CONDUCTS ENFORCEMENT IN BRAZIL

FREQUENTLY ASKED QUESTIONS

IBRAC | BRAZILIAN INSTITUTE OF STUDIES ON COMPETITION, CONSUMER AFFAIRS AND INTERNATIONAL TRADE

CONDUCTS ENFORCEMENT IN BRAZIL

FREQUENTLY ASKED QUESTIONS

Coordinator

Guilherme F. C. Ribas

Authors

Ademir Antonio Pereira Júnior
Adriana Giannini
Ana Cristina von Gusseck Kleindienst
Ana Frazão
Ana Luise Solon Sabatier
Ana Paula Paschoalini
André Santos Ferraz
Angelo Gamba Prata de Carvalho
Anna Binotto
Anna Olimpia de Moura Leite
Barbara Luvizotto
Bernardo Gouthier Macedo
Bruno Almeida Silva
Caio Machado Filho
Carolina Destailleur G. B. Bueno
Caroline Guyt França
Cristiane Landerdahl de Albuquerque
Daniel Douek
Danilo Orenga
Débora Mazetto
Denise Junqueira
Eduardo Caminati Anders
Eduardo Molan Gaban
Eduardo Ribeiro Augusto
Elvino de Carvalho Mendonça
Enrico Spini Romanielo
Fabiana Nitta
Fabiana Tito
Fábio Nieves Barreira
Fabricio A. Cardim de Almeida
Felipe Cardoso Pereira
Felipe Pelussi
Fernanda Dalla Valle Martino
Fernanda Duarte Calmon Carvalho
Fernanda Nemer
Francisco Ribeiro Todorov
Frederico Haddad
Gabriel Silva Takahashi
Gabriel Ursi

Gabriela da Costa Carvalho Forsman
Gabriela Monteiro
Graziella Angela Tinari Dell'Osa
Guilherme Teno Castilho Misale
Gustavo Madi Rezende
Henrique Santos Raupp
Isabela Maiolino
Jackson de Freitas Ferreira
Jessica Olivieri
João Ricardo Oliveira Munhoz
José Carlos Berardo
José Del Chiaro Ferreira da Rosa
José Rubens Battazza Iasbech
Joyce Midori Honda
Julia Raquel Haddad
Leda Batista da Silva Diôgo de Lima
Leonardo Duarte
Leonardo Peres da Rocha e Silva
Leonardo Vieira Arruda Achtschin
Lígia Melo
Lorena Leite Nisiyama
Lucas Griebeler da Motta
Luis Claudio Nagalli Guedes de Camargo
Luiz Felipe Rosa Ramos
Luiza Kharmandayan
Marcelo Calliari
Marcelo Laplane
Marcio C. S. Bueno
Marcos Lima
Marcos Pajolla Garrido
Maria Eduarda Scott
Maria Wagner
Mariana Villela
Marília Cruz Avila
Marina Antunes Maciel Sertã
Mauro Grinberg
Michelle Marques Machado
Murilo Machado Sampaio Ferraz
Natali de Vicente Santos
Paulo Adania Lopes
Paulo Leonardo Casagrande
Pedro H. R. Cini
Pedro Paulo Salles Cristofaro
Priscila Brolio Gonçalves
Rachel Pinheiro de Andrade Mendonça
Renan Cruvinel de Oliveira
Renata Arcoverde
Ricardo Inglez de Souza
Ricardo Lara Gaillard
Ricardo Leal de Moraes
Ricardo Pastore
Roberto Potter
Rodrigo Almeida Edington
Rodrigo Dall'Acqua
Rodrigo Mudrovitsch
Rodrigo Santos
Silvia Fagá de Almeida
Sofia Campelo
Sonia Marques Döbler
Stephanie Scandiuzzi
Tatiana Lins Cruz
Thaiane Abreu
Thales de Melo e Lemos
Thiago Marini
Tiago Cortez
Ticiana Lima
Vicente Bagnoli
Victor Santos Rufino
Vinícius Cardoso
Vinicius da Silva Ribeiro
Vitor Jardim Barbosa
Yasmine Nemer Hajar

TABLE OF CONTENTS

Foreword 4

About the coordinator 10

About the authors 10

What are the criteria for the characterization of sham litigation?

Anna Binotto, Frederico Haddad, Ticiana Lima and Vitor Jardim Barbosa 29

What are the takeaways on state-owned enterprise responsibility and Cade's jurisdiction in the financial market from the payroll loans case? .....

Vicente Bagnoli 36

MAP: is 'minimum advertised price' allowed under the Brazilian antitrust law?

Luiza Kharmandayan and Priscila Brolio Gonçalves 40

Are territorial restrictions a violation to the Brazilian antitrust law?

Murilo Machado Sampaio Ferraz 47

What are the main differences between vertical restraints and vertical integration?

Marcos Lima 52

Antitrust discrimination: where are we and what are the envisioned challenges for the future?

Gabriela da Costa Carvalho Forsman and Lucas Griebeler da Motta 57

Refusal to deal: what are the negative effects in vertical markets?

Leonardo Vieira Arruda Achtschin 65

Is selective distribution legal under Brazilian competition law?

José Carlos Berardo and Pedro H. R. Cini 70

How does the Brazilian antitrust authority understand the standard and burden of proof on unilateral conducts investigations?

João Ricardo Oliveira Munhoz, Renan Cruvinel de Oliveira and Victor Santos Rufino 77

How can economic analysis help assessing issues related to foreclose and conglomerate effects?

Débora Mazetto and Fabiana Tito 84

What are the antitrust challenges faced by the payment industry?

Denise Junqueira and Maria Eduarda Scott..... 91

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

André Santos Ferraz and Cristiane Landerdahl de Albuquerque 97

Are there standards to determine whether innovation is predatory?

Ademir Antonio Pereira Júnior, José Del Chiaro Ferreira da Rosa and Luiz Felipe..... 103

How has Cade judged cases involving the digital economy?

Anna Olimpia de Moura Leite, Bernardo Gouthier Macedo, Gabriel Silva Takahashi and Silvia Fagá de Almeida 111

What are the recent developments regarding criminal investigations of cartel in Brazil?

Rodrigo Dall'Acqua 117

What rights do defendants have in antitrust investigations in Brazil?

Mariana Villela, Rodrigo Santos and Vinícius Cardoso..... 121

How the governments may interfere to promote the unfair competition among companies through tax incentives and special tax regimes?

Fábio Nieves Barreira, Henrique Santos Raupp and Thiago Marini 128

What is the statute of limitations for anticompetitive conducts investigations by Cade?

Paulo Leonardo Casagrande, Ana Paula Paschoalini and Caroline Guyt França 136

Is "compliance credit" available to companies found liable for anticompetitive behavior in Brazil?

Felipe Cardoso Pereira, Francisco Ribeiro Todorov and Lorena Leite Nisiyama 143

Which difficulties (if any) does Cade face to carry out expert opinions and on-site inspections?

Mauro Grinberg and Barbara Luvizotto 150

What is Cade's case law in big data cases?

Joyce Midori Honda and Marília Cruz Avila 158

What is Cade's position on gun jumping?

Isabela Maiolino 164

Can unlawful tax practices affect competition?

Gustavo Madi Rezende and Paulo Adania Lopes 171

Antitrust investigations and competition compliance programs: how do they interplay?

Guilherme Teno Castilho Misale, Julia Raquel Haddad, Leda Batista da Silva Diôgo de Lima and Luis Claudio Nagalli Guedes de Camargo ... 178

Per se or rule of reason: how does CADE review conduct cases in Brazil?

Fabricio A. Cardim de Almeida 185

What is Cade's experience with consultation/query procedures related to anticompetitive practices?

Enrico Spini Romanielo, Vinicius da Silva Ribeiro and Yasmine Nemer Hajar 195

What has already been done by the Brazilian competition authorities in terms of competition assessment to avoid anticompetitive conducts?

Elvino de Carvalho Mendonça and Rachel Pinheiro de Andrade Mendonça 203

Is parallel importation a violation of the Brazilian antitrust law?

Ana Cristina von Gusseck Kleindienst 210

What are the lessons from the ANFAPE case?

Eduardo Ribeiro Augusto 217

How does the relation between antitrust and intellectual property work in Brazil?

Ana Frazão and Angelo Gamba Prata de Carvalho 223

What are the requirements for signing the settlement agreement (TCC)?

Ana Luise Solon Sabatier and Ricardo Leal de Moraes 230

What are the criminal and civil consequences of executing leniency and settlement agreements with Cade?

Bruno Almeida Silva, Ricardo Lara Gaillard and Thales de Melo e Lemos 235

To what extent can resolution cade n. 21/2018 influence the negotiation of leniency and settlement agreements at Cade?

Eduardo Molan Gaban, Fernanda Dalla Valle Martino, Fernanda Duarte Calmon Carvalho and Natali de Vicente Santos 243

Leniency policy and practice: what are the grey zones?

Jackson de Freitas Ferreira, Marcelo Calliari, Rodrigo Almeida Edington and Tatiana Lins Cruz 249

Leniency plus: what are the key topics?

Eduardo Caminati Anders, Jessica Olivieri, Marcio C. S. Bueno and Roberto Potter 256

What are the leniency application requirements?

Ricardo Inglez de Souza 264

What are the criteria for calculating fines in cartel cases?

Caio Machado Filho, Marina Antunes Maciel Sertã and Pedro Paulo Salles Cristofaro 269

Does the exchange of sensitive information amount to an antitrust infringement?

Michelle Marques Machado and Stephanie Scandiuzzi 276

Are no-poaching agreements among employers an antitrust violation in Brazil?

Carolina Destailleur G. B. Bueno, José Rubens Battazza Iasbech, Leonardo Peres da Rocha Silva and Marcos Pajolla Garrido..... 283

What are the criminal effects of the leniency agreement settled with the Brazilian antitrust authority?

Gabriel Ursi, Rodrigo Mudrovitsch and Sofia Campelo 291

How does Cade deal with sharing of evidence with other authorities?

Adriana Giannini and Lígia Melo Renata Arcoverde..... 299

Does the Brazilian antitrust authority investigate conducts carried abroad?

Fernanda Nemer, Gabriela Monteiro and Leonardo Duarte Thaiane Abreu 306

What are the criteria for the characterization of hub-and-spoke conspiracies in Brazil?

Daniel Douek, Felipe Pelussi and Ricardo Pastore 313

Collaboration agreements among competitors: when can they raise antitrust concern?

Fabiana Nitta, Graziella Angela Tinari Dell'Osa and Sonia Marques Döbler..... 321

Cade's statute of limitation for conducting cartel investigations against companies in brazil: 5 or 12 years period?

Tiago Cortez, Marcelo Laplane, Danilo Orenga and Maria Wagner ... 328

DOES THE BRAZILIAN ANTITRUST AUTHORITY INVESTIGATE CONDUCTS CARRIED ABROAD?

Fernanda Nemer
Gabriela Monteiro
Leonardo Duarte
Thaiane Abreu

1. Introduction

The Administrative Council for Economic Defense – CADE is the Brazilian Antitrust Authority in charge of investigating and punishing anticompetitive conducts, including conducts carried out abroad if they may produce effects in Brazil. Article 2 of the Brazilian Antitrust Law (Law N. 12,529/2011) establishes that its enforcement is not limited to conducts performed within the national territory, but it also includes conducts performed abroad that may produce effects in Brazil, even if such effects are not achieved.[1]

CADE has developed an effects theory when analyzing international conducts that may have effects in Brazil, particularly international cartels. This chapter provides an overview of the relevant decisions in which CADE established this cause-effect connection between conducts abroad and their possible effects in the Brazilian markets.

2. Cade's jurisdiction to investigate conducts abroad and the effects theory

Article 2 of the Brazilian Antitrust Law states that its application is not restricted to anticompetitive conducts performed within the national territory, and expressly extends its applicability to conducts

[1] See also Article 36 of the Brazilian Antitrust Law.

carried out abroad that may produce effects in Brazil. Therefore, the Brazilian Antitrust Law adopted an effect-based approach, specifically providing for its extraterritorial applicability to conducts performed abroad that may have at least the potential of producing effects in the national territory. In order to ascertain its jurisdiction to investigate foreign conducts and to successfully prosecute and convict foreign violators, CADE must demonstrate that the conduct under investigation could have at least the potential of producing effects in Brazil.

CADE has developed this effect-based approach mostly in international cartel cases, but the same rationale may also be extended to unilateral conducts performed abroad that may have effects in Brazil. According to CADE's case law, international cartels may be classified as follows from the perspective of their possible effects in Brazil: (i) **international cartels with direct effects in Brazil**, where the cartel members had direct sales (i.e. export sales) in Brazil that were affected by the collusion; (ii) **international cartels with indirect effects in Brazil**, where the cartel members did not have direct sales in Brazil, but final products manufactured based on inputs supplied by the cartel members elsewhere and affected by the collusion ended up exported to Brazil; (iii) **international cartels for the allocation of markets that include Brazil,** where there is evidence that Brazil was also covered by the market allocation agreement, and (iv) **international cartels with no effects in Brazil**, where there is no evidence that the cartel produced or could produce effect in Brazil.

3. Cade's caselaw on international cartels investigations in Brazil

Until 2018, CADE analyzed over 25 cases involving allegations of international cartels.[2] The decision on the *Vitamins Cartel Case*,[3] in 2007, is considered the leading case on this matter in Brazil and paved

[2] SEI/CADE N. 0518637.

[3] Administrative Process N. 08012.004599/1999-18. Reporting Commissioner Ricardo Villas Bôas Cueva. Decided by the Tribunal on April 11, 2007.

the way for the investigation of other international cartels by CADE under the more efficient framework established by Law N. 12,529/11. The Brazilian investigation into this cartel started after the Brazilian authorities became aware of leniency and settlement agreements executed with foreign antitrust authorities, and of decisions rendered abroad. In its decision in this case, CADE analyzed many factors to verify the possible effects caused in Brazil and ultimately concluded that there was sufficient evidence that the cartel had effects in this country, because: i) the imported goods represented almost all of the Brazilian vitamins market and the defendants were responsible for supplying a significant amount of vitamins to Brazil; ii) the defendants' market shares in Brazil were almost identical to the "international budget" that they had divided among themselves in their anticompetitive agreement; and iii) it would not be logical for an international cartel for the allocation of markets, including the Latin American market, to exclude Brazil in the market division.

The *Vitamins Cartel Case's* decision established the standard approach for the assessment of effects in Brazil that would be followed by CADE in the next international cartel investigations, since most of the international cartel cases decided by CADE involved situations in which the defendants had direct sales to Brazil through exports. This was the case in the *Air Cargo Cartel Case*[4], in which CADE concluded that the cartel agreed to fix prices and dates for the implementation of a fuel surcharge for international air cargo transportation worldwide. CADE considered that the fact that the companies involved in the cartel controlled close to 60% of the Brazilian air cargo market in the period under investigation was a strong evidence that their agreement abroad affected the national territory.

On the other hand, the analysis of international cartels that could have indirect effects in the national territory has been proving to be much

[4] Administrative Process N. 08012.011027/2006-02. Reporting Commissioner Ricardo Machado Ruiz. Decided by the Tribunal on August 28, 2013.

more burdensome to CADE than those where defendants had direct export sales to Brazil. These situations required CADE to adopt a broader interpretation of the effects doctrine to assess possible effects in cases involving indirect sales in Brazil. In the *DRAM Memory Cartel Case*, CADE concluded that DRAM memory manufacturers had formed a bid-rigging cartel to fix prices and sales strategies in bids promoted by original equipment manufacturers – OEMs abroad. In assessing whether the conduct could have affected the Brazilian market, the CADE argued that the defendants were responsible for providing practically all the DRAM memory in the Brazilian market – most of which had entered the country equipped in other products –, considering that there was no domestic production for this product in Brazil. Sales of DRAM products used to be negotiated abroad, even in cases where these products were sent directly to Brazil by the defendants.

In the *Marine Hose Cartel Case,*[5] in addition to the fact that the cartel members had direct export sales to Brazil, CADE also considered that the cartel agreement involved the geographic allocation of markets that also included Brazil. According to CADE, Petrobras acquired marine hoses through certain procedures, in relation to which the competitors that participated in the conduct would have previously discussed and allocated results among themselves. The members of the cartel that were not awarded certain Petrobras' contracts proposed offers to cover the winning member's prices and were then compensated in other countries. This, in CADE's understanding, was a strong evidence that the cartel had effects in the Brazilian market.

As for international cartels with no effects in Brazil, in 2016, CADE concluded the judgement of the *Elastomers Cartel Case*,[6] deciding for the closing of the investigation due to the lack of evidence

[5] Administrative Process N. 08012.010932/2007-18. Reporting Commissioner Márcio de Oliveira Júnior. Decided by the Tribunal on February 25, 2015.

[6] Administrative Process N. 08012.000773/2011-20. Reporting Commissioner João Paulo de Resende. Decided by the Tribunal on August 31, 2016.

that the conduct could have affected the Brazilian market. The conduct consisted of meetings between competitors to fix prices for the Chinese and Hong Kong markets. According to the leniency applicant, these prices had possibly been used as reference prices worldwide, including for the national territory. Nevertheless, according to CADE, the confession from the leniency applicants that they also used the reference prices agreed upon with competitors as calculation basis for the prices practiced in the Brazilian market, and the assumption that other competitors behaved in the same manner, were not considered enough to conclude that the alleged conduct would have potentially affected the national territory.

The *Compressors Cartel Case*[7] deserves special notice, as CADE, in a non-unanimous decision, adopted an atypical approach. CADE's General Superintendent – GS had previously concluded that this case involved "two cartels": i) a national cartel involving the two local manufacturers; and ii) a foreign cartel that would not have affected the Brazilian market. According to the GS, it would not make sense for the foreign manufacturers to discuss the Brazilian market, as the compressors market was clearly a national market due to the high applicable import taxes and transportation costs, as well as the fact that the local manufacturers were able to supply the total local demand at a lower price. CADE's Tribunal, however, concluded that the evidence in the case files demonstrated that discussions abroad had mentioned the Brazilian market, and that the foreign manufacturers were present in the meetings in which Brazil was discussed by the national manufacturers. According to the majority of the members of the Tribunal, this aspect was considered enough to establish at least potential effects of the conducts in Brazil.

[7] Administrative Process N. 08012.000820/2009-11. Decided by the Tribunal on March 16, 2016.

In the recent *Color Picture Tubes Cartel Case*,[8] CADE established a relevant precedent regarding the defendants that may be investigated for international cartel practices in Brazil. According to this decision, since cartels are considered a multi-perpetrator offense, all companies that participate in a cartel are responsible for the possible effects that may be caused by this conduct. Thus, even if only one of the cartelized companies sells its products in Brazil, all of them may be prosecuted and convicted by the Brazilian antitrust authority for the possible anticompetitive effects of the practice in Brazil.

Finally, CADE has recently issued its decisions in the *Optical Disk Drives (ODD's) Case*[9] and *LCD Panel Case*[10] and, in both cases, CADE concluded that the fact that ODDs and LCD panels consumed in Brazil depended exclusively on the external market, would be sufficient to demonstrate that any collusion in these worldwide markets would necessarily affect the Brazilian markets. Therefore, the evidence that the defendants have colluded to fix prices and sales conditions abroad was considered sufficient to base the conviction of the defendants in Brazil.

4. Conclusion

The Brazilian Antitrust Law provides for an effect-based approach that expressly extends its application to conducts performed abroad and that may have at least the potential to produce effects in Brazil. An analysis of CADE's case law in international cartel cases reviews that this authority has adopted a very broad interpretation to establish this cause-effect connection between conducts abroad and their possible effects in the Brazilian markets, making use of indirect evidence

[8] Administrative Process N. 08012.002414/2009-92. Decided by the Tribunal on August 28, 2018.

[9] Administrative Process N. 08012.001395/2011-00**.** Decided by the Tribunal on January 30, 2019.

[10] Administrative Process N. 08012.011980/2008-12. Decided by the Tribunal on February 27, 2019.

and practically shifting to the defendants the burden of proof to demonstrate that certain international cartels would not have the potential of producing effects in Brazil. It is important that foreign companies be aware that possible anticompetitive conducts carried out abroad and that may produce effects in Brazil, may be subject to investigation and severe penalties in Brazil under the Brazilian Antitrust Law, even in case of companies that do not have any direct sales to Brazil.