Competition Issues for Distribution and Supply Agreements in Brazil

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A Practice Note outlining the key antitrust and competition issues that can arise in drafting distribution and supply agreements for the sale of goods in Brazil. This includes a discussion of the antitrust and competition risks associated with common price-related terms, geographic and territorial restrictions, customer restrictions, sales channel restrictions, exclusivity, tying and bundling, and other considerations for dealing with competitors in a distribution context.

This Note describes the regulatory framework for challenging vertical distribution or supply agreements in Brazil. It also discusses the antitrust and competition risks associated with terms that counsel may consider including in a distribution agreement.

The Administrative Council for Economic Defense (CADE) is the agency responsible for enforcement of the Brazilian Competition Act (Law No. 12,529/2011) (Competition Act). CADE's authority covers merger review and investigations of anti-competitive behavior, including horizontal and vertical conduct, the latter being relevant to distribution and supply agreements.

Competition authorities have stated publicly that, in the digital economy, certain unilateral practices can be even more detrimental to the market than cartel behavior, suggesting that CADE needs to become better equipped to handle unilateral cases.

Despite this suggestion, CADE still lacks guidelines on vertical conduct, relying primarily on the text of the law and on case law, unlike other jurisdictions and unlike how CADE approaches mergers and horizontal conduct (see CADE: Guides (in Portuguese)).

Despite this, the Brazilian competition authority has recently been putting remarkable efforts into promoting predictability and efficiency in the analysis of vertical mergers and conduct involving vertical restraints.

In 2022, CADE restructured its eleventh General Antitrust Analysis Coordination and adapted it to the task of investigating unilateral conducts. The change in CADE’s institutional body is aligned with the recommendation made by OECD in a report regarding Brazil’s competition policy in 2019, which suggested the creation of a specialized unit for unilateral conduct. In February 2023, CADE established a working group designed to elaborate Guidelines on unilateral conduct (*Cade cria grupo de trabalho para elaborar guia de análise de condutas unilaterais, Cade, 6 February 2023*).

CADE has also resumed its plan to develop guidelines on vertical mergers. In 2022, CADE set up a working group responsible for carrying out studies and research on vertical integration. In January 2023, CADE formally began the process of hiring an external consultant to assist in the creation of the guidelines (*Cade reabre seleção para consultor desenvolver guia sobre ato de concentração vertical, Cade, 6 February 2023*).

Regulatory Framework

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In Brazil, vertical restrictions in distribution or supply agreements can be challenged under Article 36 of the Competition Act if they have as their object or may produce the following effects:

- Limiting, distorting or in any way threatening free competition or free enterprise.
- Dominating a relevant market for goods or services.
- Arbitrarily increasing profits.
- Abusively exercising a dominant position.

A dominant position exists whenever the economic agent is able to change market conditions. Dominance is presumed when a company controls 20% or more of the relevant market.

Paragraph 3 of Article 36 outlines examples of acts that may result in competition violations, including the following that can apply to situations involving distribution or supply agreements:

- Promoting, obtaining or influencing the adoption of uniform or concerted commercial conduct among competitors (item II).
- Limiting or preventing the access of new companies to the market (item III).
- Creating difficulties for the constitution, operation or development of a competing company or supplier or purchaser or financer of goods or services (item IV).
- Preventing a competitor from accessing sources of input, raw materials, equipment or technology, as well as distribution channels (item V).
- Imposing on distributors, retailers, and representatives in the trade of goods or services any resale prices, discounts, payment terms, minimum or maximum quantities, profit margin or any other commercialization conditions related to their business with third parties (item IX).
- Discriminating against purchasers or suppliers of goods or services through differentiated pricing or operating conditions for the sale or provision of services (item X).
- Refusing the sale of goods or the provision of services within the normal payment conditions for commercial usage and customs (item XI).
- Selling goods or providing services unjustifiably below cost (item XV).
- Making the sale of one good conditional on the acquisition of another or on the use of a service, or making the provision of a service conditional on the use of another or on the acquisition of a good (item XVIII).

These provisions cover conduct such as exclusivity, resale price maintenance, tying and bundling, discriminatory behavior, refusal to deal and predatory pricing, among other typical vertical behaviors.

Unlike cartels, vertical practices are not illegal per se in Brazil. Instead, they are subject to an effects-based analysis. Vertical conduct is usually penalised by CADE only if:

- It produces negative effects on competition, such as foreclosure effects.
- Those effects are not outweighed by countervailing positive effects or efficiencies.

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- The economic entities involved hold market power.

CADE can impose fines as follows:

- Companies: between 0.1% and 20% of their annual revenue in the year preceding the beginning of the investigation.
- Executives and officers: between 1% and 20% of the company fine.
- Other individuals and non-profit entities: between BRL50,000 and BRL2 billion.

CADE investigations can be instigated by CADE or following complaints presented by third parties, which is more often the case in vertical investigations.

Private parties can also bring civil actions before a court of law seeking damages and other remedies, such as injunction orders.

However, private antitrust enforcement is only just emerging in Brazil and is therefore not yet common, especially in the realm of distribution arrangements.

Price-Related Terms

CADE's current approach to assessing vertical price terms can be summarised as follows:

- Fixed or minimum resale prices present higher competition risks than maximum resale prices.
- Suggesting prices poses less risk than setting prices (if there is no retaliation or punishment for non-compliance with the suggested pricing).
- Market power (market share of 20% or more), held either by the manufacturer or by the aggregate of distributors, remains a key factor in determining illegal conduct. However, if competitors together hold a market share of 20% or more in the affected markets, and if these competitors implement price-based vertical restraints, CADE may consider them to collectively hold sufficient market power to negatively impact competition in the market.
- Conduct presents substantially higher risks when the resale price policy is proposed, requested, or influenced by distributors.
- If distributors are treated differently by the supplier with no reasonable justification, the conduct may represent higher risk.

Setting Resale Prices (Resale Price Maintenance)

Resale price maintenance (RPM) occurs when a supplier fixes the resale price of the product or service sold by its distributors or retailers. RPM may reduce competition at the level of the manufacturer (as a commonly used vertical tool to implement horizontal collusion), at the level of the distributors or retailers or may exclude players from a market or impair entry of new players.

The Competition Act treats RPM as an effects-based violation and not as illegal per se. Article 36, paragraph 3, item IX of the law lists the imposition of resale prices on distributors, retailers, and representatives in the trade of goods or services as one of the practices that may violate free competition.

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Because RPM is an effects-based violation, it is assessed under the rule of reason and is illegal only if:

- It produces negative effects on competition (one or more of the four effects listed at the start of Article 36).
- Its negative effects are not outweighed by positive effects or efficiencies derived from the practice.

CADE has adopted varying approaches to reviewing RPM conduct since 2013 and has generally examined RPM practices more rigorously than other forms of vertical conduct.

Traditionally, vertical RPM conduct is treated as producing anti-competitive effects only if the economic agent holds a dominant position, which is presumed whenever a company can alter market conditions or when it holds 20% or more of a relevant market.

In more recent price-related vertical practices cases, CADE has taken a more rigorous stance, indicating that there may be negative effects if the aggregate of the distributors impacted represent more than 20% of their markets, or if competitors of the supplier adopt similar RPM practices and the supplier and its competitors together hold more than 20% of the market (see SKF Case).

SKF Case

The leading precedent on RPM is the SKF case, where CADE adopted a rigorous approach to RPM. The SKF case involved the investigation into SKF do Brasil Ltda. for setting minimum resale prices to resellers and adopting mechanisms of monitoring and punishment for non-compliance. SKF held market power (more than 20% of market share) in certain relevant markets, and there was evidence that the RPM was welcomed or requested by the resellers. The majority of CADE's tribunal decided to convict SKF and imposed a fine equivalent to 1% of SKF's total turnover in the year preceding the initiation of the investigations (*Administrative Proceeding 08012.001271/2001-44, CADE, 20 January 2013*).

CADE's decision in the SKF case established that whenever there is market power involved, RPM practices involving the setting of fixed or minimum prices should be viewed as illegal by object, and the burden is on the defendant to prove efficiencies that would surpass the negative effects of the conduct.

This approach was softened to an extent in the Continental case in 2018 (*Consultation 08700.004594/2018-80, CADE, 16 October 2018*) and in the Ipiranga case in 2021 *(Consultation 08700.002055/2021-10, CADE, 30 June 2021)*, both of which concerned forms of price control by the supplier, such as minimum advertised prices (MAP) and price suggestions, but not the setting of resale prices specifically (see Continental Case and Ipiranga Case). In the *Michelin case (Consultation 08700.004460/2021-64, CADE, 15 December 2021)*, CADE seems to have returned to a more rigorous stance relating to price control conducts by suppliers (see Michelin Case).

Suggesting Retail Prices Without an Agreement

In theory, the suggestion of retail prices is assessed under the same rule-of-reason approach used for RPM. However, CADE has been much more tolerant when the practice involves solely a suggestion, with no coercion or penalties for not following the suggested retail price.

Kibon Case

The landmark case on suggested retail prices is the Kibon case in the ice cream market, decided in 1997. The investigation focused on Kibon's practice of providing resellers lists of suggested retail prices. CADE's tribunal found that the price lists were suggestive and not mandatory, since there were neither structural conditions nor contractual clauses that would allow

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Kibon to enforce the suggested pricing, nor was there any form of retaliation for non-compliance. (*Administrative Proceeding 00000.000148/1992, CADE, 22 October 1997.*)

Shell Case

CADE reaffirmed the Kibon approach in the Shell case, where CADE stated that vertical restraints must be analyzed under the rule of reason. The case followed a complaint presented by the owner of a gas station alleging that he was being prevented from practicing promotional prices in the resale of fuel. In the decision, CADE pointed out the coercive nature of the prices provided by Shell. CADE found the defendants liable and imposed fines. (*Administrative Proceeding 08012.004736/2005-42, CADE, 11 March 2015.*)

Ipiranga Case

In 2021, fuel supplier Ipiranga submitted to CADE a consultation to obtain CADE's guidance and confirmation on the competition legality of its new price policy applicable to retail gas stations. The policy involved suggesting maximum prices for the resale of fuel by stations in the Ipiranga chain. The system would provide an individualized price for each service station based on its characteristics, using the same methodology. Although the suggested prices could vary, the stations would be offered equal treatment. Ipiranga wanted to increase the competitiveness of the service stations under its brand and pass on efficiencies to consumers in the form of lower prices.

CADE noted that the suggestion of maximum resale prices does not generate competition risks and is presumed to be lawful. The revised policy provided for elements that, in CADE's view, would prevent negative effects on competition, including that:

- Maintenance of the resale prices was implemented by suggestion.
- The suggested parameters were maximum prices.
- The policy was unilaterally developed by Ipiranga.
- There were no retaliation mechanisms for non-compliance.
- The suggestion was individualized for each retailer service station but based on uniform criteria.

(*Consultation 08700.002055/2021-10, CADE, 30 June 2021.*)

Creating Unilateral Pricing Policies

CADE follows a similar analysis for reviewing unilateral pricing policies and RPM agreements. CADE assesses the conduct based on effects, and the main factors relate to whether the prices are fixed, minimum, or maximum and whether the prices are suggested or imposed. The imposition of fixed or minimum prices, either unilaterally or by agreement, tends to carry higher risks.

CADE's case law has suggested that pricing policies imposed unilaterally by the supplier may represent slightly less risk than agreed-on RPM conduct. One factor that led to the finding against SKF in 2013 was that there was evidence that resellers had demanded the imposition of minimum prices (see SKF Case). CADE stressed that in the Continental case, one of the factors that confirmed the legality of the price policy was that it had been imposed unilaterally by Continental, with no request from the distributors (see Continental Case).

Another element that normally reduces risks is treating distributors equally, with no discrimination, as also stated in CADE's decision in the Continental case. In the Ipiranga case, the fact that the suggested price was individualized for each retailer

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service station but based on uniform criteria (the specific characteristics of that resale location and the reseller) weighed in Ipiranga's favor (see Ipiranga Case).

Setting Minimum Advertised Prices

CADE typically considers policies on minimum advertised prices (MAP) similarly to other forms of price-based vertical restraints, such as RPM or suggested resale prices. Two of the most recent and relevant CADE precedents regarding price-based vertical restraints, the Continental case and the Michelin case, involve MAP policies.

Continental Case

In 2018, Continental submitted a Consultation before CADE regarding the legality of a MAP policy that it intended to implement for the resale of tyres. According to Continental, the policy was intended to prevent dealers from advertising Continental brand tyres at a price lower than the ones unilaterally established by the company. CADE ended up confirming the legality of Continental's proposed MAP policy.

CADE assessed the conduct as a price-based vertical restraint using a rule-of-reason analysis similar to how it assesses RPM. CADE then followed the script of evaluating the existence of market power, potential negative effects, and efficiencies.

CADE concluded that Continental had no market power in the analysed markets and dismissed the other steps of the competitive examination. However, CADE emphasised that its confirmation of the legality of the policy was grounded on:

- The absence of market power by Continental.
- The restriction continuing to be unilateral, without involvement of the resellers.
- The absence of discrimination among the resellers affected by the policy.

(*Consultation 08700.004594/2018-80, CADE, 16 October 2018.*)

Michelin Case

In 2021, Michelin, a competitor of Continental, submitted a Consultation before CADE to obtain CADE's approval of its own MAP policy. However, in what could be interpreted as a setback in CADE's trajectory of being less interventionist on price-based vertical restraints after the SKF case, the agency did not confirm the competitive legality of the policy. The policy was developed unilaterally by Michelin with no participation of the dealers, and its economic rationale was to preserve Michelin's business model, as it ensures qualified resellers. Michelin did not hold a market share greater than 20% in the impacted markets, which led two CADE commissioners to vote for the legality of the MAP policy. However, the prevailing position was that CADE could not confirm the competitive legality of the conduct because Michelin's competitor Continental already had a MAP policy in place, and Continental and Michelin together would hold more than 20% of the market. Michelin also could not prove that efficiencies resulting from its MAP policy would benefit consumers. (*Consultation. 08700.004460/2021-64, CADE, 15 December 2021*.)

It is not clear whether CADE will review its previous decision in the Continental case after the Michelin decision or how CADE will develop its understanding of price-based vertical restraints.

Agreeing to Most Favored Nations Pricing or Price Parity Clauses

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A most favoured nation (MFN) pricing clause or price parity clause is a contractual arrangement under which the buyer receives the benefit of more favourable terms and conditions that may be granted by the seller to other buyers. In Brazil:

- They are assessed as vertical restraints under the rule of reason.
- Market power is normally required for this practice to be considered illegal.

Online Travel Agencies Case

The most representative case in Brazil on price parity clauses was archived in August 2021. In this case, CADE reached settlement agreements with three online travel agencies, Booking, Decolar, and Expedia, to ban the use of "less favored nation" clauses. Under the settlement agreements (*Termo de Compromisso de Cessação*) *(*TCC*)*), Booking.com, Decolar.com, and Expedia agreed to replace the less favoured nation clauses for strict parity clauses. In other words, they agreed to stop prohibiting better offers by the businesses in their offline sales channels (reservation desks, physical travel agencies, and telephone service channels). They also agreed to stop demanding parity with the prices charged by other online travel agencies.

According to evidence obtained in the case, the adoption of parity clauses had two main effects:

- Reduced competition among agencies, leveling the final prices offered to consumers.
- Preventing the entry of new players in the market (because the more aggressive strategies that could have been used by new entrants to establish themselves in the market and gain market share, such as charging lower commissions, had no impact in the final price as a result of parity).

On the other hand, CADE found that the maintenance of the parity clause requirement for the hotels' websites was justified to minimise the "free-rider effect" in the online hotel reservation market, which happens when sellers and buyers find the hotels and connect through the agencies' platforms but negotiate outside them. In the long term, this practice could make the online agencies' business unprofitable and cause greater harm to consumers.

(*Administrative Proceeding 08700.005679/2016-13, CADE, 28 August 2021.*)

Offering Different Prices to Competing Customers (Price Discrimination)

Under Article 36, paragraph 3, item X of the Competition Act , it may violate competition law "to discriminate between buyers or suppliers of goods or services by means of differentiated prices, or operational sales conditions or provision of services." As vertical conduct, the illegality is determined after a rule-of-reason analysis if the conduct can produce negative impacts on competition, which normally requires holding a dominant position in the market. CADE also assesses the justifications for the discrimination and any potential efficiencies derived from the practice.

Price discrimination usually involves fixing different prices (or other contractual conditions, such as payment terms, discounts or exclusivity) for equivalent situations. This fixing may create artificial competitive advantages among the different players located in the downstream market. CADE has discussed this type of conduct extensively in cases involving the relationship between producers and their distributors.

Brazilian Post and Telegraph Company Case

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In 2013, the Union of Freight Transport Companies of São Paulo and Region submitted a complaint to CADE against the Brazilian Post and Telegraph Company (ECT), the state-owned mail company, for possible anticompetitive practices, such as price discrimination and sham litigation (*Administrative Proceeding 08700.009588/2013-04, CADE, 11 November 2013*).

The union argued that ECT discriminated between customers that were competitors and other end customers by offering different contractual modalities and different prices for the same services. ECT would discriminate by making available to financial institutions the services "Express Delivery" and "Economic Delivery" of cards and checkbooks, and to e-commerce companies the delivery service "e-Sedex," without making the same services available to ECT's competitor-customers.

The union argued that there would be no difference between the costs of the services used by competitor-customers and other end customers to justify the discrimination. In other words, there was no reasonable and legitimate justification for the discrimination.

According to CADE, there was evidence of anti-competitive discrimination. ECT's network has the greatest geographic reach in the country, with a presence in all municipalities, made financially viable by governmental benefits provided by law, including a monopoly on letter delivery. ECT's network therefore would be a necessary infrastructure for the operation of several competing companies, with no other available options in terms of coverage and reach. According to the investigation, there was evidence that ECT prevented the use of this infrastructure by other companies.

ECT settled the case with CADE through a TCC (*Requirement for Settlement Agreement 08700.003188/2018-08 2 February 2019*). Among other provisions, the TCC established:

- A price and discount policy that guarantees equal prices for equivalent transactions.
- Uniform and horizontal criteria for establishing a contractual commercial relationship.
- A specific indicator for monitoring the quality of parcel post services.
- An obligation to disclose all amendments promoted in the commercial policy as a result of the TCC.

Territorial and Customer Restrictions

Under Article 36, paragraph 3, item IX of the Competition Act, a supplier imposing restrictions on the business of its distributors, retailers and sales representatives with third parties may violate competition law. As vertical conduct, these practices are not per se illegal. CADE must evaluate whether:

- The measure is economically reasonable.
- The supplier holds market power
- Net negative impacts are produced on competition.

A supplier may impose territorial restrictions as a form of market division or as a territorial exclusivity. A market division occurs when the distributor can sell the supplier's product only in a certain geographic area but competes with other distributors that also sell the supplier's products. The territorial exclusivity, on the other hand, combines a geographic market division with an exclusivity clause imposed by the supplier, where the distributor can sell the supplier's product only within a specific geographic area determined by the supplier but is also the only distributor of the supplier's products in that geographic market.

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Over the years, most of the cases analysed by CADE that involved territorial restrictions dealt with radius clauses in contracts between shopping centers and their stores prohibiting a store owner located in a shopping center from having another store in a shopping center located within a certain radius of the first store.

The three main cases decided by CADE on radius clauses involved the Center Norte and Iguatemi shopping centers and several shopping centers from Porto Alegre/RS.

Center Norte Case

In the Center Norte case, CADE stated that imposing territorial exclusivity clauses was not an anti-competitive practice per se and may be justified in some cases to avoid free riders and to protect the investments and infrastructure offered by the shopping center. However, CADE decided that those justifications were not applicable to Center Norte's case because the other companies did not act as "free riders", having investments and infrastructure as significant as Center Norte's. CADE imposed a fine equivalent to 1% of Center Norte's annual gross sales on the company and ordered Center Norte to stop the practice and to publish CADE's decision in one of the two major newspapers in São Paulo for two consecutive days. (*Administrative Proceeding 08012.002841/2001-13, CADE, 19 January 2005.*)

Iguatemi Case

In the Iguatemi case, CADE found that when an economic agent with market power imposes a vertical restriction (such as territorial exclusivity), there is a presumption that the restrictions are a violation of the Competition Act, with the investigated company bearing the burden to prove that the restriction was justifiable. Based on CADE's decision in this case, a radius clause would be unfavourable to the stores, which would be hindered from competing effectively where the shopping centers are located. These restrictions would be acceptable only if the shopping center was responsible for the development of a peripheral area and only for a maximum period of five years. CADE ordered Iguatemi to pay a fine equivalent to 2% of Iguatemi's annual gross sales revenue and to end the practice and publish CADE's decision on the front page of the highest-selling newspaper in São Paulo for two consecutive days. (*Administrative Proceeding 08012.006636/1997-43, CADE, 4 September 2007.*)

Porto Alegre/RS Case

In 2016, CADE decided a case involving several shopping centers located in Porto Alegre, in the state of Rio Grande do Sul. According to CADE, the radius clauses imposed had the potential to cause market foreclosure unilaterally and for an unlimited time in an area equivalent to almost the entire city. CADE imposed fines in total of BRL15 million on infringing shopping centers and ordered the exclusion of the radius clause from all agreements executed by the shopping centers. (*Administrative Proceeding 08012.012740/2007-46, CADE, 31 August 2016.*)

Exclusivity

Under Article 36, paragraph 3, item V of the Competition Act, exclusivity agreements or provisions may be an anti-competitive practice if negative impacts are produced on competition, such as:

- Market foreclosure.
- Collusive outcomes in the upstream market.
- A unilateral increase of market power of the company that imposes the exclusivity by blocking new agents in the distribution segment.

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Furthermore, exclusivity provisions may lead to an increase in the degree of economic dependence on the more dominant company and decrease consumers' options. Exclusivity provisions may be justifiable when they are designed to avoid opportunistic conduct and protect against free riders.

The main considerations to determine whether the exclusivity is legal include:

- Assessing whether the imposing company holds market power. This assessment includes determining:
    - whether the company holds 20% or more of the relevant market;
    - the extent of the company's products portfolio;
    - the strength of the company's brand and reputation; and
    - whether these factors make it impossible for partners to refuse to follow the exclusivity provision.

  If there is no market power, the exclusivity does not cause anticompetitive effects.
- Analyzing any anticompetitive effects of the exclusivity provision, particularly on the extent of any market foreclosure. Exclusivity provisions may be agreed to with all distributors or with strategic retail spaces due to their higher profitability, sales volume, or impact on brand reputation.
- Evaluating the justifications and positive effects of the practice, such as the need to protect investments and avoid the opportunistic behavior of competitors that could unduly use these investments. If the outcome of the analysis is negative, with anticompetitive effects outweighing the positive effects, the exclusivity provisions may be characterized an antitrust infringement.

Unilever Case

CADE has investigated the potential of exclusivity in distribution agreements to bar the entry of new competitors in the market. In October 2018, CADE found the conduct of Unilever, owner of the ice cream brand Kibon, to be anti-competitive and imposed a fine of about BRL29.4 million for anti-competitive practices involving exclusivity agreements in the ice cream market. CADE initiated the investigation in 2006 after a complaint made by competitor Della Vita, which alleged that it was facing artificial barriers to its expansion in the market due to exclusivity agreements practised by Kibon and another competitor, Nestlé.

CADE noted that, given Kibon's dominant position in the market, the exclusivity provisions imposed on the resellers, which included sales, merchandising, and the use of freezers, had the potential to harm competition in the market. CADE ordered Unilever/Kibon to cease all exclusivity practices in existing agreements and to refrain from entering into new agreements with exclusivity provisions. CADE also imposed a fine on Unilever/Kibon. Nestlé's agreements were not found to be anti-competitive due to the company's lack of dominant position in the market.

(*Administrative Proceeding 08012.007423/2006-27, CADE, 16 October 2018.*)

Positron Case

In August 2020, CADE imposed a fine of nearly BRL8 million on Positron, a leading player in the market for car alarms, for the practice of market foreclosure through distribution agreements with exclusivity. In addition to the fine, CADE ordered Positron to amend all existing distribution agreements to remove any exclusivity provisions and to refrain from entering into new agreements with the provisions or demanding exclusivity from its distributors in any way for five years. Once the five-

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year period is over, Positron must consult CADE before executing any agreements with distributors that contain exclusivity provisions.

The case was initiated in 2010 after a complaint from Positron's competitor H-Buster. Although Positron imposed exclusivity provisions on a limited number of its distributors (responsible for just over 30% of the market), CADE found that the practice was anti-competitive, as it encompassed all distributors with the ability to sell nationwide, leaving only regional distributors available to Positron's competitors.

(*Administrative Proceeding 08012.005009/2010-60, CADE, 12 August 2020*.)

iFood Case

In March 2021, CADE imposed a preventive measure against the food delivery app iFood that prohibits the company from executing new agreements with exclusivity provisions or from amending existing agreements to include any such provisions until CADE reaches a final decision.

The investigation was started by a complaint from iFood's competitor Rappi, which alleges that iFood is the biggest food-tech company in Latin America and would have abused its dominant position in Brazil by executing exclusive agreements and imposing special commercial conditions as a mechanism to exclude or hinder the development of potential or existing players, such as Rappi. CADE noted that it was necessary to investigate whether the exclusivity provisions implemented by iFood should be considered anti-competitive practices. In the meantime, CADE decided to impose the preventive measure because new exclusivity provisions could harm competition in the market.

In February 2023, CADE executed a TCC with iFood by which iFood commits to:

- Limit exclusivity contracts with accredited establishments that represent up to 25% of iFood’s national business volume.
- Not enter into exclusivity contracts with food chains that hold more than thirty units.

In addition, iFood agreed:

- Not to impose restrictions on its accredited establishments’ business policies (regarding discount policies or contracts with rival food delivery marketplaces after the end of the exclusivity period).
- To enter into new exclusivity contracts only if those contracts also offer benefits for the contracted establishments, such as services to improve product and service quality or investments that will increase their revenue.

(*Administrative Inquiry 08700.004588/2020-47, CADE, 10 March 2021, and TCC Application 08700.005597/2022-17, 29 July 2022*.)

Gympass Case

Similarly, in December 2021, CADE imposed a preventive measure against Gympass, a digital platform that allows its users access to several gyms in Brazil and in other countries. The investigation was started by a complaint from Gympass's competitor TotalPass, which alleges that Gympass uses its dominant position in the market to keep the biggest gyms on Gympass's platform only. According to CADE, Gympass's portfolio includes between 80% and 90% of all Brazilian gyms. CADE imposed the preventive measure to prohibit Gympass from including exclusivity provisions in new agreements and to strip the effect of the MFN and "quarantine" clauses (which imposed a period during which a gym could not partner with other digital platforms after

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the agreement with Gympass ended) in Gympass's existing agreements to prevent these provisions from producing possible negative effects on competition.

In September 2022, CADE executed a TCC with Gympass where the latter committed not to enter into new contracts with fitness centers containing MFN or parity clauses, and to limit exclusivity clauses to a maximum of 20% of its gym base in municipalities or zones of municipalities.

(*Administrative Inquiry 08700.004136/2020-65, CADE, 17 December 2021*.)

Bus Serviços Case

In January 2022, CADE decided a merger case between Bus Serviços, an online travel agency (OTA), and J3 Participações, which intermediates the relationship between bus companies and OTAs, where the approval was conditioned on the execution of a merger control agreement.

The merger was identified in the context of an investigation about potential anticompetitive practices committed by the parties, which could use the exclusivity provisions to hinder the development of competing OTAs by directing all bus-related businesses to the OTA controlled by the parties. As part of the merger control agreement, the parties agreed to not implement exclusivity agreements which, given their market power, would cause market foreclosure. (*Merger Case 08700.004426/2020-17, CADE, 26 January 2022*.)

Ambev Case

In March 2022, Heineken filed a complaint with a preliminary injunction request against beverage giant Ambev before CADE. The complaint covered possible abuse of dominant position through exclusivity requirements with cold beer sale points (segment of bars, restaurants, and nightclubs), which could foreclose the market to competitors and limit consumers' choices.

In October, CADE's Tribunal granted the injunction to prevent Ambev from executing or renewing exclusivity agreements with bars and restaurants in certain regions in which it holds a market share of at least 20%, applying the same measure for other regions in which it could potentially hold significant market share until the end of 2022. The prohibitive measure, however, was also applied to Heineken relating to regions where it holds market shares of at least 20%.

(Administrative Inquiry 08700.001992/2022-21, CADE, 22 March 2022, and Voluntary Appeals 08700.005936/2022-65, CADE, 8 August 2022 (Heineken), and 08700.007547/2022-74, CADE, 30 September 2022 (Ambev).)

Sales Channel Restrictions

Restricting Online Sales

Where a supplier prohibits or restricts a reseller from selling a product online, certain provisions of vertical restrictions may apply under the Competition Act (such as Article 36, item IV and paragraph 3, items IX and X).

According to these provisions, the following practices could be characterized as anticompetitive and lead to an infringement of competition law:

- Exercising dominant position in an abusive manner.

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- Imposing on distributors, retailers, and sales representatives in the trade of goods and services resale prices, discount, payment conditions, minimum or maximum amounts, profit margins, or any other trading conditions relating to their businesses with third parties.
- Discriminating between buyers or suppliers of goods or services by fixing different prices or operational conditions on sales or the provision of service.

Because any potential anticompetitive conduct relating to these restrictions is not illegal per se, the analysis must start with determining whether the supplier holds market power to evaluate whether the practice could have negative effects in the market.

CADE has not dealt specifically with restrictions on online sales. However, in the 2018 Continental Case involving a MAP policy, CADE highlighted the importance of there being no discrimination relating to the resellers affected by the MAP policy (see Continental Case). That is, the policy would apply to all Continental resellers in Brazil, with no distinction between virtual resellers (online sales) and physical shops (whether specialized or not). According to the understanding of the majority of CADE's tribunal, this was a necessary condition for the MAP policy to be considered legal.

Setting Other Criteria for Downstream Resellers (Selective Distribution)

Suppliers may establish several policies to select and negotiate with their distributors and resellers, including to limit the channels of trade through which their products are sold. These mechanisms are commonly used to protect the company's brand and reputation.

Under Article 36, paragraph 3, items X and XI of the Competition Act, however, if these mechanisms are a way to discriminate against distributors or a refusal to deal without reasonable justifications, they could be considered anticompetitive acts. To determine if the practice is anticompetitive, CADE looks at the circumstances of the refusal rather than the fact that the refusal occurred.

For example, if a supplier (an upstream agent) with market power refuses to deal with a downstream competitor on reasonable conditions, the effect would be to eliminate competition in the downstream market, making the practice potentially illegal.

If the supplier had never had any business dealings with that distributor or reseller before, there would be no commercial relationship with the downstream player when the supplier decided on the refusal to deal. In this case, the risk of anti-competitive issues is typically lower, and there would be a presumption of innocence. However, if the supplier already had a business relationship with the distributor or reseller and abruptly refuses to deal, there is a greater potential for anti-competitive issues, especially if the distributor or reseller relies economically or is economically dependent on the supplier.

A company canrefuse to sell its products to another company for personal or internal reasons. The refusal to deal will be considered illegal when it becomes a tool to impose restricting measures in the relevant market.

Anti-competitive effects commonly associated with a refusal to deal include:

- Collusive conduct in the original market.
- Unilateral increase of the company's market power.
- Blocking of new agents in the distribution segment
- Monopoly of the users of post-sales services.

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Positive effects might be a reduction of transaction costs and limiting opportunistic conduct to protect investment costs, such as investments in brands and technology and in the protection of specific assets.

Price discrimination occurs when the supplier uses its market power to fix different prices for the same product or service, discriminating among buyers, individually or together, to increase its profits. A supplier can practice price discrimination only if the supplier holds market power. Also, price discrimination can occur only when the products or services are similar and when the buyers and supply conditions are also similar.

The supplier can benefit from price discrimination in many ways, with the first being that it allows the supplier to profit by charging more for its products to those who are willing to pay more. The company then, to the extent possible, sets different prices based on the overlap between the prices and the demand curve. The effects of this type of price discrimination are ambiguous. It reduces consumer surplus while also producing allocation efficiency, ensuring that those who want the product or service have access to it.

The anti-competitive aspect of these measures is not so much the possibility to harm a competitor, but granting a benefit to a certain agent, thus hindering intra-brand competition.

Tying and Bundling

Article 36, paragraph 3, item XVII of the Competition Act provides that tying and bundling practices may be considered antitrust violations if they have the purpose of or may generate one or more of the listed anticompetitive effects.

Many scholars argue that tying and bundling practices should be considered unlawful only if:

- There are two autonomous products or services.
- The buyer is coerced by the seller.
- The seller has market power.
- The demand is inelastic.
- It produces anticompetitive effects.

Although CADE does not strictly follow this test, the authority reviews tying and bundling practices under a rule-of-reason approach. The conduct is punished only if CADE finds it had a net negative effect on competition. However, the mere existence of the conduct may be enough to initiate a formal investigation, especially if the agent holds market power.

Tying and bundling practices are also illegal under the Brazilian Consumer Protection Code. The judicial courts usually sanction suppliers who adopt the practice if there is a consumer relationship in place, regardless of the supplier's market power or any economic justification.

Xerox and Itaú Unibanco Cases

There have been very few tying cases reviewed by CADE. In 1993, CADE decided Xerox was using its market power in the photocopying machine market to force clients into buying Xerox's office materials (such as toner) and spare parts, and Xerox was fined by CADE (*Administrative Proceeding 23/1991*).

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In 2019, CADE granted a preliminary injunction against Itaú Unibanco (Itaú Group's commercial bank) and Rede (Itaú Group's acquirer for credit, debit, and benefit cards), ordering the companies to immediately stop offering special commercial conditions to Rede clients that had an Itaú bank account. CADE reasoned that the preliminary injunction was needed due to the elevated market power of both companies and the lack of economic efficiencies arising from the tying practice. CADE's Superintendence-General (SG-CADE) recommended the dismissal of the case after it found no evidence of predatory pricing or tying. At the Tribunal level, there is an ongoing round of requests for information, which was issued in March 2023.

(*Proceeding 08700.002066/2019-77, CADE, 24 October 2019.*)

Considerations in Dealing with Competitors

Co-operating with Competitors

The main antitrust risk of co-operating with competitors in Brazil is that the cooperation may lead to or may facilitate collusion or undue exchange of sensitive information. In Brazil, cartels are per se violations, and the defendants are subject to administrative sanctions imposed by CADE and to criminal sanctions imposed by criminal public prosecutors. Civil enforcement seeking damages is also possible.

CADE's case law on exchanges of sensitive information is still being construed. Exchanges of direct information among competitors concerning current or future strategic information (such as prices, volumes, and strategies) tends to be seen as an infraction by object.

There have been very few investigations in Brazil related to cooperation among competitors in a distribution or supply context. However, CADE reviewed several mergers where this was relevant.

Depending on the nature of the cooperation, Article 90 of the Competition Act provides that the co-operation may be considered an "associative contract," which is a type of concentration act subject to pre-merger review by CADE if certain revenue thresholds are met. A cooperation will be considered an associative contract if:

- The parties establish a joint enterprise for the development of an economic activity.
- The parties share the risks and the results of the cooperation.
- The parties are competitors in the relevant market affected by the cooperation.
- The period of co-operation is at least two years.

Cooperation Between Competitors Cases

In the late 1990s, CADE analyzed three major cases related to cooperation between competitors, one being a conduct investigation and the other two, merger cases. These cases were:

- *Investigation 08012.000677/1999-70, 15 September 2004* (*Varig/TAM/VASP*), in which CADE fined three major air carriers due to an agreement to raise prices in response to an industry crisis.
- *Merger Case 08012.004117/1999-67 26 December 2000* (*Bolsa Brasileira de Álcool/COCAL*).
- *Merger Case 08012.002315/1999-50* 26 *December 2000* (*Brasil-Álcool/Bolsa Brasileira do Álcool*).

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In the two merger cases, CADE did not approve the concentration acts and ordered the termination of Brasil Álcool and Bolsa Brasileira de Álcool, two entities created by the main Brazilian players in the alcohol fuel sector to control distribution and eliminate excess stock.

In 2018, during a major fuel crisis in Brazil caused by a truck driver strike, CADE allowed three major players to cooperate for 15 days to re-establish the regular supply of fuel in Brazil. The co-operation involved the sharing of the companies' logistics structures to distribute the product throughout the country. CADE stated that its authorization did not grant antitrust immunity and that the companies agreed to create protocols to prevent the exchange of competitive information and provide CADE with any information it requested. (*Proceeding 08700.003483/2018-56, CADE, 26 June 2018.*)

In 2022, CADE's Tribunal cleared the formation of a joint venture (JV) based in Germany between Volkswagen, BMW, Mercedes-Benz, BASF, Bosch, Henkel, SAP, Schaeffler, Siemens, T-Systems and ZF subject to unilaterally imposed restrictions by CADE. The JV was aimed at enabling the creation of digital solutions, sharing information on the automotive sector's productive chain and developing an app marketplace.

After being held up for further analysis due to concerns involving possible co-ordinated effects and exchange of competitively sensitive information, the approval of the transaction was made conditional on behavioral remedies affecting the governance of the JV, including monitoring software users' information exchange. In the end, the parties ended up withdrawing the transaction in Brazil.

(*Merger Case 08700.004293/2022-32, 24 June 2022.*)

COVID-19 Co-operation

In May 2020, CADE allowed eight beverage and food companies (Ambev, BRF, Coca-Cola, Aurora, Mondelez, Nestlé, Pepsico, and Heineken) to cooperate to reduce the effects of the COVID-19 pandemic on small and medium retailers. CADE stated that the agreement would not harm competition due to its limited time frame of six months. The existence of clean teams, the requirement not to exchange competitive information, and the requirement that CADE would be constantly informed of the group activities were also elements in favor of CADE's clearance stance. (*Proceeding 08700.002395/2020-51, CADE, 27 May 2020.*)

In June 2020, the Brazilian Congress issued Law No. 14.010, with specific regulations for the COVID-19 pandemic. Law No. 14.010 suspended Article 90, item IV of the Competition Act for the duration of the pandemic, allowing companies to execute cooperation agreements, joint ventures, and other associative agreements without prior authorization from CADE.

In July 2020, CADE issued guidance regarding cooperation during the COVID-19 pandemic, including drafting guidance for the material scope, time period, geographic scope, and governance of pandemic-related agreements.

Selling to a Downstream Entity That Is Also a Competitor (Dual Distribution)

Neither the Competition Act nor CADE has clear guidelines regarding dual distribution. Therefore, the main antitrust risk of dual distribution is using the distribution agreements to facilitate collusion or the exchange of sensitive information in the markets where the two entities compete, which could be a violation of Article 36 of the Competition Act .

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