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Competition law and policy in Brazil: new developments

2st Edition 2023

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Introduction

This bulletin summarizes the main aspects of current Brazilian competition policy, as well as the Administrative Council for Economic Defense's (Cade) decisions and approaches to specific cases. Comprised of four articles, it also draws attention to trends and perspectives that companies should look out for when doing or planning to do business in Brazil.

The first article explains what sustainability agreements are, together with their role in placing the topic of cooperation between competitors back in the spotlight. It also discusses general guidelines on cooperation between competitors, which can serve to assist companies interested in entering into such an agreement.

In the second article, some of the main trends observed in Cade's investigation of collusive conduct are addressed, highlighting the authority's increased interest in non-traditional forms of collusion.

The third article outlines the most significant developments in Cade's decision-making regarding concerted practices. This includes the use of indirect evidence as proof of anticompetitive conduct, as well as possible changes to the methodology for calculating fines for collusion (that take the advantage gained by the relevant party into account).

The fourth and final article covers antitrust damages claims. This type of judicial proceeding has been gaining traction in Brazil, especially in light of Law No. 14,470/2022, which has brought about changes to the current legislation to foster private enforcement of anticompetitive conduct. However, there are still certain important challenges that need to be addressed.

Sustainability agreements and competitors' cooperation: General guidelines and Case studies

Cooperation between competitors is the subject of longstanding debate among competition authorities around the world, both from anticompetitive conduct and merger control perspectives. While cooperation may lead to increased efficiency, it may also facilitate collusive behavior and consequently hinder competition in relevant markets. This topic has recently returned to the spotlight from the perspective of sustainability agreements.

Sustainability agreements can be defined as agreements between undertakings that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on animals, the environment, or nature. As with other forms of cooperation between competitors, sustainability agreements can generate important benefits, which are perhaps more evident still in the case of these agreements. This is because companies often lack financial resources – or even incentives – to individually invest in sustainability solutions, which can be costly and complex. At the same time, as it involves cooperation among competitors, typical competition concerns related to this type of agreement still exist – particularly, the risk of exchanging competitively sensitive information.

Antitrust authorities around the world have already issued opinions and published guides and specific studies on this subject. The Dutch antitrust authority was a pioneer in this regard[1] and was followed by other authorities, such as the European Commission,[2] Greek,[3] German,[4] Austrian[5] and British authorities.[6] Generally speaking, these authorities have recognized the role of sustainability

1 The current draft guide to sustainability agreements is available at: https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.
2 Available at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.
3 Available at: https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.
4 Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2.
5 Available at: https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf.
6 The current draft is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document__.pdf.

agreements in promoting the legitimate interests of society. As such, they have sought to guide the market on the limits that must be observed in agreements of this nature to prevent competitors from being "unnecessarily or mistakenly deterred from lawfully cooperating or collaborating to promote environmental sustainability, out of fear of breaching competition rules."[7]

In addition to their guidelines and studies, antitrust authorities have also been dealing with actual cases involving sustainability issues.[8]

Some cases were approved while others were blocked, either because of the effects of the related transactions or because antitrust authorities held the view that the agreements aimed to restrict competition.

The Dutch antitrust authority reviewed one such case in 2015 – the Chicken of Tomorrow case.[9] It involved a proposed agreement between producers and retailers to replace broiler meat with so-called Chicken of Tomorrow, which was nothing more than certain standards to improve the chickens' well-being. The Dutch authority concluded that the gains would not be sufficient to offset the impact of the resulting price increases on consumers, especially as the participants in the agreement practically held the entire market for chicken meat – preventing consumers who wished to buy traditional chicken meat from doing so. Moreover, the Dutch antitrust authority assessed the price impacts of the sustainable initiatives resulting from the agreement and compared them to the potential final price increase, concluding that the impacts would be

7 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139266/Consultation_Document_sustainability_guidance_.pdf.
8 E.g., washing machine deal (case IV.F.1/36.718 of the European Commission), washing powder cartel (Case COMP/39579 of the European Commission), Chicken of Tomorrow deal (Case ACM/DM/2014/206028 from the Dutch authority), PVC and linoleum flooring cartel (Decision 17-D-20 of the French authority), recyclable battery deal (Authorization AA1000476 of the Australian authority) and auto cartel to discourage emissions abatement technology and agreement for CO2 storage (case AT.40178 of the European Commission).
9 Available at: https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf.

greater than the benefits.[10]

In Brazil, Cade has reviewed associations between competitors on several occasions. It has also indicated the main measures competitors should take to mitigate concerns involving the exchange of competitively sensitive information,[11] collusion or discriminatory practices.[12]

Although no guidelines or studies on sustainability agreements have been published at this stage, Cade has already analyzed some cases involving this subject. Two recent cases involved a joint venture between German carmakers[13] and a joint venture between companies in the agricultural sector.[14]

According to the parties, one of the main goals of the transaction involving German carmakers (which was analyzed in detail in the previous edition of this bulletin[15]) was to boost efficiency in processes to improve product quality and assist in meeting sustainability goals.[16] Cade's Tribunal, however,

10 Available at: https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf.
11 "In general, competitively sensitive information (which therefore deserves the parties' greater attention) is specific information (i.e., not aggregated information) that deals directly with the performance of core activities of economic agents." (freely translated). Available at: https://cdn.Cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-Cade/gun-jumping-versao-final.pdf.
12 Subject to a case-by-case analysis, Cade has already recognized some measures that can mitigate competition concerns, such as: (i) directors, officers and employees who access competitively sensitive information must be independent and cannot have relationships with competing companies, especially employees involved in competitively sensitive areas (e.g., sales, marketing, pricing); (ii) prohibiting exchanges of competitively sensitive information between the parties; (iii) adopting competition compliance programs and training; (iv) recording and monitoring meetings by outside counsels; (v) segregating the teams of each competitor; (vi) open-door policies for monitoring by public officials; and (vii) separating the parties' structures. See Merger Cases No. 08700.002327/2018-78 (Parties: Votorantim Cimentos S/A, Tigre S.A and Participações e Gerdau Aços Longos S.A.), 08700.002792/2016-47 (Parties: Banco Bradesco S.A., Banco do Brasil S.A., Banco Santander, Caixa Econômica Federal and Itaú Unibanco S.A.) 08700.003252/2016-81 (Parties: Dia Brasil Sociedade Ltda. and International Retail & Trade Services Sàr), 08700.012602/2015-19 (Parties: Associação Brasileira da Indústria Elétrica and Eletrônica e Sindicato da Indústria de Aparelhos Elétricos, Eletrônicos e Similares do Estado de São Paulo), 08700.006723/2015-21 (Parties: TV SBT Canal 4 de São Paulo, Rádio e Televisão Record S.A. and TV Ômega Ltda.), 08700.008607/2014-66 (Parties: GlaxoSmithKline and Novartis AG), 08700.005384/2014-85 (Parties: Instituto ProHuma de Estudos Científicos and others), 08700.010055/2014-56 (Parties: Albermale Corporation and Israel Chemicals Limited.), 08700.009902/2014-30 (Parties: BB Elo Cartões Participações S.A. and Cielo S.A.), 08700.005278/2014-00 (Parties: Sindicato Nacional das Empresas
13 Merger Case No. 08700.004293/2022-32 (Parties: BASF SE, BMW Holding B.V., Henkel AG & Co. KGaA, Mercedes-Benz AG, Robert Bosch GmbH, SAP SE, Schaeffler Invest GmbH, Siemens Industry Software GmbH, T-Systems International GmbH, Volkswagen AG and ZF Friedrichshafen AG.).
14 Merger Case No. 08700.009905/2022-83 (Parties: SustainIt PTE Ltd, Cargill, Incorporated, Louis Dreyfus Company Participations B.V. and Adm International Sarl).
15 Available at: https://www.mattosfilho.com.br/wp-content/uploads/2023/03/230310-livreto-concorrencial-v6-en.pdf.
16 Available at: https://sei.Cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj8Oh1lskjh7ohC8yMfhLoDBLdda7BqbGGRmirX0-IlJ9WbfjpOjQaHj9BPreC7QjUajMRg1fBW7r8-xoFCFHg2UFJZmGdLV2wU3Xu9jYaI7rzrwp.

did not conduct an in-depth analysis of this argument, considering it insufficient to compensate for concerns regarding potential exchanges of competitively sensitive information between the companies. Ultimately, the Tribunal imposed unilateral remedies on the parties and subsequently blocked the transaction.

On the other hand, a recent transaction involving a joint venture in the agricultural sector was unconditionally cleared after Cade's Tribunal requested to further review it.[17] The proposed joint venture seeks to develop and run a platform that would enable sustainability measurements to be standardized in the food and agricultural supply chains. The parties involved have emphasized that the joint venture will not be a trading platform or marketplace, as it will only allow the companies to measure their impacts on sustainability and standardize the methodologies for doing so. They have also argued that the platform merely recreates existing information flows that are already governed by contractual agreements regarding the supply and consumption of information. Therefore, it would not create any additional capacity to affect decision-making about the purchase and sale of agricultural and food products or influence the markets for agricultural and food products beyond the already existing capacity of information exchanges conducted outside the platform. Cade's Tribunal agreed with these arguments. In addition, the Tribunal emphasized that the joint venture will not perform sustainability certification work, that the pricing for participation in the platform will be based on non-discrimination principles, and that the platform will not have incentives to discriminate against competitors. Thus, Cade's Tribunal concluded that the transaction was not capable of promoting discriminatory practices.

In regard to potential exchanges of sensitive information, the parties explained that they would be contractually prevented from sharing such information with each other. The information and

17 Even though the transaction was unconditionally cleared, the decision considered unilateral commitments offered by the parties throughout the case.

data on the platform would only be visible to the supplier and the respective customer involved in each particular transaction, and a prior business relationship would be required. Each customer's data would be separately stored, both physically and logically. The parties also indicated that they would implement other safeguards to prevent accidental data loss or data sharing, such as (i) independent support staff; (ii) policies and controls monitored via technological or human supervision; and (iii) recording all data access logs (with reviews by the data security team) and making access logs available to customers. Cade's Tribunal agreed that these factors mitigate the concerns regarding the exchange of commercially sensitive information, especially considering that the information provided to the platform will not be competitively relevant.

In addition to the measures indicated above, the parties have also undertaken to certain obligations that Cade's Tribunal deemed important for clearing the transaction, namely: (i) the creation of a robust antitrust protocol; (ii) independence and autonomy of the joint venture and of the joint venture's Chief Compliance Officer; (iii) quarantine of shareholders' employees working in the joint venture; and (iv) prohibition of exclusivity or any preference toward the joint venture shareholders.

The cases mentioned above demonstrate that sustainability agreements have been analyzed by Cade under a traditional approach, as with any other kind of cooperation among competitors. This is despite the international trend towards issuing specific guidelines regarding such agreements and considering factors such as the sustainability benefits generated by such agreements in merger review, as is the case in the European Union. Cade's conclusions in the cases mentioned above indicate a focus solely on the analysis of the competitive aspects of such agreements, which, according with the view expressed by some members of the Tribunal, should only be cleared if they do not raise competition concerns. In other words, the signal from Cade's Tribunal is that positive impacts in terms of sustainability should not be considered a justification for clearing agreements that the authority deems anticompetitive.

New trends in Cade's investigation of collusive conducts

Besides traditional cartels, Cade has shown itself to be attentive to other conducts that, in its view, can cause coordinated anticompetitive effects. Given a reduction in the number of leniency agreements and new traditional cartel cases at Cade, other investigations have focused on practices and even statements by company representatives that may result in coordinated reactions from competitors.

Unilateral information disclosures and invitations to form cartels

In March 2023, Cade opened an investigation against Latam Linhas Aéreas,[1] after the company's CEO allegedly made a public statement saying that the company would not reduce its prices to capture more market share. The statement raised concerns before Cade due to its potential to influence competitors' commercial behavior, such as future pricing policies.

While transparency can generate efficiencies in a given market, Cade's view is that unilateral information disclosures of certain natures may raise competitive concerns, depending on the circumstances in which they are made. Data on current and future prices would potentially generate negative effects, as competitors can use this as a parameter for their commercial strategies and thus facilitate (albeit indirectly) collusive behavior among market players.

This is not the first time Cade has investigated the public statements of company representatives. In 2021, Cade opened a proceeding to investigate the CEO of Miriri Alimentos e Bioenergia S.A.,[2] a leading company in the sugar-energy segment in northeastern Brazil. In a live workshop broadcast on YouTube that brought several market players together, the director allegedly expressed interest in strategically controlling product supply and suggested monthly meetings with other participants for that very purpose. Cade deemed the CEO's

1 Preparatory Proceeding No. 08700.001819/2023-11.
2 Administrative Proceeding No. 08700.005438/2021-31.

statements as an 'invitation to cartelize'. In this case, the mere public suggestion that competitors align their practices – despite not being accepted – was sufficient for Cade's General Superintendence to recommend a conviction to Cade's Tribunal.

Hub-and-spoke cartels and deal registration

More evidence of Cade's apparent tendency to pay greater attention to new forms of collusive conduct has been seen in a first decision by Cade's Tribunal regarding a hub-and-spoke cartel case in April 2023. The cartel was made operational via a common practice in the market known as deal registration, which occurs when the distributor grants some form of exclusivity, privilege, or protection to a particular reseller (usually the one who mapped out the resale opportunity).

The investigation, which focused on the conduct of private companies involved in public tenders and contracts to acquire projectors and digital whiteboards, resulted in the conviction of 18 companies and 20 individuals and a total of approximately BRL 7.9 million in fines.[3] According to Cade, the deal registration formed the alleged cartel to the extent that upon identifying a sale opportunity, a reseller would inform the distributor (thus 'mapping out' the sales opportunity). The distributor would then ask other resellers to protect the resale opportunity by quoting values above pre-established prices, thus guaranteeing the sale to the reseller who initially identified the opportunity.

Other ongoing investigations also point to this apparent trend. One example concerns a so-called 'software cartel', which is looking into an alleged bidding cartel led by the Brazilian technology company Positivo.[4] In this case, the deal registration would have facilitated the alleged collusion between the company and some of its resellers for purchasing computer equipment and materials.

However, it should be mentioned that in both cases, the practice of deal registration was combined with a

3 Administrative Proceeding No. 08012,0070432010-79.
4 Administrative Proceeding No. 08700.008098/2014-71.

hub-and-spoke cartel, through which the distributor (hub), upon receiving information about a sale opportunity from a reseller, not only privileged or protected it, but passed this information on to the other resellers (spokes) asking them to submit bids above a certain value, and thus ensuring that the 'privileged' reseller would win the bid.

When casting his vote on the digital whiteboard cartel, Reporting Commissioner Luiz Augusto Hoffman clarified that his decision to recognize collusion did not result from mapping out the opportunity itself, nor from the privilege or protection given by the distributor to the reseller who mapped it out. Rather, Hoffman stated that the infringement stemmed from sharing commercially and competitively sensitive information, such as the client's name, corporate taxpayer registration (CNPJ) and the price that was to be quoted (with the explicit purpose of dividing the market and setting the sale price above the market average via fixed bids guided and organized by the distributor). These cases demonstrate how in Cade's view, common and (in principle) lawful forms of conduct – such as deal registration – can serve to operationalize collusive behavior.

It is also worth mentioning that Brazil's Federal Court of Accounts (TCU) has taken an even stricter position on this matter than Cade to date. In the software cartel case, the TCU concluded that the practice of deal registration could represent by itself an infringement, as it restricts intra-brand competition. Therefore, while the public authorities have evidently become more interested in deal registration, there is still no consolidated, cohesive understanding for companies to follow – as such, they should remain wary of the practice.

These cases demonstrate Cade's growing interest and attention to non-traditional forms of collusion. Consequently, they should serve as a warning to companies about carrying out certain common practices within the industry. Companies should keep track of upcoming investigations and trials regarding similar matters and, in the meantime, pay close attention to practices and statements that could result in coordinated effects – even if only potentially.

Key developments in Cade's rulings on concerted practices

Cade ruled on eight cases involving collusion in 2022, all related to cartels. Six of these resulted in convictions, with fines totaling approximately BRL 175 million. As of March 2023, Cade has ruled on three more collusion cases (all related to cartels), with two resulting in convictions.[1]

While the number of cases Cade's Tribunal ruled on in 2022 decreased compared to previous years,[2] recent decisions have provided significant insights into (i) the use of indirect evidence as proof of infringements, as well as (ii) possible changes on the methodology for calculating fines in the event of a conviction, by considering any financial advantages that defendants gain from concerted practices.

Standard of proof

The standard of proof Cade applies when investigating antitrust infringements is the subject of constant debate within Brazil's antitrust community.

Indirect evidence regards indicators that require inductive or deductive reasoning to infer or presume an infringement has occurred – unlike direct evidence, which unequivocally confirms a fact.

In collusion cases (such as those involving cartels), obtaining evidence to confirm or refute potential infringements presents a challenge for the competition authorities, as there is a significant asymmetry in relation to the information the investigated parties are privy to.

This issue was raised during Cade's 207th ruling session in March 2023, in which Cade's Tribunal analyzed Administrative Proceeding No. 08700.010323/2012-78. The case involved an alleged cartel between automotive thermal system manufacturers in Brazil's domestic market from at least 1999 to 2010.

During the session, the Tribunal members discussed the adequate standard of proof, and whether relying

1 Data on the total number of cases that Cade ruled on was obtained from 'Cade em Números' platform, available here.
2 For example, in 2021, Cade ruled on 22 cases involving anticompetitive conduct, 19 of which concerned cartel cases and three of which concerned uniform commercial behavior cases.

solely on indirect evidence would be sufficient to convict Denso do Brasil Ltda. and Denso Sistemas Térmicos do Brasil Ltda. (Denso).

In the end, the majority of the Tribunal's commissioners voted with Cade's President Alexandre Cordeiro Macedo to dismiss the case against Denso.

This judgment demonstrated that Cade's Tribunal understood there was a need (i) to more thoroughly assess the evidence used to convict defendants in collusion cases, and (ii) for a holistic evaluation of indirect evidence that would justify a conviction only if it demonstrates in a coherent and correlated manner that the conduct occurred. Cade's Tribunal also recognized that indirect evidence must be analyzed in a particular manner to avoid isolated, one-sided evaluations.

That said, indirect evidence is often used – even if not in isolation – in convictions related to collusion, particularly in cases involving cartels in public bids. These convictions have considered factors such as similarities between the proposals in terms of price range, formatting, and even spelling errors.

Supracompetitive profits

A second trend identified in Cade's recent rulings on collusion cases regards an increasing number of cases where fines for infringements have considered estimates of the economic advantage the colluding parties have gained or have sought to gain.

Traditionally, Cade's methodology for calculating fines for antitrust infringements has been based on factors within Article 37 of the Brazilian Competition Law, namely: the gross revenue of the company's economic group in the fiscal year prior to the launch of the administrative proceeding, in relation to the line of business the violation occurred in. This calculation is then capped at up to 20% of that amount, depending on variables such as how severe the violation was, whether the party under investigation has acted in good faith, and the negative impacts of the conduct on the market, among other factors.[3]

However, Article 37 also states that the fine must

3 The different variables considered when establishing fines for infringements are set forth in Article 45 of the Brazilian Competition Law.

never be less than the advantage gained from the anticompetitive conduct, whenever this can be estimated. It is this consideration that has sparked debates about the methodology for calculating fines,[4] as mentioned in previous editions of this bulletin.[5]

The aim of calculating fines based on the advantage gained is to establish a penalty proportional to the financial benefits of participating in an anticompetitive conduct. In these cases, it is up to the authority to demonstrate how the advantage was estimated – for example, it may consider the extent that products were overpriced, or the public bids or contracts affected by the collusion. As acknowledged in the legal provision itself, one obstacle to applying this rule concerns the complexity of accurately measuring these gains based on the information available at the time of the ruling.

Indeed, there is no consolidated position at the authority regarding the methodology for calculating fines. In some cases, fines have been equivalent to the value of the advantage alone, while in others, fines have been calculated by multiplying the value of the affected contract by the rate of overpricing.

When ruling on a case involving a complaint made by British Telecom regarding a consortium including Claro, Oi, and Telefonica established to compete in public bids for telecommunication services in May 2022,[6] the majority of Cade's Tribunal determined that calculating the fine based on gross revenues would be disproportionately severe. As a result, it decided that the fine should correspond to the advantage gained – calculated by multiplying the value of the contract by the percentage of the identified overpricing, considering the mitigating or aggravating factors provided for in Article 45 of the Brazilian Competition Law (e.g., good faith, the seriousness of the infringement, effects on the market, among others).

A similar calculation methodology was recently proposed for an administrative proceeding

4 Article 37, item I, of the Brazilian Competition Law.
5 Please see the first and third editions of the 2021 bulletin.

6 Administrative Proceeding No. 08700.011835/2015-02 (Plaintiff: Sencinet Brasil Serviços de Telecomunicações Ltda. Defendants: Claro S.A., OI Móvel S.A. and Telefônica Brasil S.A.).

investigating a cartel in the bidding process for engineering and construction services in Rio de Janeiro.[7] Reporting Commissioner Sergio Ravagnani argued the fine that the defendants should pay should be between one and three times the value of the advantage gained – however, the maximum fine could not exceed the limit established in the Brazilian Competition Law (20% of the gross revenue of the company's economic group in the fiscal year prior to the launch of the administrative proceeding, in relation to the line of business where the infringement took place). Although the case is still awaiting a final decision, this proposal indicates that the debate surrounding fines based on the 'advantage gained' concept is ongoing, and there have been various suggestions on how to reconcile this approach with the objective limits set by law.

Despite these differences, fines based on the traditional methodology still prevail within Cade, and the advantage gained approach is mostly employed in cases where sufficient data exists to estimate it. These discussions, however, have led to increased legal uncertainty due to inaccuracies and lack of clear guidance regarding the calculation basis that the authority uses, particularly in cases where defendants seek to settle with Cade. Settlement agreements establish the amount defendants must pay as a monetary contribution, and because Cade's Tribunal must approve them, the divergent methodologies increase the unpredictability of negotiations.

In recognition of these challenges, Cade has been looking at the possibility of consolidating its view on penalty calculations and has already started developing a guide for applying sanctions related to cartel fines in 2020. Although the guide has already been submitted for public consultation, the final version has yet to be concluded.[8] Moreover, with four of the commissioners at Cade's Tribunal set to be replaced in 2023, the new commissioners may still influence how these fines are

7 Administrative Proceeding No. 08700.007776/2016-41 (Plaintiff: Cade *ex officio*. Defendants: Andrade Gutierrez Engenharia S.A., Construções e Comércio Camargo Corrêa S.A., EIT – Empresa Industrial e Técnica S.A., Camter Construções e Empreendimentos S.A., Construtora Norberto Odebrecht S.A., Delta Construções S.A., Construtora OAS S.A., Álya Construtora S.A., Carioca Christiani-Nielsen Engenharia S.A., and Caenge S.A. Construção, Administração e Engenharia, among others).

8 The draft is available at: https://cdn.cade.gov.br/Portal/Not%C3%ADcias/2020/Cade%20estende%20prazo%20para%20contribui%C3%A7%C3%B5es%20%C3%A0%20vers%C3%A3o%20preliminar%20do%20Guia%20de%20Dosimetria%20de%20Multas%20de%20Cartel__Minuta_Guia_de_dosimetria.pdf.

Antitrust damages claims: where does Brazil stand?

In Brazil, Cade is responsible for investigating and penalizing anticompetitive practices in the administrative sphere – especially regarding cartels – in its function to uphold a free and undistorted competition system. Beyond this public enforcement, anyone who claims to have been harmed by anticompetitive practices can seek compensation in the courts by filing an antitrust damages claim (*ação de reparação de danos concorrenciais* – ARDC). This chapter briefly discusses legislative amendments and provides commentary on certain decisions regarding these claims, which have become increasingly common both in Brazil and overseas.

Recent legislative changes regarding ARDCs: Law No. 14,470/2022

ARDCs have had a greater impact on the legal landscape with recent changes to the Brazilian Competition Law via Law No. 14,470/2022, which came into effect on November 16, 2022. As highlighted in our recent newsletter,[1] the most significant changes are:

i. Claimants may now be awarded double compensation for damages, except in relation to parties that have entered into leniency and settlement agreements (TCCs) with Cade;

ii. Courts must not automatically presume claimants that have allegedly been harmed by anticompetitive practices have passed on price increases to third parties to nullify their harmful impacts (pass-on defense);

iii. Greater clarity regarding the beginning of the statute of limitations, which starts from the date Cade hands down its final decision; and

iv. A clear indication that Cade's final decision provides sufficient grounds for injunctive relief (*tutela de evidência*)[2] vis-à-vis the Judiciary.[3]

While it is undeniable that the changes foster private enforcement of antitrust claims in Brazil, ARDCs

1 Available at: https://www.mattosfilho.com.br/en/unico/competition-damage-claims-brazil/.
2 A form of claim protection that motivates immediate judicial safeguards, despite any proof of urgency. MEDINA, José Miguel Garcia. Código de processo civil comentado. 6. ed. São Paulo: Revista dos Tribunais, Thomson Reuters Brasil, 2020, p. 534.
3 This adds to the hypothesis originally provided in Article 311 of the Brazilian Civil Procedure Code.

are not necessarily a 'one-size-fits-all' solution. Challenges include quantifying damages and the potential coexistence of identical ARDCs filed against the same companies in different courts.[4]

The different natures of the new aspects of Law No. 14,470/2022 may impact ongoing ARDCs in Brazil. They include procedural rules[5] that immediately apply to judicial proceedings, provided that previous procedural acts and legal situations consolidated during the previous legal regime are upheld.[6] An example is the new provision that allows the Judiciary to grant an injunction based on Cade's final decision. On the other hand, there is some controversy as to whether the new substantive rules[7] can be applied to facts in ongoing ARDCs that occurred before Law No. 14,470/2022 took effect. These include (i) provisions regarding the statute of limitations, (ii) claimants' rights to double compensation for damages,[8] and (iii) a provision exempting the signatories of agreements with Cade from joint liability.[9] As case law is likely to address such debates,[10] this topic is worth the attention of parties interested in filing ARDCs, as well as those that may be targeted.

Comments on decisions in ARDCs

Even prior to these important legislative amendments,empirical research from the Brazilian Institute of Studies on Competition, Consumer

4 Different Public Prosecutors' Offices often file similar lawsuits against the same companies in different courts. An example of this is the ARDCs against an alleged cement cartel.
5 These are instrumental rules that regulate judicial proceedings.
6 Article 14 of the Brazilian Civil Procedure Code.
7 These are rules that define rights and duties, regulate legal situations, and establish certain prerogatives arising from personal conditions. PEREIRA, Caio Mário da S. Instituições de Direito Civil: Introdução ao Direito Civil - Teoria Geral de Direito Civil. v.I. 34 ed. São Paulo: Grupo GEN, 2022, p. 90.

8 According to Law No. 14,470/2022, without prejudice to the sanctions applied in the administrative and criminal spheres, the damaged parties are entitled to double reimbursement for loss suffered as a result of violations to the economic order, as provided for in Article 36, paragraph 3, items I and II of paragraph 3 of the Brazilian Competition Law.
9 The new rule comes from the inclusion of the third paragraph in Article 47 of the Brazilian Competition Law, which establishes that: "§ 3. The signatories of the leniency agreement and the settlement agreement are only responsible for the damage they caused to the harmed parties, and are not jointly and severally liable for the damages caused by other authors of the violation of the economic order."
10 Previous experience with legislative changes may influence how the courts resolve controversies arising from the application of the new rules. The Civil Code of 2002, for example, changed the statute of limitation framework established by the former Brazilian Civil Code (1916) and, in order to address possible questions about the transition between legislations and the application of the new statute, it established important criteria in Article 2,028.

Affairs and International Trade (IBRAC) revealed a considerable increase in the number of ARDCs filed in Brazil between 2017 and 2020.[11] Two cases highlighted below involve alleged international cartels investigated by Cade and are subject to ARDCs in Brazil or abroad.

International cathode-ray tube cartel

In March 2023, a Dutch court ordered two companies to pay more than EUR 34 million[12] to three Brazilian electronic device manufacturers that filed antitrust damages claims in the Netherlands. The companies sought damages for an alleged international cathode-ray tube cartel (CRT Cartel),[13] which had already been investigated and convicted by Cade in Brazil and other antitrust authorities in the United States, European Union, Japan, Czech Republic, Hungary and South Korea. In Brazil, Cade found that the CRT Cartel had harmed Brazilian electronics manufacturers that imported products from the companies in the cartel, which was mainly based on evidence produced via leniency agreements and TCCs executed with Cade.

One of the convicted defendants in the Netherlands, LP Display, had settled with Cade in 2015 and paid a monetary contribution amounting to approximately BRL 24 million (USD 8.33 million).[14] This sum was well below what was set by the Dutch courts.[15] Samsung SDI (which had signed a leniency agreement with Cade giving it full administrative immunity in Brazil) was also convicted. In the antitrust damages claims decision in the Netherlands, the court rejected Samsung SDI's defense that the plaintiffs had failed to provide sufficient evidence of the cartel

11 Available at https://ibrac.org.br/observatorio-jurisprudencia.htm.
12 The plaintiffs had requested EUR 434 million and, initially, the lawsuit had been filed against more companies, but the litigation against LG Electronics and Philips was settled and dismissed in relation to Samsung Amazon due to a lack of sufficient evidence.
13 The alleged conduct happened between 1995 and 2007 and involved worldwide manufacturers of components for color picture tubes (CPTs) and color display tubes (CDTs). At Cade, the CRT cartel was investigated in two separate administrative proceedings, one concerning the international market for CPTs (08012.002414/2009-92) and the other concerning the international market for CDTs (08012.010338/2009-99).
14 Exchange rate on February 28, 2015 – USD 1.00 = BRL 2.8782.
15 The Dutch court ordered Samsung SDI and LP Display to pay more than BRL 190 million in damages (EUR 34 million and USD 37 million, considering the exchange rates of EUR 1.00 = BRL 5.5244 and USD 1.00 = BRL 5.0804 on March 31, 2023). IGB received BRL 37.3 million (EUR 6.75 million, USD 7.34 million) and Cemaz received BRL 152.8 million (EUR 27.6 million, USD 30 million), while the sum paid out to Itautec was not publicly disclosed.

and the damage it caused. The court found that the leniency agreement with Cade proved Samsung SDI's participation in the cartel, and therefore, the company should be held liable for the damage caused to the claimants.

Additionally, the two defendants both invoked the pass-on defense – arguing that as the claimants had passed on potential financial damage throughout the manufacturing chain, they should be exempt from paying damages to the claimants. Although the Dutch court rejected this argument, some Brazilian courts had accepted it in relation to other ARDCs in the past. For example, in an ARDC related to an alleged cement cartel,[16] Brazilian courts found that the claimants (engineering companies) had not proven any loss of profits or reduction in the level of production due to the cartel, and that the final consumers were the ones who would have suffered the potential damages. It will be important to monitor the Brazilian courts' handling of the pass-on defense, as the new law shifts the burden of proof to the defendants, meaning the pass-on argument cannot be presumed.

16 Administrative Proceeding No. 08012.011142/2006-79.

Orange-purchasing cartel

The second ARDC case concerns an alleged cartel for purchasing oranges to produce frozen concentrated juice. Cade ruled on this case in 2018, and in settling with the authority, several defendant companies paid monetary contributions amounting to BRL 301 million (USD 92.7 million).[17-18] The case also saw two judicial proceedings filed in Brazil's courts. In the first, a farmer filed a lawsuit against Cutrale (one of the companies in the alleged cartel that Cade had investigated and entered into a TCC with) in 2019.[19] The claimant requested that the contracts he had with the company be declared null and void, as well as material damages corresponding to the difference between what he had paid and what he should have paid per box of oranges during the period of the contract – in addition to interest and monetary

17 Exchange rate on February 28, 2018 – USD 1.00 = BRL 3.2449.
18 Cade removed two companies from the group of defendants and dismissed the case against six of the companies, an association, and several individuals after they met the obligations of their TCCs. In addition, the case was dismissed for lack of evidence in regard to two other companies and other individuals.
19 See Case No. 1013956-91.2019.8.26.0037, filed in the 2nd Civil Court of Araraquara, State of São Paulo.

correction, and moral damages. The courts ended up dismissing the case, as it was time-barred.[20] The second case concerned a Public Civil Action filed by the São Paulo State Public Prosecutor's Office, seeking compensation for antitrust damages suffered by small and medium-sized orange producers who would have been excluded from the market because of the cartel. The lawsuit seeks approximately BRL 8.5 billion (USD 1.6 billion)[21] for material damages and around BRL 4 billion (USD 787 million)[22] for moral damages.

At the international level, it is worth mentioning a decision by the High Court of Justice in London from November 2021, which accepted jurisdiction over an ARDC against two of Cutrale's Brazilian shareholders. The case was brought by 1,525 independent Brazilian orange producers linked to the Brazilian Citrus Growers' Association (Associtrus) or the Federation of Agriculture and Livestock of the State of São Paulo (Faesp), as well as 22 legal entities from the orange cultivation sector. The case may represent another important precedent in regard to ARDCs, and media reports have suggested the financial penalties could reach BRL 3 billion (USD 533 million).[23-24]

20 The plaintiff claimed that the beginning of the statute of limitations period was the publication of Cade's final decision (i.e., March 2018). The judge rejected the argument and, by applying a 10-year statute of limitation period based on Article 205 of the Civil Code, decided that the claim was already time-barred when it had been filed. According to the decision, the plaintiff was already aware of the facts when he signed the contracts (between 2001 and 2003) with Cutrale, because at that time, Cade had already launched an administrative proceeding to investigate the cartel, and the commercial relationship between the parties ended in 2006.

The plaintiff then appealed (Appeal No. 1013956-91.2019.8.26.0037) and the São Paulo State Court of Appeals (TJSP) found that Cutrale's TCC with Cade did not imply an acknowledgement of the cartel, and thus there was no decision from Cade on the matter before March 2018. In addition, the plaintiff's request was not related to any breach of contract, but related to cartel formation, with the statute of limitations period of three years, as set forth in Article 206, paragraph 3, item V of the Civil Code.

Brazil's Superior Court of Justice (STJ) upheld the TJSP's decision in Special Appeal No. 1.971.316 – SP (2021/0348275-3). It is worth noting that this case was decided before Law No. 14.470/2022, which, as seen above, set an explicit statute of limitations period: five years to claim compensation for anticompetitive conduct before the courts, starting from Cade's final decision in the administrative proceeding that investigated the anticompetitive conduct.

21 Exchange rate on March 31, 2023 – USD 1.00 = BRL 5.0804.
22 Exchange rate on March 31, 2023 – USD 1.00 = BRL 50804.
23 Exchange rate on November 30, 2021 – USD 1.00 = BRL 5.6199.
24 Available at: https://globorural.globo.com/Noticias/Agricultura/Laranja/noticia/2021/11/justica-de-londres-aceita-acao-movida-por-citricultores-contra-donos-da-cutrale.html. Viewed on April 30, 2023.

Conclusions

Private enforcement of antitrust matters has been increasing worldwide, complementing the important role of antitrust authorities (public enforcement) in fighting against anticompetitive conduct. However, the number of ARDCs filed in Brazil is lower than in other jurisdictions, where important decisions – including on cartels that Cade has investigated – have been handed down.

In the wake of intense debates, new legal provisions took effect in Brazil at the end of last year to assist in providing more effective private enforcement on two main fronts. Firstly, new procedural rules were introduced, such as the evidence protection hypothesis and regulation of the burden of proof regarding price increases. Secondly, provisions such as those giving injured parties the right to double compensation mean there are now more incentives for victims to file ARDCs.

However, important challenges still need to be overcome in this area. These include the difficulty injured parties face in producing evidence of anticompetitive practices, demonstrating causal links between misconduct and the damage suffered, and quantifying the damage. There are also important challenges at an institutional level, such as a lack of familiarity within the judicial courts in regard to ARDCs, as well as the typical duration and associated costs of lawsuits of this nature. Those interested in pursuing this type of judicial strategy should always weigh up such issues.

Moreover, in Brazil, companies can be the target of multiple, separate ARDCs filed by private companies or different authorities, such as the Public Prosecutors' Offices (both federal and state levels). The prospect of facing simultaneous ARDCs puts companies at risk of receiving multiple convictions for the same legal fact, which may significantly impact legal certainty and the business environment in Brazil.

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