THE CARTELS AND LENIENCY REVIEW

EIGHTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 26 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource to the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as consider the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition

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authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 26 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the eighth edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2020

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Chapter 4

BRAZIL

Mariana Villela, Leonardo Maniglia Duarte, Alberto Monteiro and Vinicius Da Silva Cardoso[1]

I ENFORCEMENT POLICIES AND GUIDANCE

Brazilian law provides that cartels may be subject to administrative, civil and criminal scrutiny.

Law No. 12,529/2011 structured the Brazilian System for Protection of Competition with the establishment of the agency, the Administrative Council for Economic Defence (CADE) for administrative cartel enforcement. CADE investigates and prosecutes anticompetitive conducts, such as cartels, at the administrative level.

Although Law No. 12,529/2011 does not define 'cartel' as a specific conduct, it lists several anticompetitive conducts, some of which are popularly known as cartels, including agreeing the following with competitors:

a the prices of individually offered goods or services;

b the production or sale of a restricted or limited amount of goods or the provision of a limited or restricted number, volume or frequency of services;

c the division of parts or segments of a potential or current market of goods or services by means of, among other things, the distribution of customers, suppliers, regions or time periods; and

d prices, conditions and privileges of, or refusal to participate in, public bidding.[2]

Law No. 12,529/2011 also states that cartelists may be civilly liable in the case of lawsuits filed by harmed parties. Article 47 establishes that those affected by anticompetitive practices may propose civil lawsuits to cease the practices or to claim damages originated from such practices. In addition, the Public Prosecutors' Office, public companies, private associations and others may propose civil lawsuits to protect the right to competition, which is a collective type of right as provided in applicable laws. However, private cartel enforcement in Brazil is not yet common, with the exception of cartels related to public bids.

In addition to Law No. 12,529/2011, CADE regularly issues regulations and guidelines to clarify its interpretations and to regulate administrative proceedings. In September 2018, CADE's Tribunal issued Resolution No. 21/2018 governing the publicity of 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

1 Mariana Villela and Leonardo Maniglia Duarte are partners, Alberto Monteiro is an associate and Vinicius Da Silva Cardoso is a lawyer at Veirano Advogados.

2 Article 36, Paragraph 3, Item I of Law No. 12,529/2011. An English version of Law No. 12,529/2011 is available at CADE's website: www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

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private damages lawsuits. Resolution No. 21/2018 may have an impact on defendants' willingness to execute settlements or leniencies with CADE. Its effects in that regard are to be seen and assessed in the coming years.

Since 2012, CADE's General Superintendence has tried to clear the backlog of cartel cases. In 2018, CADE's Tribunal decided twice the number of cartel cases decided in 2017.[3] In nine cases (45 per cent), CADE did not convict any defendants, compared with only three cases with no convictions in 2017 (30 per cent).[4] The fines imposed by CADE in cartel convictions in 2018 totalled 600 million reais. In addition, CADE also initiated 35 new cartel investigations and executed 49 cease-and-desist agreements (TCCs) related to cartel investigations, including cases originated from the *Car Wash Operation* cartel, which resulted in 1.26 billion reais in financial compensation being paid by the defendants.[5] CADE's 2019 figures are not yet available.

In relation to criminal enforcement, Article 4, Item II of Law No. 8,137/1990 defines as a crime the act of executing an agreement between competitors to (1) set prices or units offered; (2) divide markets; and (3) control the supply in detriment of the competition. Federal and state prosecution offices are responsible for persecuting criminal offenders before the courts of law. In recent years, a number of individuals have executed leniency agreements with CADE to provide information regarding cartels to allow authorities to go after other offenders.

II COOPERATION WITH OTHER JURISDICTIONS

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

On the other hand, the Brazilians prosecutors' offices and courts are only beginning to enter the realm of international cooperation and to execute cooperation agreements, mainly due to the famous *Car Wash Operation* case. Although these international requests are more frequent in cases involving corruption or drug trafficking, authorities may expand this in the future to also encompass cooperation regarding cartel behaviour.

The Brazilian courts and government are likely to extradite foreigners that committed crimes abroad. However, the Brazilian Constitution does not allow the extradition of Brazilian nationals.

3 According to 'CADE em Números', CADE decided 20 cartel cases in 2018 and 10 cases in 2017. However, CADE's President states the authority decided 18 cartel cases in 2018 and eight in 2017. 'CADE em Números', available at http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20Números.qvw&host=QVS%40srv004q6774&anonymous=true, and 'Balanço da atuação do CADE em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.

4 'CADE em Números' (see footnote 3).

5 'Balanço da atuação do CADE em 2018' (see footnote 3) and CADE's 2018 Yearbook.

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III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Article 2 of Law No. 12,529/2011 sets out that its enforcement is not limited to conduct practiced within the national territory, but also includes conduct practiced abroad that may produce effects in Brazil, even if such effects are not achieved. Therefore, Brazil adopted an effects-based approach, specifically providing for its extraterritorial applicability to conduct that may have at least the potential of producing effects in the national territory.

To ascertain its jurisdiction to investigate foreign conduct 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's case law classifies international cartels from the perspective of their possible effects in Brazil as follows:

a international cartels with direct effects in Brazil, in which the cartel members had direct sales (i.e., export sales) in Brazil that were affected by the collusion;

b international cartels with indirect effects in Brazil, in which the cartel members did not have direct sales in Brazil, but final products manufactured with parts supplied by cartel members located elsewhere and affected by the collusion ended up exported to Brazil;

c international cartels allocating markets that include Brazil, where there is evidence that Brazil was included in the market allocation agreement; and

d international cartels with no effects in Brazil, where there is no evidence that the cartel produced or could produce effect in Brazil.

The decision in the *Vitamins* cartel case,[6] in 2007, is considered the leading decision on this topic in Brazil. The investigation started after the Brazilian authorities became aware of leniency and settlement agreements executed with foreign competition authorities, and of decisions rendered abroad. In its decision, CADE ultimately concluded that there was sufficient evidence that the cartel had effects in Brazil, because:

a the imported goods represented almost the entire Brazilian vitamins market and the defendants were responsible for supplying a significant amount of vitamins to Brazil;

b the defendants' market shares in Brazil were almost identical to the 'international budget' that they had divided among themselves in their anticompetitive agreement; and

c it would not be logical for an international cartel allocating markets including the Latin American market to exclude Brazil in the market division.

More recently, CADE has adopted a different approach in the analysis of international cartels that could have indirect effects in Brazil. These situations required CADE to adopt a broader interpretation to assess possible effects in cases involving indirect sales. 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 abroad. In assessing whether the conduct could have affected the Brazilian market, CADE argued that the defendants were responsible for providing almost all the DRAM memory in the Brazilian market – most of which had entered the country within

6 Administrative Process No. 08012.004599/1999-18. Reporting Commissioner Ricardo Villas Bôas Cueva. Decided by the Tribunal on 11 April 2007.

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other products – considering that there was no domestic production for this product in Brazil. Sales of DRAM products were historically negotiated abroad, even in cases where these products were sent directly to Brazil by the defendants.

As for international cartels with no effects in Brazil, in 2016 CADE concluded its judgment of the *Elastomers* cartel case,[7] in which it decided to close the investigation due to lack of evidence 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 a calculation basis for prices practised 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.

In the *Compressors* cartel case,[8] CADE adopted an atypical approach in a non-unanimous decision. CADE's General Superintendence argued this case involved 'two cartels': a national cartel involving the two local manufacturers; and a foreign cartel that would not have affected the Brazilian market. According to the General Superintendence, 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 fulfil 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. The majority of the Tribunal considered these facts were enough to establish at least potential effects of the conduct in Brazil.

In the recent *Colour Picture Tubes* cartel case,[9] CADE established a relevant precedent regarding the defendants that may be investigated for international cartel practices in Brazil. According to this decision, because cartels are considered a multi-perpetrator offence, 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 companies sells its products in Brazil, all companies may be prosecuted and convicted by the Brazilian antitrust authority for the possible anticompetitive effects of the practice in Brazil.

CADE's case law in international cartel cases indicates that it has adopted a very broad interpretation to establish this cause-and-effect connection between conduct abroad and its possible effects in the Brazilian markets, making use of indirect evidence 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 anticompetitive conduct carried out abroad and that may produce effects in Brazil, may be subject to investigation and severe penalties in Brazil under Law No. 12,529/2011, even if companies do not have any direct sales in Brazil.

7 Administrative Process No. 08012.000773/2011-20. Reporting Commissioner João Paulo de Resende. Decided by the Tribunal on 31 August 2016.

8 Administrative Process No. 08012.000820/2009-11. Decided by the Tribunal on 16 March 2016.

9 Administrative Process No. 08012.002414/2009-92. Decided by the Tribunal on 28 August 2018.

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IV LENIENCY PROGRAMMES

CADE was the first Brazilian agency to execute a leniency agreement, in 2003. Since then, it has executed more than 50 agreements, making its leniency programme one of its most important tools for fighting national and international cartels. In 2015, CADE released a 60-page guideline to encourage this practice.[10]

Article 86 of Law No. 12,529/2011 establishes that CADE's General Superintendence may execute leniency agreements with violators that commit to cease the conduct, confess the wrongdoing and cooperate with the investigations by providing relevant information and documents. If CADE is not previously aware of the conduct, it may waive all criminal and administrative penalties. On the other hand, if CADE is already aware of the conduct, the leniency may reduce the administrative penalty by one- or two-thirds and waive all criminal penalties.

Although CADE is only allowed to execute a leniency agreement with one player per cartel, Law No. 12,529/2011 establishes that the other players may execute settlement agreements (TCCs). Individuals and companies that execute a TCC with CADE must cease to practise the conduct and to offer useful information to CADE in cooperation with the investigations. In return, they are entitled to a reduction of up to 50 per cent in the administrative fine and to CADE's assistance to negotiate a criminal leniency agreement with the prosecutor's office.

V PENALTIES

In Brazil, cartel enforcement encompasses criminal, administrative and civil penalties.

Article 4 of Law No. 8,137/1990 defines cartel involvement as a criminal offence, the perpetrators of which may be subject to imprisonment of two to five years.

Article 37 of Law No. 12,529/2011 provides that companies are subject to a fine of from 0.1 to 20 per cent of their gross turnover in the markets affected by the anticompetitive conduct. Companies may also be subject to other penalties, such as a ban from contracting with public entities, selling assets and splitting the company. Individuals may receive a fine of from 1 to 20 per cent of the fine imposed on the related company.

Article 47 of Law No. 12,529/2011 provides that those affected by anticompetitive practices may propose civil lawsuits to cease the practices or to claim damages originated from such practices. In addition, public prosecutors, public companies, private associations, among others, may propose civil lawsuits to protect the right to competition, which is a diffuse right as provided by Law No. 7,347/1985.

VI 'DAY ONE' RESPONSE

Companies should always be prepared to react to dawn raids and other evidentiary demands as CADE is experienced in gathering evidence by these means, including with frequent coordination with the Brazilian Federal Police.

In that sense, it is advisable that companies have in place a thorough compliance programme that covers competition issues. The programme reduces the risk of wrongdoing

10 An English version is available at http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf.

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and increases the company's chances of executing an agreement or of receiving a reduced penalty. In addition, the compliance programme may encompass guidelines for dawn raids, such as how to treat the police officers involved and details of who to contact and of the information the officers may request.

After the raid or request, companies may opt for a path of cooperating with the authorities and conducting internal investigations to uncover any new facts that could help with the investigation. These new facts may help the company to prepare its defence and to bargain the best agreement possible.

VII PRIVATE ENFORCEMENT

Private enforcement does not play a relevant role in punishment and deterrence of cartel infringements in Brazil. However, CADE has publicly expressed its desire to boost private lawsuits related to anticompetitive practices.

The only exception to this scenario relates to public bid rigging – a wrongdoing that is also enforced by other legislation, such as Laws Nos. 8,666/1993 and 12,846/2013. In recent years, public entities have initiated several lawsuits – sometimes, with the assistance of the public prosecutors – to claim damages against companies that participated in such cartels. Some defendants executed leniency agreements to close these lawsuits.

In September 2018, CADE's Tribunal issued Resolution No. 21/2018 that governs the publicity of documents used as evidence in administrative proceedings, including those obtained from leniency and TCC agreements. CADE's main objective was to allow access to evidence obtained in administrative investigations to third parties and to encourage private damages lawsuits. Resolution No. 21/2018 may have an impact on defendants' willingness to execute settlements or leniencies with CADE and it may make CADE's leniency and settlements programmes more risky and less attractive. Its effects are yet to be seen and assessed in the coming years.

VIII CURRENT DEVELOPMENTS

In the past few years, CADE has focused its investigation resources in the *Car Wash Operation* cartel and other related investigations. However, CADE has already finalised many of these cases (through decisions or the execution of agreements). Therefore, CADE is expected to increase cartel enforcement in the coming years.

In 2019, CADE's Tribunal did not have a quorum for two months, disrupting the pace of decisions and creating legal uncertainty. The lack of quorum was caused by a political deadlock between the President and the Brazilian Senate on the nomination of new commissioners to take seat at the Tribunal.

Nevertheless, CADE decided one of its most important pending cases in July 2019. CADE's Tribunal fined 11 companies a total of 535 million reais for their involvement in a cartel in public bids related to São Paulo's underground transport and railway systems. The investigation was initiated after one of the companies executed a leniency agreement with CADE, the federal public prosecutor and the São Paulo state public prosecutor. Due to the agreement, the authorities conducted a dawn raid 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.

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Appendix 1

ABOUT THE AUTHORS

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Mariana Villela is the head of Veirano Advogados' antitrust and competition law and corporate integrity practices. Her experience in antitrust and competition law involves general advice on Brazilian competition law, including advice in relation to day-to-day business practices, risk assessment of specific mergers and commercial practices, merger notifications, challenges to merger notifications before competition authorities, representation of clients in procedures involving anticompetitive practices, litigation involving antitrust issues and preparation of compliance programmes. She has acted in many antitrust and competition cases, merger cases and cases involving anticompetitive conduct, including cartel cases and cases involving abuses of a dominant position. She also handles most of the firm's litigation cases involving antitrust issues.

Ms Villela holds a master's degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2008), where she presented a dissertation on exclusive dealing and competition law; and a doctorate degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2012), where she presented a thesis on abuse of dominance and distribution relations.

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