any way could cause anticompetitive effects in the Brazilian territory.

In the *ODD Case*, which is still pending decision by CADE's Tribunal, the GS followed the same understanding adopted in the *DRAM Memory Case*. Based on foreign decisions and on other evidence, the GS concluded that manufacturers of optical disc drives (ODD) would have formed a cartel to fix results in bids carried out by OEMs abroad. The GS also indicated that Brazil has no manufacturer of ODD, and that all products sold in Brazil derived from exports. Thus, even though the bids that were allegedly rigged happened outside of Brazil, and that the ODD manufacturers made their sales outside of Brazil, the GS understood that the conduct would have affected the Brazilian territory through direct and indirect sales to the Brazilian territory. According to the GS, a large amount of products imported in Brazil were equipped with ODDs (i.e., personal computers, lap tops, video games, CD-players, among others), many of which would have ODDs produced by the defendants, which was considered proof enough that the alleged foreign cartel would have had effects in Brazil.

2.2.3 International Cartels for the Allocation of Markets that included Brazil

In the *Marine Hose Case*, in addition to the fact that the cartel members had direct export sales to Brazil, CADE also considered that the cartel agreement involved the allocation of markets that also included Brazil. According to CADE, Petrobras acquired marine hoses through procedures called PCM Projects (Material Acquisition Requests Projects), in 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.

In the *Graphite Electrodes Case*, the GS indicated that the defendants would have agreed to allocate the global market among themselves, and, in doing so, the GS concluded that the conduct would have affected the Brazilian market. The GS inferred that the division would have affected the Brazilian territory based on import sales data. According to the GS, shortly after the defendants would have initiated the alleged cartel, the export sales of graphite electrodes to Brazil dropped significantly, while the domestic sales by one of the defendants with local production increased, along with its prices. After the foreign authorities dismantled the cartel, export sales to Brazil would have increased again, according to the GS. Based on this data, along with the fact that the defendants would have had direct sales to Brazil, the GS affirmed that the alleged conduct would have affected the Brazilian territory. As noted above, CADE's Tribunal did not analyze the merits of this case and ordered its termination due to a nullity of procedure.

2.2.4 International Cartels that did not Affect Brazil

On August 31, 2016, CADE concluded the judgement of the *Elastomers Case*,¹⁶ deciding for the closing of the investigation due to the lack of evidence that the conduct could have affected, either directly or indirectly, the Brazilian market. CADE became aware of the alleged cartel through a leniency agreement proposed by one of the companies involved in the conduct, which 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 in the Brazilian territory.

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 enough to conclude that the alleged conduct would have potentially affected the Brazilian territory. CADE also noted that investigations in other jurisdictions, such as Europe, Japan, South Korea and in the U.S., had also been closed due to the lack of evidence that the alleged conduct would have affected markets other than in China and Hong Kong.

The lack of evidence of effects in Brazil in this case was not simply because there was no express mention to Brazil or Latin America in the meetings and agreements between competitors. Rather, CADE understood that the conduct focused exclusively on the elastomers market in China and Hong Kong, making it extremely difficult to find a connection between this conduct and the products that were directly imported into Brazil. Furthermore, the leniency applicants were not able to provide any evidence that there would have been indirect effects in Brazil caused by the conduct in China and Hong Kong.

In an almost identical case, CADE's Tribunal understood that there was no evidence that the alleged cartel involving manufacturers of plastic products (*Plastic Products Case*)¹⁷ could have affected the Brazilian market. CADE's Tribunal concluded that the cartel was restricted to the markets of China and Hong Kong.

¹⁶ Administrative Process No. 08012.000773/2011-20. Reporting Commissioner João Paulo de Resende, decided by the Tribunal on August 31, 2016.

¹⁷ Administrative Processes No. 08012.000774/2011-74 and 08700.009161/2014-97. Reporting Commissioner Alexandre Cordeiro Macedo, decided by the Tribunal on September 14, 2016.

2.2.5 The Compressors Case

The *Compressors* case presented a very singular situation that challenged CADE to find effects in Brazil derived from conducts practiced by foreign companies in a market with clear national boundaries and dominated by national players. According to the GS's opinion, this cartel was initially created by players in Brazil, the two national manufacturers of compressors, that later evolved to an international cartel when the national manufactures, which also had manufacturing operations in other countries, started to have meetings and exchange information with foreign manufacturers. One of the national manufacturer was the leniency applicant that reported the conduct to CADE and to other foreign authorities. The other national manufacturer entered into a settlement agreement with CADE, leaving only the foreign companies and a few individuals to be prosecuted by CADE in the investigation.

In its final opinion on the case, the GS' accepted the foreign defendants' arguments that any possible discussions abroad did not relate to the Brazilian market, and that it would not make any sense for the foreign manufactures to discuss the Brazilian market, as the compressors' market in Brazil was clearly a national market for the following reasons: (i) applicable import taxes were very high in Brazil; (ii) transportation costs were also very high, and (iii) the local manufacturers were able to supply the total local demand at a lower price than export sales.

Based on these arguments, the GS sustained that there were "two cartels" in this investigation: (i) a Brazilian cartel involving the two local manufacturers of compressors, and (ii) a foreign cartel that would not have affected the Brazilian market.

Despite the GS's opinion, CADE's Tribunal concluded, in a non-unanimous decision, 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 manufactures. One member of the Tribunal rendered a dissenting opinion following the GS's opinion and concluded that the market for compressors was clearly a national market with significant barriers for foreign entrants, not an international one, and that there was no evidence that the foreign companies would have discussed the division of the Brazilian market.

3. A Brief Comparative Analysis Between the Application of the Effects Doctrine in Brazil, in the U.S. and in the European Union

CADE has traditionally looked towards the U.S. antitrust authorities and the European Commission for guidance on best practices in antitrust enforcement. However, the analysis of CADE's recent case law regarding the application of the effects doctrine seems to indicate that CADE has been adopting a broader interpretation of the extraterritorial application of the Brazilian Antitrust Law than its U.S. and European counterparts have.

Similarly to the Brazilian Antitrust Law, the applicable legislation of the U.S. also provides that the application of their antitrust laws is not limited to conducts practiced within its territory. Rather, anticompetitive conducts practiced abroad that affect the U.S. domestic or foreign commerce may also violate the antitrust laws of the U.S. Nevertheless, for the U.S. federal antitrust

laws to apply to foreign conducts, the U.S. antitrust authorities¹⁸ must evaluate whether there is sufficient connection between the anticompetitive conduct and the U.S. market.

It is clear both in the U.S. Supreme Court rulings and in the wording of the U.S. applicable legislations¹⁹ that the U.S. antitrust laws apply to foreign conducts that have a substantial and intended effect in the U.S. Cases involving U.S. importation commerce are subject to the Sherman Act's general requirements for effects on commerce, being prohibited by Section 1 as a conspiracy in restraint of trade with foreign nations. Cases involving non-importation foreign commerce, however, are generally outside of the reach of the Sherman Act and FTC Act, unless such conducts (U.S.A. export commerce and foreign commerce) have direct, substantial and reasonably foreseeable effects on commerce within the U.S.A.²⁰.

The European Commission also adopts the effects doctrine to determine the extraterritorial application of its antitrust legislation. Article 81 §1 of the European Commission Treaty applies to agreements and practices having as their object or effect the prevention, restriction or distortion of competition within the common market, regardless of whether some or all firms involved are inside or outside of the European Union, where the anticompetitive agreement was entered into or where the conducts were practiced.²¹

The European Courts embraced the effects doctrine in 1999, sustaining the applicability of the EC Merger Control Regulation when the proposed concentration had foreseeable, immediate and substantial effects in the European Community. Despite the fact that this decision dealt with the question of jurisdiction under the EC merger control rules, it is submitted that the effects doctrine is equally applicable to agreements and conducts qualified as horizontal cartels, assuring the European Commission's jurisdiction to apply Article 81 §1 to international cartels producing effects in the European common market.

In 2004, the European Commission published a Commission Notice²² containing guidelines on the applicability of Articles 81 and 82 of the European Commission Treaty. In this Notice, the European Commission pointed out that one of the requirements for the application of the Treaty is that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States of the European Union or affect its competitive structure.

In summary, although the applicable antitrust legislations in the U.S., European Union and Brazil are similar with regard to the adoption of the effects doctrine to establish their extraterritorial application, the U.S. antitrust authorities and the European Commission have adopted more clear and objective criteria to determine when conducts practiced abroad would actually have the

¹⁸ The U.S. Department of Justice ("DOJ"), and the Federal Trade Commission ("FTC").

¹⁹ I.e. the Sherman Act and the FTC Act.

²⁰ U.S. DEPARTMENT OF JUSTICE and FEDERAL TRADE COMMISSION. *Antitrust Guidelines for International Enforcement and Cooperation*. Available at <<https://www.justice.gov/atr/internationalguidelines/download>>. Access on February 21, 2017.

²¹ KIRIAZIS, Georgios. Jurisdiction and cooperation issues in the investigation of international cartels. Available at <http://ec.europa.eu/competition/speeches/text/sp2001_010_en.pdf>. Access on February 21, 2017.

²² EUROPEAN COMMISSION. *COMMISSION NOTICE Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)*. Available at <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)&from=EN)>. Access on February 21, 2017.

potential to limit competition in the territory to justify an antitrust investigation. CADE, on the other hand, still seems to be in the process of developing such criteria, applying the effects doctrine more extensively than its U.S. and European counterparts apply.

4. Conclusion

The analysis of the recent case law on international cartels in Brazil demonstrates that CADE is still maturing its understanding on the criteria for the extraterritorial application of the Brazilian Antitrust Law and, in certain cases, has not required substantial evidence of effects in Brazil to justify the conviction of foreign defendants. In spite of the GS and CADE's General Attorney Office efforts to advocate the adoption of more strict and objective criteria on this matter in certain cases, particularly in the *Compressors Case* and in the *DRAM Memory Case*, respectively, CADE's Tribunal preferred to adopt a more conservative approach, applying looser standards of proof to conclude that a certain conduct practiced abroad would have effects in Brazil.

It is possible that the Tribunal's decisions in the *Compressors Case* and in the *DRAM Memory Case* may lead the GS and the General Attorney Office to review the positions adopted in their respective opinions in those cases, which can be seen as a setback on this matter. Nevertheless, it is noticeable that the GS has been strongly committed to improve the quality of the evidence to demonstrate the connection between the practices abroad and the Brazilian market in international cartel investigations.

The GS has been more rigorous in the negotiation of leniency agreements involving international cartels, requiring leniency applicants to present detailed and persuasive evidence that the reported conducts actually had effects or, at least, could have had effects in Brazil. This is very important because it is the GS that decides which leniency applications should be accepted and which cases should be prosecuted. Therefore, it is expected that the GS should also apply a higher standard of proof of effects in Brazil when deciding which cases should be investigated in Brazil, not only in cases originated from leniency applications, but also in cases originated from complaints filed by third parties or other sources.

Although it may not be sufficient to ensure the development of more suitable criteria for the application of the effect doctrine by the Tribunal, the improvement on the quality of the proof of effects in Brazil at the early stages of the investigations by the GS is expected to reduce this problem in future cases. This approach is likely to reduce the number of cases in which the Tribunal is faced with the challenge of making decisions based on less persuasive evidence of effects in the country.

In spite of the critics to the broad application of the effects doctrine by CADE's Tribunal in recent decisions, it is undisputable the enormous improvements achieved by CADE in the prosecution of international cartels and in competition enforcement as a whole, particularly following the enactment of Law 12,529/2011. CADE has demonstrated an exceptional ability to evolve and to learn from past mistakes, which increases the chances that there may also be improvements in the application of the effects doctrine in the future.

An efficient effect-based antitrust enforcement system should focus its efforts to investigate only foreign conducts that may pose a material risk to competition in the country, and

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

avoid spending time and limited resources on conducts with little or no connection to the national market. Rather than leaving international cartels unpunished, a more restrictive and well-adjusted application of the effects doctrine will have the benefit of allowing CADE to pursue the cases that really matter and that may actually harm competition in Brazil and Brazilian consumers.

Case	Type	Start of the Proceeding	Date of final Decision	Period of analysis	Fines imposed on Companies (R\$)
International Vitamins	Direct effects in Brazil	May 16, 2000	April 11, 2007	6 years, 10 months and 23 days	Between 847,125.19 and 12,112,558.32
International Air Cargo	Direct effects in Brazil	April 24, 2008	August 28, 2013	5 years, 4 months and 4 days	Between 3,974,204.02 and 144,950,064.20
Marine Hoses	Direct effects in Brazil / Market Division	November 11, 2007	February 25, 2015	7 years, 3 months and 14 days	Between 1,064,109.00 and 11,203,804.73
Peroxides	Direct effects in Brazil	September 9, 2004	May 9, 2012	7 years and 8 months	133,644,180.67
Graphite Electrodes	Direct effects in Brazil / Market Division	December 17, 2002	October 14, 2015	12 years, 9 months	None
Sodium Perborate	Direct effects in Brazil	October 1, 2009	February 24, 2016	6 years, 4 months	17,428,573.35
Cathode Ray Tubes	Direct effects in Brazil	December 16, 2009	November 9, 2016	6 years, 10 months and 21 days	Between 1,687,263.05 and 5,852,550.00
Gas Insulated Switchgear	Direct effects in Brazil / Market Division	March 20, 2006	Pending judgement	Pending judgement	Pending judgement
Compressors	Direct effects in Brazil	July 8, 2009	March 16, 2016	6 years, 8 months	4,788,450.00
DRAM Memory	Indirect effects in Brazil	June 21, 2010	November 23, 2016	6 years, 5 months and 2 days	Between 532,050.00 and 1,596,150.00
Underground and Submarine Cables	Direct effects in Brazil / Market Division	October 26, 2010	Ongoing GS investigation	Not applicable	Ongoing GS investigation
ODD	Indirect effects in Brazil	September 30, 2011	Pending judgement	Not applicable	Pending judgement.
Elastomers	No effects in Brazil	October 21, 2011	August 31, 2016	4 years, 10 months	None
Plastic Products	No effects in Brazil	August 26, 2011	September 14, 2016	5 years, 20 days	None

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Spark Plug	Direct effects in Brazil	September 3, 2014	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Capacitors	Direct effects in Brazil	September 29, 2014	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Antifriction Bearings in the Automotive Sector	Direct effects in Brazil	October 9, 2014	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Exchange Rates	Direct effects in Brazil	December 2, 2014	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Automotive Wire Harnesses	Direct effects in Brazil	November 10, 2015	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Ceramic Substrate	Direct effects in Brazil / Market Division	December 18, 2012	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Maritime Transportation RoRo Ships	Direct effects in Brazil	February 22, 2016	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Electric Power Steering System	Direct effects in Brazil / Market Division	March 23, 2016	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Clutch Facing	Restricted Access	Restricted Access	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Front and Rear Shock Absorbers	Restricted Access	Restricted Access	Ongoing GS investigation	Not applicable	Ongoing GS investigation
Color Picture Tubes	Direct/Indirect effects in Brazil / Market Division	March 22, 2010	Pending judgement	Not applicable	Pending judgement

CHAPTER 17 - PROSECUTING CARTELS: IS RELEVANT MARKET DEFINITION NECESSARY? AND WHAT ABOUT THE PER SE RULE IN BRAZIL?

A critical (though modest) contribution to the jurisprudence of CADE

Mauro Grinberg

The author of this text aims to issue a critical (though modest) contribution to the understanding that the Brazilian authorities have about cartels. Importing a typically American and jurisprudence originated rule as the per se does not fit with Brazilian law, especially when considering that the two systems are basically different. One cannot put a banana in the middle of oranges and pretend that the banana is another orange. There is no intention here to explore the differences in the U.S. about the per se rule and the rule of reason but to demonstrate that the Brazilian system does not allow the use of the per se rule. Moreover, as the per se rule has been used to avoid defining relevant markets e market shares, the author insists on the need to define relevant markets and market shares in cartel cases.

Brazilian authorities – especially CADE – generally adhered to the understanding that, when prosecuting cartels, considering it as a typical per se rule issue, market definition and measuring market power are not necessary because this is all done taking into account the parties in the collusion. In other words, the parties in the collusion are what otherwise would be called the relevant market.

Besides, understanding that a collusion – almost any collusion – is inherently harmful to the economy, plus considering the parties to such collusion as the relevant market – regardless of the existence of other competitors in the marketplace – does not fit in the Brazilian system. This system is pyramidal, with the Federal Constitution on the top of it, and all laws having to comply with what is usually called the Major Statute or Major Law.

There are some examples that the author wants to use to make a point, starting with the Administrative Process 08012.001273/2010-24, decided on August 5, 2015, involving the solar heaters' market, in which CADE decided that “market definition for the agents responsible for this conduct is not necessary because the sheer evidence of the conduct is enough to demonstrate the potential damages of such conduct” (free translation).

We can also mention Administrative Process 08012.004039/2001-68, decided on March 12, 2013, involving bakeries in Sobradinho (a Brasilia “satellite city”), in which CADE decided that “relevant market delimitation and calculation of shares are very relevant analytical tools in a great portion of the antitrust investigations but they are irrelevant in collusion investigations aiming to the sheer price fixing. Usually the ability of the players to influence the economic environment results from other material elements contained in the file, which are enough to demonstrate market power and potentiality to harm the market without needing to define the relevant market and calculate the market shares” (free translation). The decision understands also that such conduct does not generate

any social benefit nor there cannot be found any procompetitive effect; these facts alone can justify the sanctions. Besides, only companies that are able to influence the market can adopt it.

Trying to answer the questions in this chapter's title, we understand that the rule of reason (as opposed to the *per se* rule) in the U.S. was created by the Courts (mainly when the Supreme Court added the word "unreasonable" to the Sherman Act in 1911) and not by the Law. Is this valid dichotomy also for Brazil? We must take into account, to start with, that the Brazilian system is based on Civil Law, which has less influence from the Courts in the formulation of its rules. Having this simple fact in mind, we can ask whether it is legitimate to "import" a Court created rule into a Civil Law system. In fact, in Brazil the main source of Law is the statute, with jurisprudence not even the next behind. So, the Brazilian equivalent to the *stare decisis* is the statute.

Of course, we can try to adopt some kind of understanding in order to use the *per se* rule without harming the Civil Law system, mostly by developing the idea that the division between rule of reason and *per se* rule is based on the extent of needed evidence. In some cases, the potential harm is so clear that we must only demonstrate that the collusion happened and this is how we can use the *per se* rule. However, there is no way to avoid market definition and market share, even because a violation of law can only happen in a given market.

Some specific features of Brazilian Law must here be mentioned, starting with the Federal Constitution, which can be described as the Major Law or Major Statute and source of all possible law. By the way, the 1988 Federal Constitution is very complex and not just a table of principles that, no matter how important they are – and we can say this about the American Constitution –, it does not go down to details. In fact, Paragraph 4 of Article 173 (there are 250 articles) says that "the statute will repress the abuse of economic power aiming to domination of markets, suppression of competition or arbitrary raise of profits" (free translation).

It is possible to infer from this Constitutional text that: (i) the violation is defined as abuse of economic power, this meaning that if one does not have such economic power (which can be collective), there is no possibility of its abuse; (ii) when we talk about domination of markets, such markets must be described; and (iii) in order to suppress competition, one must know who are the competitors and thus describe the relevant market. The arbitrary raise of profits is something that has never been defined, although the author understands that this is to be used only in monopolies. Most important, this Constitutional text does not leave room for the *per se* rule because of the expression "aiming to"; if some parties aim to create a cartel, there is a clear intention that must be demonstrated and thus the standard of proof is high.

Going down to Law nº 12.529/2011, known as the relevant antitrust law in Brazil, we can find Paragraph 2 of Article 36: "Dominant position is presumed whenever an undertaking or group of undertakings is able to unilaterally or jointly change market conditions or whenever controlling 20% or more of a relevant market" (free translation). Putting together the Constitutional and statutory texts, we can see that, in order to abuse economic power, one must have it and this can also be called dominant position. Interesting enough is the presumption of economic power if an undertaking or group of undertakings has 20% or more of a relevant market.

It remains clear that the Brazilian system keeps mentioning relevant market, whether measured or presumed. In fact, even when a party is accused of being able to change the market conditions, it is mandatory to describe such market in which the conditions can be changed. Here we can see a clear clash between the interpretation of the law (this meaning joint interpretation of

the Constitution and the Statute) and the decisions deeming unnecessary to describe the relevant market. Avoiding market definition through the use of the per se rule does not fit in the Brazilian system.

We can create a hypothetical: in a certain market with three players, one with 80% and each of the others with 10%, a collusion of the two small players would be a violation? In case we use the per se rule in the way it has been used in some cases, this collusion would be punishable, never minding the fact that it proposes a stronger competition to the dominant player, thus being a precompetitive arrangement. We can change the percentages (e.g. 50-25-25) and common sense, if not the rule of reason, will do the rest (if we are not biased by a standard per se interpretation). Such hypothetical leads us to the conclusion that the use of the per se rule can result in false positives and therefore to wrong and harmful convictions.

We have some cases in Brazil that can be described as near to our hypothetical. For instance, in Administrative Process 08012.004036/2014-24 CADE convicted on August 30, 2003, a group of fuel stations in a city called Lages, in the State of Santa Catarina (almost all the way to the South). In that city, described as the relevant market, there were 27 fuel stations but only 9 of them, apparently scattered through the city, were parties to the collusion. So, at least in theory, the consumers had 2 other suppliers for every member of the alleged cartel. Obviously, it can be said that the other fuel stations, even if not colluding, could follow the prices of the cartelists; but they could also have not done it. The problem here is that the authority decided that 9 out of 27 were enough to constitute a cartel, without further investigation.

It is not difficult to understand that cartels are anticompetitive. But, in order to define whether an agreement is a cartel and thus a punishable agreement, we cannot in Brazil simply use the per se rule. Yes, cartels are bad; but not all agreements are cartels just because not all agreements harm competition; in fact, some or many can be precompetitive.

Moreover, it is not possible to consider an agreement as a cartel, without inquiries about the relevant market and, in such relevant market, the shares of the participants in such agreement because the possible existence of other competitors may lead to the understanding that the agreement is, if not precompetitive, at least legitimate.

The conclusion is clear:

1. Per se rule is not something to be used in Brazil.
2. In Brazil, there cannot be a cartel conviction without market definition, including shares of the participants.

CHAPTER 18 - ELEVEN LESSONS ONE CAN LEARN FROM THE CADE'S CASE LAW IN BID RIGGING CASES

Joyce Ruiz Rodrigues Alves

1. Introduction

On May 31, 2007, the Ministry of Justice created a unit within the Brazilian Competition System dedicated to the detection and punishment of bid-rigging cartels and other antitrust infringements in public procurement. It aimed to increase public awareness and strengthen cooperation with governmental authorities from Federal and State Prosecution Offices, Audit Courts and the Federal Police. At the time, CADE had only applied penalties for bid rigging in two cases.¹

Ten years later, CADE has ruled over more than 13 (thirteen) cases² and it made the news worldwide due to the Car Wash investigation.³ Accordingly, there is no doubt that the detection and punishment of bid rigging schemes has increased significantly.

¹ (i) Repair services in oil rig (Administrative Process No. 08012.009118/1998-26, decided by the Tribunal on June 27, 2001); and (ii) Bus lines-State of Rio de Janeiro (Administrative Process No. 08012.006989/1997-43, decided by the Tribunal on June 15, 2005).

² (i) Security services in the State of Rio Grande do Sul (Administrative Process No. 08012.001826/2003-10, decided by the Tribunal on September 19, 2007); (ii) air freight (Administrative Process No. 08012.010362/2007-66, decided by the Tribunal on February 19, 2014); (iii) garbage collection services in the State of Rio Grande do Sul (Administrative Process No. 08012.011853/2008, decided on February 07, 2014); (iv) painting and plumbing materials in the City of Lages (Administrative Process No. 08012.006199/2009-07, decided by the Tribunal on December 10, 2014); (v) orthopedic orthotics and prosthesis products in the State of São Paulo (Administrative Process No. 08012.008507/2004-16, decided by the Tribunal on December 10, 2014); (vi) metal detector security doors (Administrative Process No. 08012.009611/2008-51, decided by the Tribunal on December 10, 2014); (vii) traffic radar in the City of Jahu (Administrative Process No. 08012.008184/2011-90, decided by the Tribunal on April 08, 2015); (viii) sanitation case in São Paulo (Administrative Process No. 08012.009885/2009-21, decided on April 08, 2015); (ix) solar heaters in the State of São Paulo (Administrative Process No. 08012.001273/2010-24, decided by the Tribunal on August 05, 2015); (x) components for HIV drugs (Administrative Process No. 08012.008821/2008-22, decided by the Tribunal on January 21, 2016); (xi) public hospital laundry services in the State of Rio de Janeiro (Administrative Process No. 08012.008850/2008-94, decided on February 03, 2016); (xii) blood components (Administrative Process No. 08012.003321/2004-71, decided by the Tribunal on April 13, 2016); and (xiii) special food market (Administrative Process No. 08012.009645/2008-46, decided by the Tribunal on November 09, 2016).

³ Until March 2017, CADE has opened the following investigations triggered by leniency applications that result from the Car Wash investigation: public bids in Petrobras' onshore platforms; public bids regarding Angra 3 nuclear plant and the North-South and West-East Railroads; public bids to build and operate the Belo Monte hydroelectric power plant; public bid for engineering and construction works for the urban improvement of the Alemão, Manguinhos and Rocinha neighborhoods in Rio de Janeiro, and construction of the Leopoldo Américo Miguez de Mello Research Center. They remain ongoing investigations.

As a celebration of the ten years of the creation of the bid rigging fighting unit and five years of the current Brazilian Antitrust Law, this chapter will discuss eleven lessons that one can obtain from reviewing the Brazilian case law in bid rigging investigations.⁴

2. Eleven lessons

2.1 CADE's jurisdiction does not encompasses administrative infringements or crimes regarding conspiracies with the public officials

In one of the first technical opinions issued by the unit dedicated to the detection of antitrust infringements in public procurement, it was stated that the Brazilian competition authority has power to sanction individuals and legal entities that perform economic activity.

In fact, the Brazilian competition authority does not have powers to investigate or sanction public officials for acts that may hinder the competition in public procurement. Likewise, the Brazilian competition authority does not have powers to investigate or sanction conspiracies between private corporations and public officials for acts that may hinder the competition in public procurement. Therefore, CADE has no jurisdiction over cases solely regarding conspiracy with public officials (which do not include conspiracy between economic agents) to limit competition in a public bid/auction. The authorities that are responsible for the legal enforcement actions against those unlawful acts are the following:

- a) **Audit Courts:** are part of the Legislative Branch of the Brazilian government, created to exercise external audit over the Executive Branch. In other words, their role is to prevent, investigate and sanction corruption and malpractice of public funds. They are responsible for auditing and approving budgetary compliance. Furthermore, they are also responsible for the auditing and approving of the public procurements procedures launched by the Public Administration and resulting public contracts. Specifically in regard to public procurements, they have powers to suspend the bid/action before the execution of the public contract, when they identify restrictive or illegal conditions in the bid rules that may affect the rivalry in the bid. In these cases, they may determine that authorities adopt measures in order to ensure compliance with applicable laws such as the amendment of the bid rules. Furthermore, they may apply penalties to the public officials that authorized the expense. In severe cases, audit courts may blacklist a company involved in an illegal hiring.
- b) **General Controllers:** have the duty of with assisting the government regarding the monitoring of treasury and public assets and the government's transparency policies. These tasks are carried out by means of public audits, fraud deterrence procedures, internal controls, corruption prevention, and ombudsman activities. They have powers to investigate and sanction public officials involved in unlawful conducts. The penalties include the suspension and even the expulsion of the public officials from public

⁴ It is important to note that former decisions are not binding. In other words, CADE is under no legal obligation to follow past decisions in future cases.

service. Furthermore, since the Clean Company Law came into force,⁵ they also have non-exclusive powers (i.e. jointly with governmental authorities) to commence, investigate and issue a final decision on administrative proceedings ascertain regarding alleged corruptive acts against the government committed by companies. Accordingly, they may apply, at an administrative level, the following penalties: (i) fines ranging from 0.1% to 20% of the gross income of the wrongdoer in the year preceding the commencement of the formal investigation; (ii) publication of the decision in a major newspaper at the wrongdoer's expense.

- c) **Brazilian Courts:** have powers to rule on lawsuits filed by economic agents that challenge the bid rules or the result of the bid. Therefore, it is quite common for Brazilian Courts to issue decisions examining whether a condition in bid rules is lawful and reasonable or not. Moreover, as apart from being an administrative infringement, bid rigging is also a crime in Brazil, cases are tried before the Brazilian criminal courts. According to the Economic Crimes Law (Law No. 8,137/90) amended by the current Brazilian Antitrust Law, cartel is punishable by a criminal fine and imprisonment from two to five years. This penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public official, or relates to a market essential to life or health. In addition, the Public Procurement Law (Law No. 8,666/93) specifically targets bid-rigging, providing for a jail time of two to four years and the payment of a criminal fine. Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Also, the Police (local or the Federal Police) may start investigations of bid-rigging and report the results of their investigation to the prosecutors, who may indict or not the reported individuals. Finally, Brazilian courts are also responsible for issuing a decision in regards to the application of judicial penalties in regards to violation of the Clean Company Law. They refer to following penalties: (i) confiscation of corporate assets, rights and values that represent undue benefits obtained by the practice of the corruption act; (ii) the prohibition of the wrongdoer to participate in public bids and (iii) the prohibition of the wrongdoer of obtaining funding from public banks for up to five years.

In view of the foregoing, when CADE reviews bid rigging cases that include other illegal practices (such as bribery), the decisions may contain a reference to the alleged existence of evidence of other illegal practices, but CADE usually does not describe, review or base their conclusions in the referred evidence. In other words, CADE does not explore evidence regarding other illegal practices that it does not have powers to sanction them.⁶

⁵ Law 12,846/2013 provides for strict liability for companies that practice unlawful acts against the public administration, such as bribery schemes and bid rigging.

⁶ This is made clear by the technical report issued by CADE in the commencement of the investigation regarding trains (Administrative Process No. 08700.004617/2013-41, ongoing investigation before the General Superintendence).

2.2 Antitrust leniency applications in bid rigging case encompass fraudulent bidding practices but they do not encompass other unlawful conducts such as bribery

As mentioned, the Public Procurement Law and the Clean Company Law also set forth penalties for bid rigging. In this respect, the current Brazilian Antitrust Law introduced a significant change to the Leniency Program: it increased scope of leniency to include violations provided for in other statutes. Accordingly, wrongdoers that apply for leniency could also obtain full immunity for fraudulent bidding practices that are punishable by the Public Procurement Law and even by the Clean Company Law.

Notwithstanding that, it should be highlighted that other unlawful acts – even if ancillary - are not included in the leniency application such as bribery or tax evasion. For instance, if wrongdoers have committed other infringements such as bribing public officials to impose certain conditions in the public tender rules in order to restrict the participation in the public tender to the cartel members, the bribery scheme would not be encompassed by the leniency agreement executed with CADE. Therefore, a leniency applicant would have to negotiate with (i) CADE, (ii) the highest authority of the specific government entity under whose jurisdiction the alleged corruption practice took place, and (iii) with the Public Prosecution Office in order to attempt to ensure a more lenient treatment regarding all infringements.

Since 2003, CADE has signed over 60 (sixty) Leniency Agreements⁷; only nine refer to bid rigging cases. In fact, before the Car Wash investigation, CADE had only executed two leniency agreements in bid rigging cases. Due to the Car Wash investigation, other seven leniency agreements were executed.⁸ In some of these latest agreements regarding the Car Wash investigation, the leniency applicants have coordinated agreements with CADE and also with other competent authorities.

2.3 CADE will presume that companies owned by relatives compete if they take part in the same public auction. Likewise, CADE will presume that companies that belong to the same economic group compete against each other if they take part in the same public auction. And it will punish them if they do not

In several bid rigging investigations, CADE has found that there were cross ownerships between the investigated companies and/or that the investigated companies were controlled or represented by members of the same family.

In their defense, defendants have argued that the Public Procurement Law does not prohibit that companies owned by members of the same family compete against each other in public procurements. They have also argued that the Public Procurement Law does not prohibit that companies from the same economic group compete against each other in public procurements.

⁷ This is in accordance with a presentation from CADE regarding 2016, available at <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>

⁸ In accordance to a press release issued by CADE on December 05, 2016 available at <http://www.cade.gov.br/noticias/cade-investiga-cartel-em-licitacoes-de-estadios-da-copa-do-mundo-de-2014>.

In view of these arguments, in the case regarding *special food acquisitions*, CADE has stated that, in fact, the Brazilian law does not prevent companies from the same economic from participating in the same public auction as long as they act as independent players. Accordingly, the companies cannot exchange any kind of sensitive information and cannot coordinate their strategies once they have decided to compete against each other in the same public auction. In other words, the companies are to prepare their proposals independently from each other.

Accordingly, in case CADE detects evidence that those companies have entered the same bid and exchanged sensitive information about their proposals or bids, they shall be punished for unlawful corporate conduct by CADE. This occurred in the following cases: *painting and plumbing materials in the City of Lages*; *traffic radar in the city of Jahu*, and *special food*.

2.4 In bid rigging cases, CADE always looks for similarities in the documents submitted by different bidders.

In accordance with OECD's Guidelines regarding the detection of bid rigging in public procurement⁹, CADE always looks for similarities in documents, especially proposals submitted by the investigated companies. It usually focuses on: (i) identical stationery layout, type face; (ii) common addresses, personnel, phone numbers; (iii) same calculations, handwriting, spelling errors or corrections appear in two or more bid packages; and (iv) bids or proposals contain white-outs or corrections indicating last minute price changes.

In fact, the submission of proposals with similarities amounts associated with suspicious behavior in public tenders (lack of bids or lack of appeals) were held as sufficient evidence by CADE to sanction the investigated companies for bid rigging in some cases such as: *painting and plumbing materials in the City of Lages*, *traffic radar in the city of Jahu*, and *special food*.

2.5 Review the competitive impact of consortia and subcontracting agreements executed before the bid with your competitors. CADE may consider them equivalent to cartel agreements

Firstly, it is important to note that the Brazilian Antitrust Law prohibits the acts that “have as an objective or may have the following effects (i) limit, restrain or, in any way, injure free competition or free initiative; (ii) control the relevant market of goods or services; (iii) to arbitrarily increase profits; and (iv) to exercise a dominant position abusively” (article 36).

Accordingly, the Brazilian Antitrust Law sets forth that, regardless of intent, any act that has the purpose or is able to produce anticompetitive effects, even if such effects are not achieved, shall be deemed an antitrust infringement. The broad wording of the law encompasses all forms of agreements and exchange of sensitive commercial information. As a result, if individuals and/or corporations engage in a conduct that has the potential to limit or restrain competition, they shall be sanctioned in accordance with the Brazilian Antitrust Law.

In bid rigging cases, CADE usually considers that the relevant market is defined by the bid rules. Therefore, companies that in a more traditional definition of relevant market would not hold any market power can be held liable for antitrust infringements. Accordingly, there have been cases

⁹ Available at <http://www.oecd.org/competition/cartels/42594486.pdf>.

in which *consortia* and subcontracting agreements were the main evidence considered by CADE to sanction companies as CADE established that they ended up limiting competition in a public auction.¹⁰

In the *air freight* case, the defendants argued that the bid rules authorized the execution of subcontracting agreements and that they had no intent of engaging in an unlawful corporate conduct. Notwithstanding that, in its decisions, CADE considered that regardless of their intent or, even if they could have known if the bid would have other participants, the execution of those agreements restrained competition in the public bids.

2.6 The commencement of a bid-rigging investigation triggered by a leniency application may have immediate effects in the review of the agreement by audit courts and other authorities

Until 2014, it would be correct to state that the commencement of a cartel investigation would not have any immediate effects in the review carried out by the audit courts.

In the investigation regarding the alleged cartel behavior in *train and subway procurements*¹¹, once that the Brazilian press made public the execution of a leniency agreement and the commencement of a formal investigation, the Brazilian press started to review the former decisions issued by the audit courts. After the publication of several articles criticizing the Audit Court of the State of São Paulo for approving public procurement procedures that were supposedly rigged by the cartel, the audit court decided to reopen all the referred cases and stated that it could prohibit companies convicted of bid rigging from participating in public procurements for five years.

2.7 The authorities are talking more and more, what can multiple the administrative proceedings and lawsuits convicted companies will face for the infringement

Until now, most of the cases sanctioned by CADE were commenced due to cooperation with the Prosecution Offices and the Federal Police. They identified evidence of unlawful conduct and communicated CADE.

Recently, CADE has been focusing on the development of pro-active tools to detect bid rigging. In fact, CADE has also entered into cooperation agreements with several authorities such as public banks, Union, State and City Comptrollers, audit courts with the purpose of obtaining information about public bids and auctions and building a data base to identify bid rigging behavior patterns.

Finally, CADE usually sends a copy of its decision to the other public authorities that have powers to apply sanctions for the unlawful conduct as well.

¹⁰ In this respect, we highlight the decisions issued by CADE in the following cases: *repair services in oil rig; bus lines, and air freight*.

¹¹ It is an ongoing investigation.

2.8 The number of public procurements rigged is likely to influence in the calculation of the fine

As an administrative offence, companies that are held liable for bid rigging can be sanctioned with fines imposed by the CADE that may range from 0.1 to 20% the turnover registered in the year preceding the initiation of the proceeding in the field of business activity in which the violation occurred. Managers and directors involved in the infringement may be fined an amount ranging from 1 to 20 per cent of corporate fines. Other individuals, business associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50,000.00 to BRL 2 million. Fines for repeated violations are doubled.

Furthermore, the Brazilian Antitrust Law provides that the following factors are to be taken into consideration in the calculation of the fines: (i) the seriousness of the violation; (ii) the good faith of the wrongdoer; (iii) the advantage obtained or envisaged by the violator; (iv) consummation or not of the violation; (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; (viii) the economic status of the wrongdoer, and (viii) any recurrence.

Currently, the level of fines imposed in bid rigging cases is the same applied in other cartels: the average percentage applied is 15% of the annual gross sales of the defendant in the business activity where the infringement occurred when there is direct evidence. Higher fines, leading to 20%, may be applied to the leader of the cartel. In addition, CADE's Tribunal tends to take into account the number of bids/public actions that were rigged. For example, in two cases in which CADE only identified evidentiary support of big rigging in one procurement action, the fines applied were lower than 15% of a company's pre-tax revenues in the year preceding the initiation of the proceeding in the field of business activity in which the violation occurred.¹²

At this point, it is important to note that there have been discussions between CADE's Commissioners to increase the fines by applying the fine over the value of the rigged bid(s) instead of the company's pre-tax revenues in the year preceding the initiation of the proceeding in the field of business activity in which the violation occurred. For example, in the *special food* case, one of the Commissioners argued that the calculation of the fine should take into account the volume of sales of the defendants and the losses generated to the Public Administration. In his view, this calculation would reflect the value of the auction(s) rigged and the overpricing caused by the cartel. Notwithstanding that, by majority of votes, the fines were applied over the sanctioned company's pre-tax revenues in the year preceding the initiation of the proceeding in the field of business activity of activities in which the violation occurred.

2.9 The sanctioned companies may be prohibited from benefiting from public funding for a period up to five years

Among other penalties, the Brazilian Antitrust Law provides the possibility that CADE prohibits sanction companies from obtaining funding from public banks for up to five years.

¹² In fact, in the *sanitation* case the fine imposed by CADE was only of 10% while in the *special food* cartel it was of 13%.

Despite the fact that this penalty is not applied often by CADE, it was applied to all sanctioned companies in the *garbage collection services* case. It is stated in CADE's decision that this prohibition simply encompasses the prohibition of convicted companies benefiting from public funds or public funding programs. Therefore, as public banks do not obtain funds solely from public funding programs, they could still provide funding.¹³ Accordingly, this means that the sanctioned companies could obtain loans from public banks but they would pay higher interest rates as they could not benefit from public policies.

2.10 The ring leader of the cartel is likely to be debarred from public procurements (blacklisted) for five years by CADE

In 2007, CADE applied the blacklisting penalty in the *security services bid rigging cartel in the State of Rio Grande do Sul*.¹⁴ It was the first bid rigging case commenced by a leniency application. The sanctioned companies filed a lawsuit to annul CADE's decision and later on, they entered into a settlement agreement in which they agreed to pay the fines applied by CADE in full in exchange for the "cancelation" of the blacklisting penalty.

Only seven years later, CADE started applying this penalty again to all the corporations held liable for bid rigging.¹⁵ It is worth noting that, in *metal detector security doors* case, the sanctioned companies tried to appeal from the decision arguing that (i) the penalty would result in the companies going bankrupt, and (ii) the consumers would be harmed by the debarment penalty as well. At the time, CADE stated that the application of the penalty was reasonable due to the seriousness of the unlawful corporate conduct practiced by the convicted companies. Furthermore, CADE also stated that the penalty would not harm public interest as there were other companies that offer detector security doors in Brazil and, as a result, the level of remaining rivalry would be sufficient.¹⁶

In February 2016, in the *laundry* case,¹⁷ CADE's Tribunal faced a discussion about the impacts of this penalty in the market. After investigating the defendants' allegations that the penalty would restrict the level of rivalry in the public bids, CADE decided to apply this penalty only to the company that was considered the leader of the cartel. Therefore, according to this decision, CADE should always consider two factors when deciding to apply the debarment penalty, which are, (i) severity of the unlawful conduct, and (ii) the need to serve the public interest.

In Brazil, cartel members, with no exception to the leniency applicants, are jointly and severally liable for damages caused by their illegal practices. In other words, each cartel member

¹³ CADE had already faced 2.11 Companies that committed bid rigging are more likely to face lawsuits filed by governmental entities requesting compensation for the damages caused by the infringement this discussion about the effects of the prohibition in the *cement cartel* case (Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014).

¹⁴ Administrative Process No. 08012.001826/2003-10, decided by the Tribunal on September 19, 2007.

¹⁵ In this respect, we highlight the decisions issued by CADE in the following cases: orthopedic orthotics and prosthesis products in the State of São Paulo, metal detector security doors and painting and plumbing materials in the City of Lages.

¹⁷ Administrative Process No. 08012.008850/2008-94, decided on February 03, 2016

may be held liable for the entire cartel-related damage. Despite the provisions of the Law, the fact is that there are only a few cases brought by parties requiring to be compensated for cartel damages.

However, companies that committed bid rigging are more likely to face lawsuits filed by governmental entities requesting compensation for the damages caused by the infringement. This is due to two main factors: (i) public authorities are obliged by law to seek for compensation; (ii) CADE is likely to send a copy of the decisions to them.

In fact, as occurred in the investigation regarding the alleged *cartel in public tenders for trains and subways* (ongoing investigation), Metropolitan Trains' Paulista Company (“CPTM”) and São Paulo’s Metro filed a lawsuit against the leniency applicant as soon as the execution of the leniency agreement was made public. Furthermore, the Governor of the State of São Paulo has announced that he will sue all the convicted companies for damages caused by the cartel after CADE’s conviction. In accordance, CPTM and São Paulo’s Metro have requested to take part in the investigation as third parties, and their request was granted by CADE. This means that the referred companies will have access to the main documents of the investigation and will be to submit their views to CADE during the investigation.

Finally, it is important to mention that the Brazilian Supreme Court is currently reviewing a case in which it is discussed whether the statute of limitations is applicable to lawsuits that aim compensation for damages caused by illegal acts performed by public officials. If the understating of the Superior Court of Justice prevails, there will be no statute of limitations applicable to lawsuits requesting compensation of the losses generated by unlawful acts connected to corruption.¹⁸ Therefore, if the Supreme Court decides that there is no time limitation for the Public Administration to seek compensation for damages caused by corruptive acts, this decision shall impact the bid rigging cases.

3. Conclusion

There has been a significant increase in the prosecution of bid rigging and anti-corruption cases in Brazil in the last ten years.

The enactment of the Clean Company Law and the Car Wash investigation have already meant a new phase of increased cooperation and anticorruption enforcement in Brazil. In fact, there has been a significant increase in the demand for development and enhancement of anticorruption and anti-cartel compliance programs by companies in Brazil. Finally, they will continue to demand increased cooperation and to bring further developments to the anticorruption policies in Brazil.

¹⁸ Appeal No. 852.475-SP, still under review.

CHAPTER 19 - ANTITRUST ENFORCEMENT AGAINST CARTELS: THE BRAZILIAN EXPERIENCE AND FUTURE PERSPECTIVES WITH DAWN-RAIDS AND AMNESTY PROGRAMS.

Juliana Oliveira Domingues
Eduardo Molan Gaban

1. Introduction

The Latin America has shown extremely relevant institutional changes. In this regard, many developing countries, including those of Latin America (like Brazil), have adopted competition laws or policies based on the common sense that the absence of antitrust policy exposes countries to anti-competitive practices¹.

The Brazilian example deserves attention, especially due to the recent changes which sought institutional maturity of CADE and its important role within Latin America, even as an example to be followed by other Latin American countries still lacking an effective antitrust policy².

An effective antitrust policy is out-of-doubt essential for economic development. In the antitrust enforcement realm, fighting cartels has a very special place³. International experience has shown that fighting collusion behaviour is one of the best ways to implement an effective antitrust policy and, as a result, granting immediate consumer welfare to society. As such, it is also a given that a set of investigative and punitive tools are crucial for this purpose⁴.

On the investigation side, the amnesty programs (also named as leniency programs, like in Brazil⁵) have been placed as the main tool in this sense (as it can be observed in the graph below).

¹ WTO. Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council. WT/WGTCP/2. Available at: <<http://www.wto.org>>. Access on August 28, 2009, p. 229.

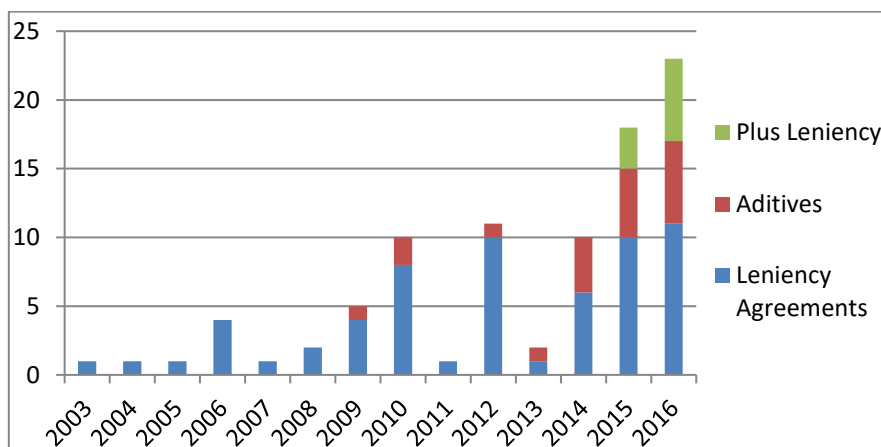
² As an example, in 2008 the Brazilian Authorities and the Fiscalía Nacional Económica (FNE) - the authority responsible for investigation of anticompetitive practices in Chile - entered into a cooperation agreement to develop investigation technics for cartels and cartels in public procurement processes.

³ See OCDE. Recommendation of the Council concerning Effective Action Against Hard Core Cartels — C(98)35 (Final).

⁴ See International Competition Network — ICN. Anti--Cartel Enforcement Manual. Cartel Working Group — Subgroup 2: Enforcement Techniques. Mar. 2010. See also: Cartel Working Group. Anti-Cartel Enforcement Manual. Chapter on Relationships between Competition Agencies and Public Procurement Bodies. 2015.

⁵ “In the United States, the terms corporate immunity, corporate leniency, and corporate amnesty are all synonymous. Under the U.S. Corporate Leniency Program, these terms all refer to a complete pass from criminal prosecution or total immunity for a company and its cooperating employees. The company pays no fine. Their culpable executives do not go to jail. The key is that only one company can qualify for leniency. [...] When I use the term "leniency" or "amnesty," I am referring to a company that is the first to report anticompetitive activity and that is seeking a pass from prosecution and a 100% reduction in fines.” HAMMOND, Scott. Cornerstones of an Effective Leniency Program. ICN Workshop

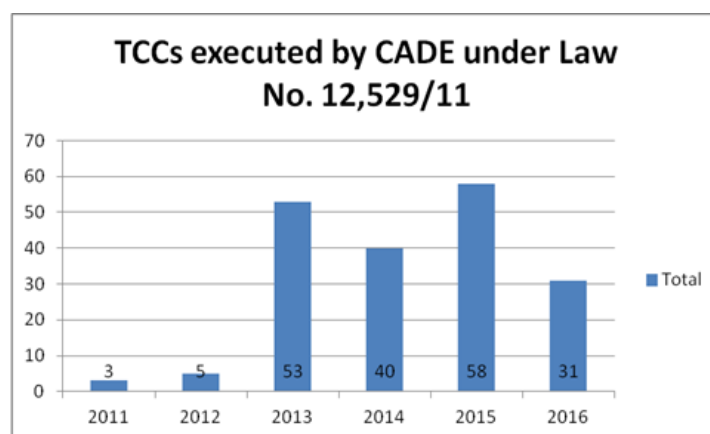
On the punitive side, an ideal (dissuasive) antitrust policy against cartels should provide for criminal and civil (or governmental) penalties.



Source: CADE, 2017.

However, according to constitutional provisions already construed by Courts in Brazil, though very important, the enforcers cannot only rely on amnesty agreements to launch and conclude investigations, including cartel ones. They still must seek to demonstrate throughout the process the cross-evidencing of the wrongdoing. In other words, they should be able to bilaterally prove the cartel infringement relying on material collected from defendants beyond the beneficiaries of amnesty programs.

In Brazil, the antitrust enforcers can perform such a task reaching plea guilty agreements (also known as cease and desist agreements, or “TCCs”), and pursuing dawn raids. The TCCs path have been used a lot by enforcers and defendants to conclude cartel investigations, as demonstrated in the graph below:



Source: CADE, and Institutional presentation carried out by CADE’s former President, Vinicius Marques de Carvalho⁶.

on Leniency Programs. Sydney, Australia, nov. 2004. Available at: <<http://www.justice.gov/atr/public/speeches/206611.htm>>. Access on February 16, 2016.

⁶ Presented in May, 2016, in the Meeting of the Board of Legal and Legislative Affairs (CONJUR) of the Federation of Industries of the State of São Paulo (“FIESP”) under title “Política de Defesa da Concorrência: Balanço e Perspectivas” (“*Competition Defense Policy: Overview and Perspectives*”).

In the same sense, the TCCs “solution” has disclosed to be a good way to “recover” damages from cartellists to “society” because a pecuniary contribution is a requirement for defendants to settle with CADE⁷. The first question that remains unanswered is whether the amount collected through TCCs is effectively driven to society, who suffered the effects of the anticompetitive behaviour. And the second question is whether TCCs’ material really adds the inventory of evidence in a given investigation in a way to sustain strong conviction decisions before Courts.

For this reason, the dawn raid tool must not be forgotten by the enforcement agents as a special tool to complete the set of tools to cartels in Brazil. As it is going to be tackled, the Brazilian experience started in this way but recently abandoned the utilization of dawn raids in cartel investigations.

2. Fight cartels in Brazil

In a wider sense, cartels represent the restraint and even the elimination of competition among a set of companies that would normally compete, with the purpose of earning higher profits. In this sense, the supply structure in force is generally established and market shares are usually maintained. With a coordinated action, each company has conditions to control prices and obtain higher profits.⁸

According to the National Agency of Petroleum, Natural Gas and Biofuels and the former Secretariat of Economic Law Office (ANP / SDE) Guidelines for Competition Defence in the Fuel Market, a cartel may be defined as:

‘[...] a horizontal agreement, formal or not, between competitors that operate in the same relevant geographic and material market, which aims at making uniform the economic variables inherent to their activities, such as prices, quantities, and payment conditions, so that it regulates or neutralises competition.’⁹ (freely translated).

In other words, cartels, collusions or uniform commercial operations are business agreements whose purpose is to increase end-prices (when entered into between sellers – a sale cartel) to reduce the sellers’ input prices as much as possible (when entered into between purchasers – a purchase cartel), which, through the reduction of competition, allows the market as much profitability as it would achieve in a monopoly or monopsony situation.

⁷ GABAN, Eduardo Molan; DOMINGUES, Juliana Oliveira. *Direito Antitruste*. São Paulo: Saraiva, 2016, p. 330.

⁸ According to Leal: ‘Any company can be seen as a group of “resources”, materials and humans, applied and organised in a way that can generate the maximum amount of profits possible, conquer preference and loyalty in the maximum number of customers possible and, consequently, the biggest participation in its market. In a word, a company that represents a certain amount of capital, materialising in a specific activity, searching for its greatest and most enduring value.’ (freely translated). LEAL, João Paulo G. Cartéis. *Revista do IBRAC*, São Paulo, vol. 8, n. 8, 2001, p. 58.

⁹ Brazil. SDE/MJ. Guidelines for Competition Defence in the Fuel Market. Available at: <www.mp.ba.gov.br/atuacao/ceaon/doutrina/a_defesa_concorrencia_mercado_combustiveis_ANP_SDE.pdf>. Access on August 26, 2011, p. 11.

It has a direct effect on economic welfare, to the extent that, by compulsorily leveraging the purchasers' prices or compulsorily reducing the sellers' prices, it transfers society's income to its members, in a situation similar to a monopoly.

In parallel to the general concept of a cartel, there is the idea of a hard core cartel, or a "classic cartel", which refers to an agreement, practice or behavioural arrangement entered into between competitive companies aiming to fix prices, share goods and services within a market by allocating customers, suppliers, geographic definition or production lines.

The agreements with the purpose of restricting or restraining outputs through quota fixation are also included in the concept of the classic cartel. On the other hand, other types of agreement, such as output arrangements, increase of efficiencies or industry self-regulation are not included in the concept of classic cartels, provided that they are legally or expressly accepted by the legislation (e.g., agreements to share assets for cost reduction, joint ventures, consortia, industry self-regulation codes grounded on a level playing field).

In this regard, CADE case law has specified two types of cartels from the judgment of the rubble cartel case: (i) 'classic', or hard core, with some form of institutionalism (with institutionalized coordination mechanisms such as periodic meetings, operation manuals, principles of behaviour, etc.), with the objective of fixing prices and sale conditions, sharing consumers, defining output levels or preventing the entry of new companies into the market. Its action does not result from a possible and randomly coordination situation, but from the building of permanent mechanisms to achieve its unlawful purposes; and (ii) 'fuzzy', or non-permanent, which although similar to the classic cartels as far as the arrangement's purposes go (i.e., price fixing, market sharing, etc.), they have a possible and non-institutionalized character. CADE understands this would be the example of a group of companies that decide to coordinate the rise in prices many times arising from an external event that has affected them simultaneously.¹⁰

Several things have possibly supported CADE in carrying out such dichotomy ('classic' cartels v. 'fuzzy' or 'diffused' cartels), among which is the measurement of sanctions by virtue of the importance of the effects for society. However, the dichotomy classification of cartels proposed by CADE is not scientifically understood as being sustainable. This is so because both 'classic' and 'fuzzy' cartels refer to very similar phenomena as to their merits, but may be different only as far as the effects on society go. Thus, before creating a new classification to sustain a minor sanction, Law No. 12.529/11 already provide legal mechanisms to attribute a different sanction to a same class of phenomenon by virtue of the degree of importance of its effects on society. The fact is that, as it may be, if CADE vote that it refers to a concrete case of 'fuzzy' cartel, it may receive a more beneficial treatment in terms of sanction than a 'classic' cartel would receive.

¹⁰ Reporting Commissioner, Luiz Carlos Thadeu Delorme Prado's decision, in Administrative Process No. 08012.002127/2002-14, involving the following defendants: *Sindicato da Indústria de Mineração de Pedra Britada do Estado de São Paulo (SINDIPEDRAS)*, *Basalto Pedreira e Pavimentação Ltda.*, *Constran S.A. – Construção e Comércio*, *Embu S. A. Engenharia e Comércio* and others. In this case, the Reporting-Commissioner affirmed that the classification of a diffused cartel could be applied to Administrative Process No. 08012.00677/1999-70 – the so-called 'sky bridge' cartel (civil air transportation), as well as the cartel involving newspapers sold by newsstands in Rio de Janeiro. Along the same lines, see Reporting-Commissioner, Luiz Carlos Thadeu Delorme Prado's decision, in Administrative Process No. 08012.000099/2003-73, involving the following Defendants: *Auto Moto Escola Detroit*, *Auto Moto Escola Manhattan*, *Auto Escola Indaiá*, and others.

Under Brazilian Laws cartels are, in summary, behavioural arrangements that may comprise both horizontal and vertical market relationships, which artificially alter variables significant to competition in order to restrict and even to eliminate competition. For example, cartels might encompass agreements on prices (e.g., increase in prices), on conducts to exclude rivals (e.g., boycotts, increase in rivals' costs), and even on competition rules (e.g., sharing customers, suppliers, distributors, and bid or private tender rigging) in the market in which it operates.

It is important to point out that this cartel modality may qualify as a crime as stated in Law No. 8.137/90, and also based on the Bidding Law (Law No. 8.666/93), and the culprit of such violation is subject to the sanctions of both statutes. Additionally, since 2013, if the cartel behaviour is deemed to be linked to other crimes such as corruption or money laundering, it may trigger the enforcement of the Organized Crimes Law (Law No. 12.850/13), whose sanctions are significantly heavier than the former statutes.

A Company's assessment of whether or not it is convenient to engage in a cartel usually depends on the evaluation of the trade-off between its competitiveness, the probability of being caught, and the weight of penalties, in case of being caught. As previously mentioned, when under the effects of a cartel, the market tends to start facing a dynamic that is similar to a monopoly situation. The maximization condition, generally used in collusions, takes into consideration the sum of profits of all companies resulting in the reduction of the total quantity required, and in the rise in total prices and profits.

In Brazil, Law No. 12.529/11 defined cartels, establishing it in its Article 36, Paragraph 3(i), as an antitrust offense, in summary, 'to agree, combine, manipulate, settle with competitors, in any way' prices and sale conditions of goods and rendering of services. The cartel conduct is an administrative and a criminal violation that should be ascertained through an administrative proceeding, under the terms of the antitrust law, and criminal proceeding, under the terms of Law No. 8.137/90, subjecting players to penalties of monetary fines and imprisonment, respectively.

As mentioned above and upon the provisions of Law No. 8.137/90 (Crimes Against the Economic Order), Article 4(i) and (ii), cartel is a criminal offense in Brazil, but the criminal liability is only applicable to individuals and is not applicable for legal entities.

3. Amnesty programs / leniency programs in Brazil

In February 2000, based on written proposals and oral discussions among representatives of the agencies of the several OECD members, different and important features arose, and among them, the biggest challenge in the attack on hard-core cartels was to lift the veil from them.

Accordingly, to encourage a cartel participant to confess and 'betray' other participants and offer more significant evidence about the meetings and secret communications, leniency is an important tool: the agencies may promise smaller fines or sentences, or even a full pardon (or immunity)¹¹. It is worth stressing that the leniency agreement should be viewed as an additional

¹¹ OCDE. *Fighting hard-core cartels* — harm, effective sanctions and leniency programmes. Available at: <<http://www.oecd.org/dataoecd/41/44/1841891.pdf>>. Access on March 3, 2017.

element to the incentives derived from the reasoning on the traditional penalty system, since it acts as a negative incentive to the unlawful act by private agents.

It should also be stressed, however, that a debate about the constitutionality of the leniency agreement under its effects in the criminal sphere has arisen in Brazil. The problem is that it is entered into with the administrative authority (CADE) without the intervention of the judicial authority that has criminal jurisdiction on the case, despite the participation of the Public Prosecutor's Office (Federal and/or State).

This should still be argued and decided by the Brazilian Federal Supreme Court (STF) in the last instance, since among its purviews is the protection of the Constitution. Notwithstanding this, in the administrative area the leniency agreement may exempt from sanction the private agent that regularly enters into it. In the criminal sphere, every case so far has been treated as valid and immunity has been given to who executes leniency agreements with CADE.

It is noteworthy that the first leniency agreement executed in Brazil involved the private security sector in the State of Rio Grande do Sul and gave rise to the so-called private security cartel. Such cartel was subject to investigation that rendered a judgment by CADE in 2007.¹² According to CADE, the companies acted in collusion and participated in bid riggings in the State of Rio Grande do Sul. CADE's decision was affirmed in courts by the first judgment on June 17, 2008 rendered by the Federal District Court of the Federal District (Brasilia).

The main idea behind the leniency agreement is to reward the wrongdoers that provide the State with information that helps it to detect and punish anti-competitive offenses. In Brazil, the leniency programme was introduced in 2000 with the enactment of the Provisional Presidential Decree No. 2.055 regulated by the Administrative Ruling of the Ministry of Justice No. 849; afterwards, it was regulated by the Administrative Ruling of the Ministry of Justice No. 4.

This document provided the execution of the leniency agreements with Brazil, through the SDE, for those who helped the SDE with its investigations. In a short time Brazil was faced with a new reality that had arisen from the OECD documents and international experience, such as the north American experience, for instance. It was a new tool to fight the persistent challenge of preserving a healthy competitive environment.

Law No. 10.149/00, arising from the Provisional Presidential Decree No. 2.055, has provided a proposal that allows companies in Brazil to enter into leniency agreements that eliminate punishment or reduce the applicable penalty by one to two-thirds¹³. The Provisional Presidential Decree No. 2.655 provided that the leniency programme should be extended to criminal laws. So, whenever requirements are met, the compliance with the agreement voids the criminal punishment for offences against the economic order in the event they characterize a crime subject to public criminal procedure.

Until May 29, 2012, according to the provision of Article 4 of Law No. 8.137/90, the execution of an agreement, covenant, arrangement or alliance among suppliers to fix prices or quantities to be sold or produced, the exercise of regional market control by a company or group of companies, or otherwise, the control of a distribution or supply network in detriment of competition

¹² Administrative Process No. 08012.001826/2003-10. Decided by CADE on October 4, 2007.

¹³ RAMOS, Marcelo. Documento de trabalho n. 5 – modificações no sistema antitruste brasileiro introduzidas pela Lei nº 10.149. October, 2000. Available at: <www.fazenda.gov.br/seae>. Access on February 23, 2017.

are antitrust violations, and the sentence was two to five years' imprisonment or a fine. According to Law No. 12.529/11, the sanction of imprisonment became cumulative with the fine, eliminating grounds for a plea bargain agreement in the criminal sphere.¹⁴

In light of such a provision, the Public Prosecution Office holding jurisdiction over the criminal action should be part of the administrative agreement (leniency agreement) in order to make it valid and, thus, effectively waiving the criminal procedure.

Likewise, still in regard to the criminal action that is very sensitive for the individuals involved in the leniency agreement, the Public Prosecution Office should be party to the drafting and execution of the agreement, along with the parties and the Superintendence General at CADE, in order to contribute to the effectiveness of the agreement and to guarantee the benefit of the exemption from or decrease of penalties for those that actually cooperate with the investigations.

In 2013, the Organized Crimes Law (Law No. 12.850/13) was enacted and brought an additional leniency framework to the Brazilian scenario. Designed to be applicable to criminal organization, this law is able to be used as grounds for the execution of leniency agreements on the on the criminal level by the Prosecutors (State and Federal) and by the Police Officers and by individuals involved in crimes like cartels, corruption, money laundering and the like.

The criteria to define whether this law would overcome other applicable statues are not well clear so far and should be addressed soon by the Brazilian Courts. However, it should face very similar, if not exactly the same, discussion faced in the antitrust leniency agreement in terms of conflict of jurisdiction, role of Prosecutors and the like.

The very first high profile case where this diploma was enforced to settle – under the plea guilty basis - with criminals is the Car Wash Operation (*Operação Lava-Jato*), handled by the Federal Prosecution Office of Curitiba – State of Paraná and brought to the Brazilian Federal Court of Curitiba – Parana State. This case basically comprises charges of bid rigging, corruption, and money laundering related to the biggest State Owned Enterprise in Brazil – *Petroleo Brasileiro S.A. – Petrobrás*.

The tremendous results derived from this set of enforcement actions named car wash can be observed in the table below:

¹⁴ Along these lines, despite the effort in detailing the hypothesis of a cartel in order to reduce the ambiguity of the legal hypothesis, it is understood that some mistakes occur that can void the norm if put in force. The first comes with the creation of two penal types for cartel practice with the same penalty: (a) a material type, i.e., one which depends on its effect in order to constitute a crime, as is the case with item (i); (b) a formal type, or of mere conduct, where its practice constitutes the crime in itself. There is no explanation as to why a crime that requires actual harm, that is: 'dominates the market in a way that totally or partially eliminates the competition' should get the same penalty as a formal crime. Another mistake arises from the terms, in item (ii), which only refers to the possibility of a sale cartel, and not a purchasing cartel. It is, in fact, possible to have a purchasing cartel as well as a sales cartel, as is explained in this book. Finally, it is not known exactly why the same device refers to a cartel, which has intention as a subjective requirement (ii), while at the same time mentioning a cartel that does not require intention (i). These two hypotheses get the same treatment in terms of penalties.

Table I

Work of Judiciary Police	Total
Dawn Raids' Injunctions	752
Coercive Conduction Injunctions	205
Pre-trial Detention Injunctions	84
Temporary Detention Injunctions	100
Flagrants	6
Police officers involved the fulfilment of all measures	3.980*
Vehicles involved in all measures	1.020*
Procedures of bank and fiscal secrecy breach	650*
Procedures of data secrecy breach (telematic)	350*
Procedures of telephone records' secrecy breach	330*
Number of police investigations installed	260
Number of police investigations in course	187
Digital motions installed	1.397
Property blocked or seized in operations	R\$ 2.400.000.000,00
Funds Returned from Foreign Countries	R\$ 745.100.000,00

*Approximated data

Source: Federal Police's website, freely translated¹⁵.

¹⁵ Available at: <http://www.pf.gov.br/imprensa/lava-jato/numeros-da-operacao-lava-jato>. Access on February 23,2017.

Table II

Perquisite material	Total
Computer Data Storage Gadget (Pen Drive)	1279
Computer Equipment (Mobile Phone)	805
Computer Data Storage Gadget (Hard Drive)	738
Computer Equipment (Computer)	619
Computer Equipment (Others)	125
Accounting document	96
Computer Data Storage Gadget (Memory Card)	96
Computer Data Storage Gadget (Floppy Disk)	92
Computer Data Storage Gadget (CD)	91
Document (Others)	91
Computer Data Storage Gadget (DVD)	76
Computer Data Storage Gadget (Others)	69
Computer Data Storage Gadget (Optical media)	54
Ammunition element (projectile)	30
Computer Data Storage Gadget (Magnetic tape)	25
Material (Others)	23
Computer equipment (Tablet)	18
Electronics (Electronic circuit with memory)	10
Electronics (Others)	8
Audio-visual material (Audio magnetic tape)	5
Document (Auto harvest)	5
Packing	5
Computer equipment (Electronic agenda)	4
Fire gun	3
Vegetal material (Others)	2
Computer equipment (peripheral)	2
Document (IPL)	2
Ammunition	1
Electronics (GPS)	1
Document (ID card)	1
Computer Data Storage Gadget (SIM Card)	1

Source: Federal Police's website, freely translated¹⁶.

Since January 2014, other statute law entered into force and brought another leniency framework: the Brazilian Clean Companies Act (or Brazilian Anti-Corruption Law), Law No. 12.846/13. This law is narrowed to legal entities and provides for administrative and civil liabilities. Its provisions on the leniency policy are very similar to the antitrust leniency framework and, therefore, the antitrust experience developed in the past years (since 2003) is likely to be used by

¹⁶ Available at: <http://www.pf.gov.br/imprensa/lava-jato/numeros-da-operacao-lava-jato>. Access on February 23,2017.

the Federal General Comptroller's Office (*CGU*), the main authority with jurisdiction to celebrate leniency agreements on the Federal level.

Although there is notice (unofficial) that several leniency agreements are under negotiation, there is no official notice about the first one duly executed under the Brazilian Clean Companies Act so far. However, there is already a huge debate over the problem of concurrent jurisdiction between CADE, the *CGU* and the Federal Prosecution Office on which branch should prevail to execute leniency agreements in cases like bid riggings such as the Car Wash Operation, where all statues are triggered by the crimes / offense under investigation.

Although not trivial to the Brazilian context and cultural background, the collaboration among authorities should drive the best way out to this tricky problem of concurrent jurisdiction in favour of society.

4. Dawn raids in Brazil

In 2001, both the dawn raid and the leniency policy were introduced in the Brazilian Competition Law. Two years later, Brazil experienced the first cases, where these two tools were implemented: the flintstones cartel and the private security cartel.

Brazilian enforcement policy can be deemed complex as it comprises a high level of concurrent jurisdiction for prosecution and ruling. This overlapping phenomenon occurs not only in the judicial level, but also in the governmental (or administrative) level. Since Brazil is a Federal Republic, it has three different levels of executive government (municipal branch, State branch and Federal branch), and two judicial levels (State and Federal).

This complex institutional framework can be easily observed in the antitrust enforcement. As it is to be further tackled hereunder, the Brazilian competition laws define the cartel, for instance, as an antitrust offense subject to criminal and administrative enforcement actions. Additionally, and according to the Brazilian Civil legislation, the conspirators are also subject to damages claims (either individual or collective / class actions).

As such, this type of antitrust offense is able to trigger both the State and Federal jurisdictions. Therefore, entities or individuals involved in cartel behaviour can basically be prosecuted in all levels in the Country.

The dawn raids boom for white collar crimes took place in 2003 according to official statistics, when CADE, the Federal Police and the Prosecutor's Office (Federal and State) jointly carried out the first dawn raid in a cartel case (flintstones cartel), and executed the first leniency agreement, also in a cartel case (private security)¹⁷.

There are several reasons to have encouraged this behaviour of the prosecution authorities, among which it is possible to highlight the overall use of more sophisticated investigation methods. It was around that time that they started to pro-actively seek for cooperation from international entities, and developed the willingness to "make it personal".

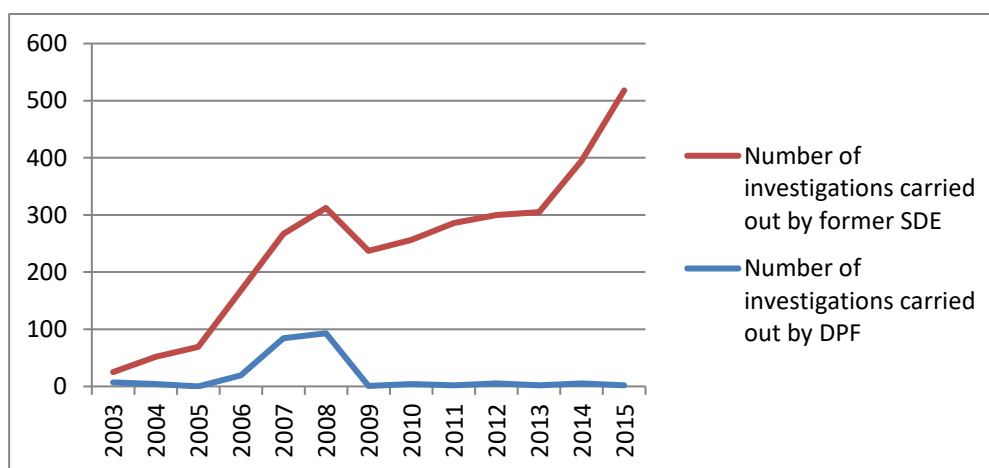
¹⁷ GABAN, Eduardo Molan; DOMINGUES, Juliana Oliveira. *Direito Antitruste*. São Paulo: Saraiva, 2016, p. 503.

This apparently subtle change in the prosecution strategies firstly emerged as a contribution from the OECD, around 2008, and was further developed by the authorities, led by a very effective campaign to promote a federal policy to strength the fight against cartels throughout the country. Until then, anticompetitive behaviours were often treated by the executives that implemented them as mere corporate infractions that would not usually lead to punishment of the individuals involved in these collusive behaviours.

The intention to bring the liability of these infractions to the executives required the authorities to implement new investigation methods, to allow them to gather the evidence of wrongdoing that was required to obtain the convictions of both the companies and the individuals. In this sense, developing a reliable leniency program was key to the improvement of these strategies. The companies and the executives involved in collusive behaviour should be able to trust the authorities to seek for their assistance in reporting a cartel, and cooperating with the investigations in exchange for a comprehensive scope of administrative and criminal immunities.

After CADE's leniency program started to effectively work¹⁸, it became a lot simpler for the authorities to have enough evidence from one company or person, to allow them to obtain, within the Judiciary, the pertinent search and seize warrants to gather evidence from the other companies and persons allegedly involved in the cartel.

The graphic bellow specifically demonstrates the similarity of the growth curves – at least until 2008 - when comparing the numbers concerning dawn raids carried out by the Federal Police in a wide variety of crimes, and the numbers specifically concerning the investigations of cartels carried out by the Brazilian competition authorities. However, tough the amnesty agreements and dawn raids for white collar crimes stared with cartel investigations and evolved until 2008, CADE started to abandon the dawn raid tool from 2009 until the present time.



Source: Federal Policy Office, SDE, CADE - 2017

Especially from 2007 onwards, it is possible to perceive a significant dawn raids boom. At the end of 2005, the use of dawn raids in cartel investigations by CADE reached a not so expressive total of 11 search warrants. As shown, this number has significantly increased in 2008, when CADE reached a record number of 93 executed warrants, distributed throughout 5 operations, including

¹⁸ CADE's first leniency agreement is dated 2003.

task forces that both CADE and Federal Police Office (*Delegacia da Policia Federal - DPF*) collaborated, providing an average of almost 19 warrants per operation, that year.

It is noteworthy that DPF operations comprehend a wider spectrum of criminal and administrative infractions, if compared to the restricted anticompetitive scope of CADE's operations. CADE's investigations only include white-collar crimes when they are directly related to cartels, as means to an end. Even so, the cooperation between these institutions enhanced the state's capacity to punish the different negative aspects of such illegal conducts.

Non-official sources state that CADE abandoned the dawn raid tool because of the lack of resources (mainly financial) to pursue such measures to fight cartels.

5. Concluding remarks

Even though there are no official sources about it, CADE apparently started to abandon the dawn raid tool because of the lack of resources (mainly financial) to pursue such measures to fight cartels. As the amnesty program and the TCCs policy went through, the agency kept up with launching new cartel investigation wilfully aware of their weaknesses in relation to the ability to bilaterally demonstrate the offense and, therefore, led to strong conviction decisions before Courts. Unfortunately, this may not be the best way to keep sustainable the already strong antitrust enforcement action in Brazil. Should the enforcers decided the keep CADE's Tribunal conviction decisions in Courts, they should return to follow the Brazilian Federal Prosecution Office example and keep using dawn raids to fight cartels.

According to official information, tough relying on various (78) amnesty agreements and lots of evidence derived from them, the Federal Prosecution Office pursued 730 dawn raids within the context of the car wash operation. The car wash operation comprises the biggest set of bid rigging schemes ever prosecuted in Brazil. Bid rigging, as settled by the international experience, are types of cartels involving public procurement processes.¹⁹ Until the present time, there have been 125 conviction decisions granted by the first federal level of jurisdiction, which has been upheld by the second federal level of jurisdiction.²⁰

Should the problem of the Brazilian antitrust enforcement agency be the lack of resources to pursue dawn raids, they should work on strengthening multi-task enforcement actions with the Federal Public Prosecution Office, for example, rather than simply abandoning the tool and exclusively relying on amnesty agreements and the like.

¹⁹ According to OECD, "bid rigging" means: "Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process". Available in OECD's website (consulted in March 3rd, 2017) : <https://www.oecd.org/competition/cartels/42851044.pdf>.

²⁰ Available at: <<http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados>>. Acess on March 3, 2017.

**CHAPTER 20 - THE LIABILITY OF INDIVIDUALS IN CARTEL CONDEMNATIONS:
THE STANDARDS OF PROOF AND THE WEIGHTING CRITERIA FOR PENALTIES
UNDER CADE'S CASE LAW**

**Joyce Midori Honda
Adriana Akiko de Andrade
Thales de Melo e Lemos**

Since Law No. 12,529/11 entered into force in 2012, the Brazilian Antitrust System has rapidly evolved and strengthened itself, becoming more organized and efficient, also reflecting on stronger consolidation of the case law.

Under the “new” law, as the General Superintendence¹ has dealt with the majority of merger cases,² the Tribunal³ has dedicated more time and efforts on the more challenging and complex cases, in particular on those related to anticompetitive conducts. CADE's database indicates a relevant increase on the number of judged cases. Between 2012 and 2016, the Tribunal issued 192 final decisions on administrative processes, which resulted in a high level of condemnation (around 63% of these decisions). Since 2012, the impressive advance on the control of conducts was accompanied by the growth in the number of cease-and-desist commitments (“TCC”, in its acronym in Portuguese), with at least 213 requirements, as well as in the number of leniency agreements, with 38 executed agreements, besides 9 leniency plus agreements.⁴ However, the increase in the number of condemnations started at least in 2003, with the implementation of the leniency program and the sophistication of the investigative techniques.⁵

In this regard, the focus on the repression of illegal conducts requires a higher level of care and attention regarding complex subjects, in particular related to the liability of individuals, which requires legal security in the standards of proof and in the weighting criteria for penalties. For instance, these shall not violate the legal principles and rights, such as of the need to identify which act or acts were perpetrated by each individual involved in the conduct (individualization of the conduct) and the presumption of innocence.

¹ In cartel matters, the General Superintendence is the investigative body entitled to prepare an opinion recommending to the Tribunal the conviction of the defendants or the dismissal of the case.

² According to CADE's statistics database, from the 1,738 mergers notified, 96.37% of them were decided by the General Superintendence (unconditional clearance).

³ The Tribunal is the decision-making body, which receives the opinion and issues the final decision at the administrative level. In merger cases, only opinions recommending restrictions or blocking the transaction are automatically forwarded to the Tribunal.

⁴ CADE 2016 Annual Report. January 2017. Available at <<http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>>. Access on February, 16, 2017.

⁵ MARTINEZ, Ana Paula; ARAUJO, Mariana Tavares de. Anti-Cartel Enforcement in Brazil: Status Quo & Trends. In: *Overview of competition law in Brazil*. São Paulo: IBRAC - Singular, 2015, p. 273.

The identification and proof of a cartel is not a simple task. It is not enough, for example, the mere verification of equal or similar prices of a product in the market.⁶ This kind of illegal arrangements tend to occur in secret or disguised meetings and using coded data or phone calls, which are rarely formally registered.

Therefore, for the antitrust analysis, it is important to verify the level of evidence – or circumstantial evidence – to determine the level of participation of the individuals in the illegal conduct and their liability and, based on such criteria, to weigh the administrative penalties applicable to them.

This chapter intends to analyse the legal devices that determine the liability of individuals in cartel condemnations under the Brazilian Antitrust Law. It also aims at analysing and clarifying, in a critical way, CADE's case law about the standards of proof for condemnation of administrators⁷ and non-administrators and about the weighting criteria for penalties.

1. Liability of individuals for cartel behavior in Brazil

Cartel is not only an administrative offense but it is also a criminal offense in Brazil, as established mainly by Law No. 8,137/90 on crimes against the tax, economic and consumer relations systems. According to Article 4 of this law, such practices are punishable from two (2) to five (5) years in prison and a fine to be established by the judge in charge of the case.

Whereas at the administrative level, companies, associations and individuals may be condemned for their participation in cartel practices, at the criminal level only individuals may be convicted.

Although the analysis of cartel prosecution under the Brazilian criminal legislation is extremely relevant to individuals, this chapter focuses only on the administrative liability of individuals and not on the criminal aspects related to this issue.

1.1. Liability of individuals under Law No. 12,529/11

The Brazilian Antitrust Law establishes that “the various forms of violation against the economic order imply the liability of the company and the individual liability of its directors or administrators, jointly and severally”.⁸

Further, Article 37 of the same Law establishes that administrators, directly or indirectly liable for the violations that were committed, will only be punished when guilty or intent is proved.⁹ Therefore, this rule eliminates the possibility of an objective liability, for example, simply by the

⁶ GILBERTO, André Marques. *O Processo Antitruste Sancionador: Aspectos processuais na repressão das infrações à concorrência no Brasil*. São Paulo: Lex, 2010, p. 202. See also MARTINEZ, Ana Paula. *Repressão a Cartéis*. São Paulo: Singular, 2013. p. 177.

⁷ “The (...) administrator of the company is the central figure of the company, who is in the position of chief, in the top of the hierarchic pyramid. All other employees are subject to him, bound to obey him and subordinated to him.” Free translation from REQUIÃO, Rubens. *Curso de Direito Comercial*. São Paulo, Editora Saraiva, 2008. p. 462.

⁸ Article 32 of the Brazilian Antitrust Law.

⁹ Article 37 of the Brazilian Antitrust Law.

position of the individual in the company, even in hard core cartel cases (which has been since the old regime considered per se violations, due to the certainty of their harm to consumers and to competition itself).¹⁰

The same Article also determines that other individuals will be punished for the practice of violation against the economic order, extending the liability to other employees with proved participation in the conduct. In other words, both administrators and non-administrators are liable for this sort of violation.

The mentioned legal provisions deserve further discussion. For instance, in the case of administrators, it is possible to question if their hierarchical position in the company depends on statutory acts or merely on the way that they act inside the company, such as making strategic decisions and/or defining the competitive performance of the company. Furthermore, the debate on the standards of proof to condemn an administrator also lies on other issues, including the probability that an administrator knew about the cartel's existence; proof that the administrator was only to be copied on e-mails that involved the illegal conduct; evidence that an administrator prevented the cartel to occur (or not); documentary proof of his/her direct participation on the practice, among others. For non-administrators, the discussion about the evidence tends to focus on their level of participation, leadership and/or organization of the collusion. Based on that, these standards of proof will then reflect in the weighting criteria for penalties.

Based on the decisions of higher value handed down by the Tribunal in the last five years, the next topics will further analyze the standards of proof for condemnation of both administrators and non-administrators, which includes the possibility of conviction based on circumstantial evidence; and, finally, the weighting criteria for penalties for all violators.

2. Standards of proof for condemnation

In the administrative processes initiated by CADE, it is very common that individuals are listed as defendants. Especially at the initial stage of each process, the set of proof and circumstantial evidence against them varies frequently, pointing different levels of involvement. It is clear that, aiming to deepen the investigation, the General Superintendence tries to include all – or almost all – the names obtained in the complaint, in the documents collected in dawn raids, and/or those who were mentioned during the investigation and, finally, listed in the leniency agreement.

However, this creates a delicate situation: in the absence of a reasonable level of legal security, individuals whose names were listed in cartel investigations tend to present their defence due to the lack of predictability on the General Superintendence's opinion and on the Tribunal's final decision. This is because non-administrators have been condemned based on their direct participation, and administrators have been condemned based on their duty to know the existence of the cartel or for not preventing it to occur.

¹⁰ CORDOVIL, Leonor et al. Nova Lei de Defesa da Concorrência Comentada – Lei 12.529 de 30 de novembro de 2011. São Paulo: Revista dos Tribunais, 2011, p. 108.

Such opinions and decisions create two problems: an individual can be certain that he has not participated in the cartel, but is condemned; or, on the other hand, even considering himself as innocent, he ends up settling with CADE, by signing a TCC, with the purpose of avoiding more serious penalties in case of condemnation.¹¹ In case of TCC, the Brazilian Antitrust Law requires that the defendant admit guilt, cooperate with the investigations, cease the practice and pay a pecuniary contribution. Thus, although settling with CADE does not protect the defendant at the criminal sphere (as opposed to the leniency agreement), fines may be reduced from 25% to 50% of the expected fine.¹²

When defining the standards of proof, the principles of law shall be taken into consideration when weighting the penalties under the Brazilian Antitrust Law. Not only the general principles of administrative law (like principles of legality, publicity and proportionality), but also the procedural ones (such as the principles of due process of law, defence on a broad sense and prohibition of illegal evidence). Even more important for this chapter, the principles usually connected to the criminal procedure (such as the principles of *in dubio pro reo* and presumption of innocence) must be considered.¹³ Some authors argue that “*it is not even the case of talking about the principles of criminal law, but about the principles that reign over the punishing power of the State, being it either criminal or administrative*”.¹⁴

Those principles should apply when analysing the standards of proof, especially when evaluating the possibility of condemnation based on circumstantial evidence, as further detailed in this chapter. For this analysis, it is also important to differentiate the standards of proof applied to administrators and the ones to non-administrators, as follows in the next topic.

2.1. Distinctions in the standards of proof for administrators and for other individuals

Recently, in the international cartel case of dynamic random access memory (also known as the DRAM cartel case), Commissioner Márcio de Oliveira Júnior made important considerations about the level of liability of administrators and other company’s employees. According to the reporting vote, followed by the other Commissioners of the Tribunal, for the condemnation of a simple employee (meaning “non-administrator”), it is not enough that he was only copied in an e-mail; the employee must have had a direct participation in the practice, since this individual does not have the duty to take measures against the cartel. In the case of directors (meaning “administrators”), however, the Tribunal must evaluate the relevance of his omission. In his words:

“However, it remains to know if he actively participated in obtaining this information or if it was only transmitted to him. May I remark that this standard of proof is only applicable

¹¹ As set forth in Article 35 of the Brazilian Antitrust Law, the repression of infractions against the economic order does not exclude the punishment of other illegal actions established by Law. In practical terms, this means that the individual is also subject to civil and criminal prosecutions, without this resulting in *bis in idem*, since the spheres and liabilities are independent.

¹² Article 187 of CADE’s Internal Regulation. If the TCC requirement is submitted when the process is under the Tribunal’s review, the maximum discount will be 15% of the expected fine to the defendant.

¹³ GILBERTO, André Marques, ob. cit., p. 88.

¹⁴ MELLO, Rafael Munhoz de. *Princípios Constitucionais de Direito Administrativo Sancionador: as sanções administrativas à luz da Constituição Federal de 1988*. São Paulo: Malheiros, 2007. p 104, as mentioned in GILBERTO, André Marques, ob. cit., p. 88. Free translation of the quoted excerpt.

in the present case because [...] (he) did not exercise a role equivalent to management, in other words, he did not have the statutory and ethical duty originating from his job to take measures for the termination of the anticompetitive conduct that he learned. However, it is really not clear if he actively contributed for obtaining this information about competitors or if he was only copied in the e-mail. In the second case, there would be a discussion about an eventual relevant omission that the investigated individual would have due to his position of administrator, which means, if he should prove that he had taken all necessary steps possible to end the cartel. With these considerations, I understand that there is a reasonable doubt about the way by which he obtained or manipulated the sensitive information that he received; for this reason, I understand that the indictments [...] must be terminated by the application of the principle of *in dubio pro reo*".¹⁵

The principle of *in dubio pro reo*, by its turn, means that when it is not possible to establish an evident interpretation about the facts and the relation of the individual or the company with them, the most favourable interpretation must be adopted to the investigated individual. The principle originates from the "presumption of innocence", as set forth in Article 5, LVII, of the Brazilian Constitution.¹⁶ The principle was also applied in relation to other investigated individuals mentioned in the leniency agreement of the DRAM cartel case, but as there was no additional evidence against them in the records of the case, the process was terminated in relation to these individuals. Even to an investigated individual who admitted participation in meetings with competitors, the process was also terminated because there was no other evidence against him.¹⁷ The Tribunal also mentioned the principle of *in dubio pro reo* in other cases.¹⁸

Also in a recent case involving the market of glass components for cathodic ray tubes the General Superintendence requested the legal opinions from both the Prosecution Office¹⁹ and the General Attorney Office.²⁰

The Prosecution Office issued an opinion for the termination of the process in relation to this individual. The authority highlighted that the proof of participation in the conduct is strictly personal and that the individualization of conduct is a constitutional principle according to Article 5, XLVI of the Brazilian Constitution. Based on that, this authority recommended the condemnation of the companies and only of some individuals, and at the same time, recommended the termination

¹⁵ Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 23, 2016. Free translation of excerpts of the vote issued by Commissioner Márcio de Oliveira Júnior.

¹⁶ GILBERTO, André Marques, *ob. cit.*, p. 273.

¹⁷ Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 23, 2016.

¹⁸ Administrative Process No. 08012.010932/2007-18, decided by the Tribunal on February 25, 2015; Administrative Process No. 08012.002096/2007-06, decided by the Tribunal on May 6, 2015; Administrative Process No. 08012.007818/2004-68, decided by the Tribunal on July 14, 2015.

¹⁹ According to Article 66 of Law No. 12,529/11, Paragraph 8, the General Superintendence may require the participation of the police authorities or the Prosecution Office in the investigations.

²⁰ According to Article 11 of Law No. 12,529/11, the Commissioners shall require the General Attorney Office, acting together with CADE, to issue a legal opinion on the cases in which they are reviewers, when deemed necessary and upon reasoned order, as set forth in item VII of Article 15 of the same law. Also, according to Article 15, the General Attorney Office shall be responsible for issuing, whenever expressly required by a Commissioner or by the General Superintendent, an opinion related to the proceedings under CADE's competence, without implying a suspension of the deadline for analysis or prejudice to the regular processing of such proceeding.

of the process for two individuals due to the lack of evidence (which included an Executive Officer, as mentioned above).²¹

On the other hand, the General Attorney in this case opined for the condemnation of this Executive Officer, considering that according to the records of the case, he represented his company in a meeting with a competitor and there was proof that strategic information was shared. However, the General Attorney argued that, due to the explicit nature of the cartel, it would be highly probable that the investigated individual knew about the occurrence of meetings involving his company and about the matter discussed. Besides that, the duration of the cartel itself and the form of acting (classic cartel) would corroborate with the condemnation, as this kind of agreement required constant involvement, coordination and monitoring, as provided in an excerpt from the opinion:

“[...] the longer someone stays in a management position in a company proved to be involved in a classic cartel, the less credible is the argument that he did not know about the facts, because the existence of a cartel itself demands that the participants spend time and energy to maintain it, by monitoring conducts, promoting meetings among the participants and checking the illegal conditions for the maintenance of the collusion”.²²

This opinion concluded that the time the investigated individual remained in the position of an officer was sufficient to eliminate the illegal practices or to minimize their effects. Therefore, there was what the General Attorney called “*conscious tolerance*” or “*negligent guilt*”, which would *also justify his condemnation*.

Even with the opinions from the General Superintendence and the Prosecution Office in favour of terminating the case, the individual decided to settle with CADE (by signing a cease-and-desist commitment), before the Tribunal’s decision, probably due to the lack of legal security and in order to avoid more severe penalties. Thus, unfortunately, the reporting Commissioner did not further analyse the matter.

Also, in the cartel case of hydrogen peroxide, Commissioner Márcio de Oliveira Júnior highlighted that it would be unlikely that one of the officers did not know about the anticompetitive practice that lasted for many years. However, as set forth in the vote, the condemnation did not occur based only in the hierarchical position of the investigated individual, but due to what he called a robust probative set.²³ The need to obtain a robust probative set before deciding for the condemnation of an individual was also a relevant matter in the judgement of the cement cartel case.²⁴

The international cartel case involving air transportation also brought important thoughts about the management position of individuals in companies with participation in the cartel. Initially, Commissioner Ricardo Ruiz clarified how to distinguish administrators from other individuals:

²¹ Administrative Process No. 08012.005930/2009-79, decided by the Tribunal on November 29, 2016.

²² Administrative Process No. 08012.005930/2009-79, decided by the Tribunal on November 9, 2016. Free translation of excerpts of the opinion issued by the General Attorney.

²³ Administrative Process No. 08012.007818/2004-68, decided by the Tribunal on July, 14, 2015.

²⁴ Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014.

“[...] it will be evaluated the type of role in which they were invested and if they had strategic and decision-making profile. As already registered and mentioned in this vote, there is no doubt that they meet this hypothesis with the positions of President and Officers” [...] “About the non-administrators, those will be the ones with limited decision-making power, both in the cartel itself and internally in the involved company, from where I highlight, as an example, the role of supervisor”.²⁵

Another highlight of the air transportation cartel case is the vote of Commissioner Ana Frazão. She was defeated in the matter of terminating the process against one of the investigated individuals. In her opinion, the reporting vote indicated that the participation of the officer of one of the companies was passive, because he was just copied in the e-mails – and only in the beginning of the exchange of communication. Thus, as this officer was not even recipient of e-mails in the period considered as illegal, the Commissioner understood that CADE would be convicting the investigated individual by the simple fact that he was an administrator of the involved company and by his supposed “duty to know” what was happening. It is important to highlight an excerpt from this Commissioner’s vote:

“Therefore, the affirmation from the Reporting Commissioner that [...] (he) ‘necessarily knew about all the facts and, as President of the company, answered for it’, it is a dangerous deduction, which could not be considered separately as evidence or proof to justify the condemnation and, even less, to justify the highest sanction imposed to individuals in this process”.²⁶

In another recent case, even though the General Attorney defended that there is no need to have an absolute certainty about the administrator’s involvement in the conduct, being enough the existence of evidence that the administrator did not act to stop or to avoid the illegal practices by the company, the Tribunal decided to terminate the process in relation to individuals against which guilt or intent was not proved in the case-file.²⁷

Based on CADE’s case law, it seems that the Tribunal has analysed in a distinct way the participation of administrators and non-administrators. For the first type of individuals, even though the mere hierarchical position is not enough – thus setting aside the objective liability, the simple negligence of not avoiding a cartel (in particular if it lasted many years) may be sufficient for conviction. In other words, the necessity of more robust evidence of direct participation may be replaced by the consideration of a probative set as a whole, including indirect proof and circumstantial evidence. As shown in the next topics of this chapter, according to CADE’s case law, if these circumstantial evidence is coherent with the evidence in the records of the case, the participation of the investigated individuals in the cartel may be proved. Thus, according to CADE’s recent precedents, the condemnation may result from negligent guilt, contributing for this conclusion the long duration of the illegal practice.

²⁵ Administrative Process No. 08012.011027/2006-02, decided by the Tribunal on August 28, 2013. Free translation of excerpts of the opinion issued by Commissioner Ricardo Ruiz.

²⁶ Administrative Process No. 08012.011027/2006-02, decided by the Tribunal on August 28, 2013. Free translation of excerpts of the opinion issued by Commissioner Ana Frazão.

²⁷ Administrative Process No. 08012.001029/2007-66, decided by the Tribunal on February 24, 2016.

As for non-administrators, the condemnation may depend on the collection of direct proof that the investigated individual directly participated in the organization or coordination of the cartel, such as by sending and/or exchanging e-mails, participating in meetings and organizing calls, as already mentioned by the reporting commissioner on the DRAM cartel case.²⁸

The following topic analyses CADE's case law about the evidence provided in the records of the case, in particular of indirect proof and the possibility of using coherent and chained circumstantial evidence to justify a condemnation.

2.2. Analysis of the types of proof and circumstantial evidence

In administrative processes involving cartel, it is necessary to prove the materiality (which means the existence of a violation to the economic order) and the violator. The materiality of the violation includes, among others (i) the participation of two or more competitors, (ii) the existence of an implicit or explicit arrangement between/among them, (iii) an objective or the probability that the arrangement produces anticompetitive effects,²⁹ according to Article 36 of the Brazilian Antitrust Law.³⁰ Once the materiality is proven, it is necessary to analyse the acts of each individual involved in the conduct (individualization of the conduct).

In this regard, some CADE's decisions highlight the difficulty in obtaining proof when investigating a cartel. Normally the individuals involved in a cartel know about the illegality of it and try to disguise it. For this reason, CADE has been more flexible in accepting any suitable proof that can demonstrate the violation.³¹ Since direct proof is less common to find, indirect proof has been presented to CADE to support cartel investigations.

According to CADE's case law, direct proof is a document that proves the material existence of the agreement (such as minutes of meetings and reunions),³² including those collected in dawn raids. Indirect proof, however, results from an active interpretation, as logical inferences, economical analysis and deductions – made by the authority, in the matter of facts and circumstantial evidence that, jointly considered, could prove the anticompetitive violation, since there will be no other rational and plausible explanation for the behavior of the investigated individual.³³

Law No. 12,529/11 does not have a definition of circumstantial evidence; however, Article 239 of the Brazilian Criminal Procedure Code sets forth that circumstantial evidence must be

²⁸ Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 23, 2016.

²⁹ RIBAS, Guilherme Favaro Corvo. *Processo Administrativo de Investigação de Cartel*. São Paulo: Singular, 2016. p. 96.

³⁰ Article 36 of the Brazilian Antitrust Law: "The 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: 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."

³¹ RIBAS, Guilherme Favaro Corvo, *ob. cit.*, p. 97.

³² See also GABAN, Eduardo Molan. *Direito Antitruste / Eduardo Molan Gaban, Juliana Oliveira Domingues*. 3th edition. São Paulo: Saraiva, 2012, p. 167.

³³ General Superintendence opinion No. 24/2016 in the Administrative Investigation No. 08700.000564/2015-51, dated of July 27, 2016.

understood as “*the known and proved circumstance that, being related to the fact, authorizes, by induction, to conclude for the existence of other circumstances*”.³⁴

According to CADE’s case law, circumstantial evidence may be used for condemnation, only if the decision is coherent and supported by what was in fact proved in the records of the case. The issue of circumstantial evidence is fundamental not to evaluate them individually, but together with the whole probative set, as to “*allow that the evidence and their circumstances clarify themselves mutually*”.³⁵ Also, the certainty of the violation based on circumstantial evidence can be better constructed if they are “*multiple, chained and with positive elements of credibility*”.³⁶

Based on that, although indirect proof was taken into consideration in some cases, there are also processes terminated due to insufficient evidence.³⁷

Nevertheless, there were various cases in which CADE decided to accept the set of proof and circumstantial evidence, as they were coherent and chained, as well as supported by other evidence and by the facts. As an example of condemnation based on circumstantial evidence, we highlight the hydrogen peroxides and the cement cartel cases.

In the first case, Commissioner Márcio de Oliveira Júnior mapped Brazilian Courts jurisprudence on the matter of using circumstantial evidence to justify the condemnation and explained that to the Brazilian Superior Court of Justice, “*a sequence of circumstantial evidence, which are coherent and chained, may result in a more certain conclusion, which is necessary for condemnation*”.³⁸ According to him, the Brazilian Supreme Federal Court, by its turn, in the course of Criminal Prosecution 470, decided about the necessary evidence to conclude for the condemnation as follows: “*It is retrieved the importance that circumstantial evidence always had, which can lead to a secure and correct conclusion when supported by the arguments of the parties and by the judgement on proved factual circumstances*”.³⁹

He also remembered that Commissioner Ana Frazão affirmed in the bread cartel case: “*considering the particularities of the economic violations, in particular those with associative character, the resource to indirect proof and circumstantial evidence must be seen with ease in the investigation of cartels, especially in the administrative field*”.⁴⁰ Based on that, Commissioner Márcio de Oliveira Júnior decided not to distinguish direct and indirect evidence, since the certainty of condemnation would come from the set of proof and circumstantial evidence, as used in other administrative processes.⁴¹

³⁴ GILBERTO, André Marques, ob. cit., p. 263.

³⁵ Administrative Process No. 08012.008507/2004-16, decided by the Tribunal on December 10, 2014.

³⁶ Administrative Process No. 08012.001029/2007-66, decided by the Tribunal on February 24, 2016.

³⁷ Administrative Process No. 08012.001325/1999-78, decided by the Tribunal on June 15, 2005; and Administrative Process No. 08012.006059/2001-73, decided by the Tribunal on February 25, 2011.

³⁸ AgRg. in the Ag. 1206993/RS, R. Minister Sebastião Reis Júnior, Sixth Chamber, judged on March 5, 2013, published on March 13, 2013; REsp 130.570/SP, R. Ministro Felix Fischer, Fifth Chamber, judged on September 02, 1997, published on October 6, 1997, p. 50035.

³⁹ Criminal Prosecution No. 470. Brazilian Supreme Federal Court. R. Minister Joaquim Barbosa, judged on December 17, 2012, published on April 19, 2013. Free translation of excerpts of the opinion issued by Minister Luiz Fux.

⁴⁰ Administrative Process No. 08012.004039/2001-68, decided by the Tribunal on May 22, 2013.

⁴¹ Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014; See also Administrative Process No. 08012.001020/2003-21, decided by the Tribunal on October 29, 2014; Administrative

In the cement cartel case, Commissioner Márcio de Oliveira Júnior pointed out that a top executive officer, responsible for the strategical objectives of the company, “*would not refrain from acknowledging and interfering in such a detailed plan of action, which was proved by the documents collected in his office*”. CADE Commissioner also strictly argued that the administrator did not “*take any attitude to end the conduct and did not deny the existence of the collected documents*”, which would be enough for his condemnation.⁴² On the other hand, Commissioner Ana Frazão, in the same case, affirmed that she had the impression that “*many individuals were included in the process merely due to testimony of the complainant*” and that this testimony would be “*absolutely biased and compromised*”.

In her words, the testimony could have initiated an investigation, but never be considered to form the conviction about the condemnation of an individual, and “*neither to reinforce an already existing circumstantial evidence set*”.⁴³ This case demonstrates that although CADE has accepted circumstantial evidence when consistent with the rest of the probative set, there is always room to discuss whether such evidence is strong enough and sufficient for condemnation.

Once it is concluded the issue of the materiality of the cartel and the involvement of each individual in the violation, some elements, including the degree of leadership in the cartel, need to be taken into consideration when weighting the value of the fines, as further explained.

3. Weighting Criteria for Penalties

The administrative penalties applicable to individuals for violations against the economic order are set forth in Article 37 of the Brazilian Antitrust Law.⁴⁴

Law No. 12,529/11 brought some significant changes related to this issue, in particular, reduced the fines applicable to administrators (which was “*from 10 to 50% over the fine applied to company*” based on the previous Law No. 8,884/94) by establishing the fines from “*1 to 20% over the fine applied to the company*”.⁴⁵ The new law also included as administrators those who exercise activity of management that do not have any corporate activity, such as associations and trade unions. In relation to non-administrators, the new law substantially increased the amount varying from R\$ 50 thousand to R\$ 2 billion.

Also, despite the imposition of pecuniary penalties, CADE may apply other penalties, such as: (i) publication of the statement of condemnation in a newspaper indicated in the decision; (ii)

Process No. 08012.006199/2009-07, decided by the Tribunal on December 10, 2014; and Administrative Process No 08012.010932/2007-18, decided by the Tribunal on February 25, 2015.

⁴² Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014.

⁴³ Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014.

⁴⁴ Article 37 of the Brazilian Antitrust Law: The practices of violation against the economic order shall render the party liable for them to the application of the following penalties: [...] II - in the case of other individuals or legal private or public entities, as well as any association of entities or persons established in fact or in law, even on a temporary basis, with or without a legal personality, which do not exercise a corporate activity, if impossible to use the invoicing amount criteria, the fine shall be from R\$ 50 thousand to R\$ 2 billion; III – in the case of an administrator, directly or indirectly liable for the violation committed, when guilt or intent is proved, a fine from one percent (1%) to twenty (20%) of the fine applied to the company in the case set forth in sub item I of the opening Paragraph of this Article or to the legal entities, in the case covered by sub item II of the opening Paragraph of this Article.

⁴⁵ Article 37 of the Brazilian Antitrust Law.

behavioral restrictions (e.g.: prohibition of acquiring new business); (iii) the company divestiture, transfer of corporate control, sale of assets or partial interruption of activity; (iv) ineligibility for participation in public biddings for a term of not less than five (5) years; (v) ineligibility for official financing for a term of not less than five (5) years; (vi) recommendation to the respective public agencies so that a compulsory license over the intellectual property rights held by the wrongdoer be granted, and (vii) prohibition to engage in commercial activities in its own name or as a representative of a legal entity for five (5) years.⁴⁶

The weighting criteria for penalties to be applied to administrators is also a controversial subject, as the increasing penalties imposed to companies for cartel violations reflect in very high fines to individuals as well. Even though it can be argued that the penalties applied to administrators and non-administrators, plus the criminalization of the practice, is a dissuasive factor more important than the fine to the company – since the participation in the illegal act depends on the decision of the first⁴⁷ - the relation between the fines to individuals and the revenues of the companies has been criticized by lawyers and by the doctrine, because it can be very disproportional. On the other hand, CADE has already applied legal minimum fines, with the purpose of avoiding the violation the principles of proportionality and reasonability.⁴⁸

As mentioned earlier, the increase of the penalties applied by CADE to companies is notorious. As opposed to the start of the previous decade, the fines that hit 15% to 20% of the company's revenue in the year before the opening of the Administrative Process have become common. In 2014, CADE applied the highest fine of its history, with values that totalled R\$ 3.1 billion. For the administrators of the convicted companies, in cartel cases, the fines ranged from R\$ 2.5 million to R\$ 15.6 million, approximately.⁴⁹ Also remarkable are the fines imposed to administrators in the air freight cartel case (between R\$ 1 million and R\$ 2 million),⁵⁰ hydrogen peroxides cartel case (R\$ 6 million),⁵¹ and laundry cartel case (between R\$ 1 million and R\$ 5.3 million).⁵² Therefore, it is extremely relevant to deeper analyse the factors that may result in millionaire fines.

In the application of penalties, it is important to observe the criteria established in Article 45 of Law No. 12,529/11. These are: (i) the gravity of the violation; (ii) the good-faith of the violator; (iii) the advantage obtained or intended by the violator; (iv) the consummation or not of the violation; (v) the degree of harm, or danger of harm, to free competition, to the national economy, to consumers or third-parties; (vi) the negative economic effects produced in the market; (vii) the economic situation of the violator; and (viii) reoccurrence.

⁴⁶ Article 38 of the Brazilian Antitrust Law.

⁴⁷ CORDOVIL, Leonor et al, ob. cit., p. 124.

⁴⁸ GUIMARÃES, Denis Alves. In: *Comentários à nova lei de defesa da concorrência: Lei 12.529 de 30 de novembro de 2011*. Coordenadores: Eduardo Caminati Anders, Vicente Bagnoli, Leopoldo Pagotto. Rio de Janeiro: Forense; São Paulo: Método, 2012, p. 164.

⁴⁹ Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2015.

⁵⁰ Administrative Process No. 08012.011027/2006-02, decided by the Tribunal on August 28, 2013.

⁵¹ Administrative Process No. 08012.007818/2004-68, decided by the Tribunal on July 14, 2015.

⁵² Administrative Process No. 08012.008850/2008-94, decided by the Tribunal on February 03, 2016.

In addition to the criteria above, the degree of leadership in the cartel and the proportionality in relation to the company's revenue are also taken into consideration when weighting the value of the fines.

Also, although not clearly expressed in the legislation and in the case law, the value of fines when the condemnation is based on direct proof tends to be higher than condemnation based on indirect proof.⁵³

As an example, the cartel cases involving fuel resellers offered an important precedent on the different fines applied to administrators with and without leadership role. For individuals without a leadership role, CADE applied fines, on average, varying from 10% to 15% of the fines applied to the companies. Regarding individuals with a leadership role in the cartel, the fines varied from 15% to 17% of the fines applied to the companies.⁵⁴ Although some cases have followed similar weighting of penalties, varying from 1-2% between the penalties for individuals with a leadership position and individuals without it, other cases applied penalties in which this variation was up to 12%.⁵⁵

With regard to the proportionality of the penalty, CADE has already applied percentages ranging from 1% to 2% of the fines applied to the company with the purpose of better weighting the penalties applicable to individuals. This happened, as an example, in the international cartel of hermetic compressors. According to the Reporting Commissioner, the intention was to give the "right proportion to the pecuniary penalty", applying the legal minimum of 1% of the fines applied to the company to administrators with supervision role and 2% of the referred fines to administrators with direction role "*due to the level of hierarchy in the companies and their direct participation in the practice*". The difference between an administrator with supervision role and with direction role is also "*the level of decision-making risk taken in their respective activities*".⁵⁶

With regard to non-administrators, considering that the previous law (Law No. 8,884/94) would be more favourable than the current law, the Tribunal applied it in their decisions related to administrative processes that initiated before Law No. 12,529/11 entered into force. This way, fines applied were ranging from 6 thousand UFIR to 6 million UFIR, and not between the thresholds established by the new law. By comparing the fines applied to non-administrators with the penalties to companies, these fines would represent around 1 to 7.5% of the fines applied to the respective companies. As a remarkable exception, in the cement cartel case, the Commissioner applied a fine of 1 million UFIR that was equivalent to 50% of the fine applied to the Association in which the individual was part (however, without meeting the concept of administrator, according to the vote).

⁵³ MARTINEZ, Ana Paula, ob. cit, p. 177.

⁵⁴ See Administrative Process No. 08012.001003/2000-41, decided by the Tribunal on March 6, 2013; Administrative Process No. 08012.004573/2004-17, decided by the Tribunal on June 19, 2013; Administrative Process No. 08012.010215/2007-96, decided by the Tribunal on March 06, 2013; Administrative Process No. 08012.011668/2007-30, decided by the Tribunal on October 23, 2013; Administrative Process No. 08012.004472/2000-12, decided by the Tribunal on October 1st, 2014.

⁵⁵ Administrative Process No. 08012.008850/2008-94, decided by the Tribunal on February 3, 2016; Administrative Process No. 08012.008821/2008-22, decided by the Tribunal on January 20, 2016; Administrative Process No. 08012.000820/2009-11, decided by the Tribunal on March 16, 2016.

⁵⁶ Administrative Process No. 08012.000820/2009-11, decided by the Tribunal on March 16, 2016.

In the same case, the Tribunal applied the highest fine ever to an individual according to the Brazilian case law – around R\$ 15.6 million.⁵⁷

We may also highlight that Commissioner João Paulo Resende tried to standardize the fines applied to non-administrators based on the duration of the cartel. According to him, in case of a cartel of long duration, the fine could not be lower than 5% of the fine applied to companies, as long as the value, obviously, does not overcome the legal limit to this kind of individual. The factor of proportionality should also be adjusted due to particular characteristics of acting role (active or passive) and leadership role (eventual or lasting).⁵⁸ Accordingly, if the investigated individual had an active and leading role, the proportion should be at least doubled. Considering the severity of the facts, the long duration of the agreement, and the fact that the investigated individuals were foreigners (which could create a risk of inefficiency of the fines), the Commissioner in this case also applied the prohibition to exercise commerce in their own name or as representatives of companies, for the period of five (5) years. However, it is not yet clear whether the weighting of penalties adopted in this case will be considered as a standard to be used in future cases.

4. Conclusion

The liability of individuals for antitrust violations is a complex subject that must be taken with caution by the authorities. The Brazilian Antitrust Law does not bring, in its text, more precise definitions on the degree of evidence necessary for the condemnation of individuals in distinct hierarchical positions. In this regard, it is up to CADE's case law to define the standards of proof and the weighting criteria for penalties.

The various decisions analysed in the present chapter indicated that the criteria for condemnation of individuals in position of management or direction are different from other individuals. On this regard, the Tribunal and the General Attorney Office have already expressed the opinion that what they called “negligent guilt” by the administrator, that knew about the cartel and did not take the necessary measures to interrupt it, may result in condemnation. For non-administrators, however, it can be deduced that a more direct proof of their active participation in the practice may be required, once they do not have the same duty and decision-making powers as the administrators.

Furthermore, in spite of the necessary thoroughness when analysing all types of proof, the condemnation based on circumstantial evidence may also be possible according to the last Tribunal's decisions. However, all circumstantial evidence must be consistent with the rest of the probative set, avoiding arbitrary decisions. The circumstantial evidence that supports a condemnation must necessarily be multiple, coherent, chained and with positive elements of credibility. On the other hand, when a circumstantial evidence is not fully consistent with the rest of what they call a robust probative set, one can defend the termination of the case due to lack of evidence.

In relation to the penalties imposed, CADE's case law related to cartel indicates that various elements may be considered for condemnation of individuals, not only the criteria

⁵⁷ Administrative Process No. 08012.011142/2006-79, decided by the Tribunal on May 28, 2014.

⁵⁸ Administrative Process No. 08012.001127/2010-07, decided by the Tribunal on March 30, 2016.

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established in Article 45 of the Law No. 12,529/11, as abovementioned, but also, for example, the degree of leadership in the cartel and the proportionality in relation to the company's revenues.

In conclusion, by lacking clear legal provisions in the Brazilian Antitrust Law related to the standards of proof and the weighting of penalties, only CADE's case law and the courts may contribute to provide the necessary legal security to individuals.

CHAPTER 21 - STANDARD OF PROOF IN CARTEL CASES INVOLVING LENIENCY AGREEMENTS

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1. Introduction

Following in the well worn path of other jurisdictions, the Leniency Program in Brazil has become one of the most effective tools for CADE to investigate and punish cartels.

The former Secretariat of Economic Law (“SDE”) successfully signed the first leniency agreement in 2003¹ and up until 2011, 23 leniency agreements and 3 amendments to leniency agreements² had been executed. These figures suffered a relevant increase during the period between 2012 and 2016 in which 38 leniency agreements, 17 amendments to leniency agreements and 20 leniency plus agreements³ were executed.⁴ This reinforces the strength of combatting antitrust violations envisaged by Law No. 12,529/11.

Despite the several leniency agreements executed in the last years originating administrative processes, most of the final decisions were rendered by CADE in the period after the Law No. 12,529/11 entered in force (May 29, 2012).⁵

This chapter strives to analyze these decisions in cartel cases involving leniency agreements rendered by CADE since May 2012 to assess the standard of proof needed to launch an administrative process as well as the imposition of penalties on the defendants.

¹ Related to the **Security services companies’ Cartel** (Administrative Process No. 08012.001826/2003-10).

² An amendment to the leniency agreement includes individuals to the original leniency agreement or amends the scope of the agreement.

³ A leniency plus consists of the reduction by one to two-thirds of the applicable penalty for a company and/or individual that does not qualify for a leniency agreement about the cartel in which it has participated, but provides information on a second cartel about which the CADE’s General Superintendence had no prior knowledge of (Article 86, Paragraph 7, and Paragraph 8, Law No. 12,529/11 cumulated with Article 209, CADE’s Internal Regulation).

⁴ Official information on the total number of leniency agreements signed from year to year with CADE is available at <http://www.cade.gov.br/assuntos/programa-de-leniencia>. Access on February 24, 2017.

⁵ Before that, only two proceedings were decided by CADE: (i) the Administrative Process No. 08012.001826/2003-10 (the **Security services companies’ Cartel**), which was decided by the Tribunal on September 21, 2007, and the Administrative Process No. 08012.004702/2004-77 (main process of the **International Hydrogen Peroxide Cartel**), which was decided by the Tribunal on May 9, 2012.

2. Setting a Standard of Proof in the Administrative Processes for Cartels in light of Leniency Agreements

The administrative process for the imposition of penalties for antitrust misconduct is an accusatory proceeding of investigation carried on under adversarial principle. It has its own rite provided for in Articles 69 to 83 of Law No. 12,529/11 and Articles 146 to 162 of CADE's Internal Regulation. Since a cartel is considered an almost "per se" illegal conduct in Brazil, its punishment depends only on evidencing the conduct itself and the potential of generating negative effects on the market is presumed. However, in international cartel cases, it is necessary to demonstrate the potential effects in Brazil to verify CADE's jurisdiction to investigate the alleged anticompetitive offence.

It is interesting that Law No. 12,529/11 does not provide a specific system of proof. It has only sparse rules and expressly refers to the Code of Civil Procedure and the Federal Administrative Process Law (Law No. 9,784/99),⁶ which are applied in a supplementary manner. CADE has also recognized the application of the Criminal Procedure Code (Decree No. 3,689/41) insofar as it is compatible with the Brazilian Antitrust Law since the purpose of both is punitive.

The pursuit of truth in the competitive administrative processes should be conditioned to a more rigorous probative value standard⁷ as in the criminal sphere. The principle of the presumption of innocence is applicable until this standard of proof is achieved pursuant to Article 5, LVII, of the Federal Constitution as well as corresponding provisions of the Federal Administrative Process Law.

The competitive administrative process permits the use of both direct and indirect evidence, which are differentiated by the coincidence or divergence between the fact to prove (object of proof) and the fact perceived by the judge (object of perception). The proof is called direct when the judge directly perceives the fact to prove by means of the evidence. On the contrary, the evidence is indirect when the object of perception is not the object of proof but rather another fact from which the judge can deduce the direct fact. An example of the latter would be circumstantial evidence that helps to corroborate the plausibility of existence of anticompetitive behavior and the participation of its authors.⁸

The evidence commonly presented by the parties in cartel probes consists of documentary evidence, oral evidence (witnesses, interrogation, confession) and circumstantial or *indicia* evidence which proves an indication for the decision maker to form guilt on the affirmation of the direct

⁶ Additionally, Article 115 of Law No. 12,529/11 sets forth the supplementary application of the Public Civil Lawsuits (Law No. 7,347/85) and of the Code of Consumer Defense (Law No. 8,078/90).

⁷ Corroborating this fact, Guilherme Ribas concludes the following (freely translated from the original): "Within this perspective, the greater proximity between processes of punitive nature (criminal and administrative sanction) is natural. Although recourse to the system of evidence of civil procedural law remains relevant, the "increased scope of administrative law" and the phenomenon of "administrativization of criminal law" justify and require a more immediate remission of the probative method adopted in criminal proceedings. (...) The Public Administration must be able to abandon formalist conceptions in favor of greater comparison and respect for the fundamental rights of the administered, as a form of strengthening and legitimating the exercise of power." (RIBAS, Guilherme Favaro Corvo. *A prova no processo administrativo de investigação de cartel*. 2015. 219 p. PhD Thesis, Faculty of Law, University of São Paulo, São Paulo, 2015, p. 70-71.).

⁸ MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz. *Prova e convicção*: de acordo com o CPC de 2015. 3. ed. São Paulo: Editora Revista dos Tribunais, 2015, p.119.

fact.⁹ Economic evidence and further documentary evidence commonly obtained through dawn raids, leniency agreements and settlement agreements is also added in.

Antitrust authorities notoriously face difficulty in obtaining evidence of a cartel especially lending to the sophisticated methods adopted to prevent leaving traces of the anticompetitive conduct. The leniency program appears as a vital instrument for CADE to discover cartel practices directly from their participants and to investigate and even punish the entities and individuals involved. The leniency program may be ultimately beneficial not only from CADE's perspective but also from that of the participants. There are several administrative and criminal benefits¹⁰ they would be entitled to by committing to cease the illegal conduct, report and confess its participation in the wrongdoing and cooperate with the investigations.

The leniency agreement depends on the confession of participation as well the identification of the others involved in the violation. There is also the burdensome collection of information and documents of the offense reported or under investigation. The leniency applicant must submit all documents, even evidentiary, that it has and considers suitable for evidencing the alleged conduct and must be the first one to qualify for the negotiation.¹¹

A leniency agreement could be seen as direct evidence, for example, when regarding the applicants' confession to participation and the existence of unquestionable evidence of anticompetitive agreements. It can also be considered as indirect evidence when referring to the applicants' mere declaration of other companies' and individuals' participation in the conduct, and to circumstantial evidence on facts that would corroborate the existence of the anticompetitive conduct, not directly, but by the decision maker's logical deduction. It is reasonable to conclude that the same applies for the settlement agreements.

In addition to the moment of signing the leniency agreement, there are two other main procedural steps in which evaluation of the set of facts and evidence occurs: the initiation of the administrative process and the final decision of the proceeding by the GS and CADE's Tribunal. In each of them the rigor in the evaluation of proof is relativized, being more rigorous to the decision than to the initiation of the administrative process when the main discussion is the sufficiency of indicia or evidence for the continuity and deepening of the investigation.

The Tribunal has already had the opportunity to express its views on this matter and ruled for broad discretion of the prosecuting authority to decide what evidence may support the decision of further investigating a reported conduct by launching an administrative process (or other more preliminary proceedings).¹²

⁹ MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz. Ob. Cit., p. 122.

¹⁰ The leniency applicant can have full administrative sanctions immunity and criminal immunity is also granted to individuals.

¹¹ Failure to submit the minimum amount of documents needed to prove the alleged conduct may lead to rejection of the leniency agreement proposal by the GS. According to the Guidelines of CADE this assessment is made on a case-by-case basis (CADE, *Antitrust Leniency Program Guidelines*. Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf>. Access on February 21, 2017).

¹² Administrative Process No. 08000.015337/1997-48, decided by the Tribunal on October 27, 1999 (see vote of the Reporting Commissioner Ruy Afonso de Santacruz, p. 1.582).

The mere presence of indicia evidence (indirect evidence) at this beginning procedural stage is sufficient for CADE to initiate proceedings according to the competition doctrine and to CADE case law, as will be further detailed in the next section. The indicia are weighed in accordance to their strength. For example, the existence of an indication of communication between competitors tends to weigh more on the probative set than an economic clue that points perhaps to suspicious behavior, such as price or conduct parallelism.¹³

In addition, the authority has to consider if the evidence originating from the version of an isolated individual/company under an agreement with CADE is strong enough to solely support a penalizing measure. No punitive decision can be based solely on the declarations of a collaborating agent as set forth in Law No. 12,850/13.¹⁴

The Federal Supreme Court has recently expressed the need of independent evidence that supports the allegations in plea bargain agreements and has adopted the position that no conviction should be based solely on such agreements. They must be corroborated with the collection of data from a different source.¹⁵ The obligation to tell the truth may be weakened when the benefits of collaboration or leniency can lead an individual to omit or give misleading information.

The following section will analyze whether there is a standard of proof adopted by CADE to launch a proceeding and to impose administrative sanctions in its decisions.

3. Analysis of CADE's case law

3.1. The International Air Cargo Cartel (2013)

The **International Air Cargo Cartel**¹⁶ raised some valuable discussions about the Tribunal view on the standard of proof needed to launch an administrative process. The conviction of defendants in cartel cases involving leniency agreements was also brought into a well-deserved light.

Ricardo Machado Ruiz, Reporting Commissioner in the case, followed the Federal Prosecution Office ("MPF") and disagreed with the former SDE and the General Attorney Office as to whether there was enough evidence to demonstrate the participation of two defendants: United Airlines (United) and its executive, Luiz Fernando Costa (Luiz). The disagreement between them related specifically to the standard of proof that should be achieved to punish.

¹³ In fact, in several cases of investigation in the fuel market, CADE's suggestion was to reject the initiation of proceedings only based on similarity of prices and adjustment dates, continuing only cases that present minimum elements of materiality (Administrative Processes No. 08012.005545/1999-16, 08012.000921/2000-53, 08012.009906/1999-94, 08012.000775/2000-66, 08012.012676/1999-12).

¹⁴ This statute more recently regulated the plea bargain agreements, which are similar to leniency agreements under the Brazilian Antitrust Law, and subsequently, Law No. 12,846/13 ("Anticorruption Law").

¹⁵ Federal Supreme Court, HC 127.483/PR, Reporting Justice Dias Toffoli, decided on August 27, 2015 (DJe April 2, 2016).

¹⁶ Administrative Process No. 08012.011027/2006-01, decided by the Tribunal on August 28, 2013.

SDE and the General Attorney Office believed that an isolated email sent by Lufthansa¹⁷ to United and its indication by the leniency applicant as an occasional participant of the cartel would be sufficient to prove its involvement in the cartel. However, the Reporting Commissioner, followed unanimously by the other commissioners, considered that such an isolated email was unable of demonstrating United's participation in the cartel. The Reporting Commissioner emphasized in his vote the existence of contraindications of United's participation in the cartel (i.e., United was not the recipient of the emails in which the competitors exchanged sensitive information and in one email "Dener" from American Airlines highlighted the need of also involving United which represented direct competition).

The Tribunal demonstrated through this analysis that a mere statement provided by the leniency applicant or isolated circumstantial evidence is not enough to convict someone, especially if there are contraindications of the allegations, as there were in the case. The Tribunal also ruled that the mere fact of the company/individual having knowledge of the existence of the conduct without participating in it, but did nothing to cease it (i.e., be silent, as the SDE considered United) is also insufficient to punish.

With respect to the other defendants,¹⁸ the Reporting Commissioner concluded that there indeed was corroborating evidence (emails, dawn raid material, statements, settlement agreements,¹⁹ etc.) of the leniency applicant allegations that proved the cartel participation of the other defendants in the case.

Another important indication by the Tribunal in this case was that the lack of decision making power of the executive does not exclude the guilt. This argument was raised by several defenses. The Reporting Commissioner voted in these cases for the punishing of the individuals for whom there was participation evidence, but the penalty was less if the individual had limited or no decision power at all.

3.2. The International Marine Hoses Cartel (2015)

The **International Marine Hoses Cartel**²⁰ is another interesting case to analyze the view of the Tribunal in relation to the standard of proof for cartel cases initiated by leniency agreements.

Márcio de Oliveira Junior, the Reporting Commissioner, exposed in his vote that the leniency agreement²¹ in itself could be enough to substantiate the launch of the process but not sufficient for a final decision. The vote exposes the importance of the evidentiary phase to complement the leniency agreement and therefore enabling a substantive final decision.

¹⁷ Group Lufthansa (Deutsche Lufthansa AG, Lufthansa Cargo AG, Swiss International Airlines) was the leniency applicant, together with the following individuals: Cleverton Holtz Vighy, Vítor de Siqueira Manhães, Eduardo Nascimento Faria, Aluísio Damião da Silva Corrêa and Fernando Amaral.

¹⁸ Including Alitalia, which was also indicated by the leniency applicant as an occasional participant.

¹⁹ The following companies and individuals settled with CADE: Paulo Jofily de Monteiro Lima, Renata de Souza Branco, KLM - Companhia Real Holandesa de Aviação and Societé Air France.

²⁰ Administrative Process No. 08012.010932/2007-18, decided by the Tribunal on February 25, 2015.

²¹ In this case, the leniency agreement was executed by the following defendants: The Yokohama Rubber Co., Ltd., Teruo Suzuki, Fumihiko Yazaki, Hajime Kojima, Yukinori Honda, Kota Kusaba and Kazuki Kobayashi.

Following this line the Reporting Commissioner analyzed the several pieces of evidence collected during the evidentiary phase composed of the documents and statements (i) provided by the leniency applicants, (ii) provided by the settling signatories,²² (iii) collected through dawn raids, and (iv) borrowed from investigations of other jurisdictions. This endeavored not only to verify if the cartel indeed had effects in Brazil²³ but also whether the defendants had actually participated. No difference was made as to whether the evidence was direct or indirect, however it clearly exposed the acceptance of circumstantial evidence for punishment if it is strong, coherent and not invalidated by contraindications or other direct evidence.²⁴

The Reporting Commissioner employed the above established premises and ruled for the dismissal of the case in relation to the defendants with reasonable doubt of participation, that is, to whom the pieces of evidence were inconclusive or at least not strong enough to corroborate a sanction.²⁵ It is interesting to note that although there were some pieces of evidence implicating these defendants, including the statement provided by the leniency applicants, the Reporting Commissioner considered that the set of evidence did not certify the participation and justify punishment. In this sense, the Reporting Commissioner voted for the termination of the investigation without the imposition of any penalties, given the existence of reasonable doubt.

The same rationale was applied in the split process²⁶ related to the case in which some of the individuals were prosecuted. The Reporting Commissioner voted for the conviction of all since there were further statements provided by the settling signatories (their employers and others) or even the confession of these defendants in the United States of America corroborating the statements provided by the leniency applicants regarding their participation.

One interesting fact in relation to this split case is that only one of the defendants convicted was not an executive of the companies that settled with CADE. Mr. Peter Whittle was an employee of the consulting company that coordinated the cartel according to the allegations. However, the consulting company itself was not even named as a defendant in the process.

In both the main and split processes, the vote of the Reporting Commissioners was followed unanimously by the Tribunal, which converged with their views in relation to the standard of proof for the conviction / termination of the case in relation to each defendant.

²² The following companies settled with CADE: Manuli Rubber Industries SpA, Dunlop Oil and Marine Ltd., Bridgestone Corporation, Parker ITR S.r.L. and Trelleborg Industrie SAS.

²³ Even if potential effects, but as an international cartel it is essential to demonstrate the effects to validate CADE's jurisdiction (see paragraph 208 of the vote of the Reporting Commissioner, Márcio de Oliveira Júnior).

²⁴ To validate this ruling, the Reporting Commissioner presented excerpts of the doctrine, precedents, decisions from the Judiciary and the Department of Justice (DOJ) and European Commission (EC) position (see paragraphs 223 to 230 of the vote). Also, invoked the principle of free convincing or rational persuasion established by Article 155 of the Code of Criminal Procedure and Article 93, IX, of the Federal Constitution.

²⁵ That is the case of the following defendants: Goodyear do Brasil Produtos de Borracha Ltda., Robert Louis Furness, Silvio Rabello, Antonio Carlos Araes and Massimo Nebiolo.

²⁶ Administrative Process No. 08012.001127/2010-07, decided by the Tribunal on March 30, 2016.

3.3. The International Hydrogen Peroxide Cartel (2015)

In the judgment of the split process of the **International Hydrogen Peroxide Cartel**,²⁷ the Reporting Commissioner, Márcio de Oliveira Júnior, stated that the leniency agreement is sufficient to launch a process but not for the conviction. He indicated that the Authority has the evidentiary phase to gather additional information to complement the evidence presented in the leniency agreement. In his opinion each document is valid and has its own value when considered as part of a set of evidence that demonstrates the collusion, although when isolated it may not be considered evidence. He also stated that the so-called “apocryphal documents”, which contain no origin information, can also be considered evidence as long as considered with or in the context of other pieces of evidence.

The Reporting Commissioner further stated in his vote, unanimously followed by the other Commissioners, that indirect evidence has the same value as direct evidence and that these pieces of evidence can also lead to a conviction. Based on that ruling, one of the individuals was punished due to the substantive evidence in the case records, i.e., the elements presented in the leniency agreement and additional evidence in the case records.²⁸

3.4. The International Sodium Perborate Cartel (2016)

The first cartel case involving a leniency agreement ruled by the Tribunal in 2016 was the **International Sodium Perborate Cartel**.²⁹ On September 11, 2006, Evonik Degussa GmbH and an individual entered into a leniency agreement with CADE regarding an international cartel between Degussa and Solvay S.A.. Besides the information provided in the History of Conduct presented by the leniency applicant, which included charts with volume and prices of the competitors, there was information from convictions in other jurisdictions and imports of the product into Brazil.

According to the vote, although Solvay had contested the veracity of the information provided by Degussa alleging that it was a strategy of Degussa to damage its only competitor in Brazil, the Reporting Commissioner, João Paulo de Resende, considered that there was sufficient evidence of the wrongdoings and that two pieces of evidence were determinant: (i) the existence of the international cartel with unquestionable participation of Degussa and Solvay and the fact that the companies exchanged sensitive information, and (ii) unquestionable change of position in the supply to Unilever in Brazil and United Kingdom during the same period of the cartel.

The Reporting Commissioner stated that the evidence demonstrated not only the existence of the cartel but also how it had effects in Brazil. The Reporting Commissioner supported this by

²⁷Administrative Process No. 08012.007818/2004-68, decided by the Tribunal on July 14, 2015. The main process related to the case was registered under the number 08012.004702/2004-77 and it was decided by CADE on May 9, 2012.

²⁸ The other individual had the statute of limitation reached in relation to his participation.

²⁹ Administrative Process No. 08012.001029/2007-66, decided by the Tribunal on February 24, 2016.

mentioning other cases³⁰ judged by CADE in which the validity and value of circumstantial evidence and its importance for cartel cases was emphasized.

The Reporting Commissioner considered that Solvay was not able to present in its defense a rationale to eliminate the collusion and concluded that there was enough evidence to demonstrate the cartel.³¹ However, the Reporting Commissioner concluded that there was not sufficient direct or indirect evidence to demonstrate the participation of two individuals in the collusion.

Commissioner Márcio de Oliveira Júnior stated in his oral vote that it was clear by the vote of the Reporting Commissioner that Solvay was not able to demonstrate an economic rationale for its behavior making the collusion the only reasonable explanation for the facts under investigation. He also highlighted the existence of direct and indirect evidence and that the evidence presented in the leniency agreement corroborated the economic evidence in the case records.

The Tribunal demonstrated in this case that although evidence would be enough for the conviction of the company, the same evidence would be insufficient for the conviction of its individuals. This is an important indication about the higher standard of proof required to condemn an individual.

3.5. The International Refrigerator Compressors Cartel (2016)

The **International Refrigerator Compressors Cartel**³² was also reported by Commissioner Márcio de Oliveira Júnior, who reported the Marine Hoses International Cartel. It was reviewed by the Tribunal shortly after the latter and consequently the Reporting Commissioner adopted the same premises with respect to: (i) the sufficiency of the leniency agreement³³ to justify the launch of the administrative process (emphasizing the discretionary of the GS to value such evidence), but not for the final decision (which would need to be complemented by further evidence), and (ii) the possibility of indirect and circumstantial evidence being used to ground a conviction (if robust and consistent with the set of evidence and allegations presented).

One important point that was the subject of further analysis and discussion in this case relates to the standard of proof in relation to the effects that should be demonstrated in Brazil in the case of an international cartel. The Reporting Commissioner considered that there was evidence³⁴ in the case records demonstrating that even in relation to the three defendants³⁵ that allegedly had no

³⁰ See votes in the Administrative Processes No. 08012.004039/2001-68 (“Bakery Cartel Case”) and No. 08012.001273/2010-24 (“CDHU Cartel Case”).

³¹ It is important to highlight that in this case no further (and independent) evidence was collected by the authority to corroborate the leniency applicants’ statements.

³² Administrative Process No. 08012.000820/2009-11, decided by the Tribunal on March 16, 2016.

³³ The leniency beneficiaries in the International Compressors Cartel were: Tecumseh do Brasil Ltda., Tecumseh Products Company, Tecumseh Products Company of Canada Ltd., Tecumseh Europe S.A., Tecumseh Products India Private Ltd., Mr. Dagoberto Sanchez Darezzo, Mr. José Celso Lunardelli Furchi, Mr. Januário Domingos Soligon and Mr. Michel Jorge Geraissate Filho.

³⁴ The set of evidence in the Refrigerator Compressors case was composed, besides the leniency agreement, mainly of documents collected through dawn raids and statements and documents presented by the settling signatories (Whirlpool, Brasmotor and several of their executives).

³⁵ ACC, Danfoss and Panasonic. The GS, the General Attorney Office and the MPF issued opinions recommending the dismissal of the case in relation to these 3 companies because they considered that there was no effects in Brazil in relation to them.

sales (or inexpressive sales) in Brazil there were effects (or at least potential effects) as they participated in competitor meetings in which the issue “Brazil” was discussed.³⁶ The Reporting Commissioner also emphasized that the strategy of “non entrance / no sales” in Brazil on the part of these defendants derived from the cartel and caused the restriction of the competition. This gave reason to why it could not be invoked as a demonstration of lack of effects.

All the other Commissioners agreed with such ruling, with exception of Commissioner Cristiane Alkmin Junqueira Schmidt, who voted for the dismissal of the case in relation to the three defendants. The Commissioner believed that there was no proof of the effects of this international part of the cartel in Brazil.

The demonstration of effects is crucial for international cases and this case demonstrates the challenge in relation to the standard of proof in relation to this matter.

3.6. The International TPE Cartel (2016)

The **International TPE³⁷ Cartel³⁸** is another case in which the discussion focused on the demonstration of the effects of the international cartel in Brazil. The administrative process was launched in November 2011 upon the signature of a leniency agreement executed by Chi Mei Corporation (“CMC”) and its executives with CADE to investigate the effects in Brazil of a cartel in China and Hong Kong in the TPE market. The leniency applicants used the prices agreed upon by the competitors in China and Hong Kong as a reference for the exports to Brazil and they believed that the other companies used to do the same.

Together with the History of Conduct describing the facts, the leniency applicants presented five travel reports of meetings with competitors.

The GS decided to finish the evidentiary phase and suggested the closure of the investigation due to the absence of evidence without even notifying all the individuals to present a defense. The leniency applicants informed about the existence of investigations in other jurisdictions also closed.

Due to the absence of evidence that the other companies used the prices set by the cartel in the exports to Brazil it was not considered possible to demonstrate the effects in the country, not even possible indirect effects. Therefore, the investigation was closed by the Tribunal for the defendants. Notwithstanding, the leniency applicants had the immunity granted.

3.7. The International ABS Cartel (2016)

The **International ABS³⁹ Cartel⁴⁰**, similar to the International TPE Cartel, was closed by the Tribunal despite being initiated by a leniency agreement also signed by CMC and its executives.

³⁶ See, for example, paragraphs 204 and 205 of the vote of the Reporting Commissioner Márcio de Oliveira Júnior.

³⁷ Thermoplastic Elastomers.

³⁸ Administrative Process No. 08012.000773/2011-20, decided by the Tribunal on August 31, 2016.

³⁹ Plastics products, including Acrylonitrile Butadiene Styrene (ABS), Polystyrene (PS), Acrylonitrile Styrene (AS) and Poly Methyl Methacrylate (PMMA).

The Tribunal concluded that there was no demonstration of not even potential or indirect effects of the cartel in Brazil.

The central issue in this case relates to the standard of proof for the demonstration of the effects in Brazil in the case of international cartels. The Reporting Commissioner, Alexandre Cordeiro de Macedo, stated that the proof of the effects in Brazil does not depend exclusively from direct sales to the Country; there are several other elements which could demonstrate that the Brazilian jurisdiction was affected by the cartel, such as: (i) if Brazil or Latin America/South America were subject of the cartel or of the market allocation promoted by it; (ii) if the product subject of the cartel was used in another product exported to Brazil, etc.

However, as in the TPE case, the Tribunal ruled that none of the elements were demonstrated (not even that the price agreed by competitors abroad was used as reference by the defendants for the exports into Brazil) and due to the lack of evidence of effects in Brazil, decided to close to the case.⁴¹ Despite the decision, the leniency protection was confirmed. This once again demonstrated the Tribunal's position that the execution of the leniency agreement does not necessarily imply in the punishment of the other defendants.

3.8. The International CRT Cartel (2016)

The **International CRT⁴² Cartel⁴³** also refers to an international cartel with effects in Brazil. The administrative process was launched in December 2009, due to a leniency agreement signed by Samsung Corning Precision Glass Co. Ltd. and some executives of the company with CADE. Based on the vote, the leniency applicants presented a History of Conduct with a detailed description of the wrongdoings together with documents evidencing the meetings among the executives of the companies in Asia and Europe where sensitive information was exchanged and decisions were taken among them.

The Reporting Commissioner, Gilvandro Vaconcelos Coelho de Araújo, cited that documents demonstrating direct and indirect effects in Brazil were also presented. Later, a decision in Europe from October 2011 and the decision by the Korea Fair Trade Commission (KFTC) were also added to the case records. In June 2016, a settlement agreement was signed by Ashahi Glass Co. Ltd. and Hankuk Electric Glass Co. Ltd. with CADE.

The Reporting Commissioner made it clear in his vote that the unilateral documents presented in the leniency agreement are not definitive evidence and should be analyzed in the context of the collusive behavior described by the leniency applicants. He also stated that the evidence is comprised of all pieces of evidence (either circumstantial and indirect or not) in Brazilian Antitrust Law but not by isolated documents.

⁴⁰Administrative Process No. 08012.000774/2011-74 and Split Process No. 08700.009161/2014-97, both decided by the Tribunal on September 14, 2016.

⁴¹ The following evidence was presented by the leniency applicants: (i) handwritten notes of meetings abroad; (ii) phone records of conversations between some competitors, and (iii) minutes of internal meetings of CMC with references to prices that the company would charge in several countries.

⁴² Cathode Ray Tubes.

⁴³ Administrative Process No. 08012.005930/2009-79, decided by the Tribunal on November 11, 2016.

He stated that there was substantial evidence in the case of an international cartel with effects in Brazil. This was based on the information provided in the History of Conduct of the leniency agreement that was corroborated by decisions issued by other jurisdictions and the settlement agreement and information gathered during the evidentiary phase, such as import data.

As in other cases above described, the Tribunal unanimously decided to not convict one individual⁴⁴ due to absence of evidence regarding his involvement in the cartel, although the Tribunal considered that there was sufficient evidence that the company for which he worked was involved in the cartel. The company was fined by CADE.

3.9. The International DRAM Cartel (2016)

The **International DRAM⁴⁵ Cartel⁴⁶** is the most recent case ruled by CADE also involving a leniency agreement. The investigation was initiated in June 2010 by the former SDE to investigate the existence of effects of the international DRAM cartel in Brazil based on documents related to the international decisions in Europe and USA and studies in the Brazilian market which were added to the case records.

Only later, in November 2011, a leniency agreement with partial protection was executed among CADE and NEC group and some individuals. The SDE named more individuals as defendants in the process based on the documents presented in the leniency agreement.

The Reporting Commissioner, Márcio de Oliveira Júnior, mentioned in his vote that the launch of a process does not mean a punishment since the final opinion is comprised of the elements presented during the evidentiary phase, i.e. the defenses and additional evidence. He further stated that the evidence in the Brazilian Antitrust Law is comprised of a “set of circumstantial evidence” and that a leniency agreement is one element to the investigation, which is complemented by additional evidence gathered during the investigation.

He made it clear in his vote that the decision for the conviction was based on several pieces of evidence that demonstrated the illicit contacts. Such set of evidence was composed of the cooperation of the leniency applicants and also settling signatories,⁴⁷ besides several documents presented such as emails and international decisions.

The Reporting Commissioner made it clear when analyzing the effects in Brazil that there was sufficient evidence to demonstrate that the cartel had direct and indirect effects. A list of affected Brazilian clients was presented in the vote to reinforce the ruling.

⁴⁴ Timm-Peter Pollak, who worked for Schott AG.

⁴⁵ Dynamic Random Access Memory.

⁴⁶ Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 23, 2016.

⁴⁷ Settlement agreements were executed by the following defendants: Infineon Technologies AG; Samsung Semiconductor Inc.; Samsung Electronics Co. Ltd; Micron Technology, Inc.; SK Hynix Inc. (nova denominação de Hynix Semiconductor, Inc.); Hitachi Ltd.; Chae Kyun Chung (Hynix), Choon Yub Choi (Hynix), Dae Soo Kim (Hynix); Kun Chul Suh (Hynix); Theodore Rudd Corwin (Infineon); Heinrich Florian (Infineon); Günter Hefner (Infineon); e Peter Schaefer (Infineon), Young Woo Lee (Samsung), Young Hwan Park (Samsung), Yeongho Kang (Samsung), Thomas Quinn (Samsung), Sun Woo Lee (Samsung), Il Ung Kim (Samsung) and Hiroyuki Kaji (Samsung).

It is important to note that the Reporting Commissioner considered that there was a reasonable doubt or there was no evidence of the participation of some individuals⁴⁸ in the collusion. The other Commissioners followed him unanimously on this point and the individuals were not punished.

Finally, it is also important to mention the oral vote by Commissioner Gilvandro Vasconcelos Coelho de Araújo. He stated that the argument of the parties regarding the unilateral evidence could be rejected since the evidence in the records, i.e., the leniency agreement together with the settlement agreements and the foreign decisions demonstrated the existence of the illicit practice.

4. Conclusion

It is clear by analyzing the rationale of the decision-making in cartel cases involving leniency agreements that they are not definitive evidence. They should be analyzed in the context of all pieces of evidence presented in the evidentiary phase, including circumstantial evidence, additional evidence gathered by the Authority as well as the defenses.

An administrative process can be launched based only on circumstantial and indirect evidence, such as the mere declarations of the leniency applicants, which seems to set a lower standard of proof. CADE has however also been indicating that the indirect evidence may only be sufficient for the conviction of companies and/or individuals involved in cartel practices if it is robust and consistent with the all pieces of evidence and allegations presented.

It should be emphasized that although individually insufficient for a conviction, it is very difficult for the investigated parties to contradict the facts described and evidence presented in a leniency agreement. So far, the investigation was closed in only two cases without any penalties due to absence of evidence of effects in Brazil. Even in those cases, the leniency agreement was considered valid and the immunity was granted to the leniency applicants.

In other cases, the evidence in the case files was considered insufficient by the Tribunal to impose penalties on some of the investigated parties (i.e., Goodyear in the **International Marine Hoses Cartel** and United in the **International Air Cargo Cartel** besides several individuals as described in the section 3 above) despite the statements from the leniency applicants.

Although CADE has been demonstrating consistency in its decisions involving leniency agreements it is important to mention that all these decisions are very recent and the majority of them were issued in 2015 and 2016. Further, the wrongdoings were related to international cartels also investigated and sanctioned abroad.

CADE still has a long path to consolidate its case law despite the great achievements over the past five years. The pending analysis of leniency agreements involving national cartels that were not subject to any other jurisdiction is one example. We also must take into consideration that CADE's decisions can also be subject to review by our Judiciary system. Some of them are already being judicially discussed and CADE will have to defend its decisions in the courts.

⁴⁸ Alfred P. Censullo, Hiroyuki Ito, Kimikazu Kitamura, Kiyotaka Shiromoto, Koichi Hirasaki, Naoharu Kajimura, Tatsuya Iida, Tatsuya Minami, Yuji Anzai and Akira Sonoda.

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

The next years will be fundamental for the development of CADE case law and the strengthening of CADE's successful leniency program.

CHAPTER 22 - THE LENIENCY AVALANCHE IN THE FIRST 5 YEARS OF THE BRAZILIAN ANTITRUST LAW: IMPROVEMENTS ACHIEVED AND CHALLENGES AHEAD

Luciana Martorano¹

The Brazilian Leniency Program has become one of the most effective globally. In general terms, for the General Superintendence to accept a leniency agreement proposal, the applicant must necessarily: (i) be the first to come forward and report the conduct making use of the marker system; (ii) immediately cease the practice; (iii) confess participation in the conduct; and, (iv) cooperate with the whole investigation.

The benefits granted to applicants who sign and fulfill a leniency agreement are: (i) full administrative immunity if CADE had no previous knowledge of the reported conduct, or (ii) a fine reduction² resulted from partial administrative immunity if CADE have already started an investigation on the same conduct, without having sufficient evidence at the time of the leniency application to expect defendants conviction. In both cases, full criminal immunity will be granted for individuals involved in the wrongdoing.

First introduced in the national legislation in 2000,³ the Brazilian Leniency Program gained momentum after important changes presented by the “new” Brazilian Antitrust Law No. 12,529/11, enacted in 2011 and which came into force in May 2012, after a good number of years of debates and amendments in Congress.

Among several improvements introduced by the Brazilian Antitrust Law, three had major impacts in the Brazilian Leniency Program: (i) structural changes to the Brazilian Antitrust System (ii) introduction of pre-merger review analysis, and (iii) expansion of rights granted to leniency applicants.

CADE gained efficiency after abolishing the previously three-phase system⁴ and concentrating the bodies responsible for issuing economic analysis (DEE), performing conduct investigations and merger review analysis (General Superintendence) and issuing final decisions on

¹ I would like to thank Mrs. **Lea Jenner de Faria**, graduated from the Law School of Universidade de São Paulo (USP) and associate of TozziniFreire's Antitrust Law Practice Group, who has helped me carry out the research for this paper.

² Varying from one-third to two-thirds of the imposed penalty.

³ By Law No. 10.149/00 that amended the Brazilian Antitrust Law then in force (Law No. 8.884/19994) by including two items in Article 35 (35-B and C).

⁴ Under the prior merger control regime, three separate bodies held competence for reviewing Administrative Proceedings related to the Brazilian Antitrust Law: the former Secretariat of Economic Law (SDE), SEAE and CADE. While SEAE and SDE were responsible for issuing non-binding economic and legal – respectively – opinions on the matters under discussion, CADE was responsible for issuing final decisions on the cases. The prior tripartite institutional structure of the Brazilian Antitrust System used to delay the issuance of final decisions even in simple cases such as fast track merger review proceedings.

Concentration Acts and Administrative Processes (Tribunal)⁵ in one single independent competition agency.

The concentration of bodies in CADE has also enabled the antitrust agency to expand its premises and staff. Following a trend that had already been taking place, CADE intensified the hiring of young and more specialized employees, which has contributed to the efficiency gain of CADE's internal proceedings. The leniency negotiation proceeding became more dynamic and more sophisticated, mainly thanks to the efforts of the General Superintendence's Chief of Staff Office, the department responsible for leading the negotiations.

The introduction of the pre-merger review analysis of transactions,⁶ in addition to the increase of the minimum company turnover threshold to make transactions mandatorily submitted⁷ considerably decreased the volume of acts of concentration filed at CADE over the years. Consequently, CADE's workforce became more available to focus their attention on cartel investigations and unilateral conducts, as well as on leniency negotiations.

Finally, the legal changes introduced by the Brazilian Antitrust Law, albeit not substantial, made the leniency program even more attractive, expanding the rights granted to leniency applicants, such as: (i) elimination of the prohibition for the conduct leader to apply for agreement, and (ii) granting effective full criminal immunity to applicants.

The elimination of the prohibition for a conduct leader to apply for leniency increased the chances of having a conduct disclosed to CADE. At the same time, the changes provided in the law text in relation to the criminal immunity, solved a previous debate on the legal extension of the Article 35-C of Law 8,884/94. In accordance with a grammatical interpretation, this Article conferred possible criminal immunity for applicants only in relation to the criminal offenses listed in Law 8,137/90,⁸ not including other crimes. The new Brazilian Antitrust Law expressly extended the immunity for other crimes directly related to the reported conduct, such as criminal conspiracy and bid rigging in public procurements.⁹

In addition to the structural and legal improvements brought by the Brazilian Antitrust Law, the non-legal enhancements that the leniency agreement proceeding has achieved is also noteworthy.

⁵ This movement has made CADE's structure analogous to that of the U.S. Federal Trade Commission, following other institutional reforms that had been recently carried out by the UK, Spain, and France.

⁶ Following the recommended practices of the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).

⁷ According to the Brazilian Antitrust Law, a transaction must be submitted to CADE's review when: (i) at least one of the groups involved registered an annual gross turnover or business volume in Brazil above R\$ 750 million in the year preceding the proposed transaction, and (ii) another group involved registered gross turnover or business volume in Brazil above R\$ 75 million in the same period.

⁸ Law No. 8,137/90, which defines crimes against the tax and economic order and against consumer relations, and other provisions.

⁹ Article 87 of Law No. 12,529/11: "For crimes against the economic order, as defined by Law No. 8,137, of December 27, 1990, and other crimes directly related to cartel conduct, such as defined by Law No. 8,666, of June 21, 1993, and the ones defined in Article 288 of Decree-Law No. 2,848, of December 7th, 1940 - Criminal Code, the execution of a leniency agreement under this Law requires the suspension of the statute of limitations and prevents denunciation from being offered in relation to the leniency beneficiary".

Recent experiences with the General Superintendence have shown growing effectiveness in the communication with attorneys of leniency applicants. The availability for conference calls and for receiving attorneys for in-person meetings has increased considerably. The constant technical development and level of staff knowledge on the details of every case under analysis are also positive points to be highlighted, especially when considering CADE's limited budget and, consequently, lack of workforce.

The General Superintendence has also become more selective in relation to the quality of evidence presented by leniency applicants who are now forced to present a higher standard of proofs of anticompetitive behavior. Among the General Superintendence's current common requirements are: (i) proper identification of the parties involved; (ii) presentation of bilateral evidence, and (iii) evidence of the potential anticompetitive effects when the conduct affects the Brazilian market.

Of course the raise of the standard of evidence now required by CADE results in even more work and expenses for leniency applicants to successfully follow all the laborious steps from the time of the marker to the execution of an agreement. On the other hand, more careful selection of proofs improves CADE's capacity to assess the quality of evidence required to choose the companies and individuals who will compose the defendants' side and that might be convicted by the Tribunal in the end.

In any case, the raise of the bar for strong evidence ensures more certainty and legal security for the whole system, being, moreover, a good sign that CADE is moving towards the maturity of its leniency program.

The use of leniency plus by companies is also an important factor that has contributed to increase the incentives for the parties involved in anticompetitive activities to apply for full administrative and criminal immunity.

Companies frequently apply for leniency plus after starting an internal investigation into one conduct that uncovered another anticompetitive behavior in addition to the one initially investigated.

Assuming that the company is able to meet the requirements for requesting the marker, it can receive full administrative and criminal immunity for the second anticompetitive behavior and, in case of conviction, a one-third reduction in the fine with respect to the first accusation already reported to CADE.

In addition to the common requirements for applying for leniency, the applicant for leniency plus must disclose the second conduct before the first case under investigation is sent by the General Superintendence to the Tribunal for final ruling.

The leniency plus applicant is also eligible - at CADE's discretion - to combine the discount for leniency plus (one third) with the discount it is entitled to receive in case of entering into a Settlement Agreement (TCC) with the General Superintendence or CADE's Tribunal in relation to the first ongoing investigation.

However, it is important to point out that the TCC and the leniency plus discounts will be applied subsequently¹⁰ and non-cumulatively, as CADE understands that it could result in excessive benefits for the company and/or individual, jeopardizing the dissuasive effect of the conduct.¹¹

Leniency plus is definitely an offer not to be refused. Unfortunately, there is no leniency plus of the plus and in case the company discloses a third independent conduct, it must apply for a leniency agreement following the course of the proceeding without any extra discount of possible fine – if convicted in the end – in addition to the one third granted when the second cartel was reported.

Granting additional discounts to a fine (in case of conviction) or to a monetary contribution (in case of TCC) for each new conduct reported to the parties involved in the first conduct would certainly amplified the incentives for companies to invest in a more in depth internal investigation in order to clean the house.

In practical terms, it is noteworthy that internal investigations may raise the issue as to whether the disclosure of another anticompetitive behavior may represent: (i) a leniency plus opportunity; (ii) a broadening of a conduct already reported to the authorities or, even, (iii) a chance to apply for a TCC.

When the discovery of a new conduct involves a totally different product, it is easier to affirm that a new marker be immediately requested by the company in order to ensure it the first-in line place for a completely new leniency or for a leniency plus if the company is already being investigated by CADE in another Administrative Process.

However, legal assessment tends to be complicated when the internal investigation leads to evidence that the conduct originally investigated is the same in terms of material scope – product(s) under investigation, but actually broader in terms of its geographic scope, companies and individuals involved. This can be a common situation when the discovery is made during internal investigations carried out to prepare a company's defense in another case.

Although the product is the same, it is likely that practices involving different players will considerably vary from case to case in terms of geographic markets impacted, anticompetitive activities developed (e.g. geographic and client division in addition to the price fixing conduct originally reported by the leniency signatory), and dynamics (e.g. conduct's establishment, functioning, monitoring, punishments etc.). This may create a difficulty for the parties involved, and for CADE, to assess the proper treatment the discovery of a new anticompetitive conduct should receive.

One possible approach to solve the issue would be to use the identification of common players in both conducts as start point key of a connection of cases analysis. As such, it would be necessary to have coincidence of parties in addition to correlation of products, so the enlargement of

¹⁰ First Leniency Plus and then the TCC discount is applied. See the full explanation in item II.2.1.4.1 “Combination of TCC and Leniency Plus discounts” of TCC Guidelines. Pages 33 and 34. Available at, <http://en.cade.gov.br/noticias-anexos/guidelines_tcc.pdf/@@download/file/Guidelines_TCC.pdf>. Access on February 20, 2017.

¹¹ “Cumulative application could result in excessive benefit for the company and/or individual that practiced cartel in several markets, with possible reduction of the dissuasive effect of the conduct, which could also discourage the presentation of new Leniency proposals, because the benefits under TCCs would be greater”. (Op. cit. p. 34).

the anticompetitive behavior would be directly related to the parties who participated in the original wrongdoing reported.

For example, we can imagine a situation in which A, as a leniency signatory, established a cartel with B in relation to a specific geographic and product market, and B established a cartel with C related to the same geographic and product market, of course A would not be able to report the scheme arranged between B and C to CADE, since it was not involved in it. Despite the coincidence of scope (product/service) the conduct involving different parties without multilateral communication among them should be considered independent and be prosecuted as such.

Given a situation in which the parties involved in cartel of the same product are different from each other – with only bilateral communications and without any multilateral communications or interaction among the other players –, then the company that first discovers evidence of the conduct should be able to apply for a new (or a plus) leniency agreement, depending on the situation, despite the coincidence of other factors, such as period of time or geography in which the anticompetitive behavior took place.

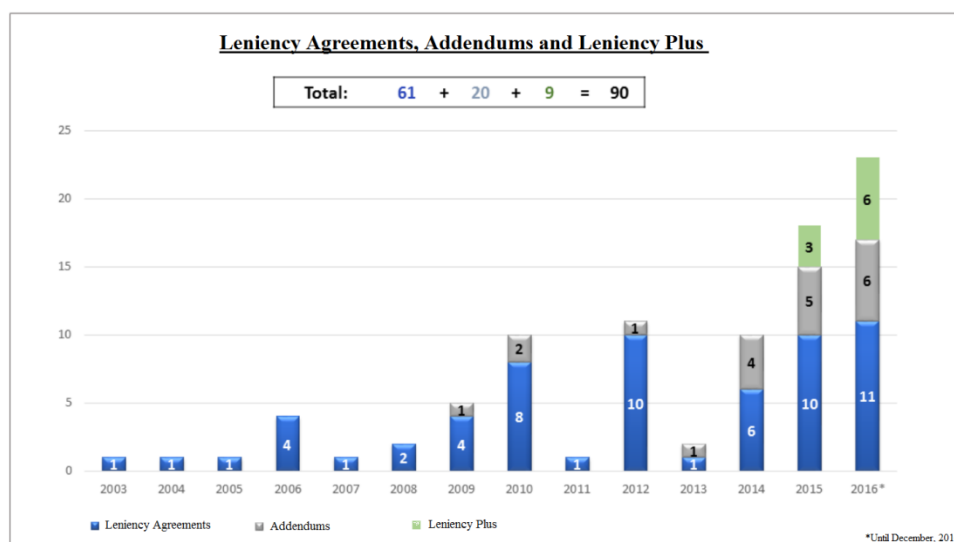
When the parties involved in cartel of the same product coincide, having had interaction and multilateral communication among them, then the company would have two possible alternatives, depending on the purpose of the internal investigation: (i) broadening a conduct possibly already reported to the authorities in case of an ongoing leniency negotiation, or (ii) applying for a TCC in case it has been already investigated by CADE and the internal investigation is being conducted with the purpose of gathering exculpatory documents to prepare a defense.

The proposed identification of common players in both conducts could be the key to solve this issue. It is indeed a really a complicated matter to be debated and addressed by authorities, lawyers and companies. CADE is probably already maturing this question in a proactive way and might soon adopt a reasonable solution for this dilemma.

All these positive changes promoted in the Brazilian Leniency Program were not only felt by attorneys, companies and individuals involved in leniency negotiations, but they may also be easily seen in CADE's numbers. Therefore, it is unquestionable that all direct and indirect improvements established after Law No. 12,529/11 came into force accounted for an escalation in the number of leniency agreements signed by CADE, given the remarkable increase in the rate of leniency agreements, leniency plus and addendums signed.

Since the leniency agreement was established (2000) in the Brazilian Antitrust System until the “new” Brazilian Antitrust Law came into force (2012, 32 leniency agreements and 3 addendums have been signed.¹² In the first year of the Brazilian Antitrust Law currently in force, CADE reached its record, with 10 leniency agreements and 1 amendment signed. Since then, 28 other agreements and 25 amendments were signed (2011-2016), totaling 38 leniency agreements and 26 amendments signed under Law No. 12,529/011, which represents a 50% increase of leniency agreements and 866% leniency amendments.

¹² Considering the impossibility of having a fragmented number for the year in which the Brazilian Antitrust Law came into force (2012), we took into account the period from 2000 until 2011.



Source: English version elaborated by the author of the graph available at: <http://www.cade.gov.br/assuntos/programa-de-leniencia>. Access on March 2, 2017. The same data were presented by CADE's Commissioner Cristiane Alkmin Junqueira Schmidt's vote on Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 28, 2016.

The increase in leniency agreements has also required CADE to invest in information to the general public, reducing information asymmetries as to how CADE enforces its leniency program. As a result, on May 26, 2016, CADE launched its first Leniency Guidelines¹³ and amended the leniency provisions included in its Internal Regulation, consolidating its practice for the application, negotiation and execution of leniency agreements.

On December 7, 2016, CADE submitted a draft of a new a Resolution for public consultation, taking another step towards transparency and reduction of legal uncertainty, with the clarification of two aspects of the utmost importance for companies involved in leniency agreements: (i) how to harmonize its leniency program with CADE's advocacy to promote antitrust damage actions in Brazil, and (ii) the level of disclosure of information and documents that leniency applicants might be exposed to when third parties require access to documents in Brazil originated not only from Leniency Agreements but also from TCCs and CADE's dawn raid proceedings.

The dialogue between public and private enforcement has been subjected to debates in international forums for years and has gained grounds in Brazil, culminating in the above-mentioned draft of resolution.

In order to promote antitrust damage actions in Brazil in a complementary and harmonious manner with the antitrust authority's investigation and agreement policy, the resolution draft proposes: (i) a pecuniary contribution discount in TCCs negotiations, and (ii) a discount in the administrative fine for participants in investigated anticompetitive conducts subject to judicial or extrajudicial compensations.

The draft version of the Resolution also aims to regulate situations in which access to documents at CADE will be of restricted or public access. The proposal of the draft resolution is

¹³ Available at http://www.cade.gov.br/acao-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf >. Access on March 2, 2017.

based on the Brazilian Antitrust Law, CADE's Internal Regulation, on the Information Access Act (Law No. 12,527/11), other related rules and specific judicial rulings.

The harmonization of private and public enforcement is a sensitive issue in relation to which CADE has already been demonstrating concern.¹⁴ Only time will tell whether CADE's efforts to promote private enforcement of the Brazilian Antitrust Law will have a negative impact on applicants' incentives to apply for a leniency agreement.

The good news is that, apart from that, CADE has been implementing very successful measures to improve not only the leniency program but the Brazilian Antitrust System as a whole. There is always room for improvements, though.

The list of suggestions can be endless when authorities responsible for improving a legal system are open for criticism and to debate the best possible ways to pursue and to implement changes with the general public. Fortunately, this has been the will of CADE's enforcers recently. Our purpose here is to address some suggestions that we considered should be heard and discussed, based on our professional experience with leniency negotiations.

Marker system: The Brazilian Leniency Program follows the marker system pattern of most OECD antitrust authorities, and can be considered a reliable and secure tool for applicants to hold their place in line while gathering the required information and documents to officially apply for immunity. To apply for a marker in Brazil, an applicant should discover some initial information on the conduct to be reported, disclosing "Who", "What", "When" and "Where", as indicated in CADE's Leniency Guide.¹⁵ However, this list is not mandatory and may vary from case to case, at CADE's discretion.

In case of rejection of the leniency proposal by the General Superintendence or withdrawal of the application by the leniency applicant, the documents and information provided during the negotiation period will not be subject to disclosure or use for any purposes other than conceding a full or a partial leniency to applicants and must all be returned to the applicants, in accordance with Articles 86, Paragraph 10, and 205, CADE's Internal Regulation.

The information disclosed by the parties to CADE when applying for a marker, as well as during the whole negotiation proceeding, must never be used for any purpose other than granting full or partial leniency to applicants, even when the disclosed information might be linked to another conduct already under investigation by CADE, as exemplified in the situation described above. Any breach could compromise the applicants' trust in CADE's leniency program¹⁶.

¹⁴ See ATHAYDE, Amanda; FIDELIS, Andressa Lin. Discovery, Leniência, TCC e Persecução Privada a Cartéis: too much of a good thing? *Revista do IBRAC - Direito da Concorrência, Consumo e Comércio Internacional*, São Paulo, v. 22, p. 89-115, 2016.

¹⁵ See pages 25 and 26.

¹⁶ This concern is also addressed by the ICN in its Anti-Cartel Enforcement Manual Cartel Working Group: "Competition agencies need to safeguard the incentives to apply for leniency by: providing certainty regarding the use of information provided by the applicant if the leniency application is rejected. [...] The protection of leniency information or evidence is necessary to allay fears that such information or evidence may be used against the leniency applicant (...) without providing leniency." Anti-Cartel Enforcement Manual Cartel Working Group. Compilation of "Good Practices" from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf>>. Access on March 2, 2017.

Another important debate in ICN's and OECD's agendas involving the marker system is whether the use of this feature could enable the development and establishment of a one-stop shop marker system that would increase applicants' incentives to apply for leniency in multiple jurisdictions, when the wrongdoing potentially has impact in international markets. This rich matter will still demand some roads of discussion to be properly addressed in Brazil.

Confidentiality uncertainty and fear of leakage: Again, the confidentiality obligation is the corner stone of the leniency program. Some cases of leakage of leniency agreements reported by the Brazilian and international media not so long ago, make leniency applicants – especially foreigners – react to attorneys' defense of the reliability of the system with a frown. Unfortunately, it is known how hard it can be to efficiently identify the source of leaks to the media.

However, there are other simple cautions that could be taken to avoid that risk. Strengthening even more the cooperation with the Judiciary and the Federal Public Prosecution Office to remind that confidentiality is one of the basic pillars of the leniency program, to prevent disclosure of the existence of ongoing leniency and TCC negotiations in decisions and declarations. Fixing bugs in the SEI¹⁷ that sometimes indicates that a specific Administrative Process derived from leniency when searching for a case by its number could also prevent the problem.

Negotiation Timeline: CADE usually grants a reasonable deadline for parties to amend present information and to collect new evidence of the conduct in accordance with the General Superintendence's comments. These deadlines for information exchanges with the authorities are usually of 1 (one) month in the first months of investigations, being reduced to 15-day terms. This timeline usually confers good rhythm to the negotiation process and makes the parties comfortable to build a reliable and strong case. At the end of the negotiation process, however, parties are usually required to present all the final documentation in its final formal requirements within a very time frame.

The final sprint of the leniency negotiation is characterized by days of intense rush. This is because after the General Superintendence declaring being satisfied with the quality and quantity of evidence delivered, the parties must necessarily present, in a very short deadline, four hardcopies and one electronic copy of the whole final documentation in accordance with a considerably extensive list of the General Superintendence's formal recommendations.

Our impression is that this occurs because the General Superintendence's authorities usually schedule the date of execution of the leniency agreement at the Federal Prosecution Office before the parties concluded the full organization of the final version of the leniency appliance. As a result, the parties are sometimes squeezed into a one week deadline to prepare the final versions of the whole documentation mentioned above. This causes pressure and rush to finish the process that could be avoided by a better scheduling of the leniency proceedings timeline.

Standard of Proof: As mentioned earlier, the improvements implemented by CADE in its respect are undeniable. Additionally, to higher standards of quality of evidence, we believe it is also necessary to focus in the logical coherence that must be established between types of evidence necessary to sign a leniency agreement and that required to convict companies and individuals.

¹⁷ SEI is the electronic platform used by CADE to register all its proceedings. More details available at: <http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/despacho-339-resolucao-no-11-de-2014.pdf/view>. Access on March 2, 2017.

It is undoubtable that the leniency agreement is a great start for the antitrust authority's investigation, since it launches an Administrative Process already based at least on reliable evidences and on confessions of the existence of wrongdoing by at least one participant of the conduct. However, this great start should not be enough to relinquish the investigation phase to confirm the actual extension of the participation of companies and individuals when necessary.¹⁸ Of course CADE should include companies and individuals in relation to whom there is sufficient indication of active involvement in a conduct in the passive pole.

We believe that a very cautious assessment should be conducted to determine the position occupied by a company – and especially – by individuals in a conduct during the leniency negotiation period, so as to avoid an unnecessary increase in the number of defendants in an Administrative Process. It is not rare to identify individuals that have been included in the position of defendant because his/her name was mentioned by third parties in communications reporting a cartel activity, or for being pro-forma copied in an e-mail with suspicious content.

When CADE and applicants are faced with a not defined role in the conduct during the negotiations of a leniency agreement, several exercises might be done to try to sharpen the identification of an illicit activity.

One possible solution could be to analyze the situation of individuals in a gray zone, by evaluating if the attached documents contain proof of: (i) direct contacts with competitors AND (ii) business responsibility intrinsic to the position held in the company; OR (iii) power of decision on the company's behalf.

If these requirements are not cumulatively met, then, our understanding is that the individual under analysis should not be included in the defendant's position from the beginning, waiting for the evidentiary stage to further decide on his/her prosecution. This measure could aim mainly at avoiding that a company or individual to be bound by years of a very emotionally and financially costly proceeding without any strong indication of participation in the conduct.

In relation to individuals, for example, we have the following sample of analysis informing that at least 44 individuals were acquitted in the final judgment of Administrative Processes of cartel investigations initiated by leniency agreements for lack of evidence:

¹⁸ This understanding was addressed by CADE's Commissioner Gilvandro Vasconcelos Coelho de Araujo's vote on the need to further investigate Administrative Processes after Leniency Agreements: "In this regard, I would like to highlight that the celebration of leniencies does not exempt [the authority] from the need to obtain further evidences capable of proving the participation of individuals included as Defendants in Administrative Processes. Based on the applicable legislation, in order to convict defendants, it is necessary to relate them to their participation in the conduct and, in cases of international conducts, to the effects or potential effects of the conduct in the national territory. Therefore, despite the fact that those cases relate to unlawful practices for their nature, it is possible for a process based on a leniency agreement, which contains confession of unlawful practices, not to entail in the conviction of the other defendants, mainly in cases in which it was not possible to gather direct evidences or sufficient indirect evidences." (Administrative Process No. 08012.000773/2011-20. Decided by the Tribunal on August 31, 2016).

Case	Administrative Process	Individuals excluded *
International marine hoses cartel	08012.010932/2007-18	4 individuals ¹⁹
International cartel in the sodium perborate market	08012.001029/2007-66	2 individuals ²⁰
International cartel in the market of refrigerator compressors	08012.000820/2009-11	3 individuals ²¹
TPE plastics cartel	08012.000773/2011-20	13 individuals ^{22*}
ABS plastics cartel	08012.000774/2011-74	11 individuals ^{23*}
International cartel in the market of cathode-ray tubes – CRT	08012.005930/2009-79	1 individual ²⁴
International cartel in the market of Dynamic Random Access Memory – DRAM	08012.005255/2010-11	10 individuals ²⁵
Total		44

* Both cases were closed for lack of evidence even though initiated by leniency agreements.

A more detailed analysis on individuals in a gray zone maybe could enhance CADE's assessment on who should be placed in the defendant's side and to avoid unnecessary prosecutions.

Administrative Process Timeline: Since the first leniency agreement was signed in 2003,²⁶ the program has progressed considerably, especially in relation to the standard of proof required by the authority to sign an agreement. However, the time for processing the Administrative Process involving leniency agreements may still be seen as too high (an average of 6 years and 8 months) from the execution of the Leniency Agreement until the ruling of the Administrative Process by CADE's Tribunal, as follows:

Case	Administrative Process	Analysis Period*
Security services companies' cartel in the state of Rio Grande do Sul	08012.001826/2003-10	1443 days
International peroxides cartel	08012.004702/2004-77	2925 days
International air cargo cartel	08012.011027/2006-02	2451 days
International marine hoses cartel	08012.010932/2007-18	2753 days
International cartel in the sodium perborate market	08012.001029/2007-66	3454 days
International cartel in the market of refrigerator compressors	08012.000820/2009-11	2602 days
TPE plastics cartel	08012.000773/2011-20	2084 days

¹⁹ Massimo Nebiolo, Antonio Carlos Araes, Robert Louis Furness and Silvio Jorge Rabello.

²⁰ Jean Marie Demoulin and Eric Degroote.

²¹ Ingo Erhardt, José Roberto Leimontas and Sr. Miguel Estevão de Avellar.

²² Annie Chung, Paul C. W. Kim, Richard J. Do., Ah-Rong, Huang, Cheng Shih, Chen, Cheng Te Tsai, Chien-Jen, Jao, Chun Hua, Hsu, Hsing-Tsung, Wang, Jau-Yang Ho, Ting Sheng, Su, Yao Tsung, Su, Yu Chuang and Wang.

²³ Cheng Shan, Lin, Cheng Shih, Chen, Chien-Jen, Jao, Ching Yao, Chou, Chun Hua, Hsu, C.S. Lin, Tien Ting, Ko, Wen-Ping Huang, Yao Ching, Wang, Yu Chuan, Wang and Shou-Ren Wang.

²⁴ Timm Peter Pollak.

²⁵ Alfred P. Censullo, Hiroyuki Ito, Kimikazu Kitamura, Kiyotaka Shiromoto, Koichi Hirasaki, Naoharu Kajimura, Tatsuya Iida, Tatsuya Minami, Yuji Anzai and Akira Sonoda.

²⁶ Administrative Process No. 08012.001826/2003-10. Decided by the Tribunal on September 21, 2007.

ABS plastics cartel	<u>08012.000774/2011-74</u>	2098 days
International cartel in the market of cathode-ray tubes – CRT	<u>08012.005930/2009-79</u>	2669 days
International cartel in the market of Dynamic Random Access Memory – DRAM	<u>08012.005255/2010-11</u>	1826 days
Average		6 years and 8 months

Despite CADE’s limited resources, we believe the agency will be able to shorten the period of analysis for Administrative Processes launched based on leniency agreements, privileging a quicker outcome that such types of cases should have.

Level of details of the Term of Rejection:

When a leniency application is rejected by the General Superintendence, the applicant(s) is entitled to request the issuance of a formal document named “Term of Rejection” containing the General Superintendence’s declaration that: (i) the information and documents submitted during the leniency negotiation were unable to provide the authorities with the necessary evidence on the reported violation or that the applicant did not meet the requirements set forth in Article 86, Paragraph 1, of Law No. 12,529/11.

The information contained in the Term of Rejection is similar to the data contained in a marker for leniency application,²⁷ not mentioning possible details of the reported conduct and the contents of the documents.

Even though CADE has been making all possible efforts to establish a predictable standard of evidence, the evaluation of evidence will always be surrounded by the subjectivity of the person who is analyzing the evidence. Considering the relatively high turnover among CADE’s staff, the lack of details in the Term of Rejection may make the document an unreliable tool in case the applicant of a rejected leniency becomes a defendant in an Administrative Process launched to investigate the same wrongdoing previously reported.

On the one hand, the lack of details is aligned with the confidentiality nature of the proceeding. On the other hand, it may cause legal uncertainty in cases like this.

Even though CADE has been making all efforts to establish a reliable patter for its standard of evidence – which would reduce this possibility of legal uncertainty of the Term of Rejection –, we understand it might be worth discussing whether it would be useful to prepare a document to be attached to the Term of Rejection containing some details of the documents and information provided by the applicant to the authorities during the negotiation.

²⁷ The model of General Superintendence’s Term of Rejection is available at: <http://www.cade.gov.br/assuntos/programa-de-leniencia/modelo-2015_rejeicao-proposta-info-insuficientes-ambos.pdf>.

Can private enforcement compromise public enforcement?

Whether a company decides to apply for leniency is obviously a matter of measuring the potential risks of the government's detection and prosecution. The costs – emotionally and financially – are high and of course intend to be compensated in the end with the extraordinary benefits from criminal and administrative immunity.²⁸ The higher the enforcement of the antitrust legislation, the higher are the incentives for companies and individuals to afford with these costs, avoiding detection and prosecution.

Private enforcement actions are important deterrents against anticompetitive practices and they are set forth in Article 47 of the Brazilian Antitrust Law, which encourages victims of anticompetitive conducts to demand compensations. For a lot of reasons,²⁹ in Brazil most of such private lawsuits are still consequence of the public enforcement performed by CADE and by the Public Prosecution Office, and not by consumer associations or consumers individually.

In cases of convictions by CADE based on leniency agreements, it is hard to tell whether CADE's direct involvement in raising the flag of private enforcement would compromise public enforcement when the antitrust damages actions started to increase.³⁰ Blocking the indiscriminate access of third parties to documents delivered by the parties to CADE within leniency negotiations was a good start.

We believe CADE will follow the same policy in this matter, by acting with parsimony when promoting acts to favor private enforcement in order to protect agreements executed with cartelists that report wrongdoing.

Compliance Programs as an enforcement tool: Even when compliance programs fail to avoid the occurrence of antitrust conducts, they can still be used as a very effective tool for identifying violations. CADE's recent trend of including the obligation of the signatories to develop and adopt a compliance program as a non-pecuniary obligation³¹ in the TCCs might be seen as an indirect incentive for companies to apply for a leniency agreement when wrongdoing was found via the reporting line of compliance programs. As such, it gives them a head start in the race for market, securing its position as first-in in line. At the end of the day, time is everything.

Conclusion

The “new” Brazilian Antitrust Law introduced relevant changes, which have significantly affected the business environment for companies doing business in Brazil.

CADE should be praised for being able to implement such revolutionary improvements in such a short term even with considerably limited resources. Among the various reasons that

²⁸ There is consensus among competition enforcement agencies throughout the world that the most effective cartel enforcement programs adopt a “carrot and stick”.

²⁹ See ATHAYDE, Amanda; FIDELIS, Andressa Lin. Op. Cit., p. 89-115.

³⁰ Op.cit.

³¹ See Settlement Agreements 08700.004780/2015-76 (related to the Administrative Process 08012.009690/2006-39), 08700.003050/2016-39 (related to the Administrative Process 08012.005324/2012-59), 08700.001429/2015-23 (related to the Administrative Proceedings 08012.006130/2006-22 and 08012.005024/2011-99).

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

contributed for the enhancement of CADE's proceedings and regulations as a whole, two are worth mentioning: (i) the breath for work that CADE's young staff has been showing, and (ii) the channel for dialogue the Brazilian antitrust authorities opened for exchanging information and ideas with attorneys and with the general public.

Although there is still room for improvement, the Brazilian leniency program is on the right track to become even more successful if CADE is cautious when executing such agreement.

CHAPTER 23 - BRAZIL'S LENIENCY PROGRAM AND ITS EFFECTS IN THE COMPLIANCE CULTURE

Isabela Salomon Reis
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1. Introduction

In this chapter we will analyze the two major Brazilian's Leniency Programs, which were established in Law No. 12,529/11 and in Law No. 12,846/13, presenting their main characteristic and highlighting their main differences. It will be also analyzed the development of Brazilian compliance culture in the recent years.

It is undeniable that this is a subject of major importance in Brazil nowadays, especially considering the number of scandals involving corruption in the private and public Brazilian sectors. Considering the relevance of the subject and the innumerable discussions related to it, it is not our objective to exhaust the theme, but only to present some relevant considerations about it.

2. Brazil's Leniency Programs

In this section we will analyze and compare the two major Brazilian's Leniency Programs – Law No. 12,529/11 and Law No. 12,846/13.

The Brazilian Antitrust Law structures the Brazilian System for protection of competition and sets forth preventive measures and sanctions for violations against the economic order whereas Law No. 12,846/13 (“Anticorruption Law” or “Clean Company Law”) sets forth the procedures for holding a legal entity liable for crimes committed against the National or Foreigner Public Administration.

In this context, although the two above mention laws are usually applied in different situations, there is a relevant occasion in which both of them can be used,¹ which is in case of cartel² in Public Procurement.³ In this scenario it is of major importance to be able to distinguish the criteria and benefits stated in each Leniency Program.

¹ Article 29 of Law No. 12,846/13.

² “In conclusion, cartels are agreements between competitors, current or potential, designed to cool or neutralize competition between them that have their object or effect typified in the subsections of Article 36, caput, of Law 12.529 of 2011.” (FORGIONI. Paula A. Os fundamentos do antitruste. São Paulo: Editora Revista dos Tribunais, 2016)

³ The fight against collusion in Public Procurement is one of the priorities of the Organization for Economic Co-operation and Development (“OECD”) and CADE. As stated in the Guidelines for Fighting Bid Rigging in Public Procurement prepared by OECD “*bid rigging (or collusive tendering) occurs when businesses, that would otherwise be*

Finally, before analyzing the Leniency Programs it is important to highlight that although the Programs stated in Law No. 12,529/11 and in Law No. 12,846/13 have significant differences, they have the same objective which is to encourage companies and/or individuals (depending on the law) currently involved or that were involved in a cartel or other antitrust or corruption conduct to collaborate with the investigation of such conducts, by presenting information and/or documents, reducing thereby the efforts and public resources used in the investigation and sanction of such illicit conduct. Due to Leniency Agreements the government can also be aware of antitrust or corruption conducts that otherwise it would not know.

Regarding cartels, the Leniency Program has also a second function which is to destabilize its structure. This because cartel is a fragile structure based on the trust and loyalty between competitors in order for them to obtain mutual profits. Therefore the trust is a key point in the creation and maintenance of a cartel and the Leniency Program develops an environment in which this trust is constantly questioned, since the participants can easily report the existence of the cartel for the authorities in their own benefit.⁴

2.1. Antitrust Leniency Program – Law No. 12,529/11

The Antitrust Leniency Program was first introduced in the Brazilian legislation on December 12, 2000,⁵ when Articles 35-B and C were included in the Law No. 8,884/94.

On May 29, 2012, Law No. 12,529/11 entered into force establishing the current Antitrust Leniency Program with minor modification compared to the former one set forth by Law No. 8,884/94.

The requirements and benefits regarding the current Antitrust Leniency Program are set forth in Articles 86 and 87 of Law No. 12,529/11 and in Articles 197 to 210 of the CADE's Internal Regulation.

Firstly, concerning the requirements for executing a Leniency Agreement with CADE, the law states that (i) the company must be the first to be qualified in relation to the reported or investigated violation;^{6 7} (ii) the company and/or individual must cease its participation in the

expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.”.(OECD. Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement. Available at <<http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf>> Access on February 5, 2017)

⁴ For more information concerning this second function of the Leniency Program see CADE's Administrative Process No. 08012.005255/2010-11, decided by the Tribunal on November 23, 2016, and No. 08012.010932/2007-18, decided by the Tribunal on February 25, 2015.

⁵ Law No. 10,149/00, which amended Law No. 8,884/94.

⁶ Since CADE can only grant one Leniency Agreement per conspiracy and in order to verify who was the first applicant that met the requirements for execution of the Leniency Agreement CADE has established a marker system. For more information about the marker system see CADE. *Guidelines – CADE's Antitrust Leniency Program*. Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf> Access on January 10, 2017.

⁷ The companies and/or individuals who are not able to sign a Leniency Agreement, whether because they didn't fulfill all the Law requirements or did not concur with the terms of the agreement set forth by CADE or because the agreement had already been celebrated with a third party, can apply for a Cease and Desist Commitment (“TCC” in its acronym in Portuguese), in order to obtain the benefits described in Articles 85 of Law No. 12,529/11. There are no limits to the number of TCC's that can be signed by CADE.

reported or investigated violation; (iii) the company and/or individual must confess the wrongdoing; (iv) when the agreement is proposed, the General Superintendence must not have sufficient evidence to ensure the conviction of the company and/or individual; (v) the company and/or individual must fully and permanently cooperate with the investigation, attending, at its own expense, whenever requested, at all procedures acts, until the final decision on the reported violation is rendered by CADE; and (vi) the cooperation must result on the identification of others involved in the violation and the collection of information and documents that prove the violation.

In this point it is important to highlight that either a company or an individual can be the leniency applicant. However if the leniency applicant is a company the benefits of the agreement can be extended to its current and former directors, managers and employees, and to companies of the same economic group involved in the violation (as long as they sign the agreement and cooperate with the investigations), what cannot happen if the leniency applicant is an individual. In this last situation, the benefits conferred to the individual who signed the Leniency Agreement cannot be extended to the company to which he/she is or was associated.

Secondly, regarding the benefits of the Leniency Agreement for the applicant, Law No. 12,529/11 establishes that (i) if the applicant submits a Leniency Agreement's proposal to the General Superintendence before this authority has prior knowledge⁸ of the notified violation, it will benefit from administrative full immunity under Law No. 12,529/11 (total leniency); and (ii) if the applicant submits a Leniency Agreement's proposal to the General Superintendence when this authority is already aware of the notified violation, the applicable penalty⁹ for the illegal conduct under Law No. 12,529/11 will be reduce by one to two-thirds¹⁰ (partial leniency).

Regarding the criminal sphere, the Leniency Agreement benefits the individuals with the suspension of limitation period and prevention of criminal prosecution of the leniency beneficiary.

It is important to point out that the benefits are granted upon declaration of fulfillment of the Leniency Agreement by the Tribunal, when the administrative process is ruled on. In the criminal sphere, the punishment for crimes established in Article 87 of Law No. 12,529/11¹¹ automatically ceases with the declaration of fulfillment.

⁸ As stated in question 19 of the CADE's Guidelines on the Antitrust Leniency Program, "although under the Brazilian law there is no express concept of 'prior knowledge' of the conduct by the General Superintendence, prior knowledge is understood to be present only when, at the time of submission of the proposal of Leniency Agreement, there is an ongoing administrative process (arts. 66 and 69, Law No. 12.529/2011) with reasonable evidence of anticompetitive practices that is the object of the proposed Leniency Agreement." (CADE. Guidelines – CADE's Antitrust Leniency Program. Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf> Access on January 10, 2017)

⁹ The administrative penalties for antitrust violations are established in Articles 37 and 38 of Law No. 12,529/11.

¹⁰ In the reduction of the applicable penalty it's taken into consideration the effective cooperation provided, the transgressor's good faith in complying with the Lenience Agreement and the criteria established in Article 45 of Law No. 12,529/11 ("*(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, consumer, or third parties; (vi) the negative economic effects produced in the market; (vii) the economic status of the transgressor; and (viii) any recurrence*"). In addition, the reduced penalty incurred by the leniency recipient shall not be higher than the lowest penalty applicable to the other transgressors (Article 86, Paragraph 5, Law No. 12,529/11)

¹¹ The crimes for which the Leniency Agreement applies "are the crimes against the economic order, as defined by Law No. 8137, of December 27th, 1990, and other crimes directly related to cartel conduct, such as defined by Law No.

Another relevant fact regarding the Antitrust Leniency Program is that the Tribunal has already ruled on 10 cases initiated as a result of Leniency Agreements (from 2007 to 2016). In those cases it was recognized that the beneficiaries had complied with all the obligations under the Leniency Agreement and, therefore, the benefits described in the agreement were granted, as can be notice in the table below.

¹² Administrative Process No.	Leniency Agreement Date	Decision Date	International Cartel	Fulfillment of the Leniency Agreement	Conviction of others violators
Private Security Firms -08012.001826/2003-10	10.09.2003	09.21.2007	No	Yes	Yes
Peroxide – 08012.004702/2004-77	05.06.2004	05.09.2012	Yes	Yes	Yes
Air Cargo – 08012.011027/2006-02	12.21.2006	08.28.2013	Yes	Yes	Yes
Marine Hose – 08012.010932/2007-18	08.13.2007	02.25.2015	Yes	Yes	Yes
Sodium Perborate – 08012.001029/2007-66	09.11.2006	02.25.2016	Yes	Yes	Yes
Compressors – 08012.000820/2009-11	01.30.2009	03.16.2016	Yes	Yes	Yes
TPE – 08012.000773/2011-20	12.17.2010	08.31.2016	Yes	Yes	No
Plastics ABS – 08012.000774/2011-74	12.17.2010	09.14.2016	No (only Hong Kong and China) ¹³	Yes	No
CRT – 08012.005930/2009-79	07.29.2009	11.09.2016	Yes	Yes	Yes
DRAM – 08012.005255/2010-11	11.24.2011	11.23.2016	Yes	Yes	Yes

Some interesting facts can be extracted from the table above:

- the number of Administrative Processes with Leniency Agreements ruled on by the Tribunal increased significantly in the last year. 6 (out of ten cases) were ruled on in 2016;¹⁴

8666, of June 21st, 1993, and the ones defined in Article 288 of Decree-Law No. 2,848, of December 7th, 1940 - Penal Code” (Article 87, caput, Law No. 12,529/11).

¹² More information regarding Administrative Process available at <<http://www.cade.gov.br/assuntos/programa-de-leniencia>> Access on January 17, 2017.

¹³ In this Administrative Process the Tribunal decided that the cartel was restricted to Hong Kong and China markets, reason why it cannot be considered an international cartel.

¹⁴ It is also noticeable an increase in the number of cartel cases ruled on in the past two years (considering cases with and without Leniency Agreements). In 2015, the Tribunal ruled on 21 cartel cases, imposing fines in the total amount of

- there were 2 cases in which the alleged violators were not convicted. The Tribunal understood that although these cartels existed in other countries, the antitrust conduct did not have any effect in the Brazilian market, which is a requirement described in Article 2 of Law No. 12,529/11 for application of the Brazilian Antitrust Law;
- 9 (out of ten) cases were related to international cartels and/or conducts practice in foreign countries. However, is important to notice that those cases relate to Leniency Agreements signed before Law No. 12,529/11 entered into force. In recent years the number of Leniency Agreements related to national cartels has increased, as explained by Amanda Athayde Linhares Martins and Andressa Lin Fidelis¹⁵ in 2015 of the 10 Leniency Agreements signed “70% were national, 20% were international and 10% were “mixes” (part national and part international)”.
- only 2 cases were related to bid riggings – the private security and the marine hose cartels.

Finally, since the introduction of the Program until the end of 2016, 61 Leniency Agreements were signed, being 11 of those signed in 2016 and 10 in 2015. CADE also executed 20 Amendments to Leniency Agreements and 9 Leniency Plus Agreements.¹⁶

2.2. Leniency Program – Law No. 12,846/13

In February 2014 Law No. 12,846/13 entered into force establishing a Leniency Program in order to incentive the report of the illegal conducts stated therein and in Law No. 8,666/93 (“Public Procurement Law”).

The Leniency Agreement, which is negotiated and celebrated with the Office of the Comptroller General (“CGU” in its acronym in Portuguese) in Federal Level, has its requirements and benefits set forth in Articles 16 and 17 of Law No. 12,846/13 and in Articles 28 to 40 of Decree No. 8,420/15 that regulates Law No. 12,846/13.

Firstly the requirements for celebrating a Leniency Program stated in Law are: (i) the company must be the first to demonstrate interest on collaborating to the investigation of the

R\$ 179,741,595.04. In 2016 from January to October 16 cartel cases were ruled on, with the fines in the amount of R\$ 77,485,384.39, accordingly CADE’s data available at <<http://cadenumeros.cade.gov.br/QvAJAXZfc/opensoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true>> and at <<http://cadenumeros.cade.gov.br/QvAJAXZfc/opensoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true>> both access on January 25, 2017.

¹⁵ MARTINS, Amanda Athayde Linhares. FIDELIS, Andressa Lins. *Leniency Programme in Brazil – Recent Experiences and Lessons Learned*. Available at <http://www.cade.gov.br/assuntos/programa-de-leniencia/publicacoes-relacionadas-a-acordo-de-leniencia/2016_ocde_leniency-in-brazil.pdf/view> Access on January 30, 2017.

¹⁶ Accordingly question No. 86 of the CADE’s Guidelines on the Antitrust Leniency Program “Leniency Plus consists of the reduction by one to two-thirds of the applicable penalty for a company and/or individual that does not qualify for a Leniency Agreement in connection with the cartel in which it has participated (Original Leniency Agreement), but that provides information on a second cartel about which the General Superintendence had no prior knowledge of (...).”(CADE. Guidelines – 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> Access on January 10, 2017)

offense, when such circumstance is relevant;¹⁷ (ii) the company must cease its participation in the investigated violation; (iii) the company must confess the wrongdoing; (iv) the company must fully and permanently cooperate with the investigation, attending, at its own expense, whenever requested, at all procedures acts, until the end of the administrative process; (v) the company must provide information, documents and elements that prove the offence under investigation, and (vi) the collaboration must result on the identification of others involved in the violation, if applicable.

The benefits for complying with the Leniency Agreement are: (i) exemption from the publication of the conviction decision; (ii) exemption from the prohibition of receiving incentives, subsidies, grants, donations or loans from public bodies or entities and public financial institutions or controlled by the government; (iii) reduction until 2/3 of the applicable fines,¹⁸ and (iv) exemption or reduction of the administrative sanctions established in Articles 86 to 88 of Law No. 8,666/93.

The Leniency Agreement of Law No. 12,846/13 does not confer to the applicant benefits in the criminal sphere. This is an essential difference of Leniency Program under analyses if compared to Antitrust Leniency Program.

Another difference compared to the Antitrust Leniency Program is that the Leniency Agreement of Law No. 12,846/13 cannot be celebrated and/or have its effects extended to individuals (directors, managers, employees of the company investigated). Hence, this Leniency Agreement can only be signed by legal entities and may have its benefits extended to companies of the same economic group, as long as they have signed the agreement and complied with its terms.

It is also important to notice that signing a Leniency Agreement does not exempt the legal entity from the obligation to make full reparation for the damage caused by the illegal conduct.

Furthermore, in Law No. 12,846/13 the CGU has more freedom to negotiate and establish the benefits that the applicant of the Leniency Agreement will receive accordingly to his cooperation, since the legislator in the wording of the Law No. 12,846/13 did not set forth a strict set of benefits, as occurred in Law No. 12,529/11.

In order to define the benefits of the Leniency Agreement, especially the reduction of the fine, should be taken into consideration not only the cooperation of the applicant, but also criteria stated in Article 6, Paragraph 7 of Law No. 12,846/13, among which is the existence of internal integrity programs, encouraging the reporting of irregularities within the legal entity¹⁹. It is noticeable that existence of compliance is a relevant criteria used by CGU, since this authority

¹⁷ Considering that CGU can analyze if this criterion is relevant according to the circumstances, eventually more than one Leniency Agreement may be executed in relation to the same investigated violation. This discretion is an important difference of this Leniency Program if compared to the Antitrust Leniency Program.

¹⁸ The fine imposed to the leniency applicant can be less than the minimum limit established in Article 6 of Law No. 12,846/16 (Article 23, Paragraph 1, Decree No. 8,420/15). The Article 6, Subsection I, Law No. 12,846/16 states that the fine will vary from 0.1% to 20% of the gross valuation of the last fiscal year prior the beginning of the administrative process, excluding taxes, which will never be less than the advantaged obtained, when it is possible to estimate it. If the gross valuation it is not verifiable the fine can vary from R\$ 6.000,00 to R\$ 60,000,000.00 (Article 6, Paragraph 4, Law No. 12,846/16).

¹⁹ For more information concerning the Integrity Program see Articles 41 and 42 of Decree No. 8,420/15. (BRAZIL, *Decree No. 8.420 of March 18, 2015*. Regulates Law 12,846, dated August 1, 2013, which provides for the administrative accountability of legal entities for the practice of acts against the public administration, national or foreign and makes other provisions.

published an Integrity Program – Guidelines for Legal Entities.²⁰ For more information about the importance and development of the Brazilian compliance culture see topic 3 of this paper.

Concerning the effectiveness of the Leniency Program of Law No. 12,846/13, this is still difficult to measure, because of the number of cases judged in which a Leniency Agreement was applied.²¹ However, it is undeniable that Leniency Agreements already signed by legal entities are helping the development of the government's investigations, such as “Operation Car Wash” regarding crimes of corruption, cartel, among others related to Petrobras.

Finally, it is essential to highlight that even if a company has already celebrated an Antitrust Leniency Agreement, it can still sign an Leniency Agreement with the CGU under Law No. 12,846/13, as explained in question No. 26 of CADE's Guidelines Antitrust Leniency Program. However, since these agreements are negotiated and celebrated with different and independent authorities, each competent authority has the discretion to decide the terms of the agreement that will be signed, observed the legal limits.

3. The Evolution and Effects of Compliance

In this section it will be demonstrated the influences, applicability and development of Compliance Programs in Brazil, which are of great relevance in the business scenario nowadays.

At first, it is important to present what has been understood as compliance. Thus, this terminology is adopted in general to designate the efforts taken by the private initiative to ensure the enforcement of legal requirements and regulations related to its activities, observing ethical principles and corporate integrity. Compliance is applied by setting internal measures that allows prevention and reduction of risks of violation of laws that are related with different activities practiced by the legal entities and its representatives or employees.

Compliance cannot be interpreted as a simply observance of rules, since comprehends a more active conduct, being understood as “*a set of rules, standards, ethical and legal procedures, which, once defined and implemented, will be the guide for the institution's behavior in the market in which it operates, as well as the attitude of its employees.*”²²

Thereby, the implementation in enterprises should be developed and adapted in particular to each situation and with the objective outlined by each one of those responsible for the internalization of the new concepts. The detailing and approach of programs will be defined as the level of risk that a certain company has and is involved in, considering factors peculiar to each

²⁰ CGU. *Integrity Program – Guidelines for Legal Entities*. Available at <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/integrity-program.pdf>> Access on February 15, 2017.

²¹ Accordingly to OECD Monitoring Report released in February 2017, in which is analyzed the implementation of the OECD Anti-Bribery Convention in Brazil, “*in January 2016, Brazil concluded its first foreign bribery case by way of a leniency agreement with a Brazilian company, and cooperation agreements with 10 natural persons. (...) In addition, Brazil now has eight ongoing cases (...)*”. (OECD. *Brazil: Follow-Up to the Phase 3 Report & Recommendations*. Available at <<https://www.oecd.org/corruption/anti-bribery/Brazil-Phase-3-Written-Follow-Up-Report-ENG.pdf>> Access on February 15,2017.)

²² CANDELORO, Ana Paula. RIZZO, Maria Balbina Martins de. PINHO, Vinícius. *Compliance 360° - Riscos, Estratégias, Conflitos e Vaidades no Mundo Corporativo*. Editora Trevisan, 2012, p.30

organization, including its size, activity branch, financial capacity and negotiation with public officials.

It is noticeable that in recent years the theme compliance has received greater attention and emphasis in Brazil, with significant investment by several companies and increasingly involvement of the private sector, in order to consolidate this culture in the daily business of the legal entities.

Today the private initiative plays an essential role in the development and implementation of what we can define here as a compliance culture. It is important the maintenance of a healthy and competitive corporate environment, based on ethical principles and integrity. It is believed that the internalization of this culture is an irreversible movement, but it needs support and has to be well structured.

Unfortunately this is still a recent movement in Brazil, despite of the strong influence of programs developed by countries such as the United States and the United Kingdom. In this first country, there is the pioneering *Foreign Corrupt Practices Act* ("FCPA") strongly enforced by the *Department of Justice* ("DOJ"), an extremely relevant benchmark for compliance, influencing an entire network of multipliers. Secondly, we underscore the *Anti-Corruption Law* originated in England, the *UK Bribery Act*. These laws are considered one of the strongest in the world in this subject and had influenced the development of this theme in many countries, including Brazil.

Another relevant influence to Brazil's compliance culture is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was incorporated in the Brazilian legal system by the Decree No. 3,678/00 and was adopted by more than thirty countries around the world.

The market in a global level is requiring increasingly relevant investments in Compliance Programs, as part of a business development focused not only in profits, but also on ethical conducts.

The recent cases in Brazil (especially on the "Operation Car Wash"), demonstrate in its essence how corruption is incorporated in daily routines of companies, being present in many different hierarchical levels, and the failures of Compliance Programs, poorly structured and poorly conducted.

The concern with a truly effective program has been growing steadily, especially due to the strictness of Law No. 12,846/13, that states severe penalties for illegal conducts established in it. It is relevant to mention that it is nowadays applied not only to the subjective responsibility, but also objective responsibility, with the punishment of legal entities, thus hurting the image and reputation of the company that were carefully built.

Taking this situation into consideration, it is necessary to develop daily and consistent standards of behavior that supports and sustains the desired changes within each organization, which will certainly require time and a lot of dedication - this development will not happen from one day to the next.

Concerning the adoption of an effective Compliance Program, it "*allows, firstly, the reduction of the risk of occurrence of illicit behaviors. On the other hand, if any violation of the Anti-Corruption Laws is committed in spite of the efforts of prevention, programs for effective compliance will increase the chances of the company itself to detect and quickly act to investigate*

and remediate it and, if appropriate, to decide to cooperate with the competent authorities as a way of reducing any penalties."²³

In this scenario, it has been verified that a more rigid legislation, that is correctly applied in order to punish the transgressor, serves as an incentive to companies to developed effective Compliance Programs, making it possible therefore for companies to grown without the use of illicit means in its business.

In other words, the Compliance Programs serve not only as a guide for relations inside the company and with third parties, but also to enable the legal entity to detect a law violation and quickly identify and punish the responsible person.

Undoubtedly, the main function of compliance cannot be to soften possible penalties for violations of law, but an effective and powerful method for the development of companies and their growth.

3.1. Applicability of Compliance and its Benefits

The compliance culture will only be effective if properly structured and implemented with each of the employees, managers and directors of the companies. For all this information to be disseminated and then internalized efficiently dedication and investment are essential.

The involvement of senior management must also occur on daily activities. It is essential to ensure that the compliance is in fact part of the corporate culture, that employees are not charged for results at any cost and that there is no encouragement or tolerance to practices that, although illicit, can bring positive results for the company in the short term.

The employee who feels over pressed can see in the illicit practices means to achieve great objectives. This corporate way of thinking necessarily results from examples set by their superiors in the organization. Therefore it is essential the collaboration of people of all levels of hierarchy, especially the senior managers, in order to establish an effective Compliance Program.

All this development, as already noted, requires structure and does not appear suddenly. This is what can be a hinder for those interested to implement this type of mechanism within the company.

In these cases, Law No. 12,846/13 explicitly provides the advantages and legal benefits for those who have an effective Compliance Program, when they are sanction for violation of such law. This has been pointed out as one of the incentive points of the dissemination of culture in our country.

In an enlightening way Law No. 12,846/13 in Article 7, VIII, which presents criteria for determination of penalties, states that will be considered: *"the existence of mechanisms and procedures of integrity, audit and encourage the reporting of irregularities and the effective implementation of codes of ethics and conduct within the legal person."*

Therefore, Compliance Programs shall not be construed only as codes of conduct or policies that are "adopted" within companies, requiring the development of a homogeneous

²³ CANDELORO, Ana Paula. RIZZO, Maria Balbina Martins de. PINHO, Vinícius. *Compliance 360° - Riscos, Estratégias, Conflitos e Vaidades no Mundo Corporativo*. Editora Trevisan, 2012.

corporate culture arising from the interaction and support of management and members with a prominent role in the company.

It has been observed that even with the discretion of judges in the application of laws, companies that have a Compliance Program already structured and fully functioning are seen differently by the authorities and even by society.

In this scenario it is certain that companies that act diligently in the prevention and fight of violations of legal regulations will be treated differently from those who act in bad faith and do not want to adapt to the changes occurred in the market and the culture of the companies. Many are still negligent to illicit conducts by employees committed in order to obtain business or other commercial advantages.

3.2. The involvement and commitment of the parties in the evolution of Compliance

The compliance policy will not be sustained and effective if managers do not give the required support and assume its leadership role as a prominently figure within the companies. It has been pointed out that *"the role of company management, fundamental to the success of any Compliance Program, is commonly referred to by the terms "tone from the top" and "top level commitment", which are reflected by the need of a message clearly and unambiguously constantly transmitted by the highest levels of the organization (...)"*.²⁴

Getting the message properly and clearly is essential. From the moment that the high administration incorporates the compliance culture, internalizes and demonstrates through their own attitudes, other employees will have those attitudes as a reference.

Clearly even the high administration that will disseminate this whole range of information needs constant training and improvement, setting the "tone from the top". All this, converges in a concrete support for the development and training of the Compliance Program.

In this situation, those responsible will be able to establish strategies and the pillars for the implementation of the program developed and, if faced with the difficulties that might arise, will be able to act quickly and appropriately in order to absorb the problems and present the solutions on a case by case basis, considering all the preparation received.

It is healthy in the mist of this situation to establish a fast and affordable communication channel. This type of communication prevents relevant information to be allayed and lost, absorbing all the essential feedback in this type of action.

A method that can be used and has brought results in this type of innovation is the implementation of individual and collective goals to employees and senior managers. These objectives may be controlled by the participation in training, submission of feedbacks and information about situations in which the program has proven to be inefficient, implementing, therefore, incentives for everyone involved to apply all the knowledge that was made available.

In addition, it is relevant to understand that the development of the effective compliance policy can generate competitive advantage, since the business community and the society are in constant transformation. A new generation of consumers tends to be highly critical and demanding,

²⁴ CANDELORO, Ana Paula. RIZZO, Maria Balbina Martins de. PINHO, Vinícius. Ob. cit.

acquiring not only products and services, but sustainable and respectable values and behaviors, as well as their effects in terms of consumer confidence, both nationally and internationally. This situation arises from an empathy with a particular company, which shares the same values and principles, going far beyond the act of being a simple product or using any service.

3.3. Cooperation and Confidence - The Facilitators of an Effective Compliance Policy

Collaboration, both internally and externally, is essential for the development of a compliance policy in companies. Internally, it generates more satisfied and willing employees, who tend to increase productivity and loyalty to the company, respecting values and becoming key players for the success of the programs. Externally, it allows the establishment of more stable and reliable relationships due to the company's reputation, with the creation of conditions that facilitate negotiations, making the companies more solid and possible for them to increase profits.

In this scenario, all those involved should follow the same direction, not searching only for results for the present, but analyzing their attitudes and the effects that it could generate in the future.

In order to achieve cooperation at the internal level is necessary to demonstrate the relevance of reduction of conflicts and the importance of forward-looking actions to the company.

It is noticeable that a simple conflict can reduce the production and cooperation of those involved in a work, because each one may have major concerns with what interests him/her personally than with the collective interest, causing, therefore, a disadvantage for the company.

In this context, it has to be developed a new scenario in which prevails the trust, known as "Trustability", seen in this plan as the extreme confidence when we refer to business relationships, between coworkers, consumer and seller, entrepreneurs, and so many other situations that require high levels of complicity.

Considering that cooperation between those involved will become natural in the course of the applicability of the program, it will enable more transparent, ethical and trustful relations. In this way, the compliance policy becomes an extremely powerful tool to reach high levels of growth of companies, allowing even greater business competitiveness.

4. Conclusions

As shown in this study, the objective was not to exhaust all themes, but to bring an important and current view of Leniency Programs and the effects that these have caused on the Brazilian compliance culture.

Compliance is no longer just a program to bring benefits in specific cases or to be something superficial, but it has revealed itself as a powerful tactic applied to the companies businesses.

Thus the compliance structure, incentivized by Law No. 12,846/13, should be created and developed for each company, not being adapted or simply copied from other models, taking

therefore into account that the culture and objectives of each organization are specific and need an tailor made program.

Finally, it is undisputed that the existence of Laws No. 12,529/11 and No. 12,846/13 can facilitate and streamline institutional changes, being of major importance as well the development of effective Compliance Programs for the maturation of the Brazilian institutional environment and the reduction of the antitrust and corruption conducts.

CHAPTER 24 - INTERFACE BETWEEN THE BRAZILIAN ANTITRUST, ANTI-CORRUPTION, AND CRIMINAL ORGANIZATION LAWS: THE LENIENCY AGREEMENTS*

Denis Alves Guimarães

1. Introduction

This paper on the interface between the Brazilian Antitrust Law (Law 12,529/11), the Anti-Corruption Law (Law 12,846/13) and the Criminal Organization Law (Law 12,850/13) has the objective of comparing three legal regimes, the administrative antitrust and anti-corruption and the criminal leniency agreements, identifying their similarities and pointing out their main conflicting provisions that are bringing challenges to the enforcement of such regimes.

The interaction between the antitrust and anti-corruption leniency regimes has been attracting the attention of policy makers at least since the enactment of the new Anti-Corruption Law, which was to a significant extent inspired by the antitrust one.

More recently, the emergence of the *operation Car Wash* (“operação lava jato”) in the context of the biggest corruption scandal of all times has created the need of adding to the analysis of the interface between the antitrust and anti-corruption leniency regimes a third one, hugely important but technically not so similar to the first and second ones: the criminal leniency regime of the Criminal Organization Law.

It is representative of such assertion the fact that the Federal Public Prosecution Office – MPF and CADE have been discussing the interaction between the three leniency regimes. The following chart has been presented by a federal prosecutor in a CADE/MPF joint event:

Administrative antitrust leniency Law 12,529/11	Administrative anti-corruption leniency Law 12,846/13	Criminal leniency Law 12,850/13
Signatory authority according to the law		
CADE’s General Superintendence	Office of the Comptroller General (CGU)	Police Chief Investigator or Public Prosecution Office
Applicant		
The 1 st legal entity or individuals (no 1 st one requirement)	The first legal entity	No 1 st one requirement Note: However, only the 1 st one can obtain full immunity
Beneficiary		
Legal entities and individuals	Legal entities only	Individuals only
Benefits		
<u>Administrative</u> (legal entities and individuals)	<u>Administrative</u> (legal entities)	

<p>Fine immunity when the alleged violation was unknown to the authority</p> <p>1/3 to 2/3 fine reduction when the alleged violation was already being investigated by the authority</p> <p><u>Criminal (individuals)</u> Full immunity in respect to: Law 8,137/90 (cartel as a criminal offense) Law 8,666/93 (bid rigging as a criminal offense) Criminal Code (cartel as a criminal association)</p>	<p>[not available]</p> <p>Up to 2/3 fine reduction + Immunity from the penalty of prohibition of receiving incentives, subsidies, grants, donations or loans from the government</p>	<p><u>Criminal (individuals)</u> Full immunity (only the 1st one) Or Up to 2/3 reduction in imprisonment time (or replacement for alternative penalty)</p>
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Adapted from FEDERAL PUBLIC PROSECUTION OFFICE. *Interface between the antitrust leniency program and the Anti-Corruption Law leniency; presentation of Mr Rodrigo de Grandis, Prosecutor of the Anti-Cartel Group of the Federal Public Prosecution Office in Sao Paulo*. Sao Paulo, June 29, 2015, p. 4 (only in Portuguese).

A glimpse at the chart above suggests the existence of inconsistencies between the three legal regimes. When there is a cartel – more specifically, a bid rigging – investigation, all these regimes may become applicable.

It is certain that in the presence of a cartel violation, the offenders have the choice of seeking for a leniency agreement, but they also have the choice of defending themselves until the end of an administrative and/or criminal proceeding without considering to apply for leniency. Several offenders are indeed considering the leniency possibility, but they do not know where to start their application nor whether they should apply for all regimes, one or two of them.

It is clear that each one sets incentives to lead an offender to provide information to the authority that may be highly useful in order to elucidate the infringement and make possible the prosecution of other offenders. That is the underlying policy reason of such legal regimes: to increase deterrence of the infringements.

However, by comparing such incentives, it becomes clear that there is not a good alignment between them, that is, it is difficult to lead the offenders involved in the matter to execute the three kinds of agreements. This may lead the authorities involved in each kind of prosecution to a very different position in terms of the level of evidence possessed to reach a decision about the infringement.

Given some limitations in terms of information sharing between the authorities, the different level of evidence possessed by each one could undermine the possibility of full enforcement of the two administrative legislations (antitrust and anti-corruption), as well as the criminal one (therefore decreasing deterrence). In the worst scenario, this could also harm the cooperation between the authorities, that could end up competing between themselves with the aim of guaranteeing full enforcement of their own jurisdictions.

2. The rise and growth of antitrust leniency agreements¹

Leniency has progressively gained importance as one of the main cartel deterrence tools. The fourteen years since the first leniency agreement can be divided into three phases: an initial slow learning curve from 2003 to 2006, but extremely important in the sense of building the grounds for the impressive growth of the leniency program from 2007 to 2010, and the consolidation of the leniency program from 2011 to 2016, with the enactment of the new Antitrust Law and the maintenance of the leniency program as a core antitrust policy, even before the “competition” of this policy with other important measures taken by CADE to successfully enforce the new law.

Seven agreements were executed in the first period, eighteen in the second, and sixty-five in the third – counting not only original leniency agreements (*acordos de leniência*), but also amendments (*aditivos*) and leniencies plus (*leniência plus*), as shown in the chart at CADE’s website².

3. The administrative anti-corruption leniency agreement created by the Law 12,846/13

In a book edited by CADE’s former or current leading officials, Nitish Monebhurrin states:

“The influence of competition law in the drafting of the anti-corruption law is worthy and interesting in that it confirms the dialogue between the two fields. Indeed, the 2013 anti-corruption law enables public bodies to enter into leniency agreements with private entities responsible for anti-corruption acts provided for in the said statute. Like in competition law proceedings, the anti-corruption legal regime enables private companies to collaborate with the public administration to help identify other companies involved in a given corruption case and to readily obtain information and documents proving the illicit act”³.

While CADE has executed ninety leniency agreements (61 original ones, 20 amendments, and 9 leniencies plus) from 2003 to December 2016, the CGU has not yet signed anyone⁴ since the enactment of the Law 12,846/13.

CGU is facing a very particular situation that can be understood as a huge opportunity, but also, at the same time as a threat to its capability to effectively enforce the new Anti-Corruption Law. The administrative regulation and the assemblage of an internal CGU structure to enforce the

¹ CALLIARI, Marcelo; GUIMARÃES, Denis Alves. Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation. *Antitrust*, Chicago, V. 25, N. 3, Summer 2011, p. 69.

² Source: CADE, at <<http://www.cade.gov.br/assuntos/programa-de-leniencia>>. Access on March 5, 2017.

³ MONEBHURRUN, Nitish. Fighting Corruption and Promoting Competition in Brazil. In: CARVALHO, Vinicius Marques de; RAGAZZO, Carlos Emmanuel Joppert; SILVEIRA, Paulo Burnier da (eds.). *International Cooperation and Competition Enforcement: Brazilian and European Experiences from the Enforcers’ Perspectives*. Alphen ann den Rijn, The Netherlands: Kluwer Law International, 2014, pp. 83/84.

⁴ <<http://www.cgu.gov.br/assuntos/responsabilizacao-de-empresas/noticias/noticias-responsabilizacao-de-empresas>>. Access on March 5, 2017.

Law are being made in the context of the rise and development of the operation Car Wash⁵, a task force led by the Public Prosecution Office and the Federal Police to dismantle the biggest Brazilian corruption scandal of all times. It concerns public procurement promoted by the state controlled oil company Petrobras in which the bidders are construction companies, and the accusations point out to the existence of bid rigging and bribery. This case is not only huge because of its economic importance, but also for the reason that it involves several important Brazilian politicians.

Currently, the CGU is investigating 20 companies in the scope of the operation Car Wash, and 12 companies have declared their interest in executing a leniency agreement⁶ in the terms of the Law 12,846/13.

It is also important to recall that CADE took more than two years to execute its first leniency agreement after the enactment of the leniency program in 2000 – the Law 10,149/00 included the Articles 35-B and 35-C into the Antitrust Law in force at that time, the Law 8,884/94. Thus, it is always useful to remember that the main point of the comparison is precisely to demonstrate how the Brazilian legal system can benefit from the exchange of experiences between CADE, CGU and the Public Prosecution Office.

4. The criminal leniency agreements

While CADE and the CGU have been developing their experiences in executing leniency agreements under what can be called *single regulations* (antitrust under the consecutive laws 8,884/94 and 12,529/11; anti-corruption under the Law 12,846/13), it can be stated that criminal leniency agreements have been incorporated into the Brazilian legal system well before⁷.

Taking into account only the operation Car Wash, 78 criminal leniency agreements have already been executed⁸. While these agreements concern investigations on the same kind of infringements investigated by CADE and the CGU, it should be recalled that the Public Prosecution Office and the Police Chief Investigators have the power to execute leniency agreements in respect to a much broader range of criminal infringements, rather than just antitrust and anti-corruption ones. Thus, it should not be a surprise if their numbers in general (agreements executed) are much

⁵ IBA – INTERNATIONAL BAR ASSOCIATION. *Brazil's "Operation Car Wash"*, by Brian Nicholson. Available at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7960b146-65c4-4fc2-bb6a-c6fbb434cd16>>. Access on March 5, 2017.

⁶ 29 investigations have been opened in the scope of the operation car wash; 6 companies have been convicted and 3 investigations have been closed due to lack of evidence to convict the defendants (<<http://www.cgu.gov.br/assuntos/responsabilizacao-de-empresas/noticias/noticias-responsabilizacao-de-empresas>>. Access on March 5, 2017).

⁷ Initially, confessions in the scope of criminal proceedings only constituted evidence against the party making the confession. This standard started to be replaced by one in which not only the assertions of the party against itself was admitted as evidence, but also assertions of the same party against others involved in criminal activity was also admitted. Later, more specifically in the decade of 1990, different laws started to regulate criminal leniency agreements similarly to what the Criminal Organization Law (Law 12,850/13) currently makes (CORDEIRO, Néfi. *Delação Premiada na Legislação Brasileira*. *Revista da Ajuris*, v. 37, 2010, pp. 275-290).

⁸ <<http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros-1>>. Access on March 5, 2017.

bigger than the ones concerning CADE and the CGU. Nevertheless, the fact that 78 agreements have been executed in the context of a single investigation (Car Wash) is indeed impressive.

5. Comparison of the legal provisions stated in the three leniency regimes⁹

5.1. Authorities with the power to execute the leniency agreements. Chinese walls and independence.

5.1.1. CADE's General Superintendence – GS

Article 86, Article 16 Paragraph 10 and Article 4 Paragraph 2, respectively, of the Antitrust, Anti-Corruption and Criminal Organization laws set the authorities with the power of executing the leniency agreements.

In the antitrust case such authority is the investigative branch of CADE, the General Superintendence. The Tribunal and the GS are separate independent bodies inside CADE: the Commissioners (and the CADE's President) of the Tribunal and the General Superintendent are independently appointed to their terms by the President of the Republic, and all must have their names approved by the Senate.

5.1.1.1. Chinese wall and independence

This separation between the investigative and the decision making bodies is important, for instance, in the sense of creating a Chinese wall in the scope of the negotiation of leniency agreements. The leniency applicant must be sure that the information being exposed to the authorities during the negotiation process will not be in any way shared with the decision makers in case the applicant and the GS do not reach an agreement¹⁰.

5.1.2. CGU

It is especially important to make reference to the Article 16 Paragraph 10 of the Anti-Corruption Law, since it establishes that, at the Federal level, the CGU is the only body with the power to execute administrative anti-corruption leniency agreements. The CGU is also the only

⁹ Suggested English versions of the laws are available at (on March 5, 2017):

- <<http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>> (Law 12,529/11);

- <<http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1>> (both Law 12,846/13 and Law 12,850/13).

¹⁰ That is the underlying rationality of other provisions of the laws under analysis, for instance, Articles 86 Paragraph 10, 16 Paragraph 7 and 4 Paragraph 10, always respectively, of the antitrust, anti-corruption and criminal organization laws. If the laws had provided differently, they would not be ensuring a good incentive for the negotiation of the agreements, since potential applicants would fear the possibility that the authorities end up using evidence brought by them regardless granting them any benefit.

body with the power to execute the agreements concerning practices that may have harmed a foreign public administration.

Unlike the Antitrust Law, the Anti-Corruption one does not differentiate investigative and decision making bodies in the context of negotiations of leniency agreements. Provisions related to the investigation are stated by the Presidential Decree 8,420/15 and the CGU/AGU Inter-Ministerial Ordinance 2,278/16¹¹. The latter states that the CGU Executive-Secretary appoints a commission with the aim to carry out the investigations.

There is a great difference between a system comprised by two independent bodies (CADE's GS and Tribunal, in the antitrust case) and a system comprised by officials subordinated to a political power – that is the case of both the members of the commission and the heads of the CGU.

5.1.2.1. Chinese wall and independence

It should be noted that such institutional difference, at least theoretically, is not related to the demand of the existence of a Chinese wall between investigative and decision making bodies. Likewise the Antitrust Law, Article 16 Paragraph 7 of the Anti-Corruption Law also demands that if the parties (authority and applicant) fail to reach an agreement, evidence brought by the applicant to the authority in the negotiation process cannot be used by the latter to make a regular case (without leniency) against the former applicant.

5.1.3. Public Prosecution Office or Police

In the criminal leniency regime (Article 4 Paragraph 2) the applicant can negotiate an agreement with the Public Prosecution Office or with a Police Chief Investigator, depending on the case.

The Police conducts criminal investigations and send their reports to a Public Prosecution Office: only the latter can recommend that a judge opens a criminal proceeding that may result in a conviction. Public Prosecution Offices, by their turn, can also conduct investigations.

When a leniency agreement is negotiated between an applicant and a Police Chief Investigator, a Public Prosecution Office will always have the obligation to issue an opinion about the agreement.

5.1.3.1. Chinese wall and independence

The demand of a Chinese wall between the Police Chief Investigator/Public Prosecution Office and the judge is stated in the Article 4 Paragraph 10 of the Criminal Organization Law, and has the same rationality of the corresponding provisions of the Antitrust and Anti-Corruption laws.

¹¹ The Inter-Ministerial Ordinance 2,278/16 was issued on December 15, 2016, jointly by the CGU and the AGU – the “Advocacy-General of the Union”, according to the English version of the Brazilian Constitution published by the Brazilian House of Representatives. About the AGU in the Brazilian Constitution, see p. 58, Section II – The Public Advocacy, on the link “Constitution of the Federative Republic of Brazil”, at <<http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1>>. Access on March 5, 2017.

However, it should be noted that the Police and the Public Prosecution Offices have structures quite different from the ones of CADE and the CGU.

The Police and the Public Prosecution Offices are giant structures responsible for investigating and prosecuting any criminal offense throughout the whole country, and not just antitrust and anti-corruption ones. Police chief investigators and public prosecutors start their careers after being approved in exams of technical nature, that is, they do not have to be appointed and/or approved by Executive and/or Legislative political authorities. Only at the top of their careers there is a process of political appointment. Yet, the power to execute criminal leniency agreements is not concentrated in the hands, for instance, of the General Director of the Federal Police or of the Attorney General of the Public Prosecution Office (their maximum authorities). That is, entry level police chief investigators or public prosecutors can work on negotiations and execute leniency agreements.

This means that the level of decentralization of the decision power is much greater in the criminal leniency agreements than in the antitrust and anti-corruption ones.

5.2. Applicants and benefits of the leniency agreements

Still in respect to the Article 86 of the Antitrust Law and 16 of the Anti-Corruption, it is respectively stated that the former is available to both legal entities and individuals, while the latter is only available to legal entities.

In addition, Articles 86 Paragraph 6 and 16 Paragraph 5 establish that antitrust and anti-corruption leniency agreements executed by a legal entity also benefits every other entities belonging to the same group, provided that the other entities also sign the agreement. This reflects an economic rationality intended to punish or benefit the ultimate responsible for the practices, and not a formalistic *ratio* designed to focus on a particular legal entity. However, while the Antitrust Law extends the benefits to directors, administrators and employees of a legal entity, the Anti-Corruption Law does not make the same, because its intent is to impose liability only on legal entities.

As a general rule, criminal law only applies to individuals, so naturally they are the only ones entitled to execute leniency agreements with the criminal authorities.

Articles 86 (Antitrust) and 4 (Criminal Organizations) set the benefits that may be reached by the leniency applicants. The former states benefits ranging from full immunity (full leniency) to a fine reduction between 1/3 (one third) and 2/3 (two thirds) of the one that could be applied in the absence of the agreement (partial leniency). A full leniency may be granted when the applicant reports to the authority the existence of a totally new violation, that is, that was not being investigated in any way; the partial leniency applies when the applicant aggregates his report to an existing investigation being carried out by the authority.

Similarly, in the scope of the Criminal Organization Law the agreement can grant to the applicant either the pardon, a reduction in the penalty of imprisonment of up to 2/3 (two thirds) or the substitution of the penalty of imprisonment for one merely restricting other rights of the applicant.

The benefits granted by the anti-corruption leniency agreement are stated in the Article 16 Paragraph 2. Unlike the antitrust and criminal leniency agreements, there is no possibility of full immunity. The fine reduction can reach 2/3 (two thirds) of the applicable fine, regardless the previous existence of an investigation being carried out by the authority on the reported practice.

Finally, it can also be included in this item the legal provisions dealing with confidentiality. Article 86 Paragraph 9 (Antitrust) grants confidentiality to the leniency applicant for a period of time longer than the one assured by Articles 16 Paragraph 6 (Anti-Corruption) and 7 Paragraph 3 (Criminal Organization): the Antitrust Law, if considered jointly with its regulation (Article 207 of CADE's Internal Regulation), grants that the identity of the applicant will remain confidential until CADE's Tribunal final decision on the case, while the anti-corruption and the criminal organization laws respectively assure confidentiality until i) the execution of the agreement, and ii) the launching of a criminal proceeding upon request of the Public Prosecution Office.

However, it should be noted the existence of a disclaimer in both the antitrust and anti-corruption laws stating that confidentiality is assured "except in the interest of the investigations and the administrative proceeding". In antitrust leniency agreements executed in connection with the operation car wash, not only the identity of the applicants, but also the content of public versions of the History of Conduct have been put in the public domain.

5.3. Leniency agreements' requirements

Articles 86 I, 16 I and 4 I (respectively, of the Antitrust, Anti-Corruption and Criminal Organization laws) demand that the leniency applicants identify other persons or entities involved in the practices.

Articles 86 II and 16 II require that the applicants take information and documents capable of proving the infringement to the authorities. In the same sense, Article 4 Paragraph 16 state that a condemnatory decision cannot be solely based on the assertions made in the deposition of the applicant.

It is interesting to observe that the Article 4 Paragraph 4 of the Criminal Organization Law states that the leniency applicant cannot be the leader of the criminal organization. There are no equivalent provisions in the Antitrust and Anti-corruption laws, but the former Antitrust Law that was in force up to May 2012 contained the same provision (Law 8,884/94, Article 35-B Paragraph 1)¹².

Articles 86 Paragraph 1 II and 16 Paragraph 1 II (Antitrust and Anti-Corruption) explicitly demand that the applicant completely ceases its participation in the reported violation.

Article 86 Paragraph 1 III of the Antitrust Law explicitly requires that the GS cannot have sufficient evidence to guarantee a conviction in case it decides to execute a leniency agreement. This means that leniency should not be understood as an instrument to reduce a possible burden on

¹² Some practitioners understand that this is one of the main changes made in the leniency program by the new Antitrust Law (CALLIARI, Marcelo; ANDREOLI, Daniel; BUENO, Marcio. *Leniency Agreements in Brazil*. In: ZARZUR, Cristianne; KATONA, Krisztian; VILLELA, Mariana (eds.). *Overview of Competition Law in Brazil*. Sao Paulo: IBRAC/Editora Singular, 2015, 317).

the offenders, but rather as a tool designed to create an environment of instability among the violators, creating an incentive in the sense that all the offenders get interested in reporting the violation in exchange for the benefits available. In other words, the GS goal should be obtaining enough evidence to convict the other parties involved in the infringement.

Articles 86 Paragraph 1 IV, 16 Paragraph 1 III and 4 Paragraphs 12 and 14 (Antitrust, Anti-Corruption and Criminal Organization) bring similar provisions stating the applicant's obligation to continuously and effectively cooperate with the authorities until the end of the proceedings.

Articles 86 Paragraph 3, 16 Paragraph 4 and 6 (Antitrust, Anti-Corruption and Criminal Organization) establish that the leniency agreements have to be made in writing and contain detailed provisions about the cooperation and its results.

5.3.1. The first in requirement

Articles 86 Paragraph 1 I and 16 Paragraph 1 I (Antitrust and Anti-Corruption) demand that the applicant is the first one to report the violation (the so called *first in* requirement). This should mean that only one leniency is available.

The Article 4 Paragraph 4 II of the Criminal Organization Law, by its turn, states that the Public Prosecution Office can only decline from criminally prosecuting the leniency applicant if this was the first one to apply for leniency. The greater benefit available is the pardon, in which the Public Prosecution Office declines to prosecute the applicant. In other words, the applicant ends up not being penalized in any way.

Thus, Article 4 Paragraph 4 II means precisely that the greatest benefit provided by the Criminal Organization Law, the pardon, is only available for the first leniency applicant. That is, other applicants can also reach an agreement, but they will not be able to get full immunity, no matter how useful their collaboration is.

5.3.1.1. The Anti-Corruption Law first in issue

Having clarified that multiple leniencies are available in the criminal sphere – even though only one can be full, the pardon – it should now be addressed a quite subtle difference between the regulation of the antitrust and of the anti-corruption leniencies. Such difference does not lie in the provisions of the Articles 86 Paragraph 1 I and 16 Paragraph 1 I (*first in*), since they are equal, but rather in the subtle addition of the Article 16 I (Anti-Corruption – “the identification of others involved in the infraction, *should that be the case*”) in relation to the Article 86 I (antitrust – “the identification of other persons involved in the violation”).

Such addition should only mean that while the antitrust leniency only applies to cartel cases, the anti-corruption one applies to any practice prohibited in the Article 5 of the Law 12,846/13. This article prohibits the practice of bid rigging that, like any other cartel practice, can only be carried out when a group of bidders agree to implement the illegal practice. Thus, leniency in such cases undoubtedly has the aim of creating instability among the cartel members, so that they have the incentive to report the violation to the authorities.

On the other hand, Article 5 of the Anti-Corruption Law also prohibits other practices that (unlike cartels) can be performed by a single offender. Thus, in case this single offender engages in executing a leniency agreement, it would not be obliged to *identify others involved in the practice* (Article 16 I), for the very reason that it is the only offender. This is the explanation for the existence of the expression *should that be the case* in Article 16 I: if there is only one offender, there is *not* the case of identifying others involved in the practice. Therefore, it creates a differentiation between the i) anti-corruption infringement of bid rigging (multiple offenders) and the ii) anti-corruption infringements carried out by a single offender. *In both cases, Article 16 Paragraph 1 I (first in requirement) should apply*, either because in i) the underlying policy reason for leniency in cartel cases is to create instability, promote a race among the cartelists and make the *first in* facilitate the prosecution of the other offenders, or, in ii) the policy reason is to save resources closing the investigation as soon as possible while charging a partial fine from the single offender – the applicant will always be the *first in*.

However, in the course of the process of regulating the Law 12,846/13 (in the context of the operation car wash, as already seen), an idea that disregards the rationality explained above came up: the execution of more than one leniency agreement in a same case where there are multiple offenders (the case of cartels, more specifically bid rigging concerning the Anti-Corruption Law) would be possible. Thus, the Presidential Decree 8,420/15 stated in its Article 30 I that “a legal entity that seeks to enter into a leniency agreement must be the first one to state its interest in cooperating with the investigation of the specific practice, *when such circumstance is relevant*”. Therefore, such wording opens a door for the execution of two or more leniency agreements in a same bid rigging case¹³.

5.3.2. Requirements in respect to individual applicants

Article 86 Paragraph 2 of the Antitrust Law states that the requirements for the execution of a leniency agreement are the same ones as legal entities and individuals (Article 86 Paragraph 1 II, III and IV), with the exception of the *first in* (Article 86 Paragraph 1 I). This means that, according to the strict provisions of the law, if *the individual applicant does not have to be the first one* to apply for leniency, then a second leniency (a second individual applicant) is also admitted. Since the law only admits two kinds of leniency – full and partial –, our understanding is that in a given case the GS could execute only two leniencies with individual applicants: a full leniency followed by a partial one¹⁴.

The Anti-Corruption Law does not bring any provision on the *first in* requirement concerning individuals because it is not intended to prosecute individuals, but only legal entities.

The criminal organizations law, by its turn, is only applicable to individuals, so all its provisions should be understood in this context.

¹³ As already seen (item 3), 12 companies have declared their interest in executing a leniency agreement in the scope of the operation car wash.

¹⁴ In case there is a third individual willing to collaborate with the investigations, then the next option available would be the execution of a settlement, according to the Article 85 of the Law 12,529/11 and Articles 179 to 196 of CADE’s Internal Regulation. Settlements would also be available for legal entities in cases where a second and other entities are willing to collaborate when a leniency agreement is no longer available (the first applicant has already executed his full or partial leniency, depending on the case).

5.4. Leniency agreements and the role of decision making authorities

While the GS is the body responsible for negotiating and executing leniency agreements, the Antitrust Law sets a limited role for the Tribunal. At the end of the administrative proceeding, it should attest whether the agreement has been duly followed by the applicant (Article 86 Paragraph 4). If that is the case, the Commissioners will i) declare the extinction of the administrative proceeding in relation to the applicant, when a full leniency has been executed (Paragraph 4 I), *or* ii) reduce the applicable fine between 1/3 (one third) and 2/3 (two thirds), when a partial leniency has been executed (Paragraph 4 II).

The role of the Judiciary in enforcing criminal leniency agreements is similar to the one played by CADE's Tribunal in respect to the antitrust agreements, but there is a significant difference in terms of timing. While CADE's Tribunal attest the applicant's compliance at the moment of its final decision on the case, a judge has to homologate a criminal leniency right after its execution between the applicant and the public prosecutor or police chief investigator.

The anti-corruption leniency has an important difference to the antitrust and criminal ones. In the antitrust and criminal cases, what we are calling the *decision making authorities* – the ones that have to attest compliance with or to homologate the agreement – i) *are politically independent from any other authority* (CADE's Commissioners have temporary terms and judges hold permanent appointments) and, more specifically, ii) *do not have a hierarchical relationship with the authorities responsible for the negotiation and execution of the leniency agreements*.

Such features are not present in the anti-corruption case. Although the Law 12,846/13 did not bring any provision in this sense, its regulating Presidential Decree 8,420/15 (by means of its Article 39) and mainly the CGU/AGU Inter-Ministerial Ordinance 2,278/16 created a system in which: the applicant presents its proposal to the CGU Executive-Secretary, who appoints a negotiating commission comprised by at least two public servants holding permanent appointments; the Commission returns a final report to the CGU Executive-Secretary and the AGU Consulting Secretary-General; the final decision on the leniency agreement is made by the CGU and the AGU Ministers.

The CGU and the AGU Ministers are directly subordinated to the President of the Republic, that is, they do not hold a term and can be freely removed from Office by the President at any time. This political relationship also exists inside CGU: the Minister is its head, and the Executive-Secretary, who is directly subordinated to the Minister, is the second highest CGU authority. The Executive-Secretary, by his turn, appoints and supervises (Article 4, I and II, of the Inter-Ministerial Ordinance) the Commission. Needless to make further considerations on the fact that this institutional structure is inferior to the ones concerning the antitrust and criminal leniency agreements.

5.5. Leniency plus and benefits related to reporting practices also prohibited by the public procurement law

Article 86 Paragraphs 7 and 8 of the Antitrust Law regulates the so called leniency plus. It is available when an applicant does not succeed in executing an agreement related to a given illegal practice, but does succeed in reporting another illegal practice unknown to the authority. In this

case, the benefits sought by the applicant are: i) a 1/3 (one third) reduction in the fine due for the commitment of the first practice (unsuccessful leniency application), and; ii) full immunity concerning the second practice (successful leniency application). The first case of leniency plus has been executed by CADE in the context of the operation car wash.

Conversely, the Anti-Corruption Law does not establish a leniency plus and could not do it in the same way, since it does not grant full immunity for any applicant. However, it is important to note that by means of its Article 17 it also makes possible the execution of anti-corruption leniency agreements related to practices forbidden by the public procurement law (Law 8,666/93). Benefits granted by such leniency can be i) not only the mitigation of the penalties set by Articles 86 to 88 of the Law 8,666, ii) but also *full immunity concerning the same penalties*, what the Anti-Corruption Law does not grant even for its own penalties. This is especially important since Article 87 III and IV of the public procurement law establishes the penalties of III) temporary suspension of the right of participating in bids and prohibition of contracting with the government, for a period not longer than 2 years, and IV) one is declared uncompliant for participating in bids or contracting with government.

5.6. Criminal immunity for the individuals applying for antitrust leniency and the lack of criminal protection in the Anti-Corruption Law

When it comes to antitrust and anti-corruption penalties, it is normal to immediately think about fines, since jointly with a prohibition of participating in public bids (section 5.5), they usually are the main concern of companies involved in the illegal practices. In addition, it should be considered that companies are the main clients of the antitrust leniency program, since they should have (and often do) the appropriate structure and resources to apply compliance programs with the aim of detecting possible breaches of the law.

On the other hand, individuals can also be convicted for *antitrust* practices and may execute leniency agreements, jointly (most commonly) or separately from the companies which they work for used to work. If executing agreements, individuals confess their participation in the practices and produce evidence against themselves, so their criminal immunity granted by Article 87 of the Antitrust Law can be understood as even more important than their immunity against fines.

However, the fact and the problem is that the possibility of criminal immunity has not been granted in the Anti-Corruption Law. *This is one of the greatest disincentives for the execution of anti-corruption leniency agreements.* The Anti-Corruption Law does not set penalties on individuals (the law was intended to deter corrupt practices undertaken by companies), but there is no doubt that when a company negotiates a leniency agreement, *it is taking to the authority evidence of a practice constituted of acts performed by individuals.* Thus, in case an agreement is reached, evidence implying at least one individual can support a criminal prosecution.

Having seen what it is probably the main unbalance between the Antitrust and the Anti-Corruption laws (no criminal immunity for individuals implicated by an anti-corruption leniency agreement) – thus reducing the incentives for simultaneous¹⁵ or consecutive executions of antitrust,

¹⁵ Practitioners have been questioning the antitrust, anti-corruption and criminal authorities about the possibility of a single leniency application before such authorities, so that their clients could be able to rapidly and certainly gather

anti-corruption and criminal leniency agreements –, it should finally be made a comparison between the Articles 87 (Antitrust), 16 Paragraph 3 (Anti-Corruption) and 4 IV (Criminal Organization).

Article 87 (Antitrust) states that leniency may assure criminal immunity for cartel practices defined by the Economic Crimes Law (Law 8,137/90), *and other cartel related practices such as* the ones defined by the Public Procurement Law (Law 8,666/93) and the Criminal Code (*Decreto-Lei 2,848/40*). The expression *such as* should be understood as meaning that the execution of a leniency agreement with CADE should i) not only criminally immunize the applicant against the penalties established by the economic crimes law, the public procurement law and the criminal code, ii) but also criminally immunize the applicant against *any other criminal infringement related to the cartel practice reported in such leniency agreement*.

However, according to Martinez and Araujo, “some prosecutors have already stated that a leniency letter signed with CADE may only protect leniency recipients from criminal conviction *regarding the offenses explicitly mentioned by the law*”¹⁶. It should be noted that leniency criminal immunity is only possible because the Public Prosecution Office executes the agreements jointly with CADE, since prosecutors are the only authorities with the power to request to judges the opening of criminal proceedings.

As already seen, the Anti-Corruption Law does not grant the possibility of criminal immunity. What the Article 16 Paragraph 3 (Anti-Corruption) does is to explicitly state that the anti-corruption leniency does not eliminate the obligation of the applicant to fully repair the damages caused by the practice. The Antitrust Law does not bring such provision, but even so it is certain that antitrust leniency does not offer benefits related to the reparation of damages. Thus, antitrust civil liability remains even in the presence of a leniency agreement.

Article 4 IV of the Criminal Organization Law brings a provision related to the Article 16 Paragraph 3 (Anti-Corruption): one of the alternative results that have to be sought by the authorities through leniency applicants’ cooperation is the full or partial recovery of the product or advantage obtained by means of the practices carried out by the criminal organization.

antitrust, anti-corruption and criminal leniency benefits, while the authorities could also rapidly and certainly strengthen their cases against the other defendants. The authorities are engaged in a dialogue for such purpose, but until now such possibility is not real. This means that lawyers have to set their particular defense strategies on a case by case basis, that is, in a given case it might be better to go first to the antitrust, or the anti-corruption, or even to the criminal authorities, depending on which authority supposedly is conducting the more advanced investigation or can offer the more important benefits to the applicants (for instance: fine immunity, criminal immunity, etc.).

¹⁶ MARTINEZ, Ana Paula; ARAUJO, Mariana Tavares de. Anti-Cartel Enforcement in Brazil: Status Quo & Trends. In: ZARZUR, Cristianne; KATONA, Krisztian; VILLELA, Mariana (eds.). *Overview of Competition Law in Brazil*. Sao Paulo: IBRAC/Editora Singular, 2015, p. 272.

CHAPTER 25 - RECOVERY ACTIONS FOR CARTEL DAMAGES: STATE OF AFFAIRS AND CHALLENGES FOR THE NEXT FIVE YEARS

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1. Introduction

Private enforcement had never been considered a hot topic in Brazil. However, a spirited debate about recovery actions for cartel damages (“RACDs”) was ignited in 2016 by a decision from Brazil’s Superior Court of Justice (“SCJ”), the highest court of appeals in the nation for non-constitutional matters. The SCJ sent shockwaves through the primarily public enforcement-focused antitrust community when it ordered CADE, the country’s antitrust authority, to disclose to plaintiffs confidential documents CADE had obtained as a result of a leniency agreement.¹ The documents would support the plaintiffs’ fundamental claim for compensation and once the leniency agreement only assured administrative and criminal immunity, maintaining the confidentiality would “perpetuate the harm to third parties, granting a favor unsupported by law to leniency applicants”,² the court reasoned. In addition, extending confidentiality well after CADE had concluded its investigation on a global cartel case³ was found unreasonable and against the mandatory rule of publicity, according to which acts by the Brazilian public administration must be disclosed.⁴ Cartel victims, therefore, should be allowed to access CADE’s files after the agency concludes its investigation.⁵

As a reaction to the SCJ’s ruling, CADE has issued a draft regulation that states that the agency will aim to strike a balance between public and private enforcement, although in reality its provisions seem to assure investigated parties that CADE will intervene and fight in court to protect information obtained by means of leniency and settlement agreements. However, by not mentioning SCJ’s decision, CADE seems to continue to overlook not only SCJ’s legal reasoning but perhaps more importantly its underlying background: the undisputed facts that thus far (i) victims have remained uncompensated for antitrust injury and (ii) Brazil’s enhanced anti-cartel enforcement remains tainted by underdeterrence as we demonstrate in Section 2 below.

¹ SCJ Appeal No. 1.55.986-SP, decided on April 5, 2016.

² Id. supra note 3, SCJ at item 13.

³ Administrative Process No. 08012.000820/2009-11, decided in March, 2016.

⁴ Id. Supra note 3, SCJ at item 9.

⁵ Id. supra note 3, SCJ at items 9 and 10. The SCJ decided that plaintiffs should have access to CADE files after the agency’s General Superintendence concludes an investigation, even before CADE’s Tribunal issues an infringement decision.

Law No. 12,529/11 has profoundly changed public antitrust enforcement in Brazil. However, RACDs are still moving at a slow pace. Over the last five years, forty-seven cartels have been fined by CADE, but only four have faced follow-on RACDs by private parties.⁶

Brazil's legal system provides no incentives for private antitrust enforcement. There are no treble damages and although consumer protection law provides consumers (but not direct purchasers in a production chain) with double damages in some instances, it is not clear whether double damages would be applicable in cases of antitrust injury.

Moreover, uncertainty abounds regarding key issues such as the statute of limitations and whether CADE's findings are to some extent binding or have the status of *prima facie* evidence (and thus could be rebutted) in federal and state courts. Furthermore, there is no legal provision barring or limiting the passing-on defense. As a consequence, courts need to consolidate direct and indirect claims and apportion damages, making, therefore, already lengthy judicial proceedings—complex litigation in Brazil may take fifteen years—multifaceted and protracted. Furthermore, losing parties must pay court fees and expenses as well as statutory attorney's fees amounting to 10% to 20% of damages claimed.

Nevertheless and despite all challenges, increased awareness of the importance of private actions for a truly effective antitrust enforcement has already produced initiatives that would possibly put Brazil in line with other developing regimes around the world.

This article is divided in four brief sections. In Section 1 we describe relevant court decisions concerning RACDs already brought in the country, providing, thus, an overview of the legal regime concerning private actions. Section 2 describes how anti-cartel enforcement in Brazil has provided unsatisfactory results both from consumer and aggregate welfare perspectives. We discuss how restricted public enforcement and underdeveloped private enforcement lead to underdeterrence. We also detail the obstacles that RACDs face in Brazil. Finally, in Section 3 we show how enhanced private enforcement may provide a solution for both budget constraints at CADE and underdeterrence. We conclude describing a bill under consideration in the Senate that would significantly improve private enforcement in Brazil.

2. Groundbreaking RACDs Have Led to Relevant Court Decisions

Although Law No. 12,529/11 has substantially improved public antitrust enforcement in several ways, it has not produced innovations in the private enforcement front. By simply reproducing provisions of the former Antitrust Law (Law No. 8,884/94), Law No. 12,529/11 has left private enforcement behind. Hence, the developments over the last five years we describe below cannot be associated with the Law No. 12,529/11, but rather with cutting-edge cases and court decisions.

The first RACD in the country was brought by independent steel distributors following a 2005 CADE decision fining long-steel manufacturers for price fixing, customer allocation, and resale price maintenance.⁷ Based on Article 47 of Law No. 12,529/11, according to which parties

⁶ Other seven cartel cases have face public civil actions brought the by the Public Prosecution Office.

⁷ *Cobraco Group v. ArcelorMittal Brazil S.A.*, Action No. 0024.06984815-8, Civil Court of Belo Horizonte, State of Minas Gerais.

injured by anticompetitive conduct are entitled to sue for compensation and injunctive relief, a judge issued a ruling granting the plaintiffs both injunctive relief and compensation for losses suffered due to cartel's overcharge.⁸

Following the independent steel distributors case, two associations of construction companies filed the first antitrust collective actions for cartel damages in Brazil. Article 47 allows adequate representatives, such as trade or consumer associations, to bring collective actions to safeguard homogeneous individual rights of its members or a whole class.⁹

Since those complaints were brought, other collective actions have been filed challenging convicted cartels. In 2010, CADE imposed a historical fine of R\$ 2,9 billion on industrial gasses producers for price-fixing, market division, and bid rigging. After the decision, several associations of hospitals brought class actions seeking both to halt cartel overcharge and obtain compensation for damages suffered.¹⁰ As a result, three state courts of first instance and the Court of Appeals of the State of Minas Gerais ruled that CADE final decisions are “unequivocal evidence” of antitrust violation, granting injunctions to displace the collusive equilibrium and halt overcharging.¹¹ On appeal, the SCJ denied defendant's request to review the matter.¹² Remarkably, even though defendants were later on successful in a parallel effort to annul CADE's decision on procedural grounds, the Courts of Appeals of the State of São Paulo and the State of Minas Gerais, have allowed such collective RACDs to proceed now as stand-alone actions.¹³

In the first follow-on RACD in a global cartel case, direct purchasers of compressors for refrigeration brought an action that led to the SCJ decision mentioned in the Introduction above, compelling CADE to disclose documents obtained as a result of a leniency agreement.¹⁴

Judicial actions have also been recently brought in other global cartel cases, namely hydrogen peroxide and air cargo.¹⁵ The former had harmed Brazilian market from 1995 to 2005 and was fined in roughly R\$ 150 million. The later had produced effects over Brazilian markets from 2003 to 2005 and CADE convicted the cartel members to pay roughly R\$ 293 million, highlighting that the collusive agreement had produced effects on Brazilian markets from 2003 to 2005.

⁸ Id. supra note 9.

⁹ Syndicate of Civil Construction Companies from Minas Gerais and Goiás States v. ArcelorMittal Brasil S.A., Gerdau S.A., Siderurgica Barra Mansa S.A., Action No. 34917-50.2009.4.01.3400, Federal Court for the Federal District, First Region.

¹⁰ Association of Hospitals from the State of Minas Gerais v. White Martins Gases Industriais Ltda., Linde Gases Ltda., Air Products Brasil Ltda, Air Liquide Brazil Ltda, and IGB – Industria Brasileira de Gases Ltda. Action No. 7099345-90.2009.8.13.0024 Civil Court of Belo Horizonte, State of Minas Gerais; and, Federation of Hospitals from the State of Parana, Association of Hospitals from the State of Parana, and Syndicate Hospitals from the State of Parana v. White Martins Gases Industriais Ltda., Linde Gases Ltda., Air Products Brasil Ltda, Air Liquide Brazil Ltda, and IGB – Indústria Brasileira de Gases Ltda., Action No. 0041466-96.2013.8.16.0001, Civil Court of Curitiba, State of Parana.

¹¹ Interlocutory Appeal No. 1.0024.06.984815-8/001, Court of Appeals of the State of Minas Gerais; Interlocutory Appeal No. 1.0024.09.709934-5/005, and 1.0024.09.709934-5/006, Court of Appeals of the State of Minas Gerais, Action No. 0041466-96.2013.8.16.0001, Civil Court of Curitiba, State of Parana, decision from January 16th 2014.

¹² SCJ, Petitions for Review No. 332849/MG, 332865/MG, and 1162128/MG.

¹³ Article 47 provides that “the aggrieved parties (...) may take legal action in defense of their individual interests or shared common interests (...) regardless of the investigations or administrative proceeding”.

¹⁴ Id. Supra note 3, SCJ at item 1.

¹⁵ Administrative Process No. 08012.004702/2004-77, decided by the Tribunal on May, 2012. Administrative Process No. 08012.011027/2006-02, decided by the Tribunal on August, 2013.

Following CADE's final decision private aggrieved parties brought several provisional remedy claims seeking to toll the limitation period, demonstrating their interest to sue for compensation¹⁶.

In addition to private RACD, the Public Prosecution Office may bring public civil actions to halt anticompetitive conduct and protect diffuse and consumer interests. In 2012, a Public Prosecutor of the State of Rio Grande do Norte filed a public civil action against six cement undertakings claiming for R\$ 5,6 billion in cartel damages.¹⁷

Therefore, although Law No. 12,529/11 has not changed the RACD scenario, a limited number of actions have tried to blaze a trail through state and federal courts, leading to a few important rulings albeit at a very slow pace and with still uncertain endings.

3. Anti-Cartel Enforcement in Brazil Has Produced Unsatisfactory Results from Both the Consumer Welfare and Aggregate Welfare Perspectives

3.1 Restricted Public Enforcement and the Crucial Issue of Underdeterrence

Law No. 12,529/11 has limited antitrust fines to “one tenth percent (0.1%) to 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”.¹⁸ Fines, therefore, are calculated considering the convicted company gross sales of the year before the beginning of CADE's investigation.

In multiple cartel cases, although the cartel period exceeded five years, the fines imposed had to be limited to 20% of the convicted company gross sales in the year before the beginning of the administrative procedure or even less in cases of a fast increasing number of settlements with CADE leading to further discounts up to 15% on the expected fine.¹⁹

John M. Connor and Robert H. Lande have argued that to produce deterrence “violator's fines should be equal to the violation's net harm to others divided by the probability of detection, enforcement, and proof of the violation”.²⁰ The core of the optimal deterrence model is the “violation's net harm”, which often ‘resides in the aggregate monopoly overcharge’ hence ‘the overcharge should be a critical factor in determining the optimal antitrust fine.’²¹⁻²².

¹⁶ Court of the State of São Paulo, Process No. 1094773-55.2016.8.26.0100 and 1044704-53.2015.8.26.0100

¹⁷ Public Civil Action No. 0105.302.66.2012.8.20.0001/RN.

¹⁸ Article 37.

¹⁹ See. CADE. Guidelines – Cease and Desist Agreement for cartel cases (‘TCC’). December, 2016. Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf>. Access on February, 2017.

²⁰ CONNOR, John H.; LANDE, Robert H. *Cartel overcharges and optimal cartel fines*. Competition Law and Policy. 3rd issue. ABA Section of Antitrust Law. Available at <http://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1719&context=all_fac>. Access on February, 2017.

²¹ Id. supra note 22, Connor and Lande. Cartel overcharge and optimal cartel fines at 1.

²² According to Connor and Lande, ‘(...) in addition to these overcharges, a cartel's social harm includes other, less obvious factors that typically are not taken into account in the fashioning of criminal fines. First, market power can produce allocative inefficiency, represented by the deadweight loss welfare triangle in the standard diagram of monopoly price. (...) Second, market power can produce umbrella effects, which occur when a cartel permits or causes

Considering the optimal deterrence model, Connor and Lande have estimated “an average median overcharge of 21.6% and an average mean overcharge of 31%”,²³ throughout more than 500 articles that had analyzed several cartels.²⁴ Based on these findings, they suggested the U.S. Sentencing Commission should increase the overcharge presumption “to at least 15% for domestic cartels, and to at least 25% for international cartels”.²⁵

In this sense, it seems obvious that antitrust enforcement in Brazil, where fines are limited to 20% of a cartelist turnover during the year before beginning of the administrative procedure, produces unsatisfactory results from both the consumer and general welfare perspectives.²⁶

3.2 Underdeveloped Private Enforcement: Convicted Cartels and Number of RACDs

Considering all minutes of CADE’s judgment sessions over the last five years, CADE has convicted forty-seven cartels.²⁷ Five cases concerned international cartels.

Table 1 – Number of convicted cartels in Brazil (2012-2016)²⁸

Year	Number of convicted cartels
2012	1
2013	11
2014	10
2015	14
2016	11
Total	47

Source: CADE’s judgment session minutes

non-conspiring firms to charge higher prices under the “umbrella” of its supracompetitive price. Third, cartel members may have less incentive to innovate or to optimize variety or quality, which results in harm to society. Finally, when monetizes, monopoly overcharges have a time-value, yet antitrust fines do not include a prejudgment interest adjustment’ Id. supra note 23, Connor and Lande. Cartel overcharge and optimal cartel fines at 1 and 2.

²³ Id. supra note 22, Connor and Lande. Ob. cit at 14.

²⁴ Id. supra note 22, Connor and Lande. Ob. cit. at 7.

²⁵ Id. supra note 22, Connor and Lande. Ob. cit. at 15.

²⁶ The international cartel in the marine hoses market is a case in point. While CADE recovered roughly R\$ 43.8 million in fines, when considering only one of the cartel customers’ purchases and an overcharge of 20%, the cartel drained at least R\$ 40 million from the Brazilian economy, from 1999 to 2007. According to CADE’s decision Petrobras was the main customers of cartelists undertakings in Brazil. However, it is worth explaining that the cartel damage is underestimated because it has not considered (i) purchases of other injured parties; (ii) the whole period of the cartel existence (1985-2007); and (iii) the inflation. *See*. CADE Administrative Process No. 08012.010932/2007-18, decided by the Tribunal on March 2, 2015.

²⁷ Of the 47 cases, ten concerned the fuel retail sector and other ten were bid-rigging schemes.

²⁸ It is worth highlighting that these findings were based on CADE’s judgment sessions minutes available on CADE’s website. Even though CADE has launched a statics platform, known as “CADE’s Numbers”, we have not used such tool for two reasons. First, CADE’s Numbers platform provides data from 2015 to 2016 only. Moreover, even in this period, we have identified some convicted cartels that were not presented on that platform. Hence, to gather accurate data on CADE’s decisions, we have decided to analyze all CADE’s judgment session minutes from 2012 to 2016. Besides, we have considered just administrative proceedings, in which the defendants were legal entities, and that CADE had understood the wrongful conduct as a cartel, and not any other exclusionary practice.

Considering those forty-seven cartel decisions, only four have led to RACDs brought by injured companies and seven have faced public civil actions brought by the Public Prosecution Office.²⁹ Therefore, it is undeniable that private enforcement in Brazil is underdeveloped.

3.3 Existing Obstacles to the Development of Private Enforcement

Substantial uncertainty concerning how courts will construe statutes such as the Civil Code and Civil Procedure Code and whether judges will embrace an evolving interpretation of traditional tort law provisions in order to allow for RACDs as provided in the antitrust law increases the risks and perceived costs of bringing private antitrust actions.

As Richard Posner explains ‘a private party will bring suit whenever the expected recovery (discounted by the probability of losing), plus the value to the plaintiffs for future cases of any rule created by the first case, exceeds the costs of a suit’.³⁰

In this sense, it might be difficult to assess the risks involved in a follow-on action considering uncertainties associated with (1) the beginning of the limitation period regarding RACDs; (2) the possibility of having to relitigate the existence of cartelization and CADE’s findings, and (3) the passing-on defense and how it could impact a claim.

The first obstacle to overcome is the limitation period concerning RACDs. The Civil Code establishes a limitation period of three years for recovery actions in cases of torts and an additional two-year period for bringing public civil actions or collective actions.³¹ Since cartelization is also a criminal offense, criminal investigation toll the limitation period.³² However, as criminal enforcement is independently conducted by the Public Prosecution Office and is still incipient, only a few decisions by CADE have been immediately or effectively followed by criminal investigations.

Relief may be found in the torts case law. The SCJ has repeatedly ruled that the three year-limitation period does not start to run before injured parties have become “unequivocally aware of the effects resulting from the unlawful conduct”.³³ The SCJ has also decided that knowledge of unlawful conduct cannot be presumed. None of such precedents, however, concerned antitrust violations. Even though fraudulent concealment is intrinsic to cartelization, courts have not had the chance yet to establish that the limitation period should not start to run before a CADE’s final infringement decision.

Another substantial barrier preventing the development of private enforcement in Brazil is the theoretical possibility of having to relitigate the cartel existence or CADE’s findings. As CADE’s decisions are not binding on courts, defendants often try to question CADE’s findings,

²⁹ The name of all convicted companies was used as keywords in each website of the competent jurisdiction (federal or state). The geographic scope of every injured market was considered to define the competent jurisdiction.

³⁰ POSNER, Richard A.; EASTERBROOK, Frank H. *Antitrust. Cases, economic notes and other materials*. American Casebook Series. 2nd Edition. West Group, 1981, at 544.

³¹ Brazilian Civil Code, Article 206, Paragraph 3, V; Law No. 12,529/11, Article 115; and Consumer Code, Article 27.

³² Federation of Hospitals from the State of São Paulo v. White Martins Gases Industrias Ltda., Linde Gases Ltda., Air Products Brazil Ltda., Air Liquide Brasil Ltda, and IGB – Indústria Brasileira de Gases Ltda., Action No. 1065317-65.2013.8.26.0100, Civil Court of São Paulo, State of São Paulo, decision from March 16, 2015.

³³ SCJ, Special Appeals No. 1346489/RS, 781.898/SC and 1116842/PR.

seeking to relitigate issues of fact, which not only increases the risks of bringing a suit but might also delay a final decision. The average lifetime of a RACD in Brazil is ten years. In this sense, if courts would construe (or legislators would assure) that CADE's final decision should be deemed as irrefutable evidence in follow-on RACD,³⁴ it would significantly reduce the expected time and costs of such lawsuits.

A third obstacle to the development of private enforcements is the lack of barriers to asserting a passing-on defense. As the indirect purchasers rarely sue³⁵ due to relatively small damages and difficulties associated with detecting and fighting cartels in upstream markets (i.e., inputs and components of purchased products), by raising the passing-on defense against direct purchasers whenever they bring a RACD defendants may end up successfully avoiding paying compensation for cartel infringement.³⁶ Moreover, assessing and adequately measuring possible passing-on impact on direct purchasers' claims is not a simple task, which will certainly delay conclusions of RACDs.³⁷⁻³⁸

In addition to the obstacles described above, losing parties must pay court fees and expenses as well as statutory attorney's fees amounting to 10% to 20% of damages claimed. It is worth noticing that, pursuant Brazilian legal system there are no mandatory fees in public civil action, and this fact might explain the reason why the number of public civil actions has been higher than the number of RACD, over the last five years.³⁹

Furthermore, the lack of a damages multiplier in most cases provides an additional disincentive for private parties. The Brazilian Code of Consumer Protection has created the possibility of double damages, however, such a provision does not apply to purchasers who are not

³⁴ See. European Parliament and of the Council. Directive 2014/104/EU of 26 November 2014. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>>. Access on February, 2017. Article 9.

³⁵ Andrew S. Gehring has analyzed 249 antitrust complaints brought in federal or state court in New York, from 2000 to 2008, finding that 'direct purchasers were involved in most of the suits alleging overcharges – specifically, 112 (81.1%) of them. Indirect purchasers were involved in 26 (18.8%) suits over the time range'. Based upon these findings, he has concluded that 'even if indirect-purchaser suits do have an effect – positive or negative – on deterrence, the actual rate at which they bring suit is so small that the effect is de minimis.' See. GEHRING, Andrew S. The power of the purchaser: the effect of indirect purchaser damages suits on deterring antitrust violations. *New York University Journal of Law & Liberty*, v. 5, 2010. p. 209-246. Available at: <http://www.law.nyu.edu/sites/default/files/ECM_PRO_065898.pdf>. Access in February, 2017 at 235.

³⁶ CLARK, Emily; HUGHES, Mat; WIRTH, David. Study on the conditions of claims for damages in case of infringement of EC competition rules. Analysis of economic models for the calculation of damages. Ashurst, 2004 at 30.

³⁷ *Id. supra* note 38, Clark at 31.

³⁸ Richard Posner explains the difficulties behind the passing-on measurement, stressing that: 'Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passes). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product. Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities – the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts, it is unrealistic to think that elasticity studies introduced by expert witness will resolve the pass-on issue". *Idem supra* note 32, Posner and Easterbrook at 565.

³⁹ Law No. 7,347/85, Article 17.

consumers at the end of the chain. Moreover, such provision has yet to be applied in an antitrust damages case.

Extending double damages to RACDs in every case is of paramount importance to creating incentives to more actions and increased deterrence. After all antitrust policy aimed at optimal deterrence must consider cartelists' expectations of being detected and convicted. John Connor explains that to reach optimal deterrence 'the "net harm to others" (i.e. damages) should be multiplied by the inverse of the probability of detection and proof'⁴⁰.

In addition, as Richard Posner argued long before deterrence does not have to do with a system that identifies and punishes every potential antitrust violation because that system would be "wasteful".⁴¹ Hence, optimal deterrence might be achieved with a minor number of violations⁴², as long as the wrongdoer's costs of taking part in a cartel outweigh its benefits. Importantly, injured parties should play a key role in an optimal deterrence policy as we detail in the Section 3.1 below.⁴³

Notwithstanding the number of barriers, private enforcement has finally become a hot topic in Brazil as in other several jurisdictions. Recent initiatives could substantially improve the prospects for a truly effective antitrust policy in Brazil. We discuss one of the most relevant initiatives, a bill under consideration in the Senate, in section 3.2 below.

4. Combining Public Enforcement with Enhanced Private Enforcement is Brazil's Main Challenge in the Next 5 Years

4.1 Enhanced Private Enforcement: Tackling Both Budget Constraints and Underdeterrence

Richard Posner stressed that private enforcement might be a way to overcome the budget constraints that competition watchdogs often face – a pervasive problem and a significant one in Brazil as well.

Investigating every antitrust violation involves high costs for taxpayers. Conversely, when the government provides incentives to private parties to sue for compensation, the Administration avoids having to bear all the costs of detecting and prosecuting violations and indeed might benefit from private parties initiatives. Despite the amnesty and leniency policies in place, a vast majority of cartels remain undetected for several years. Direct purchasers might have more information to detect the existence of some abnormality in certain input prices. In such context, the prospects of filing RACD and obtaining multiple damages might be an incentive to sue instead of simply trying

⁴⁰ CONNOR, John M.; LANDE, Robert H. Cartels as rational business strategy: crimes pays, *Cardozo Law Review*, 34, p. 427-490, November, 2012. Available at: <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1917657>. Access in February, 2017, at 433 and 434.

⁴¹ *Id supra* note 32, Posner and Easterbrook at 544.

⁴² *Id supra* note 32, Posner and Easterbrook at 544.

⁴³ 'The greater the role of private parties in enforcement, and the greater the damage multiplier, the more likely such suits are'. *Idem supra* note 32, Posner and Easterbrook at. 544.

to pass the overcharge on indirect purchasers.⁴⁴ As a consequence, the social costs of an antitrust violation might be substantially lower than in the absence of a policy that promotes private enforcement.

Private enforcement is also directly associated with reducing the incentives for companies to collude. Considering that companies will take part in a cartel only when benefits from it outweigh the costs of detection and conviction, John Connor explains that an “optimal deterrence should be based upon the expectations of potential price fixers, not the results of other’s past price fixing or the sanctions imposed on similar cartels”.⁴⁵ Studying the probabilities of cartel detection and proof of collusion, Connor has estimated that the probability of detection is around 25%-30%, while the likelihood of a cartel to be detected and convicted is roughly 20%.⁴⁶

In this sense, combining Posner’s rationality with Connor findings, it seems reasonable to argue that private enforcement increases both the probability of detection and conviction, discouraging companies to collude. If cartelists’ expected gains are the core of an optimal deterrence policy, RADCs might tilt the cost/benefits balance. Providing incentives for RADCs is, therefore, essential to make anti-cartel enforcement truly effective, increasing, as a consequence, consumer and aggregate welfare.

It is clear that RADCs go beyond the deterrence issue, since “compensation is a matter of justice”⁴⁷ as well. In Chapter 4 of Book V of *Nicomachean Ethics*, Aristotle states that corrective justice arises in transactions between private parties. When a judge rules on a recovery action establishing the duty to compensate, the award aims to reestablish the previous *status quo ante*. Therefore, in involuntary transactions between parties, the compensation “consists in having an equal amount before and after the transaction”.⁴⁸

As Coleman summarizes ‘compensatory justice is concerned with eliminating undeserved or otherwise unjustifiable gains and losses. Compensations are therefore a matter of justice because it protects a distribution of wealth – resources or entitlements to them – from distortion through unwarranted gains and losses. It does so by requiring annulment of both’⁴⁹.

In conclusion, considering the underdevelopment of private enforcement in Brazil, promoting RADCs could (i) eliminate the spectre of underdeterrence; (ii) solve the problem of optimal enforcement; (iii) help to overcome budget constraints that CADE faces, (iv) bring justice to injured parties, and ultimately (v) enhance both consumer and aggregate welfare in the country.

⁴⁴ Id *supra* note 32, Posner and Easterbrook at 570.

⁴⁵ CONNOR, John M.; LANDE, Robert H. Cartels as rational business strategy: crimes pays, *Cardozo Law Review*, 34, p. 427-490, November, 2012. Available at: < https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1917657 >. Access on February, 2017. at 434.

⁴⁶ Id *supra* note 47, Connor and Lande at 468.

⁴⁷ COLEMAN, Jules L. Mental Abnormality, Personal Responsibility, and Tort Liability. in POSNER, Richard A. The concept of corrective justice in recent theories of tort law. *The Journal of Legal Studies*. v.10. n. 1. January, 1981, pp. 187-206. Available at: <https://www.jstor.org/stable/724231?seq=1#page_scan_tab_contents>. Access in February, 2017. p. 197.

⁴⁸ ARISTOTLE. *Nicomachean Ethics*. Translated by W. D. Ross. Batoche Books. Kitchener, 1999. Available at < <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf> >. Access in February, 2017 at 78.

⁴⁹ Id *supra* note 49, Coleman in Posner at 197.

4.2 Senate Bill No. 283/16

The Senate Bill No. 283/16 has proposed to amend Article 47 of Law No. 12,529/11 in several respects. First, to tackle the problem of underdeterrence, it provides that (i) when imposing fines CADE shall consider the investigated companies gross sales during the whole period of the cartel existence, and (ii) injured parties must be awarded double damages. Leniency applicants and investigated parties that settle with CADE would be exempted from double damages (de-doubling), as long as they present documents to support the assessment by CADE of the cartel damages. Second, the Bill also established that CADE's final ruling would have enough weight to allow a judge to grant injunctive relief to aggrieved parties and possibly issue a quicker ruling. However, the Bill does not make CADE's decision binding. Finally, it proposes to include an article in Law No. 12,529/11 providing for a rule according to which the limitation period will not start to run during CADE's investigation.

The Bill is currently under discussion in the Senate⁵⁰ and although it would provide private parties with much needed incentives to file RACDs it could yet be further improved if amendments were proposed (i) to bar passing-on defenses explicitly for the reasons described by Posner as mentioned in section 2.3 above,⁵¹ and (ii) to abolish the loser pay rule in cases of private antitrust actions, carving them out from the general regime, in view of their substantial effects on deterrence and aggregate welfare.

5. Conclusion

Law No. 12,529/11 has not changed the scenario for RACDs, though a limited number of actions have tried to blaze a trail through state and federal courts, leading to a few important rulings albeit at a very slow pace and with still uncertain results.

Law No. 12,529/11, however, has limited fines imposed by CADE to one-tenth percent to twenty percent of the gross sales of the company in the last fiscal year before the initiation of the administrative proceeding, which in most cases is insufficient to deter cartelization, since benefits from collusion continue to outweigh the penalties and its maximum costs. The effects of public enforcement, therefore, on optimal deterrence have diminished, reducing aggregate and consumer welfare.

Private enforcement remains underdeveloped due to (1) substantial uncertainty concerning whether courts will embrace an evolving interpretation of traditional tort law provisions in order to allow for RACDs as provided in the antitrust law, and (2) a lack of incentives in the absence of treble or double damages, combined with the threat posed by the loser pays rule.

⁵⁰BRAZILIAN SENATE. Bill No. 283 of July 6, 2016. Available at: <<https://www25.senado.leg.br/web/atividade/materias/-/materia/126392>>. Access in February, 2017.

⁵¹ It is worth not noticing that denying the defensive pass-on might yield in an overcompensation problem whenever the offensive pass-on is still allowed. Once denying the standing to indirect purchasers does not mean that they will not benefit from the private recoveries, the standing of indirect purchasers shall be discussed as well. In an ultimate view, the benefits of that class come from the deterrence of antitrust wrongful conduct, as Posner defends it. *Id supra* note 32, Posner and Easterbrook at 561.

We believe that although public enforcement should remain the focal point of antitrust enforcement in Brazil, enhanced private enforcement could decisively contribute to solve the issues of underdeterrence and budget constraints faced by CADE.

In such context, it is of paramount importance to amend Law No. 12,529/11. A Bill currently in the Senate would substantially improve private enforcement and the prospects for a truly effective anti-cartel policy.

Enhancing private enforcement and cartel deterrence is the main challenge facing the antitrust community. And it must be overcome in the next five years. Otherwise, the specter of underdeterrence, deadweight losses and diminishing welfare will remain to haunt the Brazilian economy.

CHAPTER 26 - THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT: ACCESS TO EVIDENCE, BURDEN OF PROOF AND LEGAL PRESUMPTIONS

Adriano Camargo Gomes
Fernanda Garibaldi

1. Introduction

Effective enforcement is critical for attaining competition law objectives. Therefore, legal rules must be designed to provide for effective enforcement mechanisms.¹

Brazilian competition law combines two enforcement models: public enforcement and private enforcement. Public enforcement is carried out by an administrative authority (CADE) – the Brazilian antitrust authority, in charge of investigating infringements and, when appropriate, imposing fines and other sanctions on wrongdoings. Private enforcement is carried out by courts when settling claims for damages filed by enterprises and citizens who have been victims of antitrust infringements.

Contrary to the U.S. where private enforcement has been the driving force of antitrust enforcement since the middle of the 20th century,² it is still only marginally important in some civil law countries, including Brazil, which rely mostly on public enforcement mechanisms. Nonetheless, decentralization of enforcement is the current trend in many civil law systems worldwide. It is well-recognized that private enforcement plays an important complementary role to public enforcement: damages awards help to strip the gains of competition law infringers, thus reinforcing the punitive nature of public enforcement fines.

In this context, CADE has recently drafted a resolution respecting third-party access to documents related to leniency agreements, settlement agreements, and dawn raids, as well as a memorandum suggesting proposals for modifying Article 47 of Law No. 12,529/11 which covers civil aspects of antitrust damage actions.

This paper intends to analyze the current legal regime for the relationship between public enforcement and private enforcement in Brazil on three topics: access to evidence, burden of proof and legal presumptions. It argues that, taking these elements and their interrelations into account is crucial for a correct understanding of the Brazilian competition law system.

¹ The authors are grateful to Bruno Hauer Doetzer and Rodrigo Ramina de Lucca for their helpful comments.

² SEGAL, Ilya; WHINSTON Michael. Public vs. Private Enforcement of Antitrust Law: A Survey. *John M. Olin Program in Law and Economics*, Stanford Law School, Working Paper No. 335, p. 2, December, 2006.

2. Private Enforcement of Competition Law in Brazil

The first private antitrust action in Brazilian legal history for recovering damages caused by a cartel was filed in 2006 (*Cobraço Group v. ArcelorMittal*).³ Since then, Brazilian competition enforcement system has undergone significant change, particularly after Law No. 12,529/11 came into force.

The global trend of antitrust authorities of encouraging damages litigation by potential injured parties, the growing number of infringement decisions issued by CADE and the increasing general awareness of competition law, have been the backdrop to the Brazilian antitrust scenario in recent years.

Although still incipient, private enforcement suits are governed by Article 47 of Law No. 12,529/11 which states that victims of anticompetitive infringements may seek an injunction to cease the illegal conduct or recover damages (actual damages, loss of profits and moral damages)

Lawsuits are governed by the general rules set forth in the Brazilian Code of Civil Procedure; collective actions are also regulated by various statutes that comprise the country's collective redress system.⁴⁻⁵

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct. As in other jurisdictions, both corporations and individuals may be sued individually (e.g. by competitors, suppliers, and direct or indirect purchasers) or collectively for antitrust infringements, but the greatest majority of pending cases involves only corporations.⁶

Since 2010,⁷ when CADE began to advocate follow-on claims for damages caused by cartels, some victims filed claims in Brazil, thus contributing to the deterrent effect of competition law enforcement by increasing the economic cost of misbehavior.⁸

This has been occurring especially given the emphasis which has been given over recent years to investigate and fight cartels, including a better approach to this end by the bodies that have been set up to protect competition.⁹

In an attempt to clarify the limits of access to documents arising from leniency agreements, settlements and dawn raids, and in order to encourage redress for antitrust damages, CADE launched a public consultation on these topics. In its justification, CADE expressed concern that private enforcement demand for access to evidence could risk its successful leniency program.

³ Civil Court of Belo Horizonte, Case No. 0024.06984815-8.

⁴ Martinez, Ana Paula; Tavares, Mariana. Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency. Available at: <https://www.competitionpolicyinternational.com/assets/Uploads/MartinezTavaresOCT-132.pdf>. Accessed on February 20, 2017.

⁵ Standing on collective claims is restricted to some public entities and NGO's.

⁶ Ibidem.

⁷ In 2010, CADE, for the first time, included in a cartel decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses. Administrative Process No. 08012.009888/2003-70 (*industrial gases cartel case*), adjudicated by CADE on 1 September 2010.

⁸ MARTINEZ, Ana Paula; Tavares, Mariana, op. cit., p. 3.

⁹ ANDRADE, Maria Cecilia; ARANTES, Álvaro Brito. *Private Enforcement of Competition Law in Brazil*. Global Competition Litigation Review, V. 5, 2012.

3. CADE suggestions on evidence matters - Resolution and proposal for Legislative Amendment - Public Consultation No. 5/16

Public Consultation No. 5/16 made public a proposal for a fifteen-article resolution and a memorandum on a proposed legislative bill providing for the modification of some rules on damages for competition law infringements.

The draft resolution regulates procedures regarding third-party access to documents related to leniency agreements, settlement agreements, and dawn raids. Article 1 states that this material shall be made public, except where Laws No. 12,529/11, No. 12.527/11 (Brazilian Access to Information Law), or CADE's Internal Regulation consider such materials to be confidential and, therefore, subject to restricted access.¹⁰ Article 3 establishes that confidential materials may be disclosed only when expressly authorized by: (i) legal provision; (ii) court order granted to a third party; (iii) waiver by the leniency or settlement applicant, or (iv) international judicial cooperation under the Brazilian Code of Civil Procedure, including situations in which evidence will be used in another jurisdiction.

Articles 9 to 13 contain rules on sharing confidential documents with third parties. These articles establish different stages during the investigation in which such documents can be made available. Only when the Tribunal renders its final decision, can the confidential documents and information mentioned in Article 1 be made public.¹¹

It is worth noting that CADE's perspective entails a narrow approach to the subject, one which only considers the incentives for cooperation and ignores its role in the private enforcement system as a whole. A wider and more systematic approach regarding other procedural implications of cooperation is needed.

For instance, in Europe, Directive 2014/104/EU, which establishes rules governing actions for damages due to infringements of competition law, considers the private enforcement system in the light of several aspects implicated in cooperation. It does not consider limited access to evidence as the main solution for preserving cooperation mechanisms.¹²

Actions for damages for infringements of competition law typically require a complex factual and economic analysis. The evidence required to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant.¹³ In this regard, CADE Public Consultation No. 5/16 is important for paving the way for a private enforcement system in Brazil, ensuring access to evidence by third parties aggrieved by infringements while protecting the confidentiality of some documents provided by leniency and settlement applicants.

¹⁰ Joint comments of the American Bar Association's section of antitrust law and section of international law on cade's draft resolution on access to documents and legislative proposals on civil aspects of antitrust damage actions - January 31, 2017. Available at: http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20170131_en.authcheckdam.pdf

¹¹ Ibidem.

¹² Directive 2014/104/EU on antitrust damages actions. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html. Accessed on February 20, 2017.

¹³ Ibidem.

However, it is worth pointing out that excessively strict legal requirements for claimants (such as having to assert in advance all the facts of their case or to precisely determine the documents they are looking for) can unduly obstruct the effective exercise of the right to compensation guaranteed by the competition system.

A rational solution on how to balance public enforcement incentives and private enforcement necessities depends on a deep understanding of how current civil procedure mechanisms work in this context.

4. Procedural aspects of antitrust damages actions in Brazil

In the realm of competition law, the strong correlation between adequate procedural tools and efficient private enforcement is axiomatic. Notwithstanding, only a few academic works offer an in-depth examination of procedural rules from the standpoint of competition law. This somewhat paradoxical context is evident in Brazil: most studies on private enforcement reveal an incorrect understanding of the civil procedure rules. This chapter seeks to bridge a small part of this gap by analysing the rules on access to evidence, burden of proof and legal presumptions.

4.1 Access to evidence

Access to evidence is not so relevant in private enforcement claims when there are rules on burden of proof and legal presumptions which are favourable to the victims of an infringement.¹⁴ If there are no such rules, access to evidence is indispensable. This topic examines how it is regulated in civil procedure and whether it could be possibly limited in order to preserve the leniency program.¹⁵

The right of given publicity regarding the acts of the government (hence, CADE procedures and settlements) is a fundamental right (Article 5, XXXIII and LX, Brazilian Federal Constitution) and a constitutional principle (Article 37, Brazilian Federal Constitution). Guaranteeing its application is a duty of the State (Article 5, Law No. 12,527/11). This principle must govern CADE's actions; secrecy must be an exception (Article 3, I, Law No. 12,527/11) and demands for a reasoned decision (Article 7, Paragraph 4, Law No. 12,527/11). One of the exceptions is provided for Article 49, Law No. 12,529/11, according to which the Tribunal and the General Superintendence must ensure secrecy when: (i) necessary to clarify relevant facts,¹⁶ or; (ii) necessary on society's interest.¹⁷ Obviously, under the first condition, as have been already decided

¹⁴ One example is Germany, where access to evidence is considerably restricted and the decisions of any Member State's competition authority are binding in private claims. BAKER & MCKENZIE. *Global Guide to Competition Litigation* – 2016. Available at <http://www.bakermckenzie.com/-/media/files/expertise/antitrust/global_guide_to_competition_litigationfinal.pdf?la=en>. Accessed on February, 23, 2017. p. 115. Recently other jurisdictions have adopted the binding effect of competition authority's decisions, such as the UK [Idem, p. 91].

¹⁵ To a lesser extent this argument is also applicable to settlement agreements (TCCs).

¹⁶ For that reason, Article 86, Paragraph 9, of Law No. 12,529/11, provides that leniency proposals are secret, "except in the interest of the investigation and the administrative procedures".

¹⁷ The subject must be regulated by CADE within these limits (Article 49, Sole Paragraph, of Law No. 12,529/11).

by the Superior Court of Justice (STJ),¹⁸ secrecy must not continue after the end of the evidentiary phase.¹⁹⁻²⁰

The second condition is similar to one of the reasons for secrecy in the judicial process: acts in civil procedure are public, but a case must be subject to judicial secrecy²¹ when required in the interests of the public or society (Article 189, I, Brazilian Code of Civil Procedure).

In the judicial process, the judge may order the presentation of documents by the parties (Article 396, Brazilian Code of Civil Procedure) or by third-parties (Article 403, Brazilian Code of Civil Procedure); he may request from public entities (such as CADE), at any time, certifications or records of administrative procedures which are necessary in order to prove the parties' allegations (Article 438, Brazilian Code of Civil Procedure).²² With due regard for the right to be heard, evidence can be borrowed from the records of other judicial or administrative proceedings (Article 372, Brazilian Code of Civil Procedure). Evidence may be produced before the filing of claims in cases which are urgent,²³ when this may facilitate the use of Alternative Dispute Resolution (ADR) mechanisms or when it may justify or avoid the issue of a claim (Article 381, Brazilian Code of Civil Procedure).²⁴ In this procedure - "the Brazilian disclosure" -, the pleader must indicate "precisely the facts concerning which the evidence will be produced" (Article 382, Brazilian Code of Civil Procedure).

In both the administrative and the judicial process, secrecy does not mean that a piece of evidence will not be produced, but only that such proof will not be available to third-parties. Nonetheless, some documents are produced exclusively during an administrative procedure, such as leniency statements and settlement submissions. CADE considers these documents confidential; access can only be granted to a third party if a court decides they are not protected by secrecy or privilege.

The two main arguments related to the interest of society in favour of limiting the access to evidence in these cases are (i) the existence of trade secrets, and (ii) the possible risk to the leniency program.²⁵

¹⁸ Process No. RESP 1.554.986/SP, 3T, ruled on by STJ on March 08, 2016.

¹⁹ After claimant has filed his statement of case, the defendant has filed his response and the judge has established the disputed facts, there is a procedural phase in which the parties produce evidence.

²⁰ Article 52 of CADE's Internal Regulations provides for the possibility of secret treatment of procedural records "in the interest of the investigations and of the production of evidence", "when strictly necessary for the elucidations of the facts and with due regard for the interest of society". An example of this rationale is Article 7, Paragraph 3, of Law No. 12,850/13, which did away with the secrecy of a plea-bargaining agreement after the criminal charge is filed. An important exception is the need to preserve the secrecy of an administrative procedure already decided, when this is related to other on-going investigations.

²¹ The violation of judicial secrecy is a crime, provided for in Article 10, of Law No. 9,296/96.

²² A party may be exempted from presenting a document if, among other situations (Article 404, IV, Brazilian Civil Procedure Code), he/she demonstrates it involves professional secrecy.

²³ An example is search orders and dawn-raids, before which there is a risk of evidence being destroyed at any time.

²⁴ See, YARSHELL, Flávio Luiz. *Antecipação da prova sem o requisito da urgência e direito autônomo à prova*. São Paulo: Malheiros, 2009.

²⁵ SANSON, Mark; FREY, Nicholas; DERINGER, Freshfields; FORD, Sarah; COURT, Brick; VAN MAANEN, Martijn; BARENTS, Krans; FUNKE, Thomas; CLARKE, Osborne. 'Shielding the ball' or 'Equality of Arms'? recent developments in discovery and the treatment of confidential information in European antitrust litigation. Available at: <http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at152214_newsletter_201604.authcheckdam.pdf>. Accessed on February 23, 2017.

Trade secrets must be protected both in the administrative and the judicial process, particularly in relation to other competitors.²⁶ However, access to evidence must prevail if it is essential for effective redress.²⁷⁻²⁸

With regard to the leniency program, some authors have suggested that it would be affected where the leniency applicant envisages the possibility of being impaired (i) in absolute terms, because they could be obliged to pay more damages than they would have paid had they not signed the agreement,²⁹ or; (ii) in relative terms, because they could be obliged to pay more damages than their other competitors.³⁰

In the first case, assuming the leniency applicant makes a rational choice between two options³¹ (not paying any fine and paying more in damages *vis-à-vis* paying a fine and paying less in damages), the leniency program would only be threatened if the first option were worse than the second one – which is unlikely.

In the second case, the leniency program also suffers no impairment:³² (i) the facts related to the infringement would not demand the production of evidence because of the confession made in the leniency agreement (Article 374, II, Brazilian Code of Civil Procedure);³³ (ii) joint liability would avoid any disadvantage for the leniency applicant in relation to other cartel members, particularly because he can ask the court to add them as parties in case they were not sued in the first place (Article 130, Brazilian Code of Civil Procedure); (iii) leniency applicant's confession (even when lacking the same strength it has regarding the leniency applicant's infringement) or testimonial evidence³⁴ could be used against the other members of the cartel,³⁵ avoiding the risk that they might benefit from insufficient evidence against themselves.

²⁶ Article 5, Paragraph 2, of Decree No. 7,724/12 which regulates Law No. 12,527/11, excludes from its scope “information related to commercial activity of natural persons or corporations” obtained by public entities (such as CADE), “whose disclosure will represent a competitive advantage for other competitors”.

²⁷ See Process REsp No. 1.296.281/RS, 2T, ruled on by the STJ on May 14, 2013. See also, Directive 2014/104/EU, Recital 18: “measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation”.

²⁸ If the wrongdoer refuses to produce evidence a court ordered him to exhibit, he may be coerced to do so or submitted to the rules on burden of proof.

²⁹ MACCULLOCH, Angus; MACCULLOCH, Bruce. *The Baby and the Bathwater: The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy*. Available at: <<http://ssrn.com/abstract=2089369>>. Accessed on February, 23 2017.

³⁰ CADE's perspective [CADE. Nota Técnica n° 24/2016/CHEFIA GAB-SG/SG/CADE, Paragraph 90]

³¹ This model follows the ideas of the mainstream literature which derives from Gary Becker's *Crime and Punishment: An Economic Approach*. BECKER, Gary. *Crime and Punishment: An Economic Approach*. Available at: <http://www.nber.org/chapters/c3625.pdf>. Accessed on February, 23th 2017. Criticizing Becker's ideas and arguing that there are many uncertainties and complexities involved in the practice of leniency that must be considered, see STEPHAN, Andreas; NIKPAY, Ali. *Leniency Theory and Complex Realities*. Available at <<http://competitionpolicy.ac.uk/documents/81583a38/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b>>. Accessed on February 23, 2017.

³² In spite of the absence of more concrete stimuli for the leniency applicant regarding their exposure to damage claims, such as de-doubling damages or non-joint liability. Both solutions are the object of Senate Bill No. 283/16.

³³ See 4.3 below.

³⁴ Leniency Applicant's employees could be heard as witnesses. Even if they were considered suspect, where they may have an interest in the judgment of the case against their company's competitor (Article 145, IV, Brazilian Code of Civil Procedure), they would be heard by the judge and their statements could be taking into account.

Nevertheless, the leniency program could still be impaired if (i) CADE's decision against the other members of the cartel considered it was of shorter duration or that the other cartel members had a lesser participation than the leniency applicant;³⁶ (ii) if CADE's decision was handed down quite some time after the leniency agreement was signed, exposing the leniency applicant to the risk of having to redress the victims before the other members. As can be seen, the risk for leniency applicants in these cases has no relation with access to evidence, but with the absence of other legal techniques which can reduce the risk of these distortions occurring.³⁷

Currently, considering the precedents of the STJ and the prevailing legislation, it is difficult to argue that the judiciary will not grant access to documents related to leniency and settlement agreements when this is essential for private enforcement.

4.2 *Burden of proof*

The initial difficulty regarding burden of proof is its terminology. In common law jurisdictions, burden of proof has been used with at least three different meanings (or as a broader category subdivided into three topics):³⁸ (i) burden of producing evidence; (ii) burden of persuasion;³⁹ (iii) standard of proof.⁴⁰

Brazilian law does not explicitly differentiate the burden of production from the burden of persuasion, and burden of proof is commonly understood as a rule that establishes who bears the risk of absence or insufficiency of evidence.⁴¹ The judge, *ex-officio* or on request, can order a party to produce specific evidence; disobedience amounts to a presumption against the party on the

³⁵ There is an important discussion regarding the standard of proof in CADE's administrative procedures. In Administrative Process No. 08012.005669/2002-31, Commissioner Luis Fernando Schwartz's vote establishes that in appreciating a possible infringement of antitrust law, the standard of proof should be "beyond reasonable doubt". This standard would be different from that of private claims ("balance of probabilities" or "preponderance of evidence"). See also NOMAN, Gustavo Lage. *Das provas em processo concorrencial*. LLM dissertation, PUC-SP, São Paulo, 2010, 192 p., p. 39 e ss.; GAVIL, Andrew I. *Burden of Proof in U.S. Antitrust Law. ISSUES IN COMPETITION LAW AND POLICY 125 (ABA Section of Antitrust Law 2008)*, Chapter 5. p. 125-157.

³⁶ Considering what has been said above about standard of proof, though CADE may decide that other members of the cartel committed infringements over a shorter period than that admitted to by the leniency applicant, due to the lower standard of proof in civil procedure they could be obliged to pay damages assessed on the confessed length of the infringement.

³⁷ Moreover, in the second case, it is the restriction on access to evidence that places the leniency applicant in an unfavourable position: a delayed decision by CADE, for a substantial period of time, on the imposition of secrecy in the administrative procedure could be regarded as disincentive for the leniency program.

³⁸ See ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure principles of practice*. London: Thomson Reuters, 2013. p. 1015.

³⁹ See FLEMING, James. *Burdens of Proof*. Available at http://digitalcommons.law.yale.edu/fss_papers. Accessed on February 23, 2017.

⁴⁰ See KAPLOW, Louis. *Burden of proof*. *The Yale Law Journal*, Yale, v. 121, p. 741-742, 01 2012. Kaplow uses the phrase, burden of proof, meaning evidence threshold or standard of proof, i.e. the level of proof required for persuading the court. Brazilian courts and authors, like those of most civil law jurisdictions, have not consistently analyzed the subject.

⁴¹ MARINONI, Luis Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Curso de Processo Civil 3: Tutela dos Direitos Mediante Procedimentos Diferenciados*. São Paulo: Editora Revista dos Tribunais, 2015.

question of fact. Consequently, when a party bears the burden of producing evidence, implicitly it also bears the burden of persuasion if such evidence is not produced.⁴²

Burden of proof has no linear relation with access to evidence: it is a rule that allocates the risk of losing a dispute precisely in the absence of sufficient evidence⁴³ for persuading the court; it does not create a duty to adduce evidence.⁴⁴ However, burden of proof might induce the production of evidence by the party bearing it.

Article 373 of the Brazilian Code of Civil Procedure, provides for the general rule on the subject: the claimant has the burden of proving the facts that give rise to their right (constitutive facts); the defendant does not need to produce negative evidence in order to win the dispute, but they bear the proof burden if they allege facts that modify, obstruct or extinguish the claimant's right (affirmative defences).

Consequently, a claimant who files a claim for damages relating to a competition law infringement bears the burden of proof on three issues: (i) defendant infringed competition law (wrongdoing); (ii) claimant was harmed by the wrongdoing (loss); (iii) the loss is an efficient adequate cause of the wrongdoing.⁴⁵ This allocation might change by judicial decision in situations provided for in the Brazilian Consumer Protection Code and the Brazilian Code of Civil Procedure.

Consumers⁴⁶ are entitled to a reverse burden of proof – borne by the seller-defendant – if the judge is convinced that (i) their allegations are plausible or that (ii) they are legally, economically or technically vulnerable (Article 6, VIII, Brazilian Consumer Protection Code).⁴⁷ Thus, defendant will bear the burden of proving that no wrong was done.

According to Article 373, Paragraph 1 of the Brazilian Code of Civil Procedure, the judge may change the allocation of the burden of proof⁴⁸ where, due to peculiarities of the case, (i) it would be impossible or excessively difficult for one party to discharge the burden, or (ii) it would be easier to prove a contrary fact. Logically, discharging the burden shifted should not be impossible or excessively difficult (Article 373, Paragraph 2, Brazilian Civil Procedure Code). This

⁴² There is a legal presumption (see topic 4.3 below) that when a party does not produce a piece of evidence, the facts related to such evidence are deemed to be true. Thus, even if the difference between the burden of production and persuasion could be used in Brazilian law, such distinction does not have relevant effects.

⁴³ The level of evidence which would be sufficient is a matter of standard of proof.

⁴⁴ Mistakenly dealing with these two concepts, see CADE. Nota Técnica nº 24/2016/CHEFIA GAB-SG/SG/CADE, Paragraph 11.

⁴⁵ In competition law cases, liability does not require fault (Article 36, Law No. 12,529/2011).

⁴⁶ Generally speaking, businesses and other commercial users are not legally considered consumers.

⁴⁷ Economically vulnerable are consumers who lack sufficient resources to bear procedural costs and to meet their needs; legally vulnerable are consumers who lack minimum knowledge about legal, financial or economic aspects of the claim; technically vulnerable are those consumers who lack specific knowledge about the product or service, or who lack sufficient information regarding the claim (also called informational vulnerability).

⁴⁸ A claim starts with a petition from a claimant stating the particulars of the claim (cause of action and remedies sought). After service, defendant responds, bearing the burden of contesting every allegation of fact made by claimant – an uncontested fact is usually deemed to be true. If there is any affirmative defence in the response, claimant is entitled to present another petition on the subject. These three petitions must be accompanied by documents supporting the allegations and must have a request specifying the other type of proof the party intends to produce. It is up to the judge, then, to issue a procedural decision (Article 357, III, Brazilian Code of Civil Procedure) in which the burden of proof is allocated either in accordance with the general rule or deviating from it.

provision, which is a new departure within the Brazilian Code of Civil Procedure,⁴⁹ could be largely used in competition law claims.

Despite the fact that changing the allocation of the burden of proof depends on a casuistic analysis, several general remarks can be made.

Considering that it would be impossible or extremely difficult for a claimant to prove a wrong when the infringement is concealed from him, the judge may allocate the burden to the defendant, who will then have to prove that it did not commit the wrong alleged by claimant.⁵⁰ The same applies for infringements involving abusive pricing practices that are related to the defendant's cost structure (predatory or excessive pricing, price discrimination etc.).

In cases where the infringement is not concealed, claimant might bear the burden of proving its existence, particularly if they have a contract with defendant (e.g. contractual tying or contractual exclusivity) or if they were a victim of vexatious litigation. Where the infringement is a consequence of relationships between the defendant and third parties, the former will probably bear the burden of proof (e.g. it may have to prove that its contracts do not provide for unlawful exclusivity, tying, bundling etc.).⁵¹

If the infringement involves a pricing practice against claimant in the context of a contract with the defendant, loss may be inferred from the wrongdoing. If not, but for other cases in which claimant's losses depend of what the defendant's gains were, claimant will bear the proof burden on this issue. If quantifying the losses depends on evidence to be produced by defendant, it would be possible to file the claim without assessing the amount of damages (Article 324, Paragraph 1, Brazilian Civil Procedure Code).

The common thread in these hypotheses for changing the allocation of the burden of proof (Brazilian Consumer Protection Code and Brazilian Code of Civil Procedure Code) is that they depend on a judicial order. In this respect, they differ from situations in which the burden shifts due to legal presumptions. Moreover, because there are some presumptions applicable to the outcome of CADE's procedure, judicial allocation of the burden of proof may be more relevant in stand-alone cases.

4.3 Legal presumptions

Producing evidence in a competition law claim implies a very high cost: it is time-consuming and expensive; it might demand expert opinions and involve many witnesses and loads of documents. Even when evidence is borrowed from an administrative procedure before CADE, parties may debate the issues it should prove and the judge must evaluate it in order to be convinced one way or the other.

⁴⁹ The most recent Brazilian Code of Civil Procedure came into force on March 18, 2016.

⁵⁰ Nevertheless, the claimant might be required to produce some indirect evidence in order to shift the burden.

⁵¹ In these cases, a third party may also be obliged by a judicial order to exhibit a document (Article 403, Brazilian Code of Civil Procedure).

Legal presumptions simplify this procedure by establishing that a fact (B) can be presumed true, once another fact (A) is proven,⁵² and could have an important role to play in private enforcement.

If a party holds a document or other evidence related to factual allegations of the counterparty, the judge may order its presentation in the process (Article 396, Brazilian Code of Civil Procedure); if the party refuses to produce the evidence, those allegations will be considered true (Article 400, Brazilian Code of Civil Procedure) – i.e. if a defendant has contracts and other data proving the claimant’s case, withholding the evidence will have the same effect.

CADE has recently made three suggestions about presumptions regarding how the outcome of its procedures (leniency agreements, settlements and final decisions) should be treated in the judicial process: (i) used as a document for initiating an enforcement process (a legal instrument which can be enforced, similar to a judicial order), or; (ii) used to justify an interim injunction regardless of any risk of irreparable harm;⁵³ (iii) considered “prima facie evidence”. All three solutions ignore existing civil procedure rules which already serve the purpose of establishing presumptions related to the possible outcomes of a CADE procedure.

Firstly, taking enforcement measures as if CADE’s procedure outcome were something similar to a judgement is not possible, for two main reasons: (i) assessing damages arising out of infringements mentioned in a settlement or a decision demand the production of a considerable amount of evidence, whereas the legal requirement for initiating the enforcement process is that either damages have been previously calculated, or that this can be done with “simple arithmetic operations” (Article 786, Brazilian Code of Civil Procedure); (ii) if the outcome of a CADE procedure is a final decision, it might be subject to judicial review and thus enforcement measures would have to wait for a final judgement on the matter.⁵⁴

The second suggestion is that CADE’s decision or agreement, by establishing that the defendant had committed an infringement, could be used to obtain an interim payment order for damages,⁵⁵ directing the defendant to pay the claimant.⁵⁶ A possible justification for this suggestion is the belief of CADE that its decision or agreement with the defendant should qualify as sufficient proof for an order anticipating the likely final judgment of the case. However, currently, the

⁵² FLEMING, James. Burdens of Proof. Available at http://digitalcommons.law.yale.edu/fss_papers. Accessed on February 23, 2017.

⁵³ More precisely, it would be an interim payment order on damages directing defendant to pay the claimant. The justification for such order would be that CADE’s decision or agreement would establish that the defendant had committed an infringement, which is halfway to proving liability and, after, assessing damages. ZUCKERMAN, Adrian. Ob. Cit., p. 520.

⁵⁴ Considering the time spent from the beginning of an administrative procedure at CADE, to a final judgment on a judicial review case against CADE’s decision, limitation periods for claims for damages are also a crucial aspect of the relationship between the outcome of a CADE procedure and private enforcement. In spite of its importance, this subject will not be analyzed in this chapter.

⁵⁵ Different from what is provided for by CPR 25.7 (4), the court may, and probably will, order the interim payment in the total amount of damages claimed.

⁵⁶ More precisely, it would be an interim payment order for damages, directing the defendant to pay the claimant. The justification for such order would be that CADE’s decision or agreement would establish that the defendant had committed an infringement, which is halfway to proving liability and, after, assessing damages. ZUCKERMAN, Adrian. Ob. cit., p. 520.

outcome of an administrative procedure is not sufficient for granting this kind of order; providing for this would require a legislative amendment.

Nonetheless, it may be used to fulfil one of the current conditions: Article 311, IV, Brazilian Civil Procedure Code, states that an interim injunction will be granted if the claimant produces “sufficient documentary evidence” of the constitutive facts of his right and if the defendant does not adduce any evidence capable of creating a “reasonable doubt” in this respect. In some private enforcement claims, where the infringement has been previously confessed by defendant or acknowledged by CADE, the judge may consider the agreement or decision as “sufficient documentary evidence” to prove the infringement. If from the infringement it is not possible to infer that the claimant suffered harm, then they will have to adduce more documentary evidence in order to obtain the interim payment. Finally, the judge may also decide that the defendant’s evidence meets the “reasonable doubt” threshold and refuse to grant the order.

Thirdly, the concept of *prima facie evidence* has been highlighted by Directive 2014/104/EU (Recital 35 and Article 9.2): a final decision of a competition authority of one-member state may be used in another member state’s court “as at least *prima facie* evidence that an infringement of competition law has occurred”. This provision has raised a problem: what exactly is *prima facie* evidence? Referring to the German legal doctrine on evidence, Michele Taruffo defines it as a situation in which “the appearance (*Anschein*) of a fact allows the shifting of the burden of proof to the counterparty”,⁵⁷ but fiercely criticises the concept as inconsistent, useless, one which “aggravates the problems regarding the relations between proof, probability and verisimilitude”.⁵⁸ In common law, *prima facie* evidence is how evidence can be described when it immediately allows the burden of proof to be shifted.⁵⁹ Brazilian law does not have a category such as *prima facie* evidence, although it is pretty clear that in some cases evidence may shift the burden of proof to the defendant.

One such case is when the evidence consists of a public document. The veracity of this type of document is presumed (Articles 405 and 427, Brazilian Code of Civil Procedure) both in formal and substantial terms. Considering that the outcome of an administrative procedure results in a public document, if it affirms the existence of an infringement, such an infringement will be presumed and the defendant will bear the burden of proof on this issue.

Another case is when, in a settlement or a leniency agreement, a wrongdoer confesses its participation in an antitrust infringement: confessed facts do not need further evidence (Article 374, II, Brazilian Code of Civil Procedure). In Brazilian civil procedure, the confession is the queen of evidence (*regina probationum*), and consists of admitting a fact which is contrary to its own interests and favourable to the counter-party (Article 389, Brazilian Code of Civil Procedure). Judicial or extrajudicial confessions have the same effects, but the latter should be in writing (Article 394, Brazilian Code of Civil Procedure).

⁵⁷ TARUFFO, Michele. Considerazioni su dubbi e verità. In: JOBIM, Marco Félix; FERREIRA, Willian Santos. *Direito Probatório*. Salvador: Ius Podivm, 2015. p.795-806. p. 513.

⁵⁸ Idem, p. 515. Taruffo (Idem, p. 514) explains that the concept cannot be assimilated to either presumptions or indicia, and that it may even not be considered as proper evidence, but an inference from what typically happens in similar situations.

⁵⁹ THAYER, James B. the burden of proof. Available at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>. Accessed on February 23, 2017. p. 63; 68-69.

Considering that settlement and leniency agreements are extrajudicial written confessions in the form of a public document, they provide for almost irrefutable proof that a defendant has committed an antitrust infringement.

5. Conclusion

The Brazilian private enforcement system has evolved consistently in recent years, giving rise to important questions about how it relates to public enforcement and, more particularly, to the CADE leniency program. This chapter has examined three aspects of such a relation (access to evidence, burden of proof, and legal presumptions) and has attempted to clarify how some procedural rules should be applied.

A well-developed private enforcement system is a necessary condition for a fair and effective competition law regime. We have got a great future ahead of us, but we should bear in mind that, in order to establish a functional system, we need to fully understand our civil procedure rules.

CHAPTER 27 - THE BRAZILIAN EXPERIENCE INVOLVING SETTLEMENT AGREEMENTS IN UNILATERAL CONDUCTS

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There is no doubt that CADE has implemented an effective settlement policy in relation to anticompetitive practices in Brazil, notably in investigations involving cartel practices. Initiated in 2000¹ through the implementation of the Leniency Agreement Program, and afterwards, with improvements in Cease and Desist Agreements (known by the Portuguese acronym “TCC”),² since then, such policy has improved significantly.³ With the advent of Law No. 12,529/11 in May 2012, CADE has experienced considerable institutional development, having achieved extraordinary results in each one of its competencies.⁴

Nonetheless, considering the greater level of maturity CADE has recently achieved, and the fact that cartel investigations have naturally been receiving more attention than unilateral conducts from the antitrust authorities in Brazil, the purpose of this paper is to identify developments related to settlement agreements involving unilateral conducts since the entry into force of the Brazilian Antitrust Law. In this sense, this paper intends to respond essentially two questions: considering the main changes occurred in relation to TCCs since the entry into force of the Brazilian Antitrust Law, what changes does it refer to TCCs involving unilateral conducts? Furthermore, has CADE’s case law related to the matter evolved since then?

This paper will be divided into the following sections: (i) Cease and Desist Agreements: definition, objectives and benefits; (ii) Law No. 12,529/11 and Resolution CADE No. 5/13: main changes and contributions; (iii) Developments verified in CADE’s enforcement and policy with respect to TCCs, and (iv) TCC’s executed under Law No. 12,529/11 in unilateral conducts.

¹ Even though Law 10,149/00 amended Law No. 8,884/94 (the former antitrust law in Brazil) to introduce the leniency program, it was only in 2003 that the fight against cartels became a top priority in Brazil.

² For more information about TCC’s history in Brazil, please see: SAITO, Carolina. O termo de compromisso de cessação de prática e o reconhecimento de culpa. In: CORDOVIL, Leonor (Org./Coord.). *Revista do IBRAC*. Vol. 20. São Paulo: Ed. RT, 2011, p. 14-49.

³ In order to deepen the studies in recent developments and upcoming challenges of settlements in Brazil, please see: DUARTE, Leonardo Maniglia, SANTOS, Rodrigo Alves do. Cartel Settlements in Brazil: Recent Developments and Upcoming Challenges. In *Overview of competition law in Brazil*. São Paulo: Singular, 2015.

⁴ OLIVEIRA JUNIOR, Marcio de. Brazil: Administrative Council for Economic Defence. Available at: <<http://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2017/1068704/brazil-administrative-council-for-economic-defence>>. Access on March 3, 2017.

1. Cease and Desist Agreements: definition, objectives and benefits

The TCC can be defined as an agreement executed between the authority and the investigated party in which “(...) *the antitrust authority agrees to halt investigations against TCC signatories as long as the signatories comply with the terms of the referred agreement and agree to the commitments expressly provided thereunder*”.⁵

This type of agreement can be compared with a consent decree,⁶ in which legitimated authorities can execute with interested parties a commitment for adjusting their conducts in accordance with legal standards. It is valid as extrajudicially executable instrument, according to Article 5, Paragraph 6, Law 7,347/85,⁷ and Article 85, paragraph 8, Law No. 12,529/11.⁸

TCCs can present significant benefits to the antitrust authorities, interested parties, as well as to society. As its main purpose is to cease the anticompetitive practice or the effects generated by a conduct under investigation, the social benefits can be immediate, notably in investigations involving unilateral conducts, as the market can promptly return to its real dynamic.

From CADE’s standpoint, the execution of TCCs can produce the following benefits: (i) time and resources savings that would be deployed in the investigation; (ii) the fact finding phase against the remaining defendants/investigated parties will be conducted more quickly, efficiently and precisely, as the interested party commits to fully cooperate with the investigation; (iii) the collection of monetary value to society is instantaneous; (iv) it is considered as a significant barrier to challenging administrative decisions before courts, and (v) it can discipline markets or regulatory failures and, consequently, be more effective than the imposition of fines.⁹

Furthermore, the benefits generated to interested parties can be also substantial. By executing a TCC, the party will: (i) save time and resources (*i.e.*, the agreement is considered an alternative to the payment of considerable fines, and the party will not spend money with litigation

⁵CADE. *Guidelines: Cease and Desist Agreement for cartel cases*. Available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf>. Access on February 24, 2017, p. 7.

⁶ It is noteworthy, however, that due to recent changes in the antitrust legal framework, the payment of monetary value; the acknowledgement of participation in the conduct, and collaboration during the investigation became mandatory in the execution of TCCs involving cartel practices. Such requirements, however, are not mandatory in consent decrees. According to GABAN, there would be a difference between TCCs applicable to cartel behaviour and to other types of anticompetitive practices due to the standards required by Resolution CADE No. 5/2013. In the first scenario, the TCC would be characterized as a type of state’s evidence, whereas in the second, it would be classified as an alternative instrument of conflict resolution. In GABAN, Eduardo Molan, DOMINGUES, Juliana Oliveira. *Direito Antitruste*. 4ª Ed. São Paulo: Saraiva, 2016, p. 331.

⁷ Law 7,347/85 which disciplines civil action lawsuits.

⁸ Law No. 12,529/11, Article 85. In the administrative proceedings referred to in items I, II and III of Article 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. (...) Paragraph 8: The cease-and-desist commitment constitutes an instrument enforceable in Tribunal.

⁹ MARQUES, André Gilberto. *O processo antitruste sancionador: aspectos processuais na investigação das infrações à concorrência*. 2ª Ed. São Paulo: Singular, 2016, p. 276, and PALMA, Juliana Bonacorsi de. Acordos substitutivos dão mais eficácia ao direito da concorrência? In: SUNFELD, Carlos Aris; ROSILHO, André (Org./Coord.). *Direito da regulação e políticas públicas*. São Paulo: Malheiros, p. 215.

costs); (ii) not have its attention distracted to judicial problems; (iii) have less reputation risks; (iv) have the safety of a non conviction, and (iv) it avoids recidivism.¹⁰

As it is known, such instrument, combined with a legal framework that provides the right incentives to stimulate defendants to settle and cooperate with the investigations can be very useful to enhance the antitrust settlement policy, notably in the bust against anticompetitive practices.

2. Law No. 12,529/11 and Resolution CADE No. 5/13: main changes and contributions¹¹

The Brazilian Antitrust Law, which came into effect on May 29, 2012, brought important changes in the antitrust arena in Brazil, both in the assessment of merger filings (merger control) and anticompetitive conducts.¹² In relation to unilateral conducts, it reproduced, however, almost all content from Article 21 of Law No. 8,884/94 (the former Brazilian Antitrust Law),¹³ preserving, thus, the same treatment of the previous law. In the criminal field, though, it revoked subparagraphs “a” to “f” from subsections I and II of Article 4 of Law. No. 8,137/90, decriminalizing unilateral conducts, and maintaining only cartel practices as crime.¹⁴

As to TCCs, the Brazilian Antitrust Law also preserved the same discipline of Law No. 8,884/94 as from its Article 85. Even though it did not innovate substantially with regard to settlement agreements, it introduced provisions established in its former internal regulation, such as (a) the value of the monetary value should be provided in the TCC, when applicable (Article 85, Paragraph 1, III), and (b) that the presentation of its proposal before the authority should be allowed only once (Article 85, Paragraph 13).¹⁵ Under the terms of Article 85, it is important to highlight that CADE will only execute the TCC when it understands that it is convenient and appropriate, and it attends the concerns protected by the Brazilian Antitrust Law.¹⁶

¹⁰ PALMA, Juliana Bonacorsi de. Acordos substitutivos dão mais eficácia ao direito da concorrência? In: SUNFELD, Carlos Aris; ROSILHO, André (Org./Coord.). *Direito da regulação e políticas públicas*. São Paulo: Malheiros, p. 228, and FORGIONI, Paula, GRAU, Eros Roberto. Compromisso de cessação e compromisso de desempenho na Lei Antitruste Brasileira. *O Estado, a empresa e o contrato*. São Paulo: Malheiros, 2005, p. 234.

¹¹ This section does not include all changes existing in relation to TCCs but only those ones that were considered as remarkable for the purposes of spreading antitrust policy in Brazil, specially for unilateral conducts.

¹² In order to verify the main changes brought by Law No. 12,529/2011, please see: ANDERS, Eduardo Caminati; BAGNOLI, Vicente; PAGOTTO, Leopoldo (Org./Coord.). *Comentários à nova lei de defesa da concorrência: Lei 12.529, de 30 de novembro de 2011*. São Paulo: Método, 2012.

¹³ Law No. 12,529/2011, Article 36.

¹⁴ Law 8,137/90 which sets forth crimes against the economic order.

¹⁵ In the end, if CADE does not reach into an agreement, the proposal will be rejected by CADE’s Tribunal, and the party will not be able to present a new proposal. As mentioned, such provisions were already provided by former CADE’s Internal Regulation, however, given its significance, the legislator decided to include them in Law No. 12,529/11.

¹⁶ Law No. 12,529/11, Article 85. In the administrative proceedings referred to in items I, II and III of Article 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.

Moreover, since Law No. 12,529/11 changed significantly CADE's organizational framework,¹⁷ the antitrust authority created a new methodology for the management of administrative processes ongoing at the Brazilian Antitrust Defense System ("SBDC"), so as improved investigation techniques. Specifically, considering that the Brazilian Antitrust Law granted CADE's General Superintendence a pivotal role in the analysis of merger filings and investigations of anticompetitive practices, the CADE's General Superintendence structured and implemented internally an effective selection and prioritization policy of investigations, in order to allocate effectively the resources destined to the combat of anticompetitive practices. As a result, the antitrust authority became more effective, and started to devote more time and resources in Leniency Agreements and TCCs.¹⁸

Almost one year after Law No. 12,529/11 came into effect, CADE implemented the Resolution CADE No. 5/13, which altered CADE's Internal Regulation as from Article 179. According to the antitrust agency, the objective of such resolution was to improve the settlement policy executed with CADE, once TCCs are considered a significant tool for evidence gathering, which is crucial in investigations and effective decisions to be held by CADE.¹⁹ In this sense, although the Resolution CADE No. 5/13 focused in the improvement of TCCs involving cartel investigations, it enhanced legal certainty and predictability for parties interested in such settlement instrument, regardless of the type of anticompetitive conducts they were facing, that is, coordinated or unilateral practices.²⁰

In this regard, the Resolution CADE No. 5/13 better structured and organized the role of CADE's bodies during the negotiation of TCC, enhancing its respective procedure. For instance, before such resolution, the negotiation of TCC was attributed to CADE's commissioners or

¹⁷ Law No. 12,529/11, Article 5. CADE is comprised of the following bodies: the Tribunal, the General Superintendence, and the Department of Economic Studies. Before, Law No. 8,884/94 did not provide CADE's internal bodies, which were created through resolutions published along the years. In order to verify the main changes brought by Law No. 12,529/2011 in relation to CADE's organizational framework, please see: ANDERS, Eduardo Caminati; BAGNOLI, Vicente; PAGOTTO, Leopoldo (Org./Coord.). *Comentários à nova lei de defesa da concorrência*. Lei 12.529, de 30 de novembro de 2011, São Paulo: Método, 2012.

¹⁸ In this sense, see: RODRIGUES, Eduardo Frade. A Superintendência-Geral do Cade e a estruturação da função de instrução dos processos administrativos e atos de Concentração. In: CARVALHO, Vinicius Marques de (Coord.). *A Lei 12.529/2011 e a Nova Política de Defesa da Concorrência*. São Paulo: Singular, 2015, and RAGAZZO, Carlos Emmanuel Joppert; ANDRADE, Diogo Thomson de. Beyond detection: the management of cartel cases. Available at: <<https://www.competitionpolicyinternational.com/assets/Free/cpicartelragazzo.pdf>>. Access on May 1, 2017.

¹⁹ Available at: <<http://www.cade.gov.br/noticias/cade-define-nova-politica-para-acordos-em-investigacoes-de-cartel>>. Access on February 24, 2017.

²⁰ Besides Resolution CADE No. 5/13, CADE has been taking other measures to enhanced legal certainty and predictability for parties interested in the execution of TCCs. For instance, CADE launched in 2016, the Guidelines for negotiation of Cease and Desist Agreement for cartel cases. According to CADE, guidelines "*consolidate the best practices and procedures usually adopted during the negotiations of TCCs with the Administrative Council for Economic Defense (CADE) in cartel cases. Their objective is to provide an institutional framework for future negotiations and to keep record of the institutional memory acquired by CADE in TCC negotiations and to be used by public sector employees, attorneys, and for the society as a standard regarding the procedures of this relevant activity of competition policy*". Available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf>. Access on February 24, 2017, p. 6. Likewise, in 2016, CADE and the Cartel Investigative Unit of the Federal Prosecution Office in São Paulo ("MPF/SP") executed the Memorandum of Understandings No. 1/16 to improve their cooperation in negotiations of settlement agreements involving cartel investigations carried out in both administrative and criminal spheres (*i.e.*, CADE and MPF/SP's jurisdictions, respectively). Available at: <http://www.cade.gov.br/assuntos/programa-de-leniencia/memorando-de-entendimentos-sg-e-mpfsp_tcc-e-acordos-de-colaboracao_15-03-2016.pdf>. Access on March 6, 2017.

CADE's President, even if the investigation was ongoing at the GS.²¹ With its implementation, the GS started acting with more autonomy in its negotiation.²²

Additionally, in order to obtain better collaboration from proponents in cartel investigations, the Resolution CADE No. 5/13 also established the following requirements for the execution of TCCs involving investigations of agreement, combination, manipulation or adjustment between competitors (*e.g.*, cartel practices): (i) payment of monetary value to the Diffusive Rights Fund ("FDD"), which cannot be lower than the minimum established in Article 37, Law No. 12,529/11;²³ (ii) acknowledgement of participation in the investigated conduct by the party,²⁴ and (iii) collaboration of the party during the investigation and the administrative proceedings.

As such requirements are not mandatory in conducts involving unilateral practices, it is worth mentioning that interested parties would be naturally less exposed to criminal and civil spheres. As to the civil field, considering that Article 47, Law No. 12,529/11 provides that victims of anticompetitive practices may promote civil claims for losses and damages suffered,²⁵ interested parties could be exposed when executing TCCs. In relation to the criminal sphere, since the Brazilian Antitrust Law amended Law 8,137/90 and maintained as crime only cartel practices, it is noteworthy that the execution of TCCs involving unilateral conducts will not imply further liabilities to individuals.

Although the new legal framework did not innovate specifically to TCCs involving unilateral conducts, as mentioned, the changes pointed out above have enhanced legal certainty and predictability for parties interested in such settlement instrument. They have resulted in more

²¹ According to former CADE's Internal Regulation.

²² In this sense, the resolution implemented that if the investigation is ongoing at the GS, the proposal will be negotiated with CADE's General Superintendent, while if the process was already sent to CADE's Tribunal, it would be negotiated with CADE's Tribunal, specifically with the reporting commissioner responsible for the case. During the negotiation (be at the GS or the Tribunal), a "Negotiation Commission" will be composed by three members who will conduct the negotiation and assist CADE's General Superintendent or the reporting commissioner. Once concluded, the proposal will be sent to CADE's Tribunal with a suggestion of its ratification or rejection (CADE's Internal Regulation, Articles 181 and 182).

²³ The monetary value is based on the amount of the expected fine, on which a percentage reduction is applied, varying according with the scope and usefulness of the party's cooperation, as well as the moment the TCC is proposed. In this sense, if the TCC is filed during the fact finding stage at GS, when possible, the following percentage reduction will be applied upon the expected fine: (a) 30% to 50% for the first TCC proponent; (b) 25% to 40% for the second TCC proponent, and (c) up to 25% for the other TCC proponents. On the other hand, in case the TCC is proposed when the case is already at CADE's Tribunal, when possible, the percentage reduction to be applied can only be up to 15% (CADE's Internal Regulation, Articles 186 and 187).

²⁴ Before, under Law No. 8.884/94, the acknowledgement of participation in the investigation was required only in Leniency Agreements, in order to avoid that the TCC's proponent had a better position than the lenient party. See: PEREIRA NETO, Caio Mario da Silva; e CASAGRANDE, Paulo Leonardo. *Direito Concorrencial. Doutrina, Jurisprudência e Legislação*. (Coleção direito econômico / coordenador Fernando Herren Aguillar). São Paulo: Saraiva, 2016, p. 192.

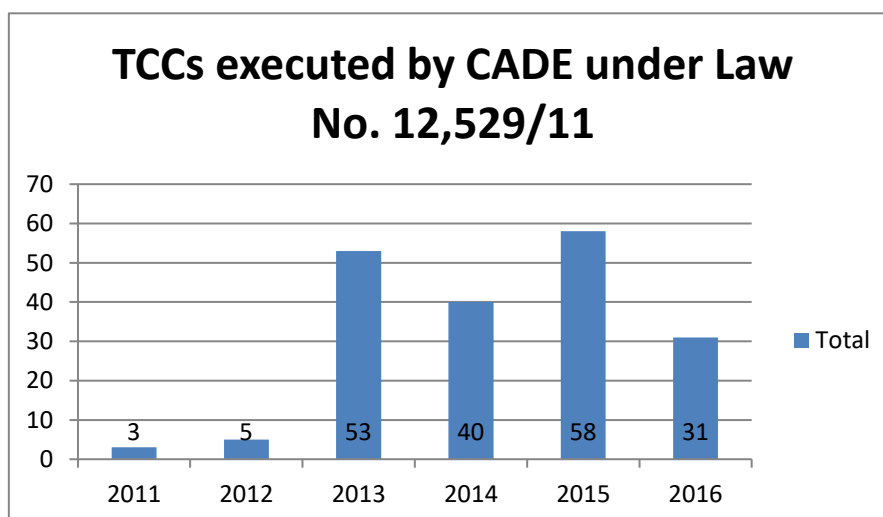
²⁵ Law No. 12,529/11, Article 47. The aggrieved parties, on their own accord or by someone legally entitled and referred to in Article 82 of Law No. 8,078/90, may take legal action in defense of their individual interests or shared common interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative proceeding, which will not be suspended due to Tribunal action.

incentives²⁶ to investigated parties to enter into TCCs with CADE, and, therefore, in an increase in the number of TCCs executed.

However, what can be noted is that the normative changes related to TCCs were adopted along with CADE's policy associated with its leniency program (which has been notably the highest priority in CADE's new agenda),²⁷ in order to become an instrument carried out by CADE to confer investigations with more effectiveness. As a consequence, TCCs applicable to unilateral conducts (or even other regulations or guidelines, like the guidelines on vertical restrains) seems to be remained in the background. Such fact could partially reflect on the reduced amount of investigations and agreements involving unilateral conducts in comparison with cartel investigations.

3. Developments verified in CADE's enforcement and policy with respect to TCCs

As mentioned above, changes in TCC's regulations under Law No. 12,529/11 have resulted in more incentives to investigated parties to enter into TCCs with CADE, and, therefore, in an increase of TCCs executed with the antitrust authority. The chart below evidences such evolution:²⁸



Source: CADE, and Institutional presentation carried out by CADE's former President, Vinicius Marques de Carvalho.²⁹ Internal preparation.

²⁶ There has been substantially criticism related to the new requirements implemented by No. 5/13, notably the acknowledgement of participation in the investigated conduct by the party. For more information about the matter, please see: BOTTINI, Pierpaolo, SOUZA, Ricardo Inglez de; DELLOSSO, Ana Fernanda Ayres. A nova dinâmica dos acordos de cessação de prática anticoncorrenciais no Brasil. In: CORDOVIL, Leonor (Org./Coord.). *Revista do IBRAC*. Vol. 23. São Paulo: Ed. RT, 2013, p. 117-140.

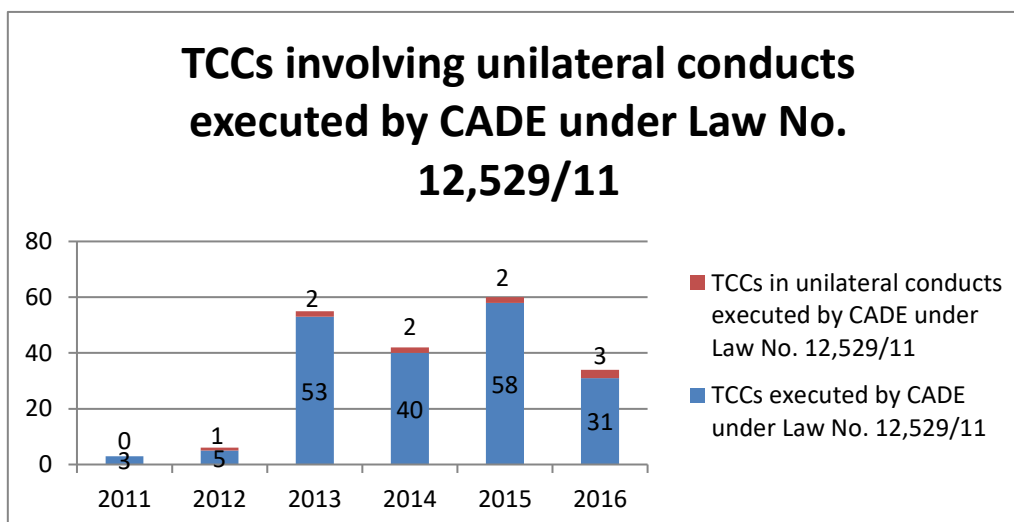
²⁷ See: Carlos Emmanuel Joppert; ANDRADE, Diogo Thomson de. Beyond detection: the management of cartel cases. Available at: <<https://www.competitionpolicyinternational.com/assets/Free/cpicartelragazzo.pdf>>. Access on May 1, 2017.

²⁸ The chart did not include TCCs' proposals that were rejected by CADE's Tribunal.

²⁹ Presented in May 2016, in the Meeting of the Board of Legal and Legislative Affairs (CONJUR) of the Federation of Industries of the State of São Paulo ("FIESP") under title "Política de Defesa da Concorrência: Balanço e Perspectivas" ("*Competition Defense Policy: Overview and Perspectives*").

The evolution above is part of CADE’s intention to increase the efficiency of its decisions by means of settlement agreements.³⁰

In spite of the significant increase of TCCs executed after the enactment of Law No. 12,529/11, the number of settlement agreements involving unilateral conducts remains small in comparison with all TCCs executed in the last five years, according to the chart below:



Source: CADE, and Institutional presentation carried out by CADE’s former President, Vinicius Marques de Carvalho.³¹ Internal preparation.

A similar situation is verified with respect to the amounts of the monetary value derived from TCCs executed in the same period. In 2015, CADE collected R\$ 464,955,618.41 to the FDD, out of which only R\$ 5,574,075.21 (*i.e.*, 1.2%) resulted from the only TCC executed in that year concerning unilateral conduct. The same is verified in the previous years, as per the chart below:

Year	Total collected	Monetary value Unilateral conduct	(%)
2015	R\$ 464.955.618,41	R\$ 5.574.075,21	1.2%
2014	R\$ 162.947.075,34	0	0
2013	R\$ 41.600.000,00	R\$ 2.191.024,85	5.2%
2012	R\$ 40.878.539,08	R\$ 99.476.840,00 ³³	N/A
2011	R\$ 17.405.584,23	0	0

Source: CADE. Internal preparation.

As it can be seen, monetary values imposed by TCCs involving unilateral conducts have little representativeness in relation to the total amount collected by CADE. Although there have

³⁰ CADE. Relatório de Encerramento do Plano Estratégico 2013-2016. Brasília, jan. 2017, p. 10.

³¹ Presented in May, 2016, in the Meeting of the Board of Legal and Legislative Affairs (CONJUR) of the Federation of Industries of the State of São Paulo (“FIESP”) under title “Política de Defesa da Concorrência: Balanço e Perspectivas” (“*Competition Defense Policy: Overview and Perspectives*”).

³² Complete information for the year 2016 was not available until the publication date of this chapter.

³³ TCC No. 08700.004988/2012-42, decided on December 10, 2012. Such amount was not collected in that same year. Information on the date of the payment of such amount was not found for the purposes of this paper.

been legislative changes and guidelines that encouraged settlement agreements,³⁴ so as the implementation of mechanisms to improve investigation techniques, the numbers above evidence that, indeed, the results from such efforts are mostly brought up by cartel investigations.

4. TCC's executed under Law No. 12,529/11 in unilateral conducts

Until 2007, the obligations imposed by CADE in TCCs (either in cartel cases or unilateral conduct investigations) essentially aimed to cease the investigated practice.³⁵ Afterwards, CADE became to value and impose more complex obligations, in order to discipline the markets subject of investigations. With effect, obligation clauses which establish new functionalities to settlement agreements, started to be used by CADE, such as: (i) antitrust compliance; (ii) pecuniary contribution; (iii) technical collaboration from the party (disclosure), and (iv) to contribute to the evidentiary phase of the administrative process.³⁶

Nevertheless, among the few TCCs executed in the scope of investigations for unilateral conducts since the enactment of Law No. 12,529/11, only three of them contain positive obligations to the parties that exceeds the scope of merely ceasing the misconduct.

The first case refers to the TCC executed with ABAFARMA (acronym for “Associação Brasileira do Atacado Farmacêutico”) and IMS Health do Brasil.³⁷ In that case, in addition to the obligations usually set forth as a requirement by law, the TCC included collaboration obligations, such as to provide information that could help the authority to understand the relevant market, and, as a consequence, contribute to the monitoring of the compliance with the TCC, as well as to fact finding. According to CADE, such kind of commitment would be able to ensure antitrust enforcement as there was no monetary value established in the TCC.

The second case refers to the TCC executed with AMBEV in relation to anticompetitive conducts with the objective to impose difficulties of access to points of sales to competitors, as well as artificially raising barriers to entry.³⁸ In view of the complexity of the misconducts, the TCC contained several obligations aiming not only to cease the conducts, but also to change the commercial policy of the company. For instance, pursuant to the TCC, AMBEV should refrain from imposing exclusivity to points of sale. Also, the settlement established minimum volumes of beverages to be sold in reusable bottles (“*giro mínimo*”).

³⁴ CADE. Relatório de Encerramento do Plano Estratégico 2013-2016. Brasília, jan. 2017, p. 25.

³⁵ Such as in the Administrative Process No. 0800.016384/1994-11, in which the TCCs executed in the fertilizer market provided specific obligations (such as to refrain from selling raw materials to agents that organize themselves in order to obtain discounts by acquired quantity), however, with large use of open legal concepts. In this sense, see also: (i) Administrative Process No. 08000.020849/96-18, related to CO2 distribution market; (ii) Administrative Process No. 08012.003048/2001-31, regarding pay TV market; (iii) Administrative Process No. 08012.003303/98-25, concerning the cigarettes distribution market, and Administrative Process No. 08012.006805/2004-71, which comprises the market of port operators and clearance warehouses, *in* PALMA, Juliana Bonacorsi de. *Op. Cit.*, p. 218.

³⁶ PALMA, Juliana Bonacorsi de. *Op. Cit.*, p. 220.

³⁷ TCC No. 08700.002545/2014-89, decided on May 14, 2014.

³⁸ TCC No. 08700.004578/2015-44, decided on June 10, 2015.

The third case refers to the settlement agreement executed with Ediouro Publicações S.A. (“Ediouro”)³⁹ on July 27, 2016. The company was accused of adopting sham litigation practices by means of the execution of non-compete judicial settlement agreements, and market foreclosure conducts to prevent competitors to have access to distribution network. The TCC provided that, in addition to the cessation of the conduct, the obligation set forth therein had the purpose of “correcting imperfections that could harm competitors of products and services”. Accordingly, the TCC established conditions to future agreements to be executed with competitors.

In this context, it is important to mention that the Ediouro case brought up a relevant innovation in TCCs in unilateral conducts: the inclusion of the acknowledgement of participation in the conduct. This TCC can be considered as specially complex, in addition, it also contained a monetary value to be paid as deterrence and compensatory factor.

This represents an exception to what has been observed in unilateral conducts settlements, given that no other precedent analyzed since the enactment of Law No. 12,529/11 contain such obligation. On the contrary, most of them, in light of the applicable rules, provide that the settlement does not result neither in confession nor in analysis of merits of the case.⁴⁰ Although it is not clear in the decision, the inclusion of the confession covenant had its scope limited to the judicial non-compete agreements settled with competitors. Hence, it seems that that covenant is linked to the fact that part of the investigated conduct could be considered as collusive.⁴¹

Finally, the existence of monetary value has been more frequently observed in recent years in TCCs in unilateral conducts as a deterrence factor, despite the fact that it is not mandatory in this type of case. In this sense, it is possible to verify different treatment of this subject between similar cases before and after Law No. 12,529/11.

For illustration purposes, the TCC celebrated into by CADE and Ediouro determined the payment of a monetary value of R\$ 4,696,494.94. Likewise, the Banco do Brasil case, related to the imposition of exclusivity clauses for consigned loans to public servants, involved the payment of monetary value of almost R\$ 100 million, the highest amount ever imposed in cases of TCC in unilateral conduct.

On the opposite, some similar cases that resulted in the execution of TCC under Law No. 8,884/94 did not contain the obligation to pay monetary values. This was the case of the TCCs executed with White Martins Gases Industriais S.A.⁴² on July 26, 2000, and the executed with Souza Cruz S.A.⁴³ on September 13, 2000 in relation to exclusivity clauses.

In light of the above, it can be concluded that the evolution in complexity of obligations assumed in TCCs in unilateral conducts refer to the inclusion of non-mandatory covenants, such as the payment of monetary value and acknowledgement of participation in the conduct. Those changes, based on arguments presented by CADE in the decision of approval of TCCs, are related

³⁹ TCC No. No. 08700.003082/2016-34, decided on July 27, 2016.

⁴⁰ See, e.g. TCC No. 08700.004578/2015-44, 08700.002545/2014-89, and others.

⁴¹ Part of the investigated misconduct is related to judicial settlement agreements executed between Ediouro and competitor in the context of lawsuits related to the alleged violation of intellectual property rights by Ediouro’s competitors. Such agreements contained non-compete obligations. These facts may lead to the conclusion that, in spite of collusion not being part of the investigated conduct, it could have the effects of a coordinated practice.

⁴² TCC No. 08000.20849/1996-18, decided on July 26, 2000.

⁴³ TCC No. 08012.003303/1998-25, decided on September 13, 2000.

to what the authority understands as a proper deterrence factor in each case, specially in light of the complexity of the misconduct.

5. Concluding remarks

The changes brought by Law No. 12,529/11 and Resolution CADE No. 05/13 did not innovate specifically to TCCs involving unilateral conducts. Notwithstanding, the new legal framework have enhanced legal certainty and predictability, resulting in an increase of TCCs executed by CADE. Still, since the normative changes were adopted along with CADE's policy associated with its leniency program, the amount of TCCs executed by CADE involving unilateral conducts remains negligible in comparison with the ones involving cartel practices.

The assessment of CADE's precedents after Law No. 12,529/11 evidences certain evolution in terms of complexity of TCCs executed in unilateral conducts. Yet, it can be noted that CADE has not developed a pattern or standard obligations in light of the gravity of unilateral misconducts. Albeit, this seems to be consistent to the variety of types and effects of anticompetitive unilateral conducts, which requires a more complex assessment by CADE.

Considering this, it is expected that CADE endeavors more efforts to improve the enforcement and the institutional framework for anticompetitive unilateral conducts.

ANNEX

TCC's in unilateral conduct executed under Law No. 12,529/11				
Administrative Process	TCC Proceeding	Defendant	Date of Execution	Monetary value
8700.003070/2010-14	08700.004988/2012-42	Banco do Brasil S.A.	10.10.2012	R\$ 99.476.840,00
08012.003921/2005-10	08700.005949/2012-62	Philip Morris Brasil Ind e Com Ltda.	23.01.2013	R\$ 250.000
080 12.003064/2005-58	08700.005399/2012-81	Infoglobo Comunicação e Participações S.A.	28.08.2013	R\$ 1.941.024,85
08012.009876/2007-79	08700.002545/2014-89	Intercontinental Marketing Services Realthinc e ABAFARMA	14.05.2014	None.
08012.010829/2011-54	08700.002692/2014-59	Bematech S.A.	14.05.2014	None.
08012.002608/2007-26	08700.004578/2015-44	AMBEV S.A.	10.06.2015	None.
08700.010789/2012-73	08700.005819/2014-91	Aperam Inox América do Sul.	22.04.2015	R\$ 5.574.075,21
08700.001743/2014-25	08700.010029/2015-17	Unimed de Catanduva - Cooperativa de Trabalho Médico, Armindo Mastrocola Júnior e Everaldo Grégio.	24.02.2016	R\$ 615.440,49
08700.004938/2014-27	08700.003364/2016-31	North Empreendimentos Ltda.	22.06.2016	R\$ 462.305,22
08012.005335/2002-67	08700.003082/2016-34	Ediouro Publicações S.A.	27.07.2016	R\$ 1.696.469,94
08012.001594/2011-18	08700.008345/2016-00	Instituto Aço Brasil.	01.02.2017	R\$ 271.345,50

CHAPTER 28 - ABUSIVE EXERCISE OF INTELLECTUAL PROPERTY RIGHTS IN BRAZIL. CADE CASE ANALYSIS.

Simone Villaça Aguiar

1. Introduction: The Search for Efficiency

When addressing economic efficiency, many authors argue for a needed limitation on the scope of Intellectual Property Rights¹ - IPRs (See FERRAZ JUNIOR² and ROCHA),³ at the cost of allowing the existence of “*harmful monopolies*” in contrast with the free initiative constitutional principle.⁴ Therefore, free competition should be used both as “*directives and boundaries*” to inhibit IPRs misuse or abuse. This view tends to oppose forces that in fact should work together: IPRs and Consumer rights may together enhance Competition and Market Efficiency. They are - or should be - part of a greater view of Economic Policy and the role of Brazil as a serious economic player.

Others, with whom I agree, will reason that a patent is not a monopoly,⁵ it is an exclusive right, with no little consequence coming from this name changing.

In *Carl Schenck, A.G. v. Nortron Corp.*, 713 F.2d, 782, 786 n. 3 (Fed. Cir. 1983), Chief Judge Markey stated: Nortron begins its file wrapper estoppel argument with “Patents are an exception to the general rule against monopolies...” A patent, under the statute, is property. 35 U.S.C. S 261. **Nowhere in any statute is a patent described as a monopoly. The patent right is but the right to exclude others, the very definition of “property.”** That the property right represented by a patent, like other property rights, may be used in a scheme violative of antitrust laws creates no “conflict” between laws establishing any of those property rights and the antitrust laws. The antitrust laws, enacted long after the original patent laws, deal with appropriation of what should belong to others. **A valid patent gives the public what it did not earlier have.** Patents are valid or invalid under the statute, 35 U.S.C. It is but an obfuscation to refer to a patent as “the patent

¹ IPRs: For the purposes of this Paper, we will consider under this label all types of rights, i.e: patents (both invention and design), trademarks, copyrights, software, trade secrets, trade dress, cultivars and data protection, to name the most usual ones.

² FERRAZ JUNIOR, Tercio Sampaio. *Propriedade Industrial e Defesa da Concorrência*. ABPI Magazine, 8, ano II, São Paulo, 1993. pp. 10-12

³ ROCHA, Afonso de Paula Pinheiro. *Implicações do Princípio da Livre Iniciativa e da Livre Concorrência Sobre o Perfil Constitucional da Propriedade Intelectual*. v. 2, p. 4279, 2009.

⁴ Sometimes overlooking that, among the Fundamental rights of the Brazilian Republican Constitution, Article 5th includes (chapters XXVII and XXIX) an established legal right to authors and industrial property rights owners, even calling it “privilege”. Social interest and the need of Economic development commands so.

⁵ To our limited purposes here, when referring to IPRs, we argue that “monopoly” equals a legal monopoly and not a monopoly in the economic sense: *exclusive control of a commodity or service in a particular market*. (For more on this, see PROVEDEL, Leticia. *Propriedade Intelectual e Influencia de Mercados*. Revista da ABPI n. 79, nov/dez/2005).

monopoly” or to describe a patent as an “exception to the general rule against monopolies.” That description, moreover, is irrelevant when considering patent questions, including the question of estoppel predicated on prosecution history.⁶

Monopoly or not, patents, as well as other IPRs, may be misused by their owners. When this happens, the anti-trust authority can interfere. And, for what we are seeing in Brazil, it does.

When balancing consumer rights and IPRs, there is no small complexity. The analysis of consumer rights targets their immediate needs, especially choice variety. In the middle ground, we have the need of economic efficiency and market competitiveness, whereas governmental IP strategy is – or should be - a long-term policy planning, not to mention constantly reviewed.

Of course, as it happens with any proprietary right, the use of IPRs could be distorted by its owners or licensees to create an abusive use of the IPRs system, which may lead to undesirable market effects and unfair competition. This is when CADE is called upon to intervene, for market efficiency’s benefit.

This goes right to the core of what is an abuse of right. Brazilian Civil code: Article 187: ... “ also commits an unlawful act the holder of a right in which exercise clearly **exceeds the limits** imposed by their **economic or social purpose**, the good faith or morals” (free translation, our highlights).

Our purpose here is to read into recent Brazilian antitrust policy through the lens of the most relevant CADE case law regarding IPRs abuse. Our argument is that whenever there is IPRs abusive exercise, as it happens with any proprietary right, the anti-trust authority can and should interfere to guarantee a healthy market regulation and honest practices, as already agreed by Brazil when signing the TRIPS (e.g., accepting compulsory IPRs licensing for social and economic purposes).⁷

2. The role of CADE, the BPTO(INPI) and Federal Courts. Law 12.529/11.

2.1. CADE

When Law No. 12.529/11 was enacted, it was an overall consensus that unifying the former SDE (Secretariat of Economic Law) and SEAE into one only agency would allow a more efficient and proper intervention on the economy. On the side, there were some critics that worried that the new CADE might have “too much power”.⁸

Apart from the Institutional question, which favors a more robust set of decisions and anti-trust policy, the new Law shifted post-factum analysis to **ex-ante analysis**, and, along the way, *it “raised the thresholds for compulsory merger notification, filtering relevant transactions and*

⁶ QUIN, GENE. Debunking the Myth that Patents create a Monopoly., Feb 25, 2017.

Retrieved Feb 26, 2017. Our highlights.

⁷ Compulsory license of IPRs: See Brazilian Industrial Property Law (Law No. 9279/96), Articles 68 to 71.

⁸ The Economist: *A Champion for Choice* (2012) <http://www.economist.com/node/21560892>).

allowing CADE to focus on the analysis of anticompetitive behavior by firms acting on the Brazilian market”⁹

CADE’s mission, according to its strategic plan for 2013-2016, was “[t]o strive for the maintenance of a healthy economic environment, preventing and repressing actual and potential acts against the economic order, observing the due process of law in its material and formal components”.¹⁰

Five years later, and after strong international recognition, as well as a very productive structure and well-prepared staff, we have a first glimpse of what CADE’s views are and to where the agency is heading to in most questions. In intellectual property, however, each case is different and, justifiably, each reasoning goes through a different path. IPRs cases are complex, relatively sparse, heterogeneous, and prone to ignite passionate debates.

2.2. The Brazilian Patent and Trademark Office (BPTO or INPI)

The Brazilian Patent and Trademark Office (BPTO or INPI) is, by its turn, the federal agency responsible for examining, granting and confirming (or cancelling) IPRs. The BPTO’s decisions may be *ex ante*, when the Examiner evaluates the extent of the right to be given to the future IPR owners as a *trade-off* for what they are giving to society, or *ex post*, when, for instance, the BPTO decides on the correct scope of enforcement a patent owner may be entitled to¹¹ or on amount of royalties cap that can be remitted abroad.

In this last role, the BPTO has a “Policy-maker” role which directly intersects with CADE’s role. Thus, as accurately pointed by Marcos C. M. Blasi¹², information interchange between the two cited agencies, added to an organic and systematic approach, would greatly benefit both CADE and the BPTO in achieving one of their main common goals – to allow competition to flourish in a healthy economic scenario and still offering choice to consumers.

2.3 Federal Courts – Federal Regional Tribunals.

In Federal courts, it is widely agreed that IPRs must be enforced, but not at all costs. It falls upon the Judiciary System¹³ to say the last word on IPRs validity, scope and in some cases, misuse. Also, courts can declare whether BPTO’s decision in limiting private agreements (i.e., cap of

⁹ BRANT, Leonardo Nemer Caldeira et al., CEDIN Publication: AN OVERVIEW OF CADE’S RECENT JURISPRUDENCE REGARDING INTELLECTUAL PROPERTY, Available at:

http://www.wipo.int/export/sites/www/ip-competition/en/studies/wipo_cedin.pdf (accessed

¹⁰http://www.cade.gov.br/aceso-a-informacao/institucional/planejamento_estrategico/cade-strategic-plan-2013-2016-final-version.pdf).

¹¹ See Files n. ANCOR case, Ancor Tecmin S.A e Outro x Corrosion Ip Corp e Outro. Processo: 0147586-58.2008.8.19.0001- Rio de Janeiro Tribunal, when the BPTO was called upon a State IP Court and (correctly in our view) stated what was the correct scope of a patent. Disclosure: author was counsel for ANCOR.

¹² BLASI, Marcos Chucralla Moherdau. “Propriedade Intelectual e Direito da Concorrência: Premissas de Análise e Apontamentos Sobre a Jurisprudência Brasileira e Estrangeira”. ABPI Magazine– nº 116, Jan/Feb 2012.

¹³ Usually Federal Courts, in view of the mandatory intervention of the BPTO – for our purposes here we will not address competence discussion between Federal vs State Courts with regards IPRs.

royalties for remittal abroad, or abusive clauses in IPRs license agreements) are accurate and legal. But Brazilian Courts themselves, when addressing competence issues, were clear in stating that CADE is fully competent to evaluate anti-competitive conducts.

For more detailed court cases, see our references below (especially ABPI Magazines). In the next section, we will look with more detail in CADE's reasoning regarding IPRs abuse. We refer to the Brazilian Antitrust Law - Article 36, Paragraph 3, XIV and XIX: "*abusive IPRs exercise or exploring characterize abusive conduct of dominant position.*"

3. Driving Market Efficiency: from ANFAPE (Spare car parts) to UBER.

3.1. The "ANFAPE" case – External spare car parts

This case (Administrative Process No. 08012.002673/2007-51, pending judgment) have been extensively debated, with passionate opinions from both sides.

Case Summary: This process began in 2007 on alleged abuses by car manufacturers, filed by ANFAPE (*Brazilian Association of Independent Automobile Spare-parts Manufactures*), who claimed that car makers were engaging in abusive practices when abusively enforcing IPRs towards independent manufacturers, based on Patent protection (Industrial Design) for spare car parts.

Defenders of ANFAPE argued that (i) when granting an Industrial Design, the BPTO does not evaluate merits, it is an automatic granting – thus, less enforceable than others IPRs, such as patents or trademarks, and that (ii) the BPTO does not evaluate or distinguish car market (national or regional) from external car afterparts market (national or regional).

IPRs owners (car manufacturers) argued that when Industrial Designs are granted and registered, even without merits analysis by the BPTO, there is an legal assumption that could only be cancelled by means of a proper Federal Lawsuit against the enforced IPRs. They also argued that Compulsory Licenses should not apply to this case, since they were a punitive measure only applicable, according to the Industrial Property Law, to Invention Patents and not Industrial Designs¹⁴.

So the core discussion was whether CADE could interfere what IPRs and to what extent. On 2008, during the first years of the Administrative Process, the former SDE, decided to shelve ANFAPE's, claiming that it could not exclude the secondary market (Car parts replacement) from the protection of the Industrial Property Law.

There has been a shift in this position, beginning with the Federal Prosecution Office, who understood that the lock-in effect in this case did not justify IPRs enforcement.

As of last June (2016), the General Superintendency decided that CADE was competent to examine the case and able to separate the two matters: (i) **VALIDITY**: the industrial designs were valid and other car manufacturers could not use them in their own vehicles for the purposes of mimetizing the IPRs owner design, and (ii) **ENFORCEABILITY** before a specific group in the

¹⁴ The Brazilian Industrial Property Law mentioned compulsory licenses as applicable only to patents. Law No. 12.529/11, in line with the TRIPS agreement, does not distinguish which type of IPRs could be subject to a compulsory license.

market (aftersales car parts manufacturers). In this last case, so far CADE understood consumer interests and protection should prevail in the afterparts market.

In addition, as recently as this month (March 2017), CADE's General Attorney Office concluded that Volkswagen, Fiat and Ford Motors committed abusive exercise of dominant position and should be condemned for anti-competitive conduct in the external spare car parts aftermarket sales. Thus: The IPRs were legitimate *per se*, but not the way they were used or, more specifically, enforced. This goes in line with European jurisprudence on the subject.

Brief chart summary follows:

pre- primary market or pre-secondary	Foremarket Primary mkt Car Manufacturers	Aftermarket/ Secondary mkt Spare car parts ANFAVEA
<ul style="list-style-type: none">•Supply market, under provided designs and guidance, to supply parts either to Manufacturers or Spare car parts dealers.•Still not discussed (unless in some private legal opinions)	<ul style="list-style-type: none">•Manufacturing and new car sales.•Competition between car manufacturers - IPRs enforceable in CADE's view	<ul style="list-style-type: none">•Manufacturing and Selling of Spare car parts.•Maintenance services (replacement)• Competition between car manufacturers vs. Spare car parts salespeoples. IPRs not enforceable in CADE's view= Consumers rights prevail.

Since we are amidst a long-term economic crisis in Brazil, expectancy of an increase in the after-parts market is foreseeable, which enhances the *lock-in* effect. Another important argument is that such secondary market existed for a long time and that car manufacturers failed to act in proper time. This is a very important point for IPRs owners to pay heed. Final advice: Do not wait until a whole new market is created to only then enforce your IPRs.

Case is currently being reviewed by the Reporting Commissioner, and final judgment is expected to occur in 2017.

3.2. CADE and disruptive innovation – the Uber case

On 2015, CADE received a complaint regarding the online rideshare platform UBER (by students University Directories)¹⁵. Another case is one that CADE itself filed against A taxi drivers associations, for barring CADE from functioning in Brazil. Both cases are still ongoing and likely more will follow.

One of the most interesting aspects regarding UBER competition analysis is the fact that CADE is now dealing with truly disruptive innovation, which presents a different challenge for CADE than the one in the ANFAPE case, dealing with industrial designs. The drive for innovation and incentive policies for industrial development, especially focusing on disruptive technologies,

¹⁵ Administrative Process n. 08700.006964/2015-71 (CADE)

will, in our view, likely raise the bar for competition analysis, when opposed to society's interest in protecting the market and consumer rights.

On a study published in 2015 by the DEE (Department of Economic Studies), the SEAE concluded that UBER favors competition inside the public transportation market, of which cabs and UBER drivers integrate. SEAE compared UBER with other services, such as 99TAXIS and EASYTAXI, which also operate on a door-to-door basis.

The DEE Study went even further, stating that UBER, in fact, created a “**new market**” in Brazil.¹⁶ Furthermore, CADE found that the auto-regulatory characteristics of such market lead to the conclusion that UBER's entrance did not influence negatively the Taxi Cell Phone Applicatives in Brazil.¹⁷ In sum, CADE would rather see taxi drivers unregulated than regulating UBER.

What we are curious about is that, so far, intellectual property does not appear to have entered the equation. The DEE Study does not address IPRs so far, and we suspect that when if some UBER patents enter the scenario, the discussion will heat up. UBER has consistently been filing and defending, globally, patents that, if found to be fully valid and enforceable, may in fact bar any competitor in the booking segment of taxi or private drivers.¹⁸

Lately, UBER has joined forces with major global players, such as GOOGLE and VOLVO, and filed many other patents in the USA and abroad (including Brazil).

One specific patent being globally attacked (and followed closely) is U.S. Patent Application 13/672,658,¹⁹ described as “*method for determining a location relating to an on-demand service on a computing device*”. This patent becomes even more important in the context of Associative agreements between CADE and GOOGLE. Claim 1 of the referred patent application is included below, to illustrate our point:

- “1. A method for determining a location relating to a transport service on a computing device, the method being performed by one or more processors **and comprising**:
- receiving a transport request from a user, the transport request specifying at least one of a pick-up region of the drop-off region;
- determining one or more locations of interest within at least one of the pick-up or the drop-off region;
- comparing the at least one of the pick-up region or the drop-off region with one or more historical locations related to the user; and

¹⁶ Available at <http://www.cade.gov.br/noticias/o-mercado-de-transporte-individual-de-passageiros.pdf>.

¹⁷ Available at <http://www.valor.com.br/empresas/4356906/cade-conclui-que-uber-nao-concorre-com-aplicativos-de-taxi> Lucas Marchezini, Valor Econômico. Dec, 14, 2015. Retrieved March 5, 2017.

¹⁸ Available at <http://www.ipwatchdog.com/2016/10/09/uber-patent-prosecution-history/id=73511/> by Audrey Ogurchak, retrieved March 6, 2017.

¹⁹ Brazilian corresponding patent so far not found. USA patent family: [US20110301985](http://www.uspto.gov/patft/US20110301985), [US20110307282](http://www.uspto.gov/patft/US20110307282), [US20110313804](http://www.uspto.gov/patft/US20110313804), [US20120323642](http://www.uspto.gov/patft/US20120323642), [US20130132140](http://www.uspto.gov/patft/US20130132140)

Also, see PCT/US2010/059152, published as WO2011069170 A1, with subsequent deposits in Europe and Australia (patent granted in Australia).

- determining a likely location based on the determined one or more locations of interest and the one or more historical locations”.

3.3. Overview of CADE’s analysis - Relevant Criteria for IPRs Abuse Findings

CADE recognizes that Intellectual Property Rights exercise and abusive conduct could be interfered with whenever competition issues are at stake. Most cases tried by CADE which involve Intellectual Property were, so far, based on general IPRs negotiation (e.g., assignment, license, cross-license, within the context of a merger or not). As a WIPO study published on 2014 pointed out²⁰, “cases related to the abusive exercise of Intellectual Property Rights, are still few”. It still holds true today.

This goes in hand with Brazilian courts jurisprudence. For express recognition of the *patent misuse doctrine* by Brazilian Courts, for instance, we refer to the Superior Tribunal of Justice case – RESP n. 1.166.498 (3a Turma STJ – 2011). Although dealing with trademarks, in this case the Court found for abusive IPRs enforcement, arguing that two trademarks containing the word “EBONY” could coexist, since “*The Judiciary cannot recognize to a corporate society the market indication of a whole economic segment. ... There is abuse of rights in the monopoly of a trademark which identifies half of the Brazilian public.*”²¹

Among some conducts that could, in our view, constitute IPRs abuse and hinder competition and, arguably, be subject to CADE, we point out some worthy of notice:

- **Patent Ambush:** rent-seeking behavior by the owner of a technology that shows to be essential to an industry.²²
- **Patent Flooding:** filing more patents than needed, with the aim to make it expensive and intimidating for smaller businesses to defend themselves. Usually combined with sham litigation.²³
- **Patent Shadowing:** filing double fake patents, or fake misleading claims, simply to misguide competitors into what is the relevant invention, therefore deliberately confusing competitors whenever they are evaluating patent portfolio.²⁴
- **Patent Trolling:** Trolls are ugly mythical creatures who were controlling bridges and bullying people that want to cross such bridges into paying them money. In a similar manner, around 1999, Intel’s attorney Peter Detkin described as “patent trolls” some non-practicing entities (BPRsP who were, in his view, simply filing

²⁰ BRANT, Leonardo Nemer Caldeira et al., CEDIN Publication: *AN OVERVIEW OF CADE’S RECENT JURISPRUDENCE REGARDING INTELLECTUAL PROPERTY*, retrieved March 2, 2017. http://www.wipo.int/export/sites/www/ip-competition/en/studies/wipo_cedin.pdf

²¹ BRAGA, SAMANTHA BANCROFT VIANNA. “Notions on Intellectual Property Rights Abuse and the Doctrine of Patent Misuse” (ABPI Magazine 129, pp. 3-20).

²² HILLEL, Jonathan. “<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?Article=1212&context=dltr>”

²³ RUBINFELD, D. and MANEFF, R. https://www.law.berkeley.edu/files/Strategic_Use_of_Patents.pdf

²⁴ Author’s definition.

*lawsuits based on weak patents simply for gaining value out of the patent system, monetizing inventions they never planned to use in the first place.*²⁵

- **Undue prosecution** (eg, abusively asking additional protection for previously registered IPRs).

4. Conclusion.

The challenge here for CADE, as seen above, is the delicate and ongoing balance between several forces: Market, Innovation Drive, consumers, IPRs investors and owners. For us studying IPRs, this challenge may bring a pleasant surprise – in the same way that one can argue that CADE should intervene to oppose anti-trust concerns to curtail IPRs use or exercise, conversely CADE may do the very opposite: in helping to find against anticompetition acts, CADE may in fact reinforce IPRs for owners who correctly use the IPRs System²⁶. The very old system of “Honest Practices.”²⁷ And this is no small conquer.

²⁵ STOLL, Robert. “*Patent Trolls. Friends or Foe?*” accessed, march 01, 2017. In http://www.wipo.int/wipo_magazine/en/2014/02/Article_0007.html.

²⁶ DELMANTO, CELSO, apud GOMES, Franklin Batista.

Concorrência Desleal: A (Des) necessidade de Existência de Patentes. ABPI Magazine, n.º 82, p. 65 a 70, May/Jun 2006.. P. 68: even if the patent related to the product has expired or has been cancelled, there is the possibility that an unfair competition act takes place.” Free translation”.

²⁷ CARVALHO, Nuno P. C. *A Estrutura dos Sistemas de Patentes e de Marcas: Passado, Presente e Futuro*. Lumen Juris, 2007. Available at: <http://bdjur.stj.jus.br/dspace/handle/2011/26144>. Retrieved, Feb. 22/2017.

CHAPTER 29 - CADE AND THE SHAM LITIGATION THEORY: THE ABUSE OF THE RIGHT OF ACCESS WITH ANTITRUST EFFECTS

**Luis Gustavo Miranda
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1. Initial considerations

The context of free competition guaranteed by Article 170 of the Brazilian Constitution presupposes freedom of action in the market, a *locus* in which economic agents must participate with relative trading harmony. In this context, the existence of the Brazilian Antitrust Law (No. 12.529/11) is essentially justified to punish situations of economic power abuse. CADE in its capacity as an autonomous entity with attributions and competence defined by Law No. 12.529/11, constitutes the body entitled to regulate this area of free competition, either by means of sanctions or by promoting affirmative actions of free competition without predatory conduct.

The topic chosen for this discussion, regulated by CADE, was inspired by the foreign experience referred to as “sham litigation”, for that is precisely what it expresses in factual terms; the simulacrum of a litigation, baseless litigation or a fallacious conflict that ultimately tries to obtain a benefit in the competitive field in favor of very party that has claimed it. From a more rigorous perspective, sham litigation aims to define a predatory and fraudulent litigating conduct, since the party that promotes it unlawfully resorts to the right of access with anticompetitive effects.

The epistemological framework applied herein has focused on the study of more recent cases received by CADE, either to impose sanctions,¹ refuse the thesis of sham litigation,² or promote the signing of a Cease and Desist Agreements.³ The methodology consists of the analysis of those three cases in order to evaluate the sham litigation theory in Brazil, as well as identify the objective requirements that characterize it and which elements of free competition are violated when this scenario occurs.

2. The sham litigation theory and the right of access abuse as an anti-competitive violation

Sham litigation was the legal term imported from the U.S. law to designate cases where abuse of rights (Article 187, Civil Code) is practiced by the functional deviation of the right of

¹ Administrative Process No 08012.011508/2007-91 decided by the Tribunal on June 24, 2015.

² Administrative Process No 08012.003303/2011-18 decided by the General Superintendence on April 20, 2014.

³ Administrative Process No 08012.001594/2011-18 decided by the Tribunal in February 2017.

access, in order to achieve an anti-competitive end. The U.S. Supreme Court has defined this structure to admit of antitrust liability. The thesis considers the economic cost-benefit of false litigation to enforce antitrust liability.

“Frivolous litigation may have detrimental effects beyond the litigants involved and courts. In certain situations, such litigation may harm competition by adversely effecting conduct of other (nonlitigating) market participants, such as suppliers, distributors, purchasers, and even consumers. Consequently, it has long been held that objectively baseless—or “sham”—litigation that is done to impede competition and which has that effect may violate the antitrust laws”.⁴

In this context of false economic litigation, the litigant does not intend to receive what they demand from the other party in the lawsuit, but instead, they use the court enforcement as a form of intimidation. The result of the judicial process is not what the litigant intends, since they actually seek, as a remote objective, a market result to the detriment of their competitor. The lawsuit is intended to create tortuous and delayed situations, which will help damage the other party competitively.

In this context, the theory termed as sham litigation or sham exception developed, representing an exception in the U.S. law to the “doctrine of immunity for antitrust laws”, known as Noerr-Pennington Doctrine, whose bases are in the First Amendment to the American Constitution. The Noerr-Pennington Doctrine⁵ developed as a form of protection granted by the American Supreme Court to the right to petition, even if the exercise of this right were to damage free competition or lead to the consolidation of market power.

The Noerr-Pennington Doctrine context serves as a rule whose exception is exactly the theory of sham litigation or sham exception, whose case of origin (California Motor Transport Co. v. Trucking Unlimited) involved a company that commercialized trucks and filed a lawsuit in a context of right of access abuse against its competitor, with the aim of removing it from the market. The court emphasized, in a language closer to Brazilian civil procedural law, that the right of access could not be used beyond its function, promoting illicit and fraudulent conduct.

3. CADE and some recent cases of sham litigation

3.1. A case of conviction for sham litigation by CADE

On June 24, 2015, CADE found two companies guilty of abusing the right of access and imposed them a fine of R\$36,600,000. The companies, active in the sector of medicine

⁴ ZAIN, Saami. Antitrust Liability for Maintaining Baseless Litigation, 54 Santa Clara L. Rev. 729 (2014). Available at: <<http://digitalcommons.law.scu.edu/lawreview/vol54/iss3/5>>. Access on March 21, 2017.

⁵ “The Noerr-Pennington doctrine has its genesis in two United States Supreme Court decisions² decided in 1961 and 1965, respectively, dealing with antitrust litigation, in which the Supreme Court recognized a defense to a suit under the antitrust laws, rooted in the U.S. Constitution’s First Amendment right to petition the government (...)”. CONTINO, Peter. The Noerr-Pennington Doctrine A Constitutional Defense Available to Attorneys. Available at: <http://www.americanbar.org/content/dam/aba/events/lawyers_professional_liability/lpl_spring_13_noerr_pennington_doctrine.authcheckdam.pdf>. Access on March 21, 2017.

manufacturing, implemented, through contradictory and fraudulent claims in lawsuits filed in the Federal Court of Rio de Janeiro, in the Federal District, and in São Paulo, the exclusive marketing right of a certain drug, whose active principle was a substance called gemcitabine hydrochloride, used for the treatment of cancer patients.

When analyzing the content of the application for the proposed lawsuits, CADE understood that the companies omitted relevant information about the modification of the patent application scope – which initially dealt only with the production of the active principle – and on the administrative procedure carried out by the National Institute of Industrial Property – INPI. As a result of this omission, the company obtained the temporary monopoly of the drug in July 2007, through a decision by the Federal Regional Court (1st Region), which ordered the National Health Surveillance Agency (ANVISA) not to grant authorization for other competitors to market a similar product for the treatment of breast cancer. The judicial protection of the monopoly went on until March 2008, when the Superior Court of Justice understood that the maintenance of the injunctive relief that granted the exclusivity could cause serious damage to public health and economy due to the limitation of competition.

CADE decided that the represented companies had abused their right of access (as of the U.S. sham litigation theory) when requesting the obtaining of a registration of exclusiveness of commercialization of the drug along ANVISA, despite being aware that the patent application only comprised the drug production process and failing to inform such a most relevant fact to the Federal District Court (since the addition in the application had been denied in an earlier lawsuit filed in Rio de Janeiro).

According to the decision by CADE, the antitrust effects were characterized by an infringement of the antitrust law when the company attempted to improperly extend the right of exclusivity to other therapeutic purposes not included in the Federal Regional Court decision, which were restricted to breast cancer treatment. By obtaining the undue monopoly of gemcitabine hydrochloride, based on a favorable judicial decision reached through strategies that involved the omission of relevant data, the company would have conducted with objective injurious effects to free competition. Over the period in which the exclusivity was obtained, (between July 2007 and March 2008) the company's competitors remained out of the market.

In this case, the requirements identified by CADE were to use the right of access as a violation characterized by the petition where information is missing or contradictory, confusing, or fraudulent, which allowed the obtainment of exclusivity of a particular product through the exclusion of competitors from the market.

3.2. A case of sham litigation with a Cease and Desist Agreements

On May 24, 2016, CADE's General Superintendence opened an administrative process to investigate alleged abuse of the right of access by a company in the steel production sector whose conduct would have the purpose of harming competing importers of steel rebar, hence configuring sham litigation.

The organization in charge of defending the importing companies and steel manufacturers formalized a complaint before CADE, whose argument to configure sham litigation would be the

filing of several lawsuits by the defendant, in order to prevent the importing of steel rebar by other companies already established in the Brazilian market.

In the view of CADE's General Superintendence, the defendant would have filed precautionary measures for the production of evidence in advance, by requesting an injunction that questioned the conformity of the imported goods with the Brazilian technical safety standards. As a result of these actions, the imported steel rebar loads would be retained in the ports to be inspected, in a context that would cause significant costs to importers and hinder the movement of merchandise in the country.

At the time, CADE's General Superintendence found that most of the actions were based on false or inaccurate information, some of them being filed repeatedly in different districts, with the sole purpose of preventing competition in the steel rebar market.

Recently, on February 1, 2017, CADE's Court approved a Cease and Desist Commitment (TCC) proposed by the company represented, with the purpose of closing the administrative process. Through the agreement, the company committed to dropping all lawsuits that were currently under way and to take measures to cease its anticompetitive practices. The Cease and Desist Commitment also determined that the represented party paid BRL 271,300 as a pecuniary contribution to be paid to the Diffuse Rights Defense Fund (FDD). The value of the pecuniary contribution is generally estimated from the expected fine in case of conviction.

3.3. A case of sham litigation claim rejected by CADE

In 2011, CADE received a complaint to investigate the alleged practice of sham litigation by a cosmetics company, which led to the opening of an administrative process. A competitor accused the company on the grounds of right of access abuse with anti-competitive ends. The claimants declared to be representatives and manufacturers of hair products, further informing that they owned the registration of a particular product brand and had been prevented by the defendant from creating a cosmetic with the name "Novex Gold", due to lawsuits filed, which claimed to hold the exclusive right to use the term printed on a gold package, hence accusing the claimants of unfair competition.

An inquiry was opened to find evidence and information and, after the analysis, CADE decided on the case. It stated that the lawsuits proposed by the defendant did not meet the requirements necessary to configure sham litigation since the content of the application was not unfounded or misleading so as to exclude or harm competitors.

CADE concluded that the case was, in fact, a private matter concerning the use of the brand, with no potential impact on the final consumer, and that under such conditions it would be outside the scope of competence of CADE to decide on aesthetic aspects of packaging of the products of the companies. Hence, the investigation was closed.

In this case, the requirements traditionally required for the configuration were not identified by CADE, since the content of the actions to discuss the right to use the trademark was considered legitimate, not fraudulent. The analysis conducted by CADE did not identify elements that could demonstrate the fraudulent and "empty" use of the right of access exclusively for anti-competitive practices, leading to the closing of the inquiry.

4. Evaluation of *sham litigation* application by CADE

From the three narrated cases concerning CADE's decisions on the subject of sham litigation, some considerations can be made. First, the relevance of being able to identify sham litigation conduct in the competitive context as a very good away to promote Law No.12.529/11 with the prevention and repression of infractions against the economic order.

Then, the relevance of identify the tension that lies between the healthy exercise of the right of access that guarantees the access to justice and the abusive exercise of that right. In this sense, we have noticed that the decisions produced by CADE are dedicated to an investigation that is rather objective in as far as the analysis of the evidence goes. We verify the attempt to identify the occurrence of any of the situations provided for in the provisions of Article 36 of Law No 12.529/11.

In order to express its opinion on the existence of the exercise in functional deviation of the right of access, CADE is dedicated to identifying the particularities of the competitive environment of the sector in question. From the decisions, we verified the necessity of demonstrating the intentionality of the conduct and whether this conduct was able to create an effective barrier to the entry and existence of market power. The identification of the legitimacy and plausibility of the right of free initiative that CADE intends to defend also appeared as a necessary demonstration element to configure sham litigation.

The practice of sham litigation seems to lead to a context in which the right of access is irregularly exercised, resulting in detrimental effects to the context protected by healthy competition. Like any right, the right of access also has a functionality to fulfill and such is verified from the decisions in cases of sham litigation.

CADE's analysis considers the cost-benefit of the false litigation to enforce antitrust liability, since the false litigant does not have the purpose of winning the lawsuit against his competitor, but instead, of intimidating them through the process itself, by means of defrauding its own claims.

As the theory was imported from US law, it is important to know CADE's own policy for sham litigation and what is actually or, at least, sought when the council must arbitrate in such cases. According to the Federal Trade Commission⁶

“(...) sham litigation has generally been defined legally as anticompetitive litigation that is “baseless or otherwise without any legitimate foundation. From an economic perspective, this is a very restrictive definition which allows considerable use of the legal and administrative systems for anticompetitive ends. A definition of sham litigation that more in keeping with economic reasoning would identify sham litigation as predatory or fraudulent litigation with anticompetitive effect, that is, the improper use of the courts and other government adjudicative processes against rivals to achieve anti-competitive ends.”

⁶ KLEIN, CHRISTOPHER C. .THE ECONOMICS OF SHAM LITIGATION: THEORY, CASES, AND POLICY. Bureau of Economics Staff. Report to the Federal Trade Commission, April 1989, in <<https://www.ftc.gov/>>. Access on March 21, 2017.

The Federal Trade Commission emphasizes that “(...) nonstrategic litigation is undertaken if the expected value of the direct effect of the judgment on the merits exceeds the expected cost of Litigation. In contrast, strategic (including predatory) litigation is undertaken to achieve a goal collateral to winning a judgment on the merits”.

Therefore, the objective requirements to demonstrate the occurrence of Sham Litigation would be:

- The plaintiff is a dominant firm;
- The defendant is a recent or potential entrant or a competitor and;
- The effect of the plaintiff's action is to prevent or delay entry or expansion by the defendant, or cause exit.

Therefore, the abuse of the right of access through lawsuits with anti-competitive purposes depends, firstly, on the ability to use the courts in a fraudulent manner. The so-called “predatory litigation” aims at an anti-competitive objective that may create difficulties in the constitution, operation or development of a competitor or supplier, acquirer, or financier of goods or services. What is most relevant in any case would be to demonstrate the existence of a secondary and collateral objective to the purpose of the lawsuit, which overall consists of the abusive exercise of the dominant position.

4. Final thoughts

As pointed out in the introduction, free competition presupposes the exercise of the right of free participation in the local market, where agents cannot be oppressed by competitors with relevant action power in the sector. In order to confirm this area of negotiating freedom, among other measures, the right of access is presented as a mechanism for provoking jurisdiction.

In general, the right of access will be used within its functionality, which is to request that the authority in charge of mediating conflicts within its jurisdiction to arbitrate on which of the parties is right. It occurs that, just like any right, the right of access may be exercised outside the scope of its functionality, that is, irregularly. Article 187 of the Brazilian Civil Code provides that the rights exercised outside its functionality configure unlawful acts to be held liable (see Article 927 of the Brazilian Civil Code).

This would be the basic rationale of sham litigation theory in Brazilian law. However, it would not be sufficient to merely indicate the existence of an unlawful act, but of a functional offense with anti-competitive effects. In order to configure sham litigation, a violation exercised through the right of access abuse must demonstrate the absence of primary litigation and the existence of an attempt to exclude or inhibit competitors in the market. In this context, Law No. 12.529/11 shall be used as an instrument to punish economic power abuse that may entail irregular market action. The competition law intends to avoid such irregular action, which may sometimes be predatory, by stating a set of conditions that allow all market players to compete freely without violating the lawful claims of others.

The recognition of sham litigation only demonstrates the development of the Brazilian system of competition defense when dealing with complex issues, since, as aforementioned, the tension of the analysis lies in identifying when the right of access has been exercised legitimately or when it has been exercised in a non-functional way, leading to anti-competitive effects. The right of access, despite its fundamental relevance that allows undeniable access to justice, can only be configured if exercised within its functional sphere of action. In the context of sham litigation, what is considered is the right of access to achieve wrongful purposes, since it is used as an instrument to violate the precepts of market protection. If this irregular exercise is evidenced, for example, by what Noerr-Pennington Doctrine proposed to establish, and a predatory market conduct is evidenced, only a subject of law remains, abusively resorting to the protection provided to him. Hence, the accountability through CADE's actions ultimately have two purposes: (i) to discourage the practice; (ii) to "educate", through sanctioning actions, the regular conduct of presence in the market with the exercise of free initiative.

IV. OTHER TOPICS

CHAPTER 30 - THE COMPLIANCE GUIDELINES AND THE RISE OF THE ANTITRUST SOFT LAW IN BRAZIL

Guilherme F. C. Ribas
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1. Introduction

In January 2016, following a public consultation, CADE issued the Compliance Guidelines, with suggestions on how to build a compliance program and a didactic explanation about the antitrust risks to which companies are subject in their daily activities.

Since Law No. 12,529/11 came into force in 2012, CADE has provided guidance on different areas of practice, including leniency, settlement agreements in cartel cases, gun jumping, and horizontal mergers review.¹ The guidelines issued accordingly form CADE's soft law, a powerful and dynamic tool for a more efficient and updated application of the law by the agency.

Many of these guidelines are updated versions of documents prepared by the former Secretariat of Economic Law ("SDE"), the antitrust department of which was transferred to CADE upon the implementation of the 2012 antitrust reform.² For instance, the Compliance Guidelines are a fresh take on Ruling No. 14, enacted by the SDE in 2004.

This chapter briefly describes the development of the antitrust soft law in Brazil and the main sections of the 2004 and 2016 compliance guidelines.

2. Antitrust Soft Law in Brazil

Several guidelines and recommendations have been issued by antitrust authorities in Brazil over the last two decades in connection with both merger control and conduct enforcement. Below we list the most important ones:

*2.1 Horizontal Merger Guidelines (2001)*³

These guidelines were issued by SEAE and the SDE in 2001 and have been used by the competition agencies for 15 years, until they were replaced by the Horizontal Merger Guidelines

¹ All of these topics are addressed in other chapters of this book.

² The Consumer Law Department of the former SDE is still under the direct authority of the Ministry of Justice. CADE is an independent agency with limited connection with the Ministry of Justice

³ SEAE/SDE Joint Ruling No. 50/2001, available at <http://www.cade.gov.br/assuntos/normas-e-legislacao/portarias/2001portariaconjunta50-1_guiia_para_analise_economica_de_atos_de_concentracao.pdf> (Portuguese only). Access on March 21, 2017.

issued by CADE in July 2016. The objective was to describe the method by which the authorities review merger cases submitted for antitrust clearance, setting forth a 5-step procedure, including: (i) the definition of the relevant market; (ii) the calculation of the notifying parties' market shares; (iii) the analysis of the level of rivalry, market entry conditions (potential barriers, likelihood, and timeliness), and imports; (iv) the calculation of efficiencies, and (v) whether efficiencies could outweigh anticompetitive effects.

*2.2 Practical Guidelines (2007)*⁴

In 2007, CADE issued a practical guide with information about the competition enforcement regime in Brazil, covering general aspects of both merger and anticompetitive practices review.

2.3 Compliance Guidelines (2009)

Ruling No. 14, enacted by the SDE in 2004, as amended in 2009, is a mix of soft law (including recommendations on the main points that should be addressed in a successful compliance program) and ordinary law (commanding the former SDE to review the effectiveness of the compliance programs filed with it). More details are provided in Section 3 below.

*2.4 Guidelines on Bid Rigging (2008)*⁵

In 2008, the SDE issued guidelines especially focused on public procurement and bid riggings, aimed at recommending best practices for public agents in charge of coordinating public bids in order to avoid and/or detect anticompetitive practices.⁶

*2.5 Guidelines on Cartel Investigations and Leniency Applications (2009)*⁷

In 2009, the SDE and CADE jointly issued guidelines on cartel investigations and leniency applications. The guidelines were issued shortly after the ruling of the first case ever derived from a leniency application in Brazil.⁸

⁴ *Guia Prático do CADE: A defesa da concorrência no Brasil*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/guia_cade_3d_100108.pdf/view>. Access on March 21, 2017.

⁵ *Combate a Cartéis em Licitações*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_licitacao.pdf/view> (Portuguese only). Access on March 21, 2017.

⁶ In 2010, the SDE also created a very interesting campaign (“Playing Fair Campaign”) during the FIFA’s 2010 World Cup. The campaign was focused on fighting bid rigging. *Campanha Jogando Limpo*, available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/Campanha%20Jogando%20Limpo/view>> (Portuguese only). Access on March 21, 2017.

⁷ *Combate a Cartéis e Programas de Leniência*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/brazil_leniencia_program_brochure.pdf/view> (English version). Access on March 21, 2017.

⁸ Even though the leniency program exists since 2000, the first agreement was executed by the former SDE in 2003. CADE ruled on this case only in 2007.

The guidelines were drafted to explain to companies and individuals the legal consequences of being accused, prosecuted and convicted in cartel investigations, as well as to address the main aspects of the leniency program, including details of the requirements and related benefits.

*2.6 Guidelines on Cartel and Trade Associations (2009)*⁹

In 2009, the SDE also issued guidelines especially focused on competition defense in the context of trade associations and companies' unions. The document addressed relevant topics of the daily routine of such entities, and explained which activities were illegal or could be considered illegal from the perspective of the antitrust law.

*2.7 Monica's Gang Comic Books (Revista da Turma da Mônica) (2009)*¹⁰

Also in 2009, the SDE collaborated with Maurício de Sousa, author of the Brazilian comic book Monica's Gang (Turma da Mônica). Monica's Gang was then (and probably still is) the most famous comic book in Brazil. Mr. Sousa created a story called "The Lemonade Cartel," where Monica's Gang's characters are depicted discovering a cartel in the lemonade market. The comic book, aimed at promoting awareness about competition defense in Brazil, was freely distributed by the Ministry of Justice.

*2.8 Guidelines on Fighting Cartels in the Retail Fuel Market (2009)*¹¹

In 2009, the SDE issued guidelines specifically aimed at fighting cartels in the retail fuel market. The guidelines followed several enforcement actions in this market, addressed general aspects of these cases, and provided general information related to the enforcement of competition law in Brazil.

*2.9 Guidelines on Competition Law Matters before the Judiciary Branch (2010)*¹²

In 2010, the SDE and CADE jointly issued guidelines focused on competition law matters before the judiciary branch. In addition to addressing general aspects of the application of competition laws, these guidelines described the importance of the judiciary for their enforcement

⁹ *Combate a Cartéis em Sindicatos e Associações*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_sindicatos.pdf/view> (Portuguese only). Access on March 21, 2017.

¹⁰ *Cartel da Limonada*, available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartel-da-limonada.pdf/view>> (Portuguese only). Access on March 21, 2017.

¹¹ *Combate a cartéis na revenda de combustíveis*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_revenda_combustiveis.pdf/view> (Portuguese only). Access on March 21, 2017.

¹² *Defesa da Concorrência no Judiciário*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_defesa_concorrancia-no-judiciario.pdf/view> (Portuguese only). Access on March 21, 2017.

in Brazil, addressing subjects such as search and seizure procedures and telephone calls interception.

2.10 Gun Jumping Guidelines (2016)¹³

In 2016, CADE issued guidelines for the analysis of previous consummation of merger transactions (this practice is commonly referred to as gun jumping). The guidelines set forth the activities that may constitute previous consummation of merger transactions, procedures to mitigate the risks of gun jumping, and penalties associated with this practice.

2.11 Horizontal Merger Guidelines (2016)¹⁴

In 2016, CADE also issued guidelines on the assessment of horizontal mergers. These guidelines are a review of the 2001 version, updating several procedures and information according to the agency's experience over the past fifteen years.

2.12 Guidelines on Settlement Agreements in Cartel Cases (2016)¹⁵

In 2016, CADE also issued guidelines on the execution of settlement agreements in cartel investigations. The guidelines provide guidance on subjects such as the level of expected cooperation, pecuniary contributions, and proceedings before CADE's General Superintendence and the Tribunal, among others.

2.13 Leniency Guidelines (2016)¹⁶

In 2016, CADE also issued guidelines describing and providing practical details about its leniency program. The guidelines comprise general aspects of the antitrust leniency program filed with CADE, procedural details of its negotiation, and the level of collaboration expected under these circumstances.

¹³ *Guia para Análise da Consumação Prévia de Atos de Concentração Econômica*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf> (English version). Access on March 21, 2017.

¹⁴ *Guia de Análise de Atos de Concentração Horizontal*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf> (Portuguese only). Access on March 21, 2017.

¹⁵ *Guia de Termo de Compromisso de Cessação para casos de cartel*, available at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf (English version). Access on March 21, 2017.

¹⁶ *Guia de Programa de Leniência Antitruste do CADE*, available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf> (English version). Access on March 21, 2017.

3. The 2004 and 2016 Compliance Guidelines

3.1 The 2004 Guidelines

Ruling No. 14/04 was drafted to promote compliance programs in Brazil, engaging companies in adopting mechanisms to comply with Brazilian competition laws. As an incentive to companies to adhere to such compliance programs, Ruling No. 14/04 created a mechanism to certify compliance programs. Accordingly, under the Ruling's terms, companies and associations could file their compliance programs with the SDE, which would then analyze the programs' contents and certify whether they were in accordance with Brazilian law or not. The certification of the compliance program would expire in two years.

Pursuant to Ruling No. 14/04, compliance programs should take into account four fundamental aspects:

- **The Importance of Compliance.** Programs should be drafted to undoubtedly show that the company is strongly engaged in complying with the law. Accordingly, compliance programs should be clear, accurate, and applicable to all executives and employees of the company.
- **Supervision.** Compliance programs should be firmly enforced by the management of the company, including the allocation of adequate resources for this purpose.
- **Organization of Powers.** Companies should organize the distribution of powers within their structures according to clear and precise limits.
- **Enforcement Mechanisms.** Companies should have mechanisms to enforce compliance-related rules, including tools aimed at identifying and punishing potential violations.

Ruling No. 14/04 also provides examples of tools that can be used to achieve these goals, including videos, manuals, folders, lectures, and computer programs, among others. In addition to these materials, the company applying for certification should also engage external auditors especially to assess compliance regarding competition-related matters. External audits should be conducted every two years.

In the event a company with an effective certified compliance program would be found guilty of violating competition laws, the certification would entitle the company to receive a recommendation from the SDE regarding a reduction in applicable fines. Notwithstanding the certification, companies with effective compliance programs could also use their non-certified programs to request recommendations regarding a reduction in fines (provided that the relevant programs were properly designed and effectively enforced by the company). No recommendation from the SDE regarding a reduction in applicable fines in either situation would bind CADE, the decision-making authority.

In 2009, due to lack of human resources, the SDE amended Ruling No. 14/04, eliminating the certification of compliance programs submitted for its review. Accordingly, Ruling No. 14/04 turned into a guide for preparation of compliance programs.¹⁷

Ruling No. 14/04 played an innovative role by inserting compliance programs in the agenda of enforcers at a very early stage of the enforcement of competition laws in Brazil.

3.2 The 2016 Guidelines

In January 2016, CADE issued guidelines on the structuring and benefits of adopting competition compliance programs. The issuance of the guidelines was preceded by a public consultation and several stakeholders were able to present their comments to the draft. As we discuss in this topic below, most of the contents of these guidelines is derived from Ruling No. 14/04 and the other guidelines described above.

The 2016 Compliance Guidelines are structured as follows.

The **introduction** explains CADE's functions and the importance of compliance programs in the context of the enforcement of competition laws.

The **second chapter** presents general information on compliance and its benefits (e.g., risk prevention, anticipated identification of problems, identification of infringements by other companies, reputational benefits, employee awareness, and reduction of costs and contingencies).

The **third chapter** deals specifically with antitrust compliance programs, explaining how to design a robust program (as opposed to mere sham ones), including guidance on specific matters (cartels, bid rigging, associations and unions, and unilateral conducts and vertical restraints). According to the 2016 Guidelines, robust competition compliance programs must consider four general criteria:

- **Commitment.** The genuine commitment of a company is described as the basis for any successful program. A company must show its commitment through: (i) an effective engagement of the senior management and governing bodies in complying with the policy (“tone from the top”); (ii) the adequate allocation of resources for the program, and (iii) the autonomy of the Compliance Leader.
- **Risk Analysis.** A compliance program should only be designed after a thorough review of the specific risks faced by the company in its daily routine in the markets in which it operates. According to the Guidelines, “among other factors, risks generally vary owing to a company’s size, economic sectors in which it runs its businesses, position occupied in the market, the reach of its activities, the number of employees and the level of training such employees have received.” Following the risk analysis, the resources for the program must be allocated accordingly, prioritizing areas and topics subject to greater risks.

¹⁷ The Office of the Comptroller General (“CGU”) has a similar proceeding aiming to certificate anticorruption compliance programs. For more details, please refer to: <http://www.cgu.gov.br/assuntos/etica-e-integridade/empresa-pro-etica>>. Access on March 21, 2017.

- **Risk Mitigation.** Compliance programs must provide the means to mitigate competition risks, including: (i) training and internal communication; (ii) monitoring tools to assess the adequate functioning of processes and controls as well as to evaluate the effectiveness of the program; (iii) appropriate documentation of the activities related to the program, and (iv) internal discipline and incentives to compliance.
- **Program Review.** The program must also be reviewed and adjusted from time to time, according to changes in market dynamics or in the company's structure.

Finally, the **fourth chapter** addresses the impact of compliance programs on administrative penalties. In this context, the 2016 Guidelines stress that the mere existence of compliance programs is not sufficient to avoid the application of administrative penalties. Nevertheless, programs are positive for companies as they can help to quickly identify and handle potential anticompetitive issues, mainly in the following situations:

- **Leniency Program.** The timely discovery of a competition violation enables the company to be the first to apply for leniency, which can grant immunity in the administrative level or a reduction in applicable penalties by one-third to two-thirds. Executives and employees can also benefit from criminal immunity.
- **Settlement Agreements.** In the event leniency application is no longer available, the timely discovery of violations can still be useful for the company, as it gives better grounds to such company to negotiate a settlement agreement and provide the necessary information for a collaboration to be considered effective (in some occasions, when a second independent violation is found, the company may also be entitled to apply for leniency plus). According to the Guidelines, "the compliance program does not ensure the celebration of a settlement agreement, but, as in the case of leniency agreements, it may substantially increase the organization's chances of doing so."
- **Consultations.** The program can also be helpful in identifying disputable practices adopted by the company. The legality of these practices can be confirmed by CADE upon consultations, thus mitigating potential risks derived from conducts that would otherwise be engaged in without previous certainty of its legality.
- **Sentencing.** The adoption of effective compliance programs can also reduce applicable fines as, according to the Brazilian Antitrust Law, the good faith of the offender must be taken into consideration in the calculation of the fines.

As one can clearly see, Ruling SDE No. 14/04 already provided for most of the elements described in the 2016 Guidelines, albeit germinally. The other guidelines issued by the former SDE and CADE over the years have also contributed to strengthen the document.

4. Final Remarks

The existing Brazilian antitrust soft law is a powerful tool for companies and trade associations to build a solid compliance culture and educate their executives, employees, shareholders, and other stakeholders. In this context, special attention must be given to the

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

Compliance Guidelines, which certainly are of great help to the private and public sectors in developing their own mechanisms to avoid antitrust liability.

CHAPTER 31 - THE ASSUMPTION OF CASES IN THE FINANCIAL MARKET BY THE COMPETITION LAW

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The present chapter aims to demonstrate the cases related to the financial market analyzed or under analysis of CADE since Law No. 12,529/11 came into force on May 29, 2012.

It is worth noting that antitrust cases involving financial markets bring together a controversial debate – about what is the adequate authority in charge to analyze and decide competition issues as mergers and acquisitions and anticompetitive conducts on this market: CADE or the Brazilian Central Bank (“BACEN”). This discussion, however, is not the focus of the present paper.

As established by Law No. 12,529/11, on its Article 31, 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.

For instance, the payroll loans case¹ that started in 2010 – when the Law No. 8,884/94 was in force, and decided in 2012, when the Law No. 12,529/11 was in force – was a kind of milestone for CADE to confirm its jurisdiction power as a duty on the analyses of competition issues on the financial market.

Since then, many other cases have been assessed/investigated by CADE, such as several merger reviews and anticompetitive conducts. The next sections will present a summary of the following cases: payroll loans cases, the FX investigation in Brazilian offshore market, FX investigation in Brazilian onshore market, Itaú Unibanco/BMG merger, HSBC/Bradesco acquisition, and Itaú Unibanco/Citi acquisition.

1. Payroll loans case

In June 2010, a complaint² was filed by civil servants’ association – such as Federação Interstadual dos Servidores Públicos Municipais e Estaduais dos Estados do Acre, Alagoas, Amapá, Amazonas, Bahia, Maranhão, Minas Geras, Paraná, Piauí, Roraima, Sergipe e Tocantins (“FESEMPRE”) – against the state-owned Banco do Brasil (“BB”), the largest bank in the country.

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.

The complaint alleged that striking inter-brand competition among the financial institutions that offered payroll loans³ was eliminated due to contracts signed between BB and public institutions.

These contracts referred to services such as: centralization and processing of credits from 100% of the payroll generated by State or by Municipality; centralization and processing of the financial movement of all current accounts, including the single account of the State or Municipality; centralization and processing of all financial transactions of payments to creditors of the State or of the 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 more than that, the bank had exclusivity on offering the service of payroll loans for these servants. The servants of FESEMPRE, by the time of the complaint, wanted to be able to use other banks for the service. The complaint was originally filed before the Secretariat of Economic Law (“SDE”), the former authority responsible for the opening an investigation of administrative proceedings.

The SDE, however, closed the case without opening a Preliminary Investigation on June 21, 2010. The reason for this closing was (i) the nature of the payroll loan service, object of the complaint, and (ii) the exclusive powers to enforce competition rules in respect to financial markets by BACEN to identify and apply sanctions for competition cases in the financial sector, and to edit its own rules or use criteria set forth in other laws, including Brazilian Antitrust Law. Besides that, the SDE forwarded a copy of the complaint to BACEN – for the determination of a violation of the economic order and application of an eventual sanction – and to CADE (then a separate agency), for its knowledge.

It should be mentioned that is controversial the debate about what is the adequate authority – CADE or BACEN - in charge to analyze and decide competition issues as mergers and acquisitions and anticompetitive conducts in the financial market. In 2001, Brazil’s Attorney General published an opinion stating that BACEN alone should have investigatory powers in the financial sector. CADE is not bound by the opinion, but the former SDE was.

FESEMPRE raised the argument before BACEN of complementary competence between the authorities. Both CADE and BACEN had repeatedly expressed themselves in cases between financial system agents in order to confirm the complementary competence of the institutions to investigate and decide cases in the financial system. This understanding was confirmed in two large cases involving financial institutions: BB/Banco Nossa Caixa (Concentration Act No. 08012.011736/2008-41), and Unibanco - União de Bancos Brasileiros and Banco Itaú (Concentration Act No. 08012.011303/2008-96).

CADE’s President at the time, Arthur Badin, due to the referral of FESEMPRE’s complaint documents decided to open a procedure. Reporting Commissioner Vinícius Marques de Carvalho sent the files to CADE’s Attorney Office. The General Attorney Office, in turn, suggested sending an official letter to the BACEN, requesting information on any treatment given by it for the complaint. The Reporting Commissioner sent the official letter on November 18, 2010.

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.

After approximately six months analyzing the case, BACEN reported that the absence of regulation on the matter, within the scope of the national financial system, prevented it from investigate the practice and launch eventual punitive administrative proceeding against the BB.

On January 11, 2011, FESEMPRE forwarded such information to CADE and requested its assessment in the case. On February 23, 2011, pursuant to the decision of the Reporting Commissioner, Vinícius Marques de Carvalho, CADE approved to publicize the procedure and to inform BB to provide clarification about the complaint of FESEMPRE. Meanwhile, on January 14, 2011, BACEN published a regulation prohibiting financial institutions to set contracts or agreements that prevent or restrict the access of customers to credit operations offered by other institutions, including those with payroll assignments.

Yet under CADE's proceeding, on March 16, 2011, BB alleged the lack of legal reason for FESEMPRE's arguments, since the matter were in the scope of BACEN's jurisdiction. BB acknowledged that BACEN had issued a regulation prohibiting the provision of services or contracts that prevent or restrict clients' access to credit operations. BB did not cancel its exclusivity clauses on payroll loans based on the argument that the BACEN's regulation applied only to future contracts. By that time, Commissioner Marcos Paulo Veríssimo started presiding the case.

At the CADE Hearing Session No. 498, held on August 31, 2011, the Reporting Commissioner Marcos Paulo Veríssimo decided to open, considering the inaction of both the SDE and BACEN, an Administrative Process in order to investigate the complaint made by FESEMPRE. He also adopted an injunction ordering BB to suspend immediately all contracts that held with exclusivity clauses in the granting of payroll-deductible loans. It would be applied a fine of one million reais for every day that BB did not comply. The other Commissioners unanimously followed the decision.

This decision intensified the long-run controversy whether CADE has investigative powers over financial institutions. It is worth noting that the payroll case was the first case that CADE has opened an investigation of a bank for alleged violation of competition law. It was the first time in CADE's trajectory that the authority conducted an entire investigation, from investigating to final decision. As pointed out previously, earlier investigations were usually carried out by the former SDE and then sent to CADE for final judgment.

By opening an investigation specifically against a publicly-owned bank, CADE then confirmed the significant institutional independence of its commissioners.

Afterwards, BB filed a motion alleging contradictions and omissions in CADE's decision, which was denied on November 9, 2011.

In disagreement with the CADE's decision that denied the opposing objections, BB filed a Voluntary Appeal at CADE, on November 18, 2011. BB also 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 Process n.º. 08700.003070/2010-14, of eventual fine resulting from noncompliance with the decision and the course of the administrative process.⁴

⁴ Process n.º 61339-91.2011.4.01.3400 (6ª Federal Court of Federal District) and Bill of Review Appeal n.º 0072129-52.2011.4.01.0000/DF.

On November 30, 2011, the Reporting Commissioner received the Voluntary Appeal filed by BB, attributing only devolutive effect (with non-suspensive effects) to the appeal. On December 16, 2011, all documents of the process were sent to the General Attorney Office to express its opinion on the voluntary appeal filed by BB. The opinion of the General Attorney Office of January 24, 2012, concluded, in general terms, that there were no grounds for appealing in the case-file or elements that refute the arguments already addressed in the decision.

During this period, court decisions confirmed CADE's understanding of the matter and its jurisdiction, so the tendency was for CADE's final decision to be maintained by the Judiciary. On May 29, 2012, CADE unanimously approved the end of investigation, meaning that the final judgment and ending of the process were near.

BB submitted to CADE, on July 11, 2012, a settlement proposal, requesting the suspension and, subsequently, the withdrawal of the Administrative Process. CADE decided to start negotiating a settlement with BB on July 18, 2012.

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

BB agreed to end its exclusivity agreements and to inform the decision to all public entities that had contracts, within a month, pay a R\$ 99 million fine. With the settlement, it was possible to re-establish competition in the payroll loan market and, consequently, the public servants benefit from the competition between financial institutions in the supply of credit. It was also at that time 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 in respect to other markets. At this time, Law No. 12,529/11 was already in force.

2. Anticompetitive conducts

2.1 Payroll loans cases

Following the case described above, Commissioner Marcos Paulo Veríssimo recommended investigating other banks for the same practices carried out by BB.

On December 18, 2013, the GS launched a Preparatory Procedure to investigate this complaint and sent several Information Requests to the main financial institutions of the country, including those mentioned by BB in the records of the above mentioned Administrative Process. CADE requested those financial institutions to inform whether they were engaged in agreements with federated entities to offer payroll loans and if there was any kind of exclusivity.

The GS also requested information whether the banks had any knowledge of exclusivity agreements between other financial institutions and public entities for payroll loans, and if those financial institutions would be interested in expanding the offer of the service and what would be

the possible barriers to such expansion. BB was also requested to provide additional information that could support the facts previously informed to CADE.

After this preliminary investigation, the GS found evidence of exclusivity clauses in payroll loans in contracts signed with public agencies. Ten banks were involved: Itaú Unibanco (“Itaú Unibanco”), Caixa Econômica Federal (“Caixa”), Santander (“Santander Brazil”), Banco Bradesco (“Bradesco”), Banco do Estado do Rio Grande do Sul (“Banrisul”), Banco de Brasília (“BRB”), HSBC Bank Brasil (“HSBC Brazil”), Banco do Estado do Espírito Santo (“Banestes”), Banco do Estado de Sergipe (“Banese”) and Banco do Estado do Pará (“Banpará”).

The exclusivity clauses were found in, at least, four major agreements with public entities, named here: the governments of the Federal District and the States of Ceará, Rio Grande do Sul and Goiás. In those agreements, one or more banks had some kind of advantage rather than others to negotiate payroll loans with public servants. In the State of Goiás, for instance, the Act No. 18.674 created an advantage for Caixa, which held the contract to manage the state's payroll, allowing it to finance paycheck-deduction loans for up to 96 monthly installments. Other banks could only go up to 60 monthly installments.

Thus, on March 13, 2014, the GS decided to open Preliminary Investigations in order to deepen the investigation of a possible infraction against the national economic order supposedly committed by six of the aforementioned financial institutions: Itaú Unibanco, Caixa, Santander (Brazil), Bradesco, Banrisul and BRB, (Preliminary Investigations [08700.005781/2015-38](#), [08700.005761/2015-67](#), [08700.005759/2015-98](#), [08700.005755/2015-18](#)). It is worth noting that the investigations against HSBC, Banestes, Banese and Banpará were closed due to lack of evidence.

Subsequently, in order to gather more information regarding the existence of exclusive contracts signed between financial institutions and public entities, the GS sent Information Requests to various public entities, such as Municipalities, State governments and Public Agencies, based on the existence of some indication of exclusivity agreement involving the respondents and financial institutions.

As a consequence of this investigation, it should be noted that several exclusivity clauses were revoked in some contracts. The investigations are still in course.

2.2 FX investigation in Brazilian offshore market

In July 2015, CADE opened an Administrative Process (No. 08700.004633/2015-04) to investigate a so-called cartel in the Foreign Exchange Market ("Forex" or "FX") during the period from 2007 to 2013. The supposed anticompetitive practices were specifically related to: the FX spot market; FX indexes/benchmark fixing rates such as WM/Reuters, European Central Bank and BACEN (“PTAX”),⁵ and the Brazilian Real FX trading, including the BRL Non-Deliverable Forwards (BRL NDFs).⁶

⁵ PTAX is an exchange rate calculated during the day by the Brazilian Central Bank. It consists on the average of the rates reported by the dealers of US dollars along the four different windows of the day. It is the benchmark rate for the value used, for example, in hedge contracts.

⁶ NDFs can be understood as hedge instruments, as the buyer of a NDF ensures a future exchange rate for a specific contract. In countries like Brazil that impose currency controls for offshore entities and where currencies can also be

The investigation initiated due to a leniency agreement.⁷ According to the evidence provided by the leniency applicants in Brazil, through online chats on the Bloomberg platform, parties would have cartelized in order to: (i) fix price levels (specifically, fix FX spread levels) and (ii) share commercially sensitive information among competitors on the FX market. It is worth noting that similar investigations have been carried out by different antitrust authorities around the world, as such in the US and in the European Union.

The investigated banks are: Banco Standard de Investimentos, Tokyo-Mitsubishi UFJ Bank, Barclays, Citigroup, Credit Suisse, Deutsche Bank, HSBC, JP Morgan Chase, Merrill Lynch, Morgan Stanley, Nomura, Royal Bank of Canada, Royal Bank of Scotland, Standard Chartered and UBS, in addition to 30 individuals. By the time of the alleged conduct, the defendants were located outside Brazil, in foreign trading desks (offshore markets).

The conducts were alleged to have direct and indirect effects in the Brazilian market. In technical terms, FX market carries out the operations that refer to the purchase of one currency in exchange for another. Regarding the indirect effects, these exchange rates could influence domestic rates of consumption in a country, levels of investment, imports and exports, among other financial transactions based on them. About the direct effects, the GS considered that, even the BRL (real) being the official currency of the Country, a considerable number of commercial transactions by Brazilian entities are made through foreign currencies (e.g. Euro, US Dollar, British Pound Sterling).

Moreover, the FX market has benchmark rates, calculated based on the exchange rates in the market and periodically published by public and private entities – such as BACEN (PTAX), WM/Reuters and the European Central Bank – all over the world for specific pairs of currencies. These reference rates are used as a reference by multinational companies, financial institutions and investors which evaluate contracts and assets worldwide, among others.

In December 2016, CADE entered into settlement agreements with Barclays PLC, Citicorp, Deutsche Bank - Banco Alemão, HSBC Bank PLC and JP Morgan Chase & CO. The amount of the pecuniary contributions collected by CADE sums R\$ 183.5 million.

CADE suspended the investigation in relation to the banks that signed the agreements. The investigation moves forward regarding the remaining defendants: Standard Chartered Bank, The Bank of Tokyo-Mitsubishi UFJ, LTD, Credit Suisse AG, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Banco Morgan Stanley, Nomura International PLC, Royal Bank of Canada, Royal Bank of Scotland, Standard Chartered Bank (Brazil) and UBS AG, and also 30 individuals.

2.3 FX investigation in Brazilian onshore market

In December 2016, the General Superintendence opened another investigation on the FX market (Administrative Process No. 08700.008182/2016-57) to examine an alleged cartel in the

less stable, NDF trading is more common. NDFs can be performed in Brazil with Brazilian companies as well as outside Brazil by international trading desks.

⁷ Information available at: <http://en.cade.gov.br/press-releases/cade2019s-superintendence-investigates-cartel-in-the-manipulation-of-exchange-rates>. Access on February 21, 2017.

national onshore exchange rate market, involving the Brazilian currency. The supposed conducts relate essentially to spot, forward and futures operations conducted and settled in Real (BRL).

The evidence analyzed indicates attempts to coordinate exchange operations and exchange risk positions; to define prices and/or level of prices to exchange and differential spreads (such as FRP); attempts to affect the PTAX reference index of BACEN, and to share commercially sensitive information, such as risk positions, prospective activities of negotiation and/or clients' information.

Different from the above explained case (i.e. the offshore investigation), the investigated conducts in this specific proceeding refers to financial institutions and individuals located in Brazil. According to the GS, there is evidence that the banks were colluding also via Bloomberg's chat rooms from the period between 2008 and 2012.

The investigation reaches 10 financial institutions based in Brazil and 19 of their employees and/or former employees. Among them, Banco BBM; Banco BNP Paribas Brasil; Banco BTG Pactual; Banco Citibank; and HSBC Brazil; Banco Múltiplo, Banco ABN AMRO Real; Banco Fibra; Banco Itaú BBA; Banco Santander (Brazil); and Banco Société Générale Brasil. The defendants are still being notified to submit their defense.

In both cases, offshore and onshore FX procedures, CADE has been coordinating its investigations with BACEN.

3. Merger review

3.1 Itaú Unibanco/BMG case

In mid-2012, BMG S.A. ("BMG") signed an association agreement with Itaú Unibanco that aimed offering, distributing and commercializing payroll loans in Brazil, forming a joint venture called Banco Itaú BMG Consignado S.A. By the proposed deal, Itaú Unibanco would own 70% of the joint venture, while BMG would hold the remaining 30%.

The notifying parties notified the joint venture to CADE (Concentration Act No. 08700.006962/2012-39) in August 2012 and, according to them, it aimed to enhance the performance of those institutions in the market of payroll loans. By that time, the firms also justified that Itaú Unibanco would benefit from both the expertise and the network of BMG's correspondents. BMG, on its terms, would be able to raise funds at a lower cost through Itaú Unibanco. It is worth remembering that Itaú Unibanco/BMG case was the first ordinary merger review under Law No. 12,529/11. CADE reviewed the transaction in 48 days.

Regarding CADE's assessment on the definition of the relevant market and potential antitrust effects, the GS understood that payroll loans market configures a market itself, since it is not a substitute for other financial products – both from the supply and the demand-substitutability argument. From the supply perspective, the institution that offers payroll loans must meet the criteria of Law No. 10,820/03, establishing a partnership with the paying institution. From the demand side, the individual interested in the payroll loans is also subject to specific situations to access this type of credit. It means that the applicant must receive salary and depends on a partnership between his employer and the bank. Liberal professionals, for instance, are unable to receive such credit. About the geographic dimension, the GS understood that the payroll loans

market should be defined as national. Moreover, the GS understood that the argued remaining competition in the payroll loans market was enough to avoid harm to consumers.

Considering those arguments, CADE approved the transaction without any remedies. The transaction was also assessed by BACEN.

3.2 HSBC/Bradesco case

The transaction refers to the acquisition of 100% of the capital shares of HSBC Brazil by Bradesco (Concentration Act No. [08700.010790/2015-41](#)). The transaction was publicized in the market after HSBC's announcement on the closure of its activities in Brazil and Turkey in 2015.

With the referred transaction, Bradesco took on all the HSBC's operations in Brazil for USD 5.1 billion, namely regarding, retail, high income clients, commercial and wholesale banking; consumer finance and operating agreements with retailers (more than 6.000 points of sale); insurance / pension / capitalization bonds.⁸

In order to better assess the effects of the merger and collect information about the markets affected by the transaction, the GS sent several Information Requests to competitors and other players.⁹ In January 2016, by means of Order No. 140/2016, the GS declared the complexity of the transaction (i.e. non-fast track procedure), pursuant to Article 56 of Law No.12,529/11 and Article 120 of CADE's Internal Regulation. In the same occasion, the GS determined the preparation of a quantitative study by CADE's Department of Economic Studies ("DEE") on the competitive impacts arising from the transaction. Moreover, the GS determined the presentation by the notifying parties of (i) the economic efficiencies generated by the operation and of (ii) quantitative or qualitative studies that may mitigate the possible competitive concerns identified by the GS.

In April 2016, the GS published its Opinion N.º. 12/2016/CGAA2/SGA1/SG/CADE, challenging to the Tribunal the present transaction and recommending its approval subject to the signature of a Merger Control Agreement (in Portuguese "Acordo em Controle de Concentrações", or just "ACC"). Finally, in June 2016, eight months after the notification,¹⁰ following GS's recommendations, CADE's Tribunal approved the merger with restrictions. According to the Reporting Commissioner, João Paulo de Resende, the transaction led to an increase of the market concentration levels, especially within specific markets such as the cash deposit market (current accounts) and the free credit to individuals and companies¹¹.

By signing the ACC, Bradesco agreed on several behavioral remedies, among them:

⁸ Bradesco. Presentation about *Acquisition of HSBC Brasil*. August 2015. Available at:

<https://www.bradesco.com.br/site/conteudo/download/Download.aspx?file=~%2Fuploads%2F635741665745559369-hsbc-presentation.pdf>. [21-02-2017]

⁹ Among them institutions such as BB, Caixa, Itaú Unibanco, Santander, Banco Safra, Banco BTG Pactual, CCB Brasil – China Construction Bank, Banco Volkswagen, Bancoob - Banco Cooperativo do Brasil, Banco GMAC, Scotiabank, SICREDI, Brasilprev Seguros e Previdência, Embraccon Administradora de Consórcio, Scania Administradora de Consórcios, Porto Seguro, BB Mapfre SH1 Participações and Rodobens Administradora de Consórcios.

¹⁰ Parties notified the transaction on 27 October 2015.

¹¹ For more details on the assessment, check the full Report of the case at www.cade.gov.br

- I. not being involved in any mergers and acquisitions of financial and consortium administration institutions acting in Brazil during 30 months, beginning at the publication date of the Tribunal's decision on the Federal Official Journal;
- II. offering incentives to former HSBC Brazil clients from several municipalities to transfer their credit operations (consumer credit modalities) into other financial institutions;¹²
- III. improve the proceedings applied in the credit and wages portability procedures, and
- IV. implement measures that enhance the transparency and the quality of the services provided to their clients; and conduct training sessions to its personnel aiming at improving the services provided to its clients.

The density of this case sign CADE's capability to assess such complex case in financial markets. BACEN also approved the transaction with remedies in January 2016, almost 6 months before CADE's approval.

3.3 Itaú Unibanco/Citi case

This case refers to a transaction that involves the corporate restructuring of some companies of the Citibank group¹³ ("Citi"). Citi announced, in October 2016, that it reached a definitive agreement to sell its consumer banking business in Brazil to Itaú Unibanco. Within this transaction, Citi's consumer banking operations in Brazil would continue to operate in the ordinary course through Itaú Unibanco, while Citi would continue serving clients of its corporate and investment bank, commercial and private bank businesses in the country.¹⁴

The information regarding this case is still very limited, as it was not yet formally notified to CADE. In truth, parties are still awaiting CADE's approval to duly file the case. It means that the transaction is currently in a confidential "pre-appraisal" procedure, in which parties discuss the best way of preparing all the filing together with the authority. This informal procedure usually happens in complex cases, when CADE requests preliminary information before giving the parties the approval for formal filing. The antitrust authority has also begun notifying competitors for information about potential competition risks brought about by the deal, even before the filing.¹⁵

As like as the above-mentioned cases, this transaction is also subjected to the approval of BACEN.

¹² Exception: Caixa, BB and Itaú, which are among the largest banks in the country.

¹³ Information provided by material available at Itau webpage: <[https://www.itau.com.br/arquivosstaticos/RI/pdf/en/IHF-Fato_Relevante_CITI_\(FOR\)_ing.pdf](https://www.itau.com.br/arquivosstaticos/RI/pdf/en/IHF-Fato_Relevante_CITI_(FOR)_ing.pdf)>. Access on February 21, 2017.

¹⁴ Information available at: <<http://www.businesswire.com/news/home/20161008005039/en/Citi-Announces-Sale-Consumer-Business-Brazil-Ita%C3%BA>>. Access on February 21, 2017.

¹⁵ Information available at: <<http://www.valor.com.br/financas/4868032/aprovacao-de-compra-do-citi-pelo-itau-deve-atrasar>>, Access on February 21, 2017.

CHAPTER 32 - OVERVIEW OF THE INTERPLAY BETWEEN CADE AND THE PROSECUTION OFFICE IN THE FIGHT AGAINST CARTELS IN BRAZIL

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1. Introduction

The Brazilian Federal Constitution states expressly that the economic order is based on the principles of free enterprise, free competition and consumer defense (Article 170). It also states that the law should repress abuse of economic power aiming at the dominance of markets, elimination of competition, and an arbitrary increase of profits (Article 173, Paragraph 4).

The Brazilian System for the Defense of Competition (Sistema Brasileiro de Defesa da Concorrência – “SBDC”) derives from the above constitutional provisions, and is based on three basic pillars for action: (i) preventive (related to the premerger review system); (ii) repressive (related to the prosecution and punishment of anticompetitive conducts in general, but especially of cartels), and (iii) educational (related to competition advocacy).

The SBDC is currently organized under the rules laid down by Law No. 12,529/11 (“Brazilian Antitrust Law”), which came into force on May 29, 2012. The Brazilian Antitrust Law made significant changes to the previous antitrust framework in Brazil, mainly with regard for the institutional design of CADE, but also related to the prosecution of cartel behavior. These changes were brought in by the Brazilian Antitrust Law in the context of ongoing efforts to concentrate scarce resources, and enhance the tools available to the authorities for fighting cartels.

In Brazil, where the antitrust legislation establishes administrative and civil liabilities for individuals and legal entities involved in cartel behavior, and also criminal liability for individuals involved in these practices, both CADE and the Prosecution Office (Ministério Público) play a significant role in deterring, prosecuting and punishing such practices. In this context, based on an analysis of the Brazilian legal framework, opinion of scholars and case law, this chapter aims at setting out briefly the main aspects of the interplay between CADE and the Prosecution Office in the fight against cartels.

As described in greater detail below, cooperation between CADE and the Prosecution Office in Brazil has been increasing over the years. In this context, on September 30, 2016, the two entities issued a joint resolution (“Joint Resolution No. 1/16”), which consolidates and organizes the attributions of the Prosecution Office in connection with defense of the economic order.¹ It is undeniable that cooperation between CADE and the Prosecution Office is a path with no return, but

¹ Joint Resolution No. 1/16 is based on the legal provisions laid down in the Brazilian Antitrust Law and in Law No. 75/93, which governs the organization, attributions and the statute of the Federal Prosecution Office.

there are several issues that still need to be further developed by means of legal provisions, regulation and court decisions.

2. General Aspects of the Prosecution of Cartels In Brazil

As widely accepted in the dominant economic literature, the net effects of cartel behavior for society are invariably negative. By artificially limiting competition in a certain market and enabling its participants to increase prices and restrict supply, cartelized practices critically damage consumers. Moreover, cartels may also be detrimental to technological innovation in a given sector, as they significantly reduce incentives for competitors to improve their productive processes and launch new and better products on the market.²

In addition to their harmful effects, cartels are also considered as one of the most difficult behaviors to be detected, investigated and proven. Aware of the illegality of their collusive conduct, members of a cartel are usually discreet and secretive, and hide the evidence of their actions (contacts, meetings, exchanges of information by various means, etc.). Moreover, the evolution of communication technologies and the shortening of distances for exchanging information make meetings among the participants of the collusive scheme unnecessary, and thus further facilitate the organization and practice of cartels, as well as the monitoring and punishment of members who may try to abstain from acting in concert and boycott the rules governing this practice. For these reasons, it is often necessary for the competition authorities to make a great effort to gather evidence or minimal signs of the conduct.

In light of the foregoing, in many antitrust jurisdictions, cartels are frequently assessed under some type of *per se* illegality rule, under which mere evidence of the existence of the agreement is sufficient to convict individuals and legal entities involved in the collusive conduct (in other words, there is no need to prove and measure the negative net effects of the conduct). Furthermore, many jurisdictions are increasingly adopting a large variety of rules and measures to establish and/or improve not only the administrative prosecution and punishment of cartel practices, but also their systems of civil and criminal liability.

This is the case of Brazil, where both the administrative and criminal policies seek to concentrate efforts and scarce public resources on combating cartel behavior. Under the Brazilian legislation, cartels are considered not only an administrative offense (Article 36, Paragraph 3, I and II, Brazilian Antitrust Law), but also a crime (Article 4, Law No. 8,137/90). Moreover, Brazilian legislation establishes that any person harmed is authorized to file a civil lawsuit seeking compensation for damages caused by cartel practices (Article 47, Brazilian Antitrust Law), and the Prosecution Office (among other entities) is authorized to file class actions against those involved in the collusive conduct (Articles 1 and 5, Law No. 7,347/85).

Moreover, given the difficulties in detecting and obtaining evidence of cartel behavior, the Brazilian antitrust legislation has over the past years increasingly adopted sophisticated investigative techniques and mechanisms to assist in the investigation of cartelized conduct, such as

²Information available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_leniencia.pdf>. Access on: September 18, 2016.

the possibilities of carrying out search and seizure operations authorized by court decisions, and reaching leniency agreements or settlements.

In this context, it is also important that all entities involved in the prosecution of cartels should cooperate among themselves to rationalize the use of investigative tools, save time and resources and increase the chances of finding evidence and punishing.

Cooperation between CADE and the Prosecution Office is not new and, in fact, has been increasing over the years. At the present time, several provisions of the Brazilian Antitrust Law and CADE's Internal Regulation govern the interplay between CADE and the Prosecution Office. Moreover, as mentioned above, recently these authorities issued Joint Resolution No. 1/16, which consolidates and organizes the attributions of the Prosecution Office in connection with defense of the economic order, based on the Brazilian Antitrust Law and Complementary Law No. 75/93. Issuing this Resolution aimed at saving time in decision-making processes, improving procedures, and eliminating unnecessary activities performed by both authorities. In the following sections, we shall present a brief overview of the interplay between CADE and the Prosecution Office in the fight against cartels in Brazil, under each type of liability system provided for by the Brazilian legal framework.

3. A Brief Overview of the Interplay Between CADE and the Prosecution Office in Fighting Cartels in Brazil

3.1 Administrative Liability

At administrative level, the procedures for prosecuting cartel behavior are set out under the Brazilian Antitrust Law and CADE's Internal Regulation, encompassing basically four stages: (i) preparatory procedure for preliminary investigation (*procedimento preparatório de inquérito administrativo*), (ii) preliminary investigation (*inquérito administrativo*), (iii) administrative process (*processo administrativo*) and (iv) decision-making phase at CADE's Tribunal. The first two stages are usually initiated in situations where the General Superintendence does not have sufficient signs of anticompetitive behavior. The administrative process is initiated in situations where there is, in the opinion of the General Superintendence, sufficient indication of the existence of anticompetitive behavior. After examining the evidence during the investigation phase, the General Superintendence issues a non-binding opinion in which he/she indicates whether or not he/she believes a cartel or other anticompetitive behavior has occurred and, at the final stage, the CADE's Tribunal hands down a final decision.

According to the Brazilian Antitrust Law, companies that have committed anticompetitive behavior are subject to fines that may range between 0.1% and 20% of the gross revenues registered by the company, group or conglomerate in the year prior to starting of the Administrative Process, in the field of economic activity in which the violation occurred.³ This fine may not be lower than

³ CADE has issued a resolution (CADE Resolution No. 3/12) containing a list of "fields of economic activities" that should be considered for purposes of calculating the fine.

the advantage obtained from the underlying conduct.⁴ The fines applicable to individuals are to be calculated based on the fine effectively levied on the company and may vary from 1% to 20% of the fine levied on the company. In the case of other public or private entities, and also any associations of entities or persons that do not exercise business activity, if it is not possible to use the above criteria, the fine would be between R\$ 50 thousand and R\$ 2 billion.

In addition to these fines, CADE may impose other penalties, such as a prohibition on obtaining official financing, banning participating in bidding proceedings for a period equal to or greater than five years, or ordering a company's spin-off, transfer of the corporate control, sale of assets or partial stoppage of activities.

As to the interplay and cooperation between the Prosecution Office and CADE, the Brazilian Antitrust Law expressly states only three types of interaction: (a) the General Superintendence may ask the Federal Prosecution Office and Federal Police to help with the investigation (during stages (i) and (ii) indicated above),⁵ (b) the Tribunal must notify its final decision to the Federal Prosecution Office (stage (iv) indicated above), to enable the latter to take applicable measures within his jurisdiction,⁶ and (c) the Federal Prosecution Office may issue an opinion in the course of the administrative process (stage (iii) indicated above) on request from the Reporting Commissioner or ex officio.⁷

CADE's Internal Regulation provides further details related to these three types of interaction and also grant the Federal Prosecution Office the right to participate in CADE's sessions of judgment, while also stating that CADE and the Prosecution Office may enter into cooperation agreements to implement the attributions foreseen in the Brazilian legal framework.

In this context, CADE and the Prosecution Office issued Joint Resolution No. 1/16,⁸ which provides for a broader and more intense involvement of the Prosecution Office in CADE's activities, contemplating possibilities of participation that are not expressly foreseen by the Brazilian Antitrust Law, such as: (a) having one member from the Prosecution Office at CADE's headquarters with the right to participate in any stage of the procedure and to request discovery (production of evidence) at any time; (b) access to CADE's database and case records in the same conditions as the commissioners, and (c) being notified by CADE of any proceeding filed, settlement proposal or leniency agreement, among others.

Over the years, it is fair to say that interface between CADE and the Prosecution Office has become more intense, especially in cases involving cartel behavior.⁹ Considering that the

⁴ This could give rise to an interpretation that the fine may be higher than the maximum percentage set, if the advantage obtained from the conduct is higher. CADE is currently discussing this issue.

⁵ Article 66, Paragraph 8, Brazilian Antitrust Law.

⁶ Article 9, Paragraph 2, Brazilian Antitrust Law.

⁷ Article 20, Brazilian Antitrust Law.

⁸ Complementary Law No. 75/93.

⁹ It is important to note that there was also a significant increase in the number of cartel cases decided on by CADE in recent years, especially as from 2013. In that year, CADE decided fifteen cartel cases, which can be considered an expressive number, if compared to the quantity of cases decided in 2012 (four cases in total). In 2014, the Tribunal rendered a decision in seventeen cases (RIBAS, Guilherme Favaro Corvo. **Processo administrativo de investigação de cartel**. São Paulo: Singular, 2016, p. 66). In 2015 and 2016, sixteen cartel cases were decided in each year. Information available at:

Brazilian Antitrust Law foresees three specific types of interaction between the two entities, Joint Resolution No. 1/16 appears to increase the possibilities initially envisaged by the law. However, leaving aside a possible discussion of its legality, the resolution seems to reflect the practices and cooperation that already occur between CADE and the Federal Prosecution Office on a day-to-day basis.

As to the statistics of this interaction, it is interesting to note that CADE has initiated an expressive amount of administrative processes – almost 30% of the cases initiated by CADE between 1996 and 2015 – arising from complaints filed directly by the Prosecution Office directly with the antitrust authority.¹⁰ In most of these cases, the Prosecution Office had already started an investigation when it initiated the complaint at CADE.¹¹

This leads to an interesting example regarding this interaction, which is the use by CADE of evidence obtained by the Prosecution Office. In general, CADE accepts and uses evidence collected by other enforcement authorities as long as it meets the requirements established by CADE's case law.¹² In this regard, it is usual to see CADE using evidence collected through search and seizure orders or wiretaps (*interceptação telefônica*) authorized by courts in the context of investigations carried out by other enforcement authorities, including the Prosecution Office.

3.2 Civil Liability

With respect to the private enforcement of antitrust laws, the Brazilian Civil Code has a general liability provision (Article 927) which allows damage claims in case of any harm caused by unlawful conduct. In addition, the Brazilian Antitrust Law (Article 47) states that individuals or companies harmed by anticompetitive behavior may seek compensation for damages, individually or collectively, through the Prosecution Office, associations and other entities listed in Article 5 of Law 7,347/85 (Public Civil Action Law).

It is important to note that applicants for leniency have no protection or immunity in relation to claims for damages arising from cartel behavior. Under the Brazilian system, the civil and administrative spheres are independent of each other, which means that a decision rendered by CADE does not bind other authorities (including the courts and Prosecution Office) and vice versa. It is possible for CADE and other enforcement authorities to reach different conclusions as to the occurrence of the offence, since the requirements for verification of each kind of violation (administrative vs. civil) are different. In the case involving the generic medication cartel,¹³ for example, CADE decided that anticompetitive conduct had occurred and convicted the defendants at

<http://cadenumeros.cade.gov.br/QvAJAXZfc/opensdoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmero.s.qvw&host=QVS%40srv004q6774&anonymous=true>. Access on: March 5, 2017.

¹⁰ RIBAS, Ob. cit., p. 181.

¹¹ For example, in Administrative Process No. **08700.005789/2015-02**.

¹² The requirements are: (i) the evidence must be licit, (ii) the parties/defendants related to the evidence must have the opportunity to discuss it with the authority who collected it (adversarial principle), and (iii) the use of the evidence in an administrative process must be allowed by the courts (RIBAS, Ob. cit., p. 142). For more details regarding the requirements cited, please refer to the decisions rendered in the following administrative processes No.: 08012.004599/1999-18, 08012.010932/2007-18 and 08012.006019/2002-11, decided by the Tribunal respectively on May 9, 2007, March 3, 2015 and July 29, 2008.

¹³ Administrative Process No. 08012.009088/1999-48, decided by the Tribunal on November 9, 2005.

administrative level; a Civil Court in São Paulo,¹⁴ however, decided to dismiss the public civil action (*ação civil pública*) filed by the Prosecution Office, understanding that no wrongdoing was committed, nor any evidence of damages.

Unlike other jurisdictions, where there are mechanisms that create incentives for private enforcement actions (e.g., treble damages), in Brazil, plaintiffs may seek single damages compensation for pecuniary losses, i.e, actual damages and lost profits. In some cases, according to recent case law from the Brazilian courts, plaintiffs may also be entitled to non-pecuniary losses (*danos morais*), which derive from losses related to the reputation of the plaintiff on the market or even collective non-pecuniary losses, as a consequence of having offended society and consumers in general.

As opposed to the administrative and criminal spheres, where it is possible to observe a significant increase in enforcement activities, private enforcement of antitrust law is still at a very early stage in Brazil, if one looks at the number of private actions ruled on by the courts. It appears that parties harmed who could potentially initiate a claim are not aware of their right to compensation, or may also face practical and procedural difficulties, such as gathering evidence of the illicit conduct.

On the other hand, it is fair to say that there has been an increase in interest by the Brazilian antitrust authorities in discussing bills of law and other actions to encourage damage litigation by potential injured parties.¹⁵ There has been a recent increase in the filing of lawsuits seeking compensation for damages deriving from cartels and other anticompetitive conduct, especially in collective-redress types of claims initiated by the Prosecution Office (such as public civil actions). Most of the civil lawsuits initiated by the Prosecution Office and with national impact arise from investigations initiated or administrative processes decided on by CADE¹⁶ – and are still pending a final decision (for example, the cases of industrial gases and subway trains cartels).

In a cartel case decision rendered in 2010, CADE included a recommendation to send a copy of its decision to the representative of the Prosecution Office active at CADE¹⁷ for the purposes of analyzing the possibility of filing a public civil action,¹⁸ in an effort to encourage plaintiffs. Currently, as stated in section 3.1 above, the Tribunal has the duty to notify its final decision to the Prosecution Office, to enable the latter to undertake the measures applicable within

¹⁴ Public Civil Action No. 0029912-22.2001.403.6100 – 14th Civil Court of São Paulo. For more details regarding comparison of the decisions rendered in this case, please see the work of Leopoldo Pagotto (PAGOTTO, Leopoldo. **Aspectos de direito econômico da sentença da ação civil pública proposta contra o alegado cartel dos genéricos**. Revista do IBRAC, São Paulo, No. 18 / 2010).

¹⁵ For instance, CADE recently submitted for public consultation a draft resolution (Public Consultation No. 05/16) aiming at regulating access to evidence by the Prosecution Office and individuals/companies affected by anticompetitive conduct. One of the purposes of this resolution still under discussion is to encourage private enforcement of antitrust laws by means of damage claims. In line with this, Article 7 of this draft resolution states that the Prosecution Office should have full access to evidence from leniency agreements to facilitate civil and criminal prosecution.

¹⁶ CARVALHO, Livia Cristina Lavandeira Gândara de. **Responsabilidade civil concorrencial: a busca pela efetiva reparação de danos**. Rio de Janeiro: Fundação Getulio Vargas Direito-Rio, 2011, p. 25

¹⁷ Also to potential injured parties and associations.

¹⁸ Please refer to the decision rendered by Commissioner Fernando Furlan in Administrative Process No. 08012.009888/2003-70 (“Industrial Gases Cartel”), decided by the Tribunal on September 6, 2010.

its jurisdiction, which include filing public civil actions and criminal actions (see section 3.3 below).

3.3 Criminal Liability

Law No. 8.137/90 contains provisions that classify certain anticompetitive conduct as criminal offences¹⁹. Items I and II of Article 4 of Law No. 8, 137/90 state that it is a crime against the economic order: (i) to abuse economic power, dominating the market or eliminating, total or partially, competition by means of any kind of understandings or agreements by companies and (ii) to establish an agreement, cooperation, understanding or alliance among suppliers, seeking: (ii.a.) the artificial fixing of prices or quantities to be sold or manufactured, (ii.b.) regionalized control of the market by a company or group of companies, and (ii.c.) control, to the detriment of competition, of the distribution network or of suppliers.

Under Article 4 of Law No, 8,137/90, individuals²⁰ involved in the crime of a cartel are to be punished with imprisonment from two to five years or a monetary penalty. The imprisonment penalty may be aggravated from 1/3 to 1/2, if : (i) the crime causes serious damage to collective wellbeing, (ii) it is carried out by a public servant in the exercise of his/her position, or (iii) it is carried out in relation to the provision of services or goods that are considered essential to life or health. The imprisonment penalty, however, may also be converted into a fine (Article 9).

According to Article 15 of Law No, 8,137/90, criminal charges of a cartel are public in nature and therefore, can only be initiated by the Prosecution Office. However, any individual or public entity, such as CADE, may offer information and evidence of cartel practices to the Prosecution Office.

In the Brazilian system, the criminal and administrative spheres are independent from each other. A decision rendered by CADE, for example, does not bind the criminal authorities (including the Prosecution Office) and vice versa. In other words, it is possible for CADE and the criminal authorities to reach different conclusions as to whether or not to initiate a proceeding and punish those involved in the offence, especially since the requirements for qualification of the facts as a violation (administrative vs. criminal) are different.

Despite the independence of the spheres, there is growing cooperation between CADE and the Prosecution Office in the criminal sphere. As mentioned above, the Brazilian Antitrust Law states that CADE's Tribunal is to notify the Prosecution Office of its decisions in administrative processes, to enable the criminal authorities to take the applicable legal measures (Article 9, Paragraph 2)²¹. According to Joint Resolution No. 1/16, the representative of the Prosecution Office must be notified in the following cases, among others: (i) commencement and closing non-confidential administrative inquiries for the investigation of violations of the economic order; (ii)

¹⁹ In addition, Article 90 of Law No. 8,666/93 specifically addresses cartel behavior organized in the context of public tenders.

²⁰ Under the Brazilian legislation, only individuals can be criminally prosecuted (except in case of environmental crimes).

²¹ Please note that notification of the Prosecution Office to inform a decision to convict rendered in an administrative process was already a practice at CADE, even before Joint Resolution No. 1/16 came into force (October 3, 2016). In this regard, please see Administrative Process No. 08000.015337/1997-48, Reporting Commissioner Ruy Santa Cruz Lima, decided by the Tribunal on October 27, 1999.

commencement of administrative processes for the imposition of penalties for infringements of the economic order; (iii) submission, by the General Superintendence, of the case records of administrative processes to the Tribunal; (iv) settlement proposals that have been included on the agenda of the Tribunal for analysis and ratification (Article 4); and (v) execution of a leniency agreement by the General Superintendence, when filing the non-confidential preliminary investigation or administrative process (or before this, if the agreement is made publicly available by the General Superintendence). These notifications to the representative of the Prosecution Office at CADE must be done using an electronic procedure or in person (Article 3, Paragraph 1). Moreover, this representative has access to case records available in CADE's electronic system in the same conditions as a Reporting Commissioner (Article 3, Paragraph 2).

Besides the formal communications mentioned above, CADE and the Prosecution Office effectively cooperate with each other within the scope of investigative measures. As of 2003, administrative and criminal authorities began to cooperate with regard to court ordered telephone wiretaps and search and seizure operations, and also in the context of executing leniency agreements.²² Since then, CADE has entered into several technical cooperation agreements with the Federal and State Prosecution Offices to coordinate investigative procedures to combat violations of the economic order and organize the flow of information between these entities.²³ These agreements, among other measures undertaken by the federal government and the states (e.g., the development of cartel repression working groups, forensics labs and cartel-specialized investigation units),²⁴ have enabled the criminal authorities to expand the range of markets and sectors investigated.²⁵

In this context, there have been many cases in which the criminal authorities, together with antitrust administrative authorities, carried out search and seizure operations to collect evidence for both criminal investigations and administrative processes.²⁶ Effective cooperation between these entities is also observed in regard to the execution of leniency agreements by CADE together with the Prosecution Office. Although Joint Resolution No. 1/16 did not specifically address details on

²² Cooperation between CADE and the Prosecution Office also predates the issuance of Joint Resolution No. 1/16. As stated by Ana Paula Martinez, “the year of 2003 may be considered a milestone in cooperation between the spheres, with execution of the first leniency agreement within the scope of an ongoing criminal investigation and with the first search and seizure operation to collect evidence of an alleged cartel relying on participation of the two authorities. If on one hand the administrative authority can draw on specialized know-how, on the other, the criminal authority has wide investigative experience and capillarity in the national territory, permitting a more comprehensive collection of evidence” (MARTINEZ, Ana Paula. **Repressão a Cartéis: Interface entre Direito Administrativo e Direito Penal**. São Paulo: Singular, 2013, p. 244).

²³ These agreements are available at: <http://www.cade.gov.br/acesso-a-informacao/convenios-e-transferencias/acordos-nacionais>. Access on: March 05, 2017.

²⁴ For example, in 2009, the National Strategy to Fight Cartels (*Estratégia Nacional de Combate a Cartéis* – “ENACC”) was established, an effort by the Brazilian Ministry of Justice and the National Association of Criminal Prosecution Offices (*Associação Nacional do Ministério Público Criminal* – “MPCrim”), to bring together experts from several bodies, including CADE and the Prosecution Office, to discuss strategies and action plans to repress cartels in Brazil.

²⁵ MARTINEZ, Ob. Cit., p. 244/245.

²⁶ The former Economic Law Secretariat (*Secretaria de Direito Econômico* – “SDE”), which was replaced by the Superintendent-General in the new institutional design of CADE, joined the Prosecution Office in some search and seizure operations to facilitate the filtering and selection of documents relevant to the investigation, due to SDE's know-how in the repression of cartels. In this regard, for example, refer to Administrative Process No. 08012.011853/2008-13, decided by the Tribunal on February 11, 2014.

cooperation between CADE and the Prosecution Office with regard for these investigative measures, it is fair to state that the increasingly cooperative relationship between the entities is an unchanging path.

3.4 Leniency Agreements

Leniency agreements are important mechanisms for the investigation of cartel behavior, given the difficulty in detecting and obtaining evidence related to this type of conduct. Articles 86 and 87 of the Brazilian Antitrust Law state that CADE, by means of its General Superintendence, may enter into a leniency agreement with legal entities and/or individuals involved in anticompetitive behavior, as long as they meet the requirements set by the Brazilian Antitrust Law, such as the obligations of confessing the participation in the violation and effective cooperation. In exchange for the confession of participation and effective cooperation, the legal entity and/or individual may benefit from extinction of the punitive ability of the enforcement authorities or a reduction from one to two thirds of the applicable penalty in this sphere. Moreover, since cartels are also considered a crime, execution of a leniency agreement determines suspension of the statute of limitations and impairs the filing of criminal charges against individuals who are also signatories of the leniency agreement. Once the Tribunal confirms fulfillment of the conditions set under the leniency agreement, the individuals who applied for leniency benefit from the automatic extinction of the possibility of punishing the criminal offence.

From a historic standpoint, leniency agreements are relatively new in Brazil, considering that they were introduced into the Brazilian antitrust legislation only in 2000, and that the first one was signed in 2003.²⁷ This first leniency agreement was a milestone for the policy of anticompetitive behavior in Brazil and, from that moment on, CADE started to increase the enforcement of such conduct, with special attention to cartel repression.

Although certain rules applicable to the negotiation and execution of leniency agreements in Brazil have been amended, some of their aspects still raise discussions among scholars. This is the case, for example, of the lack of a legal provision on the compulsory participation of the Prosecution Office in the execution of leniency agreements whenever they produce effects in the criminal sphere (i.e., extinction of the possibility of punishing the criminal offence). This discussion is mainly grounded on the fact that, as seen above, the execution and verification of fulfillment of the terms of leniency agreements automatically affects the constitutional exclusive remit of the Prosecution Office to submit charges of unconditioned criminal prosecutions (Article 129, I, of the Federal Constitution), as in the case of the crime of a cartel.²⁸

In the light of these questionings as to the constitutionality of the criminal effects of the Brazilian leniency program (which have not yet been addressed by Brazilian courts), on the one hand, CADE has, as a matter of practice, been frequently inviting the Prosecution Office to

²⁷In a cartel case involving the market for private security. Please refer to Administrative Process No. 08012.001826/2003-10 (“*Cartel dos Vigilantes*”), decided by the Tribunal on October 04, 2007

²⁸ SOARES, Rafael Jr. **Da impossibilidade do uso do acordo de leniência como forma de impedir o oferecimento de denúncia pelo Ministério Público.** October, 2010. Available at: <http://www.ibccrim.org.br/desenv/site/boletim/exibir_artigos.php?id=3535>. Access on: September 2, 2016.

participate in execution of the agreements.²⁹ In this way, CADE seeks to assure the signing parties of greater legal certainty and avoid future complaints as to the validity of executed leniency agreements. On the other hand, in the case of antitrust violations with criminal repercussion, the Prosecution Office has not been submitting charges against the beneficiaries of leniency agreements.³⁰

4. Final Remarks and Conclusion

Based on an analysis of the Brazilian legal framework and case law at CADE, is possible to identify that CADE and the Prosecution Office cooperate in several aspects in the three enforcement spheres (administrative, civil and criminal). It is unquestionable that interaction between these entities has increased over the years, especially in the context of cartel investigations. In addition to the already-existing legal framework (Brazilian Antitrust Law, CADE's Internal Regulation and technical cooperation agreements), recently CADE and the Prosecution Office issued Joint Resolution No. 1/16.

Although this resolution aimed at regulating this interplay, some issues still lack clear guidelines. This is the case of the lack of clear guidance with respect to the use of evidence collected by other enforcement authorities in administrative process at CADE or with respect for the need for mandatory participation of the Prosecution Office in the execution of a leniency agreement whenever it produces effects in the criminal sphere. It is undisputable that cooperation between CADE and the Prosecution Office is a reality, but there are still aspects that require further clarification through the enactment of additional rules and/or development of case law.

²⁹ CADE. **Guia do programa de leniência antitruste do CADE**. May, 2016. Available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia_programa-de-leniencia-do-cade-final.pdf>. Access on September 5, 2016.

³⁰ ANDERS, Eduardo Caminati; BAGNOLI, Vicente; PAGOTTO, Leopoldo (cord.); GIANINNI, Adriana Franco [et al.]. **Comentários à nova lei de defesa da concorrência: Lei 12.529, de 30 de novembro de 2011**. Rio de Janeiro: Forense; São Paulo: Método, 2012, p. 265).

CHAPTER 33 - CADE'S MARKET STUDIES IN LIGHT OF THE PRINCIPLES AND RECOMMENDATIONS OF THE INTERNATIONAL COMPETITION NETWORK (ICN): AN OVERVIEW

Marcel Medon Santos
Vivian Fraga do Nascimento Arruda
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1. Introduction: market studies as a manifestation of competition advocacy

The present chapter aims at addressing CADE's activity in a central area for competition as a worldwide practice: competition advocacy, particularly in the form of market studies, as a means to assess state of competition, promote competition culture and help deter anticompetitive actions.¹

Competition advocacy is a key tool in addressing public restrictions to competition, further to supporting the efforts of competition agencies in dealing with private anticompetitive behavior. The issue here is the promotion of competition in ways other than enforcement action against individual undertakings.

In the context of competition advocacy, market studies carried out by antitrust authorities stand as a valuable instrument to address competition problems in specific sectors of economy.² Based on the OECD Roundtable on Market Studies in June 2008, ICN has pointed out that market studies are usually performed either prior to enforcement action when anticompetitive behavior in certain sector is suspected, but competition authorities are unaware of its exact nature and source, or as an introduction for competition advocacy, where there is no suspected anticompetitive behavior but it seems the market is not working well for consumers.³ As an instrument of advocacy, market

¹ In the words of Terry Murrissa, competition advocacy is “aimed at strengthening the competitive environment through mechanisms that do not involve the use of coercive measures, and the use of active relationships with other government agencies and an increased understanding by the general public of the benefits of competition”. See MURRISA, Terry. *Materials of the First international competition network*, Naples, 2002, apud KNYAZEVA, Irina. Competition Advocacy: Soft Power in Competitive Policy. *Procedia Economics and Finance*, Sibiu, v. 6, p. 280-287. Available at <http://ac.els-cdn.com/S221256711300141X/1-s2.0-S221256711300141X-main.pdf?_tid=94b6bbfa-f47b-11e6-92ac-00000aab0f26&acdnat=1487272409_0414d28af206afd464909b0381cc91c6>, p. 281. Access on February 20, 2017.

² Particularly in regards to the definition of *market studies*, the Comisión Nacional de la Competencia, the Spanish competition authority, described this function in the following terms “market studies can be more appropriate than pure enforcement activities where competition problems identified are not due to specific anticompetitive behaviors of operators and affect the whole of the industry. Through market studies we can detect market flaws and evaluate regulations that may be unjustifiably distorting competition i.e. by establishing unnecessary entry barriers”. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT – OECD. *Policy Roundtables: Market Studies 2008*. Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, page 110, apud INTERNATIONAL COMPETITION NETWORK – ICN. *Market Studies Project Report*. Presented at the 8th Annual Conference of the ICN Zurich, June 2009. Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc363.pdf>>, p. 3. Access on February 20, 2017.

³ ICN. Market Studies Project Report, cit., p. 3.

studies can identify the origins of a weakening of competition and propose appropriate remedies (e.g. recommendations to decision makers, or voluntary action by market players) in the context of public restrictions on competition or inefficient market equilibrium.

Finally, competition advocacy in general and specifically by means of market studies and enforcement work are interconnected, and actually mutually reinforcing.⁴

2. Competition advocacy and market studies in the Brazilian System for the Defense of Competition

Law No. 12,529/11 gave birth to profound changes in antitrust law in Brazil and also redefined the framework for the exercise of competition advocacy in the country.

Under the former Brazilian Antitrust Law (Law No. 8,884/94), CADE and the former Secretariat of Economic Law – SDE were in charge of the exercise of competition advocacy.⁵ The SDE then launched a series of publications, guidelines, seminars and exchange programs related with advocacy issues. Nevertheless, in spite of the absence of legal provision, SEAE turned out to be a de facto promoter of the competition advocacy in the country in addition to its work in the context of merger review and anticompetitive conduct.⁶

After the debates which led to the unification of the competences of the former SDE and SEAE into a more powerful CADE as set forth in the Brazilian Antitrust Law, SEAE was given a focus on competition advocacy issues instead of merger review and investigations of anticompetitive practices.⁷ CADE would also be responsible for competition advocacy,⁸ particularly by means of its Department of Economics Studies – DEE – which has the competency to prepare economic studies and opinions.⁹

Note that According to the Brazilian Antitrust Law, the so-called Brazilian System for the Defense of Competition is composed of only two different entities: CADE and SEAE.

The scope of the present article is to comment on CADE's work on market studies advocacy since the entering into force of the Brazilian Antitrust Law. SEAE's work in such area,¹⁰

⁴ ICN. Advocacy Working Group Report – Advocacy and Competition Policy, International Competition Network Conference, Naples, Italy, 2002, Executive Summary, page iv, apud ICN. Market Studies Project Report, cit., p. 14: “[e]nforcement is strengthened by active advocacy, and advocacy is less effective in the absence of enforcement powers, or when enforcement lacks credibility”.

⁵ Articles 7 and 14.

⁶ REIS JÚNIOR, Alexandre Jorge dos et. al.. *Advocacia da Concorrência: Propostas com Base nas Experiências Brasileira e Internacional*. São Paulo: Editora Singular, 2016, p. 31.

⁷ See Article 19.

⁸ Article 9.

⁹ Article 17.

¹⁰ SEAE. *Advocacia da Concorrência*. Available at <<http://seae.fazenda.gov.br/assuntos/advocacia-da-concorrencia>>. Access on February 20, 2017. See also *Sectoral Overview*. Available at <<http://seae.fazenda.gov.br/central-de-documentos/panoramas-setoriais>>. Access on February 20, 2017. On the referred web pages, it is possible to identify the various studies – especially Technical Opinions – conducted by SEAE since 2006 on several sectors of economy. Note that the majority of such studies originated from official letters issued to SEAE by CADE or the several Public Prosecution Offices across the country in order to assess local competition issues. As a result of the studies, SEAE has in many cases issued recommendations to local or national authorities for them to implement certain measures in the

which is of course remarkable just as its whole work on competition advocacy, will not be addressed here.

3. The ICN principles and best practices for conducting market studies

The ICN is the international body composed of members representing national and multinational competition authorities (including CADE) who discuss competition policy principles across the global antitrust community.¹¹ Its work product, which encompasses areas as diverse as advocacy, agency effectiveness, cartels, mergers and unilateral conduct, helps to create dialogue, consensus and convergence towards sound competition policy worldwide.

ICN's Advocacy Working Group has worked on valuable material concerning market studies¹² and has indicated "guiding principles" and "best practices" (recommendations) which authorities decide whether and how to implement. Actually, although ICN does not exercise any kind of rule-making function, its principles and best practices are certainly a reference which the competition community worldwide seriously takes into consideration.

The objective of the present article is to briefly analyze CADE's market studies experience since the entering into force of the Brazilian Antitrust Law in light of an overview of ICN's principles and best practices on market studies. Taking into consideration that ICN's material is not prescriptive, the analysis will focus more on identifying which principles and recommendations CADE has selected from priorities and resources according to its needs, and also on identifying any room for improvement in CADE's market studies practice as the Brazilian antitrust law regime goes on.

3.1 Developing the market study process

ICN's Market Studies Good Practice Handbook¹³ prepared by ICN Advocacy Working Group ("Handbook") recognizes that, regardless of the fact that competition authorities have to

benefit of competition. It was the case, for instance, in 2016 when SEAE recommended that the Department of Traffic of the State of Maranhão (Detran/MA) refrained from enforcing its regulation in prejudice of competition in the market for license plates (see Technical Note No. 06020/2016. Available at <<http://seae.fazenda.gov.br/assuntos/advocacia-da-concorrenca/notas-tecnicas/2016/nota-tecnica-n-o-06020-2016-df-regulamentacao-do-detran-ma-sobre-o-mercado-de-fabricacao-de-placas-e-tarjetas-de-veiculos.pdf>>. Access on February 20, 2017). Also, in the Technical Note No. 06013/2016, SEAE recommended that the Public Power refrained from attempting to block or hinder the smartphone applications (e.g. Uber) aiming at the personal transportation (see Technical Note No. 06013/2016. Available at <<http://www.seae.fazenda.gov.br/assuntos/advocacia-da-concorrenca/notas-tecnicas/2016/nota-tecnica-n-o-06013-2016-df-impactos-concorrencais-do-uber-no-mercado-relevante-de-transporte-individual-de-passageiros.pdf>> Access on February 20, 2017). For a detailed approach on SEAE's advocacy activity in the past years, including an overview of SEAE's technical opinions and other published studies, please refer to REIS JÚNIOR, Alexandre Jorge dos et. al., ob. cit., p.p. 78-88.

¹¹ INTERNATIONAL COMPETITION NETWORK – ICN. *About*. Available at <<http://www.internationalcompetitionnetwork.org/about.aspx>>. Access on February 20, 2017.

¹² Idem. *Advocacy*. Available at <<http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx>>. Access on February 20, 2017.

¹³ Idem. *Market Studies Good Practice Handbook*. Revised handbook presented at the 15th Annual Conference of the ICN, Singapore, April 2016. Available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1088.pdf>>. Access on February 20, 2017.

handle varying levels of resource and time to use in market studies preparation, they should consider creating a standardized process for both carrying out market studies and implementing them. This can be helpful in terms of transparency, resources allocation and also for information collection and planning of the engagement of the stakeholders.¹⁴

The Handbook suggests a standardized market study process which can include some or all of these steps: (i) identifying and selecting a market to study; (ii) scoping and planning a market study; (iii) planning stakeholder engagement; (iv) launching a market study; (v) collecting and analyzing information; (vi) developing and securing outcomes, and (vii) evaluating a market study.¹⁵ In the following section, there is a brief overview of those steps.¹⁶

3.2 Steps of the market studies process

The first step indicated by the Handbook, which is identifying and selecting a market to study, states on the importance of soundly and flexibly selecting and prioritizing the most relevant subjects for market studies, preferably in a public and transparent manner. The aim is to enhance the likelihood of reaching outcomes that have a substantive impact on the society.

An important principle is that authorities should consider market study subjects from a wide range of sources and consider sources both external to and within the authority to collect information on possible subjects. The Handbook also points to practical aspects that should not be overlooked, such as available human resources and costs and benefits of the intervention.

It is considered good practice, if the authority has discretion to identify and select a market study, to consider how to resource and organize the market study activities and select only subjects that meet the authority's objectives. On the other hand, if the authority is required to carry out a market study, it is good practice to engage in dialogue and to coordinate with the mandating body prior to any requirement being imposed; to seek clarification on expectations for the market study, including timelines, deliverables, from the mandating body at the outset; and ensure a process is agreed to with the mandating body to manage changes to the mandating body's expectations or requirements.¹⁷

Once the subject for a market study has been selected, authorities should consider scoping and planning a market study. Timing is crucial here as well as quality standards, so it is recommendable that authorities prepare a detailed plan, including anticipated actions,

¹⁴ According to the Handbook, stakeholders may include: Government departments, regulators and public bodies at national, regional or local levels; international organizations; businesses and trade bodies, including producers, distributors/wholesalers, retailers, agents, etc. of inputs, substitutes and complements; consumers and/or users, consumer advocates and consumer groups; professional organizations, sectoral business associations and trade unions; chambers of trade, commerce or industry, and chambers of agriculture; legal and industry experts in the area studied; academics with expertise in the sector; media; other parties that may have an interest in the market. See Handbook, p. 27.

¹⁵ See Handbook, p. 5-6.

¹⁶ This overview proposes a high-level approach to the Handbook and obviously selects information, principles and good practices that were considered more relevant by the authors of the present article. For the complete work developed by ICN, please see the full text of the Handbook.

¹⁷ *Ibid.*, p. 13.

responsibilities and deliverables, even though scope and timeframe can be quite manageable and flexible.

Among the good practices which authorities should consider when scoping and planning the market study, we highlight the following ones according to the Handbook: establish a professional team to work on the project; contact work team and give them notice of how and when their input will be required; establish clear roles for the team; identify and contact other public bodies that might be working on or considering working on issues that could be relevant for the market study; consult stakeholders on the scope and possible outcome of the study; consider and manage the risks and uncertainties associated with a market study; determine how the quality assurance will be carried out.¹⁸

The third step is to plan stakeholder engagement. ICN Advocacy Working Group members recognized that stakeholders can provide crucial input to a market study, hence authorities should identify the key stakeholders, their interests and knowledge, as well as consider developing a strategy for their engagement early in the process.

As good practices when planning stakeholder engagement, authorities should consider publicly soliciting broad voluntary stakeholder engagement before and during market studies, and even after completion of a market study. They should also review and update the stakeholder engagement strategy as necessary throughout the study.¹⁹

When it is time for the next step, launching a market study, authorities should consider a public launch, as market studies often merit it.²⁰ This publicity can be made by different means, such as a published document, a press release or an announcement in a public event.

Once it is made publicly available, authorities should provide information about the study's scope, the reasons for undertaking it, and contact points for further information.²¹ All this can be helpful for the stakeholders to better understand the process, increase the level and ensure the focus of their engagement. It is also good practice to explain the potential benefits of stakeholder participation in market studies, as well as communicate to stakeholders what (if anything) will be published at the end of the market study process. Most common ways to engage with stakeholders include to issue press releases, put information on websites, hold private meetings with stakeholders and issue questionnaires.

The fifth step is to collect and analyze information, as reliable information is essential for carrying out market studies. Authorities then should focus their attention on sources that are most potentially useful and consider the best approaches and methods in order to effectively research for information from relevant sources.

ICN's best practices also involve selecting multiple methods for collecting information; consulting stakeholders; using publicly available information; preparing clear information requests and informing timeframes for submission; safeguarding sensitive/confidential information; and supporting findings with empirical evidence where possible, as it is considered more reliable especially in view of future enforcement activities based on the market study.

¹⁸ Ibid., p. 24.

¹⁹ Ibid., p. 28.

²⁰ Ibid., p. 29.

²¹ Ibid., p. 33.

Next step is developing and securing outcomes, taking into consideration purpose and findings of a market study. Of course, such outcomes should be relevant, feasible and noticeable as far as possible, as well as based on effective communication to stakeholders. If it is found that a market is working well, in a way that costs of remedies outweighs benefits, probably no action should be taken as outcome of a market study. On the other hand, positive actions include recommendations to governments and their authorities, competition enforcement and/or further advocacy, voluntary action by business, direct action to restructure the market, stakeholder education (including consumer education) and even further study.²²

Good practices which stand out when it comes to developing and securing outcomes of market studies encompass consulting stakeholders in developing market study outcomes, and testing possible outcomes to assess their feasibility and their likelihood of implementation; planning for and including relevant stakeholder engagement; considering how to present the recommendations to effectively advocate for change where market study recommendations are addressed to government; and engaging effectively with business and industry where voluntary action is a desired market study outcome, as well as being aware of individual and collective business interests.²³

Finally, the last step of ICN's suggested market study process is evaluation of market studies. It is useful for verifying the effectiveness as well as the costs and benefits of the market studies and even of the market studies regime as a whole. Hence, it is good practice for authorities to consider evaluating the effectiveness of their market studies to demonstrate that individual studies have fulfilled their purposes in a cost-effective way and to confirm the value of market studies in general terms. The Handbook also suggests that it is good practice for authorities to consider purpose and scope of evaluation as well as available resources when deciding how to approach the evaluation process.²⁴

4. CADE's market studies experience in light of the ICN's principles and guidelines

As introduced above, under the Brazilian Antitrust Law, both CADE and SEAE are responsible for the work on competition advocacy,²⁵ and CADE is to rely particularly on its Department of Economics Studies – DEE – to prepare market studies. In fact, among DEE's main roles stand: to conduct sectoral studies with the goal of keeping CADE updated on the progress of specific markets; carry out studies on the effects of CADE's decisions in certain markets; and prepare and publish technical studies.²⁶

The ICN has mapped up CADE's market studies experience in the past years and identified 11 studies from 2010 to 2015.²⁷ We have researched for further studies as of December 2015 and

²² Ibid., p. 45.

²³ Ibid., p. 52.

²⁴ Ibid., p. 55.

²⁵ Articles 9 and 19.

²⁶ CADE. *Departamento de Estudos Econômicos*. Available at: <http://www.cade.gov.br/aceso-a-informacao/institucional/departamento_de_estudos_economicos>. Access on February 20, 2017.

²⁷ ICN. *Market Studies Information Store*. Jurisdiction: Brazil – CADE (Conselho Administrativo de Defesa Econômica – Administrative Council for Economic Defense). Available at:

Brazilian Antitrust Law (Law N.º 12,529/11): 5 years

we identified other five, being two ongoing, which we consider as being market studies recently conducted. See below a table containing the identification of CADE's market studies since the entering into force of the Brazilian Antitrust Law, in May 2012.

CADE's Market Studies under the Brazilian Antitrust Law ²⁸			
Year	Sector	Market ²⁹	Possible outcomes ³⁰
Ongoing	Other – Retail Market	Wholesale distribution	Competition enforcement (unilateral conduct/merger control)
Ongoing	Pharmaceuticals	Pharmaceutical (retail)	Competition enforcement (unilateral conduct/merger control)
2016	Chemical	Hydrogen Peroxide ³¹	Competition enforcement (cartels)
2016	Health	Hospitals ³²	Competition enforcement (merger control)
2016	Education	Higher education ³³	Competition enforcement (merger control)
2015	Transport	Taxi and paid rides ³⁴	Competition enforcement (unilateral conduct); recommendations for changes to law/policy
2015	Transport	Taxi and paid rides ³⁵	Competition enforcement (unilateral conduct); recommendations for changes to law/policy
2015	Construction	Inputs for cement production (pozzolana, clinker, limestone, among others) ³⁶	Competition enforcement (cartels/merger control)

<<http://www.internationalcompetitionnetwork.org/uploads/advocacy/mkst%20studies%20dir/brazil.pdf>>. Access on February 20, 2017.

²⁸ Updated: February 2017.

²⁹ Not intended to stand for any specific definition of “relevant market” in the technical sense.

³⁰ Based on ICN. *Market Studies Information Store*, cit., and the opinion of the authors of this chapter.

³¹ CADE. *Documentos de Trabalho 002/2016. Prevenção Ótima de Cartéis: o Caso dos Peróxidos no Brasil*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-002-o-caso-dos-peroxidos-no-brasil.pdf>>. Access on February 20, 2017.

³² Idem. *Documentos de Trabalho 001/2016. Identificação do Mercado Relevante Geográfico para Hospitais no Brasil*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-001-2016-identificacao-do-mercado-geografico-relevante-para-os-hospitais-no-brasil.pdf>>. Access on February 20, 2017.

³³ Idem. *Cadernos do CADE. Atos de Concentração no Mercado de Prestação de Serviços de Ensino Superior*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/caderno-de-educacao-20-05-2016.pdf>>. Access on February 20, 2017.

³⁴ Idem. *Rivalidade após entrada - o impacto imediato do aplicativo Uber sobre as corridas de táxi*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/rivalidade-apos-entrada-o-impacto-imediato-do-aplicativo-uber-sobre-as-corridas-de-taxi.pdf/view>>. Access on February 20, 2017.

³⁵ Idem. *O Mercado de Transporte Individual de Passageiros*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/o-mercado-de-transporte-individual-de-passageiros.pdf/view>>. Access on February 20, 2017.

2015	Health	Collective bargaining involving medical services ³⁷	Competition enforcement (unilateral conduct); consumer/business education; voluntary business compliance
2014	Fuel	Automotive fuels (retail) ³⁸	Competition enforcement (cartels); consumer/business education
2013	Financial Services	Bank sector ³⁹	Competition enforcement (merger control)
2012	Other – Food industry	Meat market ⁴⁰	Competition enforcement

Only the studies between 2014 and 2016 (eight in total) are publicly available, so our analysis in this chapter is limited to them. Note that all the available studies conducted by CADE included some of the steps suggested by the Handbook on the market studies process, thus adopting the principles and recommended practices to some relevant degree. Note also that CADE's DEE was the responsible for carrying out all these studies.

On selection and scoping of markets to be studied, CADE's approach to its enforcement case law stands out. The studies on automotive fuels (2014), collective bargaining involving medical services (2015) and higher education (2016) provided an overview of CADE's precedents on each sector and a description of the market characteristics and conditions. In all cases, market structures demanded from CADE special attention and careful exercise of its decision-making power. CADE's DEE attempted to highlight consolidated issues of its precedents concerning administrative proceedings involving medical services bargaining and retail of automotive fuels, as well as merger reviews involving private education institutions. In the first two cases, there had been lots of unilateral conduct or cartel claims, while in the latter the vast majority of precedents had taken place between 2008 and 2013.

For its part, DEE's 2015 study on the inputs for cement production was originated by a recommendation from CADE's Tribunal after analyzing a merger in the cement market in 2010,⁴¹ when Commissioners understood that it would be helpful to have an assessment on how vertical integrations in the cement sector could affect competitive environment. CADE's DEE went through the economic structure and industrial organization of such an oligopolized sector and with relevant barriers to entry taking into account the development of CADE's case law, especially the cement

³⁶ Idem. *Documentos de Trabalho 002/2015. Mercado de Insumos para Cimento: Aspectos Estruturais e Exercício Empírico*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-dee-002-2015.pdf/view>>. Access on February 20, 2017.

³⁷ Idem. *Cadernos do Cade – Mercado de Saúde Suplementar: Conduitas*. Available at <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/copy_of_cadernos-do-cade-2013-mercado-de-saude-suplementar-conduitas-2013-2015.pdf/view>. Access on February 20, 2017.

³⁸ Idem. *Cadernos do Cade - Varejo de Gasolina*. Available at: <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/cadernos-do-cade-varejo-de-gasolina.pdf/view>>. Access on February 20, 2017.

³⁹ No link to report available.

⁴⁰ No link to report available.

⁴¹ Concentration Act No. 08012.008947/2008-05, approved by the Tribunal on July 21, 2010.

cartel case (Administrative Process No. 08012.011142/2006-79) and some other conduct cases related specifically to inputs for cement production (Administrative Processes No. 08012.012207/2011-61, 08012.000429/2007-54 and 08012.010208/2005-22).

The Hydrogen Peroxide study focused on a specific precedent of cartel condemnation – the Hydrogen Peroxide case (Administrative Process No. 08012.004702/2004-77, decided by the Tribunal on May 9, 2012) – in order to assess the deterrence effect of CADE’s fines in cartel cases. The study was part of the results of the UNDP (United Nations Development Program) Project (“Projeto PNUD”), which aimed at assessing the damages caused by the peroxide cartel. This study pointed out the importance of having both punishment and damages compensation addressed by authorities in their enforcement action. CADE analyzed the economic data available in the records of the case and applied a series of calculations and models to estimate the damages caused by the cartel. The study can also be seen as pertinent in the context of the recent discussions in CADE’s Tribunal regarding the consideration of the cartel members’ gains to set the penalties rather than considering only a fraction of a company’s gross sales.

In CADE’s study on the hospital market in Brazilian municipalities, not only CADE’s case law, but also international case law (specifically from the US and Europe), were analyzed in order to reach conclusions on the difficulties and challenges of the relevant geographic market definition. By referring to extensive technical literature and assessing the available public information, the study aimed to verify the adequacy of CADE’s approach to such market definition.

CADE’s studies on the taxi and paid rides market stood out in 2015 as Uber’s activities in Brazil triggered a huge controversy on competition in the personal transportation sector. It was a crucial moment in which CADE decided to use its advocacy powers in order to first focus on the impact of Uber’s entrance in the market and then, in a second study, to deepen the agency’s understanding about the market by means of an empirical investigation.

In the first study, dated September 2015,⁴² the DEE contextualized the debate on the antitrust, regulatory and urban planning impact of innovation in the transport market and discussed empirical evidence related to the deregulation of the taxi markets. It also analyzed the possible impact of the traffic structure and the personal transportation market on the urban space.

In the second study, dated December 2015,⁴³ the DEE focused on a deep empirical investigation in order to verify the economic impacts of Uber’s entrance over the number of taxi rides in São Paulo, Rio de Janeiro, Belo Horizonte and Distrito Federal. The DEE designed the research on the effects on competition considering periods prior to and after the entrance of the application in the markets. The DEE also collected some information about private vehicle fleet in each of the municipalities based on public vehicle licensing records of the State Traffic Departments.

CADE’s market studies identified above have observed some of ICN’s principles and best practices as conveyed in the Handbook. All studies have been introduced with a well-founded justification on the relevance of their subject and scope. All subjects seem to meet the agency’s objectives as the majority of the studies consolidate or confirm CADE’s case law on such sectors and thus end up confirming antitrust approaches adopted by the agency.

⁴² O Mercado de Transporte Individual de Passageiros: Regulação, Externalidades e Equilíbrio Urbano, cit..

⁴³ Idem. Rivalidade após entrada - o impacto imediato do aplicativo Uber sobre as corridas de táxi, cit.

An important point to be considered is that all studies were carried out by very qualified staff as CADE relied on the credentials of the economists of its DEE to engage in the works. On the other hand, inasmuch as CADE has published its work product and disclosed the methodology of its studies, not all aspects involved with the organization and preparation of the market studies are available for public consultation, such as roles within the team, internal report process, etc. We understand this is natural as it refers to CADE's internal processes for conducting its work and rely on best practices for public management as well as available human resources.

We have also noticed relevant stakeholder engagement in the work product as CADE, by means of both the DEE and the General Superintendence, has formally requested information from players in the different markets where deemed necessary in order to carry out market analysis. For instance, taxi companies 99Taxis and Easy Taxi provided useful data for CADE's study of December 2015⁴⁴ and dozens of companies of the concrete market were consulted by DEE to provide information on market structure and other sorts of information.⁴⁵

CADE's studies also suggest that information collection and analysis was conducted in an efficient manner, that is, intelligently combining data from the various sources such as CADE's case law, information from stakeholders, academic work, international studies and public information, among others. Such collection and analyses has also been performed in very timely manner in most cases – within 6 months in the case of automotive fuels and collective bargaining and just a month in the case of the taxi and paid rides studies. CADE's empirical effort – for instance, in the second study on taxi and paid rides and in the study on the relevant geographic market for hospitals in Brazil – should be pointed out as the ICN highlights the importance of supporting study findings with empirical evidence if and when possible.

Competition enforcement always appears among the possible outcomes of CADE's market studies.⁴⁶ This seems to be expectable since (as explained above) the majority of the studies were dedicated to consolidating CADE's precedents on some crucial markets or analyzing CADE's case law seeking its improvement. In CADE's retail automotive fuels and collective bargaining studies, other possible outcomes identified by the ICN were consumer and business education, while for the studies on taxi and paid rides the ICN indicated possible recommendations to government for changes in the law or policy.⁴⁷ Actually, in its first study on taxi and paid rides, CADE wondered whether there would still be the need to keep regulation over market services or to use regulation to prohibit paid rides services.⁴⁸

On the other hand, the studies did not indicate that CADE would be engaging in securing any outcomes relative to possible changes in law or policy. Either, they did not indicate whether

⁴⁴ Ibid., p. 12.

⁴⁵ Idem. Documentos de Trabalho 002/2015. Mercado de Insumos para Cimento: Aspectos Estruturais e Exercício Empírico, cit..

⁴⁶ ICN. *Market Studies Information Store*. Jurisdiction: Brazil – CADE (Conselho Administrativo de Defesa Econômica – Administrative Council for Economic Defense). Available at: <<http://www.internationalcompetitionnetwork.org/uploads/advocacy/mkst%20studies%20dir/brazil.pdf>>. Access on February 20, 2017.

⁴⁷ Ibid.

⁴⁸ CADE. *O Mercado de Transporte Individual de Passageiros*. Available at <<http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/o-mercado-de-transporte-individual-de-passageiros.pdf/view>>, p. 45-48. Access on February 20, 2017.

CADE would consider evaluating the effectiveness and costs and benefits of its market studies. We believe these are points which the agency could take in the future as possible improvements for its market studies regime as a whole.

Finally, we believe there is particularly some room for stakeholder engagement in CADE's market study process. Stakeholder engagement means actively consulting and taking into consideration the views of interested parties, such as, businesses, organizations representing businesses, consumer associations and possibly government departments over the course of the market study.

As mentioned above, we identified some preliminary engagement in the form of requests for information addressed to players in the different markets. That is, we believe CADE should consider focusing more on broad, active and diverse stakeholder engagement since the beginning of the process, for instance by means of public consultations and discussions. This would, in our view, help the authority to gain a better understanding of the market, promote the involvement of stakeholders other than companies, such as consumers and civil society as a whole. Ultimately, this increases the likelihood that the suggestions and recommendations will be accepted by the stakeholders.

5. Conclusion

Under the Brazilian Antitrust Law, CADE was given competency to engage in competition advocacy. Its Department of Economics Studies – DEE – has been active in preparing market studies to support the agency's exercise of such attribution.

The Market Studies Good Practice Handbook prepared by ICN Advocacy Working Group suggests a standardized market study process as well as certain principles and good practices to be implemented by competition authorities worldwide, although they are not prescriptive and should be selected by authorities according to their own needs, priorities and resources.

All available studies conducted by CADE since the entering into force of the Brazilian Antitrust Law included at least some of the steps suggested by the Handbook on the market studies process and also adopted some very relevant ICN principles and recommended practices, such as careful delimitation of subject and scope of the studies and relevant stakeholder engagement.

Besides building technical expertise about markets and addressing public interest regarding them, CADE's studies also bring about relevant outcomes, especially by enabling competition enforcement. Other possible outcomes that have been identified were consumer and business education, as well as recommendations to government for changes in the law or policy.

Perhaps CADE may find some room for improvement in the following years as to broadly engaging stakeholders, proposing how to secure outcomes relative to possible changes in law or policy and how to evaluate the effectiveness and costs and benefits of its market studies.

Chapter 34 - Competition policy and the relationship with the judiciary

Patricia Agra Araujo¹

1. Introduction

The International Competition Network (ICN), through its Competition Policy Implementation Working Group, co-chaired by CADE, organized two studies that analyzed the relationship between the Competition Authorities and the Judiciary in different countries.² Such studies were conducted during 2006 and 2007 (called herein as the “ICN Studies”). In previous findings of the Working Group the Judiciary was identified as one of the key stakeholders whose decisions may impact the implementation of competition law in developing and transition countries.

The first study was elaborated based on responses from 18 competition authorities from 17 countries (approximately 20% of ICN members at that time). The study reached the following conclusions:

“The judiciary shapes competition policy results irrespective of the legal tradition and development level;

It appears that competition authorities’ decisions are most likely to be overturned when conduct cases or the amount of fines are being reviewed, as opposed to mergers;

In a majority of respondent jurisdictions, judges are shaping competition policy and playing an important role in the development of competition policy;

One of the main issues offered by competition agencies relates to a perceived lack of familiarity of judges with the concepts of competition law;

The pendency of judicial review was detected as the main reason for competition authorities not being able to collect an imposed fines right away;

It is common sense that decisions challenged in court increase in proportion to the level of maturity of a competition authority”

The second study used the conclusions reached by the 2006 Report, as a starting point, and analyzed the relationship between competition authorities and the judiciary from case studies.

Regarding specifically Brazil, it pointed that:

“The judicial intervention and review of decisions has been the changing of competition authorities’ behavior: the authorities are paying more and more attention to procedures;

¹ Special thanks for Isabela de Oliveira Parisio and Rodrigo França Viana.

² ICN Competition Policy Implementation Working Group – Sub group 3. Competition and the Judiciary: A report on a survey on the relationship between Competition Authorities and the Judiciary, April 2006. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf>> and International Competition Network Competition Policy Implementation Working Group – Sub group 3. Competition and the Judiciary: Second Phase – Case Studies, May/June 2007. Available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc372.pdf>> Access on: March 17, 2017.

making the administrative processes closer to the judicial standards (what have been called as the “judicialization” of the decisions) and are making efforts to improve the quality of the evidence”;

“The lack of specialized knowledge on competition issues by the judiciary is an important issue affecting competition policy implementation”;

“The delay caused by judicial intervention (even when the judiciary decides not to annul or replace the decision, but to refer it back to the authority) is a problem because it weakens the competition decision as well as authority’s reputation”;

“The enforcement of CADE’s decisions have significantly improved after CADE’s attorneys started to be successful in requiring the judiciary to oblige parties to deposit the total amount of fine in order to appeal the decision”.

As it is possible to verify by the conclusions presented in the ICN Studies, the concern with the relationship between Antitrust Authorities and the Judiciary is not new, nor is it limited to one country or to the specific characteristics of the authority or to a country’s legal regime.

The Studies commented above show that the judicial review and the Judiciary Branch perspectives on the decisions of competition authorities are fundamentally important, especially to the effectiveness of those decisions and to the authority’s autonomy.

Ten years have passed since the 2006 and 2007 Studies and some of its conclusions are still valid and applicable. The 2011 Brazilian Antitrust Law has substantially changed the structure of the country’s “Competition System”. Before the enactment of the new law, there were three different authorities. Two of the SEAE and the Secretariat of Economic Law (SDE) – were secretariats of the Ministries of Finance and Justice respectively, both responsible for investigations. CADE was the Tribunal, responsible for adjudicate conduct cases and for clearing M&A transactions. After the enactment of the new law, CADE is responsible for investigations and adjudication, as well as for the clearance of M&A transactions. CADE now is divided into two departments: the General Superintendence and the Tribunal. The GS is responsible for investigation of conducts and the Tribunal for its judgment.

From the time of the ICN Studies, the Brazilian Competition System gathered investigations and adjudication into one sole body – CADE; leniency agreements are a successful and uncontroversial investigative tool and CADE settles the majority of the conduct cases under investigation.

The Brazilian Antitrust Law has its basis on constitutional principles, which determine that all administrative-nature decision may be reviewed by the judiciary.³⁴ There is an important theoretical discussion in Brazil nowadays about the limits to judicial review of CADE’s decisions: whether courts should refer the decision back to the authority; if courts could decide on the merits

³ Brazilian Federal Constitution, Articles 5, XXXV, 170 and 173.

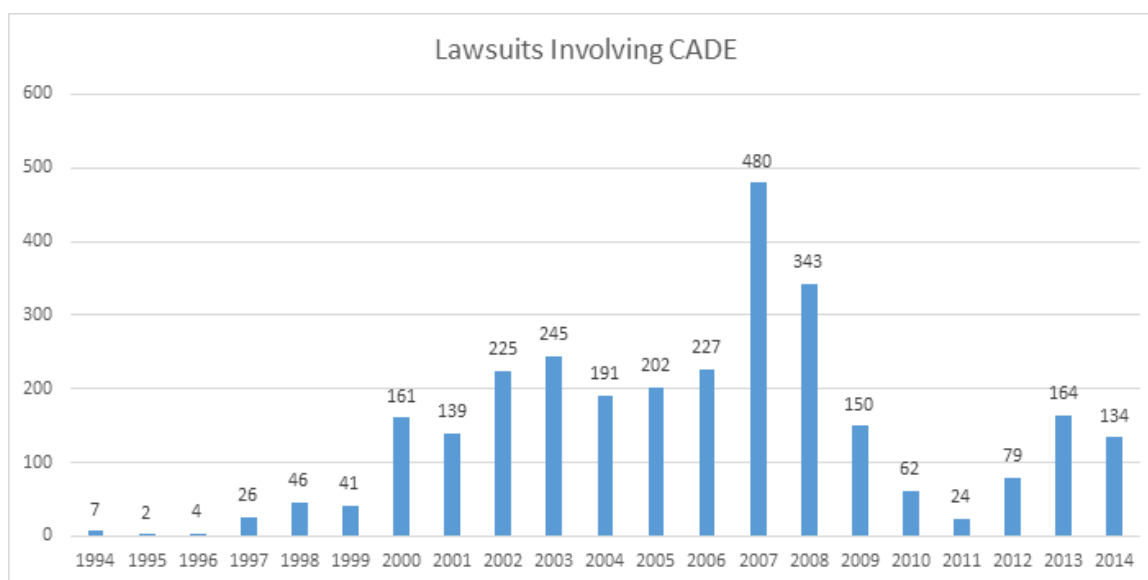
⁴ About the Brazilian model of judicial review see: DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. São Paulo: Atlas, 2014, p. 827; SUNDFELD, Carlos Ari. *Direito Administrativo para Céticos*. São Paulo: Malheiros Editores, 2012, p. 43-44; MEDAUAR, Odete. *A processualidade no direito administrativo*. São Paulo: Editora Revista dos Tribunais, 2008, p. 47-49

and replace the authority's decision; or whether courts can only make legality control on procedures. Such discussion is still far from a definitive answer and judicial decisions on this matter lack uniformity.

The judiciary can be involved in competition matters in a wide range of situations, such as: (i) allowing competition authority to conduct dawn raids; (ii) reviewing CADE's decisions; (iii) granting injunctions suspending procedures; (iv) in Class Actions; (v) Private Actions, and (v) implementing CADE's decisions, either demanding convicted parties to pay the imposed fines and/or enforcing behavioral conditions.

As shown in the graph below, the number of judicial decisions on competition matters has been decreasing over the years.⁵ There are four main reasons for that: (i) CADE has become more aggressive in defending its decisions before the judiciary and, based on its past experience, changed its procedures, bringing them closer to those used in the judicial process; (ii) the number of conviction decisions in anticompetitive investigations and imposition of restrictions in merger reviews has dropped; (iii) the number of settlements – either in merger reviews and in conduct cases – has increased substantially, and (iv) the obligation for parties to secure the total amount of the fine in advance to appeal the authority's decision.⁶

Graphic 1: Lawsuits having CADE as party



Ten years ago, the majority of judicial reversals of CADE's decisions referred to procedural issues, as observed in the ICN Studies. The general perception (including the authority's one) is that procedural issues are still a key argument brought by defendants to courts and the main issue discussed by judges.

⁵ All data reviewed in the paper were extracted from the Annual Management Reports issued by CADE's General Attorney Office, CADE's Annual Reports and judicial decisions obtained on the federal courts website: <<https://www2.jf.jus.br/juris/unificada/Resposta>>, Access on March 17, 2017.

⁶ Fernando Alves de Oliveira Junior in *Avanços da Política Antitruste no Brasil: o CADE e o Judiciário* also analyzed this subject, pointing out partially similar four reasons to explain the changes in the relationship between CADE and the judiciary. Available at: <<http://www.ppge.ufrgs.br/congresso-iders-2010/apa-cade.pdf>> Access on March 17, 2017.

In Brazil, judicial response to competition procedures was more focused on procedural issues instead of material ones. This conclusion is still valid for the same reasons pointed in ICN Studies: judges are more familiar with procedural legal issues than to competition or economic issues. There is a wide recognition that CADE is the body established for competition scrutiny and has the legal competence and technical capability for assessing anticompetitive conducts or M&A transactions.

It is also important to note that CADE has gained society's recognition and confidence as an institution that makes its assessment based on technical knowledge and that is not subject to any form of capture. This perception includes the judiciary. It has been a long way, but CADE has succeeded in demonstrating that its decisions are technical and autonomous.

In addition to CADE's good reputation, the number of convictions for anticompetitive conducts and restrictions in merger reviews has dropped as a consequence of three facts: the increase in number of cases that are settled; an effort to clean the stock of pending cases that had no anticompetitive impact; and a change in the merger review system.

In the case of M&A, many of the judicial challenges questioned fines imposed by the authority for untimely submission of transactions. In 2012, Law No. 12,529/11 changed the system to the pre-merger review regime under which there are no deadlines for reviewing an application, since a transaction cannot be closed before authority's clearance.

In addition, CADE has been imposing less unilateral conditions to reviewed transactions and increased the settlements whereby remedies have been negotiated jointly to better address competition concerns. Between 1994 and 2010 (under the former Law), 54 settlements were executed, an average of 3.17 per year; from 2012 to 2016 (under the new Law) 26 cases were settled, an average of 5.2 per year.

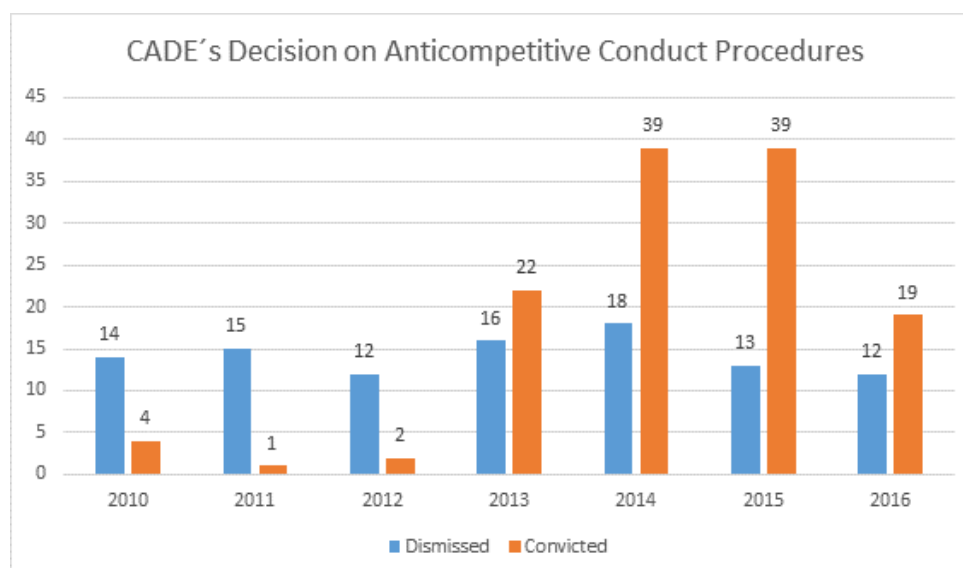
Settlements also became the most common outcome of anticompetitive conduct cases.⁷ It is estimated that today 80% to 85% of the work of the General Superintendence is related to the negotiation of settlements. An evidence that support this proposition is that in 2016 the condemnation decisions decreased substantially, to almost half of the number of the previous years, although the number of cases filed was kept practically stable.

Settlements have two effects in the reduction of judicial challenge. It reduces the number of parties willing to complain against the authority's decision and it strengthens the case for the competition authority.

Think of a cartel investigation, for example. To settle, the party has to confess or to recognize the existence of the conduct, as well as to cooperate with the authority, providing evidence that demonstrates not only its own participation in the conduct, but also the involvement of other participants. As a consequence, the authority will surely have a more robust case to hold before courts.

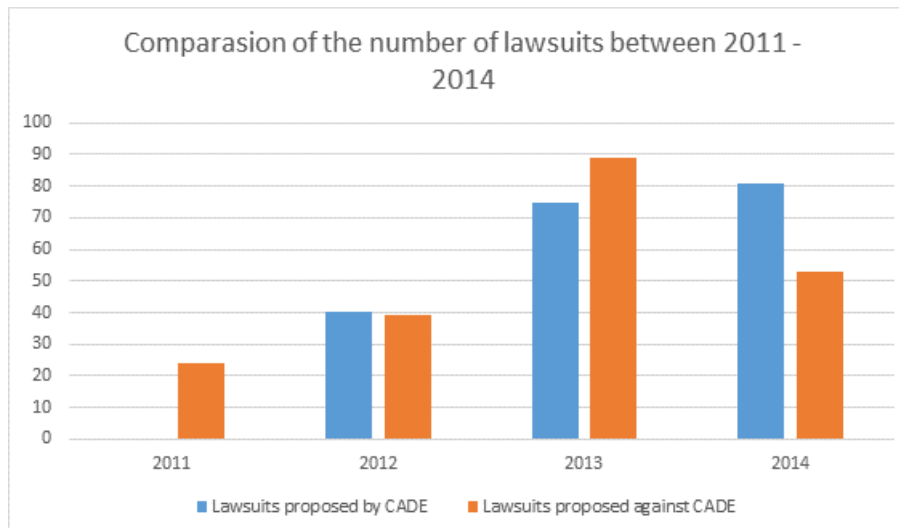
Graphic 2: CADE's Decision on Anticompetitive Conduct Procedures

⁷ According to CADE's annual balance for the year of 2016, the number of settlements made by the authority has substantially increased since 2013. In *Conselho Administrativo de Defesa Econômica. Balanço 2016*. Available at: <<http://www.cade.gov.br/noticias/cade-apresenta-balanco-de-suas-atividades-em-2016/apresentacao-balanco-2016.pdf>> Access on March 17, 2017.



As it can be observed in the graph 2, CADE's convictions had an impact on judicial lawsuits involving the authority, but not by the same proportion. In 2013, for instance, CADE had an increase in number of convictions, but the number of judicial lawsuits more than doubled. Graph 3 qualifies those lawsuits. In 2013, the majority of lawsuits were proposed by the parties against CADE in reaction to the increase in condemnations. In 2014, the numbers related to judicial review and CADE's activities are coherent: CADE had a record of fine application and became the plaintiff in courts in order to collect those fines.

Graphic 3: Plaintiffs in Lawsuits related to Competition



Another element that affected the decision of the parties whether or not to challenge a CADE's decision in courts was the legal provision that made the deposit of the total amount of the fine due or a guarantee enough to secure the debt to file the appeal. Although such provision was already in the Antitrust Law of 1994, judges started applying it in the last ten years. Nowadays, it is undisputed that to discuss or suspend a CADE's decision, the full amount of the fine has to be

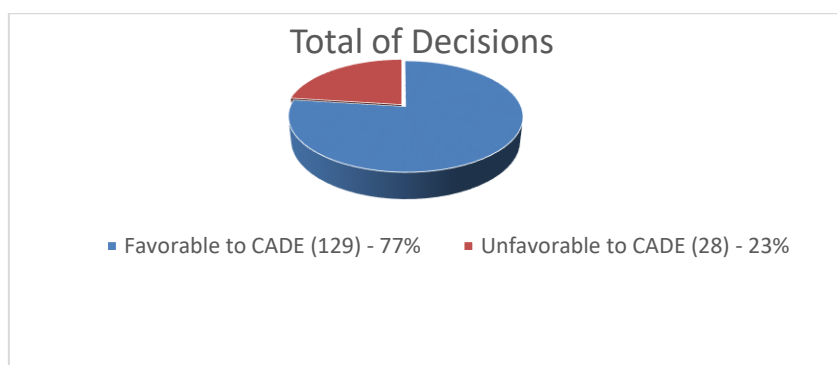
judicially deposited or guaranteed.⁸ Under such a condition, frivolous or weak appeals may become too expensive and not worthy, reducing the judicial challenges to CADE’s decisions.

Amongst the ICN Studies conclusion, the focus countries recognized that judicial intervention is more frequent in conduct cases and collection of fines. Fine payments have always been a bottleneck for competition policy implementation in Brazil. The authority has improved the collection of fines imposed in last years, but it is still an issue often subjected to judicial review.

	Table 1: Fines imposed in the years of						
	2011	2012	2013	2014	Total up to 2014	2015 ⁹	Total up to 2015
Fines paid	0	15	71	21	107	8	115
Fines imposed	26	19	30	14	89	149	238
Percentage of fines imposed and paid	0,00	78,95	236,67	150,00	120,22	5,37	48,32

The increase in percentage of fine payments demonstrated in Table 1 above may be a consequence of the settlement policy implemented and of the effect of the need to secure the total amount of the fine upfront to challenge it. It may also be a consequence of the CADE’s success rate before the judiciary. Most of decisions are favorable to CADE, as demonstrated in the graph 4:

Graphic 4: Courts Decisions



⁸ See the following decisions rendered by Federal Courts: *Tribunal Federal da 4ª Região. 3ª Turma Julgadora. Acórdão no Agravo de Instrumento No. 2009.04.00.019472-7/RS. Relator: Desembargador Federal Carlos Eduardo Thompson Flores Lenz. Decisão de 18 de agosto de 2009; BRASIL. Tribunal Federal da 4ª Região. 4ª Turma Julgadora. Acórdão no Agravo de Instrumento No. 2009.04.00.007403-5/RS. Relatores: Desembargador Federal Márcio Antônio Rocha. Decisão de 22 de julho de 2009. BRASIL. Tribunal Federal da 1ª Região. 7ª Turma Julgadora. Acórdão na Apelação Cível 20484 DF 2000.34.00.020484-5. Relator: Desembargador Federal Tourinho Neto. Decisão de 23 de março de 2004; BRASIL. Tribunal Regional Federal da 1ª Região. 6ª Turma Julgadora. Acórdão no Agravo de Instrumento No. 38292 DF 2001.01.00.038292-1. Relator: Desembargador Federal Daniel Paes Ribeiro. Decisão de 09 de outubro de 2006.*

⁹ According to CADE, 2015 was a very atypical year. Due to internal organization, the body had a poor performance in collection of fines this year.

Accordingly, such rate is also reflected in the judicial intervention; according to table 2, Courts intervene in a very low number of cases to suspend fine payments, but those few cases refer to the highest fines imposed.

Table 2: Fines (2015 CADE's General Attorney Office Report)	
<i>Item</i>	<i>Fines imposed and not paid up to 2015</i>
Imposed but not paid fines	148, in the amount of R\$ 214.514.824,72
Fines imposed but not paid for having its enforceability judicially suspended	5, in the amount of R\$ 51.575.119,89
Percentage of fines imposed and judicially suspended	Number of cases: 3,38% Value of cases: 24,04%

Conclusions

It is worth noting that the Brazilian Antitrust Law that came into force in May 2012, did not change conducts cases procedures. As such, one should not expect a great impact in judicial review as a result from the new Law. A research made in public legal basis did not show any results for lawsuits discussing cases that started and were adjudicated under the Law No. 12,529/11 – in the superior court and the Supreme Court (*Superior Tribunal de Justiça* and *Supremo Tribunal Federal*). Since the period of the validity of the new Law is relatively short, there was not enough time to appeal to higher instances. In Brazil, lawsuits take an average of eight years to render a final decision.¹⁰

It is common sense that settlement policy had a positive impact in competition policy implementation and effectiveness. As mentioned before, it will also undoubtedly affect judicial review of competition authority's decisions. A consistent settlement policy will also strengthen the choice of parties about going to the judiciary, since judicial review in Brazil is costly and slow. A first instance decision may take five to eight years to be rendered. From the parties perspective, having the fine amount deposited to discuss the authority's decision for such a long period of time may be worth financially.

CADE's main problems concerning judicial review of its decisions remain in procedural issues and collection of fines.

Concerning the latter, although CADE's collection of fines increased in value from 2011 to 2015, 238 fines were imposed, but only 115 were paid, which amounts to 48.32% of the fines

¹⁰ Estimative made considering the data published in the 2016 Report, Justice in numbers, of the Brazilian National Council of Justice (CNJ) - *Justiça em números 2016: ano-base 2015. Conselho Nacional de Justiça*. Brasília: CNJ, 2016. Available at: <<http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/b8f46be3dbbf344931a933579915488.pdf>> Access on March 17, 2017.

imposed. There is room for improving that rate, making the fines imposed by the authority and the policy itself more effective.

Judicial demands against CADE refer, in general to procedural issues (and probably it will continue to refer to), including illegality of evidence, defense rights and other procedural matters, mostly related to the investigative stage, in line with the conclusion of the ICN Studies of ten years ago. Therefore, for Brazilian competition policy to be effective, substantive issues seem to matter as much as material ones and special attention should be given to them both by the GS and the members of the Tribunal.

CADE has a perception that “competition on the merits” are under scrutiny more often now than in the past. In fact, courts have been recognizing the authority’s competence over competition matters by constantly referring to CADE’s decision when taking their own ones. And courts have been limiting the judicial review to control of legality as in the cases of malls in the city of Porto Alegre and the M&A case involving Usiminas and CSN, the two large Brazilian steel producers.

Judicial review is important in a democracy. It improves the quality of decisions and, in case of a decision-making body with adjudicative powers like CADE, it forces the improvement of its internal and procedural rules.

Nevertheless, judicial review cannot be used to uphold delay in the implementation of competition policy and to avoid compliance with the competition authority’s decisions, which can have a harmful impact on the effectiveness and development of competition policy, that are essential for a healthy competitive environment, which results in lower prices, higher quantities and better products and services.

Undermining CADE’s power by replacing the authority’s decisions on the merits to judicial decisions may also have the same impact, undermining competition policy and consequently welfare. The Judiciary can and must control the legality of CADE’s procedures, as well as of administrative body, but there is no reason to justify the replacement of CADE’s decisions by a judge.

Last but not least, CADE’s decisions are not monocratic; they are taken by a Tribunal after the due process of law. And as I said before, judges seldom question the material issues of CADE’s decisions, but the substantive ones. Therefore, if CADE’s procedures resemble those used by the judiciary, judges will certainly be less prone to question the competition authority’s decisions, what will contribute to the effectiveness of the competition policy itself. That is why, quoting Paul Troop, “legal formalism is not a stupid thing”, even in the field of competition law.