

Cartels

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Overview of the law and enforcement regime relating to cartels

Brazilian Law provides that cartel behaviour may be subject to administrative, civil and criminal scrutiny.

Law 12.529/2011 (the Brazilian Competition Act) describes various conducts that may be considered violations of the Act and that would fall under the cartel behaviour category, including agreeing with competitors on: (i) prices of goods or services; (ii) provision of a limited number or volume of products or services; (iii) the division of segments of a potential or actual market by means of, among others, the distribution of customers, suppliers, regions or time periods; and (iv) participation in or commercial aspects of public biddings.

Although the Brazilian Competition Act does not state textually that conducts are *per se* illegal, case law have consistently decided that cartel behaviour is considered a violation illegal by object, meaning that it is not necessary to show that the conduct has had negative effects on competition; the mere existence of a cartel is considered to be a violation of the Brazilian Competition Act.

The Brazilian Competition Act says that the Brazilian Competition agency (Administrative Council for Economic Defence – "CADE") is in charge of investigating and prosecuting anticompetitive conducts at the administrative sphere. CADE may investigate and penalise individuals and legal entities for cartel behaviour. The penalties imposed by CADE are administrative in nature, including fines and prohibition of participation in public bidding procedures, among others. Legal entities may be subject to fines that range from 0.1% up to 20% of gross revenues of the company or group, in the financial year before the initiation of the administrative proceedings. Individuals who occupy managerial positions and who are directly or indirectly responsible for the violation may be subject to penalties that range from 1% up to 20% of the penalty applied to the company.

The Brazilian Competition Act (article 47) sets out that injured parties may file lawsuits to obtain the cessation of violations of economic order and to request compensation for damages suffered from cartel behaviour. Private antitrust litigation is not very common in Brazil yet, but is possible both under the Brazilian Competition Act and under general civil and civil procedure rules.

Law 9,137/1990 (the Economic Crimes Act) considers cartel-type behaviour as a criminal offence. The following conducts are considered crimes: (i) if one abuses its economic power, by dominating a market or totally or partially eliminating competition through any kind of agreement among companies; and (ii) to form agreements among suppliers with the aim of (ii.a) artificially fixing prices or quantities sold or manufactured, (ii.b) regionally controlling a market, and (ii.c) controlling network of distributors or suppliers to the detriment of

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competition. Individuals who commit these offences are subject to penalties of imprisonment that may vary from two to five years, plus monetary penalties.

In addition, article 288 of the Brazilian Criminal Code sets out that the association of three or more individuals, with the intent of committing a crime, is considered a criminal offence known as "criminal association". Individuals that commit this offence are subject to imprisonment from one to three years. This provision is often used in criminal prosecution of cartel behaviour in combination with the provisions of the Economic Crimes Law.

Criminal enforcement of cartel behaviour falls under the responsibility of Public Prosecutors' Offices. Legal entities are not subject to criminal penalties under the Economic Crimes Act or under the Criminal Code's criminal association provision. This is in line with the general rules under Brazilian criminal laws, under which legal entities are not liable for criminal offences. Therefore, only individuals may be criminally prosecuted for cartel behaviour.

Other laws and regulations also prohibit cartel behaviour, but do not have cartel enforcement as their main focus, such as Law 8,666/1993 (the Public Bidding Law), which contains a provision relating to bid rigging cartels. The main authorities enforcing cartel prohibitions are CADE (at the administrative level) and the Public Prosecutors' Offices (at the criminal level).

Overview of investigative powers in Brazil

CADE's General Superintendence is the office within CADE in charge of investigating violations of the Brazilian Competition Act, including cartel conduct. The General Superintendence has broad investigative powers and may, among other measures, request information from legal entities and individuals, undertake inspections at companies' premises and, through CADE's Prosecutors' Office, request courts to authorise dawn raids to be carried out at companies' premises and individuals' homes.

At the criminal level, the Public Prosecutors' Offices are in charge of investigating cartel behaviour. The Public Prosecutors' Offices have broad investigative powers, outlined in general criminal procedural rules, which also includes the possibility of requesting courts to authorise dawn raids.

Administrative and criminal authorities act independently, although they work together in some instances (e.g. in negotiation of leniency agreements). The administrative and criminal proceedings, however, run independently, which means, for example, that a company or individual may be penalised under CADE's proceedings, but not under criminal procedures, depending on the circumstances. Criminal proceedings usually require a higher standard of proof to prosecute cartel behaviour than administrative proceedings.

Overview of cartel enforcement activity during the last 12 months

For the last two decades, CADE has been very active in prosecuting cartels. In the last few years, CADE has initiated a series of investigations related to the so-called Operation Car Wash, which is a huge Brazilian anticorruption operation that involves corruption, bid rigging and cartel behaviour, among other illicit conducts. Operation Car Wash has occupied most of CADE's resources in the last years, but CADE has been gradually returning its focus to cartels unrelated to this operation.

In July 2019, CADE's Tribunal decided a relevant pending case when it fined 11 companies in BRL 535 million in relation to a cartel in public bids related to the State of São Paulo's subway and train systems. The investigation had been initiated many years ago after one of

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the companies executed a leniency agreement with CADE, the Federal Public Prosecutors' Office and the State of São Paulo Prosecutors' Office. Due to this leniency agreement, the Brazilian authorities conducted dawn raids in which they gathered 30 terabytes of data, that was used as evidence. Several individuals were also convicted in criminal proceedings related to the case.

Key issues in relation to enforcement policy

Brazilian competition authorities have consistently declared that the prosecution of cartel behaviour is its main enforcement priority. CADE has acted accordingly by continuously improving its investigation techniques, enacting regulations and guidelines to clarify its policies and encourage cooperation and by entering into cooperation agreements with other competition authorities and with Public Prosecutors' Offices (at the Federal and State levels).

The fact that a cartel is considered unlawful under different legal statutes in Brazil and that it may be prosecuted by different authorities and at different spheres makes this area of enforcement rather complex. However, the coordination efforts by Brazilian competition authorities and by Public Prosecutors' Offices, including the enactment of guidelines to clarify the procedures, have contributed to provide more predictability and legal certainty.

Key issues in relation to investigation and decision-making procedures

CADE's General Superintendence is the entity within CADE that is in charge of investigating cartel behaviour at the administrative level. Investigation procedures are governed by the Brazilian Competition Act and by CADE's Internal Regulations and general rights of defence are assured at all stages of administrative proceedings.

After carrying out its acts of investigation and granting the investigated parties the opportunity of presenting their defences and other information, the General Superintendence issues a detailed opinion on whether or not there is enough evidence of a cartel conduct and on whether or not parties should be penalised. The General Superintendence opinion is then forwarded to CADE's Tribunal, which is CADE's decision-making body, for a final decision.

CADE's Tribunal is composed by seven commissioners. Once the case is forwarded to the Tribunal, one of the commissioners' is randomly assigned to be the reporting commissioner of the case. The reporting commissioner may request additional information and the investigated parties have the opportunity of presenting additional information and arguments to the reporting commissioner, to other commissioners and to the Tribunal. The reporting commissioner then submits the case to the Tribunal for a final decision. The decision of the Tribunal is taken by a majority during a public hearing and is final at the administrative sphere, which means that parties may not challenge it at the Tribunal or within the Federal Administration.

Although appeals against the decision of the Tribunal are not allowed, parties may submit motions for clarifications in case of omission, contradiction or lack of clarity in the decisions. Once the request for clarification is decided, the Tribunal decision is final, and parties may only challenge it through lawsuits before the courts of law. As a rule, the filing of these lawsuits does not suspend the effects of the Tribunal's decision, although parties may request the courts for such suspension. In practice, however, it is unusual for courts to order the suspension of the effects of the decision by CADE's Tribunal and, therefore, parties must comply with the decision even if it is being challenged in courts. For this reason and, considering the costs and time associated with litigation in Brazil, many companies decide not to present judicial challenges to CADE's Tribunal's decisions.

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Leniency/amnesty regime

CADE's leniency programme is at the core of its efforts to uncover and investigate cartels. The first antitrust leniency agreement was executed in 2003 and, since then, more than 50 agreements have been executed, consolidating it as one of CADE's most important tools for fighting cartels. In 2015, CADE released a 60-page guideline to encourage companies to apply for leniency, which is available also in English and serves as a useful guide to understand the leniency programme and benefits.[1]

Under the Brazilian Competition Act, CADE's General Superintendence may execute leniency agreements with violators that undertake to (i) cease the conduct, (ii) confess the wrongdoing, and (iii) cooperate with the investigations by providing relevant information and documents. If CADE is not previously aware of the conduct, it may grant total immunity to the signatory of the leniency agreement. On the other hand, if CADE is already aware of the conduct, the leniency agreement may have the effect of reducing the administrative penalty by one or two thirds.

To be eligible to enter into a leniency agreement, a company must be the first to formally apply for leniency.[2] Leniency agreements may be entered into by CADE with a company and its employees jointly, if the agreement is so proposed. The Public Prosecutors' Offices usually participate as intervenient parties in leniency agreements, although this is not a requirement under the Brazilian Competition Act. The Public Prosecutors' Office's participation in the leniency agreements has the purpose of assuring greater certainty to the signatories of the agreements and to assure that the agreements also have effects in the criminal sphere. Under the Brazilian Competition Act and related criminal rules, the execution of an antitrust leniency agreement has the effect of preventing that criminal investigations are initiated against the signatories of the agreement. Leniency agreements do not prevent the signatories from being subject to civil lawsuits related to the violation.

CADE is only allowed to execute leniency agreements with one player per cartel.

The Brazilian Competition Act sets out that violators who are not able to be the first to apply for an antitrust leniency agreement may execute settlement agreements, the so-called Cease and Desist Agreements (*Termo de Compromisso de Cessação* – "TCC"). Individuals and companies who execute a TCC must cease to practice the conduct and to offer useful information to CADE in cooperation with the investigations. In return, they may obtain a reduction of up to 50% in the administrative fine and to CADE's assistance to negotiate a criminal leniency agreement with the Public Prosecutors' Offices. TCCs do not prevent the signatories from being subject to civil lawsuits related to the violation.

In addition, under the Brazilian Competition Act, if a company or individual is not successful in executing a leniency agreement with respect to a cartel under investigation, it may enter into a leniency agreement with respect to another cartel, as long as this other cartel is not yet under investigation and that CADE has yet no knowledge of it. This type of agreement is called "leniency plus" agreement. To be eligible to enter into a leniency plus agreement, the agreement must be executed before the date the original investigation goes to judgment at CADE's Tribunal. The benefits of executing a leniency plus agreement are that the signatory may obtain a reduction of one third in the penalty with respect to the original cartel investigation and all benefits related to the leniency agreement with respect to the new cartel reported. Leniency plus agreements do not prevent the signatories from being subject to civil lawsuits related to the violation.

Administrative settlement of cases

Administrative settlement of cartel cases are possible through the execution of TCCs, according to the requirements and rules mentioned in the previous section.

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Third party complaints

Third parties may file complaints to CADE about the existence of cartel behaviour. CADE's General Superintendence may initiate administrative proceedings upon the well-founded representation of any interested party that indicates signs of violation of the economic order. In addition, CADE also has an anonymous online reporting tool through which any person reports a possible cartel. Under Resolution n. 292/2019, CADE assures the preservation of the identity of the complainant.

Civil penalties and sanctions

In addition to penalties that may be imposed by CADE at the administrative level, violators may be liable for civil damages caused by cartel behaviour. The Brazilian Competition Act sets out that injured parties may file lawsuits to obtain the cessation of violations of economic order and to request damages suffered from cartel behaviour. In addition, because competition law and the right to free competition are considered as collective or diffuse rights (Law 7,347/1985), Public Prosecutors' Office (*Ministério Público)*, private associations and others entities allowed by law may propose civil lawsuits to protect the rights of third parties (e.g. consumers).

Right of appeal against civil liability and penalties

CADE's decisions are final at the administrative level and the defendants may only challenge CADE's decision before the Courts of Law.

In the case of lawsuits filed by harmed parties against violators seeking damages, general rules of civil procedure apply. This means that plaintiffs will file the lawsuits and that defendants are afforded all defence rights provided under civil procedure rules and the Federal Constitution, including rights to present defences and to file appeals.

Criminal sanctions

Under Law 9,137/1990 (the Economic Crimes Act), individuals who commit criminal cartel offences are subject to penalties of imprisonment that may vary from two to five years plus fines. Under article 288 of the Brazilian Criminal Code, individuals that commit the crime of criminal association are subject to imprisonment from one to three years. Finally, under Law 8.666/93 (Public Bidding Law), individuals who commit bid rigging crimes are subject to penalties that may vary from two to four years of imprisonment plus fines. All these provisions may be applicable to individuals who engage in cartel behaviour. As mentioned before, legal entities are not subject to criminal penalties involving criminal cartel offences. Only individuals may be criminally prosecuted for cartel behaviour.

Cooperation with other anti-trust agencies

CADE has executed several bilateral and multilateral agreements with authorities from other jurisdictions and/or international entities to boost the exchange of information and best practices. Therefore, when investigating an international cartel, CADE is likely to contact and to cooperate with competition authorities in foreign jurisdictions.

On the other hand, Public Prosecutors' Offices and Brazilian courts are only beginning to enter the realm of international cooperation and to execute cooperation agreements. Although these international requests are more usual in cases involving corruption and/or drug trafficking, authorities may expand this type of cooperation in the future to also encompass cooperation regarding cartel behaviour.

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Cross-border issues

The Brazilian Competition Act sets out that CADE has jurisdiction to investigate not only conducts practised within the national territory, but also conducts practised abroad that may produce effects in Brazil, even if such effects are not achieved. The Brazilian Competition Act, therefore, adopts an effect-based approach, specifically providing for its extraterritorial applicability to conducts 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.

Broadly, CADE's case law classify international cartels from the perspective of their possible effects in Brazil 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) 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 an effect in Brazil.

CADE has adopted a very broad interpretation to establish the connection between conducts abroad and their possible effects in the Brazilian markets, making use of indirect evidence and, in some instances, 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 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 Competition Act, even in cases of companies that do not have any direct sales with Brazil.

Developments in private enforcement of antitrust laws

Private enforcement does not yet play a relevant role in the enforcement of antitrust laws in Brazil, although this is a possibility under applicable laws. CADE has publicly expressed its desire to boost private lawsuits related to anticompetitive practices. In September 2018, CADE's Tribunal issued Resolution 21/2018 governing the publicity of the documents used as evidence in administrative proceedings, including those obtained from leniency and settlement agreements executed with CADE. CADE's main objective was to allow access to the evidence obtained in the administrative investigations to third parties and to encourage private damages lawsuits. This resolution is controversial because of its potential impact on the investigated parties' willingness to execute settlements or leniency agreements with CADE, considering that the confession of participation in illicit acts is a requirement for the execution of these agreements. The effects of this resolution in this regard are still to be assessed in the coming years.

Reform proposals

Currently, there are various bills of law which relate to competition law matters, ranging from a criteria of penalties applied by CADE to the amount of damages that may be claimed

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in civil lawsuits. The legislative process in Brazil is rather complex and contains various phases; therefore, the content and pace of bills being turned into actual amendments to existing legislation is unpredictable.

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* * *

Endnotes

1. An English version is available at: http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf.
2. Individuals may apply for leniency even if they are not the first violators to formally apply.

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