

Brazil

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Antitrust law

- 1** What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main legal source applicable to vertical restraints in Brazil is Law No. 12,529 of 30 November 2011 (Law No. 12,529/11 or the Antitrust Law), which entered into force on 29 May 2012 and replaced the former antitrust statute, Law No. 8,884 of 12 June 1994 (Law No. 8,884/94). The new Administrative Council for Economic Defence (CADE) has yet to issue secondary legislation setting formal criteria for the analysis of vertical restraints, and the agency has been relying on regulations issued under the previous law, primarily CADE's Resolution No. 20 of 9 June 1999 (Resolution No. 20/99). In Brazil, the Anglo-American common law concept of binding judicial precedent (ie, *stare decisis*) is virtually non-existent, which means that CADE's commissioners are under no obligation to follow past decisions in future cases. Under CADE's internal regulations, legal certainty is achieved only if CADE rules in the same way at least 10 times, after which the ruling is codified via the issue of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one ((Binding Statement No. 7, which provides that it is an antitrust infringement for a physicians' cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians' cooperatives and health plans).

Apart from administrative liability, parties may face private claims (see question 54) and criminal investigations for anti-competitive vertical restraints. Abuse of dominance through vertical restraints can be considered a criminal violation under article 4 of Law No. 8,137 of 27 December 1990 (Law No. 8,137/90 or Criminal Statute). Only individuals (as opposed to corporations) may be held liable under the Criminal Statute and may be subject to imprisonment from two to five years and to the payment of a criminal fine. No individual has been criminally investigated for an anti-competitive vertical restraint as the primary focus of the criminal enforcement has been to fight cartels.

Types of vertical restraint

- 2** List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The basic framework for the assessment of vertical restraints in Brazil is set by article 36 of Law No. 12,529/11. Article 36 deals with all types of anti-competitive conduct other than mergers. The Antitrust Law prohibits acts 'that have as [their] object or effect':

- the limitation, restraint or, in any way, harm to open competition or free enterprise;
- control over a relevant market for a certain good or service;
- an increase in profits on a discretionary basis; or
- engagement in market abuse.

Article 36(3) contains a lengthy but not exhaustive list of acts that may be considered antitrust violations provided they have the object or effect of distorting competition. Potentially anti-competitive vertical practices include resale price maintenance, price discrimination, tying, exclusive dealing and refusal to deal.

Vertical restraints are not defined by Law No. 12,529/11. Such definition is available, however, in annex I of CADE's Resolution No. 20/99, which states that vertical restrictive practices are 'restrictions imposed by producers/suppliers of goods or services in a specific market (of origin) on vertically related markets – upstream or downstream – along the productive chain (target market)'. Annex I of CADE's Resolution No. 20/99 further notes that 'vertical restrictive practices require, in general, the existence of market power in the market of origin'. Annex I also states that such practices shall be assessed under the rule of reason, as the authority needs to balance their pro- and anti-competitive effects.

Legal objective

- 3** Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

CADE's policy has been to enforce the law considering promotion of competition as its main objective, although the law also makes reference to consumer protection, freedom of enterprise and the 'social role of private property' as its guiding principles.

Responsible authorities

- 4** Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

CADE's structure includes a tribunal composed of six commissioners and a president; a Directorate-General for Competition (DG); and an economics department. The DG is the chief investigative body in matters related to anti-competitive practices. CADE's tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review. Governments or ministers do not play any role in the enforcement of legal competition provisions – on the contrary, article 9 of Law No. 12,529/11 states that no appeal against CADE's decision shall be submitted to the Minister of Justice.

Federal and state public prosecutors are responsible for enforcing the Criminal Statute. Also, the police (local or federal) may initiate investigations of anti-competitive conduct and report the results of their investigation to prosecutors, who may indict the individuals. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. As previously stated, criminal enforcement has mostly focused on cartel cases.

Jurisdiction

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

According to article 2 of Law 12,529/11, in order to establish jurisdiction over any practice, including vertical restraints, CADE must prove that the conduct was wholly or partially performed within Brazil or, if performed abroad, was capable of producing effects within Brazil. Direct presence is achieved through a local subsidiary, distributor, sales representative, etc. Although indirect presence is most commonly established through export sales into the country, it cannot be ruled out that CADE would consider third-party sales (eg, via a licensing agreement) as evidence of indirect presence in Brazil. To date, there has been no case where CADE applied the law extraterritorially against anti-competitive vertical restraints or in a purely internet context against a company with no local presence in Brazil.

Agreements concluded by public entities

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Brazil's Antitrust Law applies to any vertical restraints by individuals and legal entities, either private or state-owned (wholly owned or mixed enterprises) (article 31). For example, state-owned Banco do Brasil, one of the largest banks in the country, was being investigated from early 2010 for imposing exclusivity arrangements for the provision of payroll loans to civil servants. In October 2012, Banco do Brasil agreed to terminate the conduct and pay a fine of 65 million reais.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

The relationship between manufacturers and distributors in the motor car industry is regulated by Law No. 6,729 of 28 November 1979 (Law No. 6,729/79), which sets forth specific rules on territorial and customer restraints. Furthermore, in regulated industries (such as telecommunications, energy and health care) there are industry-specific laws enforced by a regulatory agency covering assessment of vertical restraints. Finally, Brazil's Copyright Law states that publishers may set retail prices to bookstores, as long as the price is not set at an amount that would deter the publication from being accessible to the general public.

General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

No. However, the Antitrust Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. Such a presumption provides some guidance to private parties as it would be unlikely for CADE to find a violation in the absence of market power.

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Law No. 12,529/11 does not provide for a definition of 'agreement'. CADE's Resolution No. 20/99 establishes that vertical restrictions raise antitrust issues:

when they lead to the creation of mechanisms that exclude rivals, whether by increasing the barriers to the entry of potential competitors or by increasing the costs for actual competitors, or furthermore when they increase the probability of concerted abuse of market power by manufacturers/providers, suppliers or distributors, through mechanisms that enable them to overcome obstacles to the coordination that would otherwise have existed.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

Any arrangement, be it formal or informal, oral or in written, leading to the effects listed in questions 2 and 9 above may be subject to antitrust scrutiny in Brazil. For example, in 2009 CADE imposed what is still today the record fine for a unilateral case for an exclusivity arrangement that was not formally agreed between the parties. The investigation, initiated in 2004, was about a loyalty programme created by AmBev, Brazil's largest beer producer, which accounted for approximately 70 per cent of the beer market in Brazil. The programme, named To Contigo, awarded points to retailers for purchases of AmBev products, which could be then exchanged for gifts. CADE concluded that the programme was implemented in a way that created incentives for exclusive dealing, foreclosing competitors from accessing the market – there was no formal request of Ambev directing the point of sales to exclusive relationships (Administrative Proceeding No. 08012.003805/2004-10).

Parent and related-company agreements

- 11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Law No. 12,529/11 does not define 'related company'. Nonetheless, CADE's Resolution No. 2 of 29 May 2012 (Resolution No. 2/12) defines the following entities as part of the same economic group: entities subject to common control and all companies in which any of the entities subject to common control holds, directly or indirectly, at least 20 per cent of the voting or total capital stock. This definition was made for merger control purposes, but may be adopted for the prosecution of anti-competitive practices by CADE. Vertical restraints rules apply to agreements between companies of the same economic group whenever the agreements result in anti-competitive effects, as the exclusion of rivals from the market through margin squeeze practices, for example.

Agent–principal agreements

- 12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Vertical restraints rules will apply to agent–principal agreements whenever the agreements result in anti-competitive effects, such as exclusion of the principal's rivals from the market or if the agreement facilitates collusion among principals.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

See question 12.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Article 36 of Brazil's Antitrust Law includes as examples of anti-competitive practices conduct performed through the abuse of intellectual property rights, and CADE has been consistently stating that the grant of IPRs may lead to anti-competitive effects (when, for example, a party licenses IPRs to one party and refuses to do the same to its rivals). Restraints involving IPRs are assessed under the same rules and principles that are applied in other cases.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

CADE's Resolution 20/99 specifically provides that exclusivity agreements, refusal to deal, price discrimination and other vertical restraints are not per se infringements in Brazil and shall be assessed under the rule-of-reason test. Annex II of CADE's Resolution No. 20/99 (Annex II) outlines 'basic criteria for the analysis of restrictive trade practices', including:

- definition of relevant market;
- determination of the defendants' market share;
- assessing the market structure, including barriers to entry and other factors that may affect rivalry; and
- assessment of possible efficiencies generated by the practice and balance them against potential or actual anti-competitive effects.

In practice, no case has yet been decided on the basis that harmful conduct was justified by pro-competitive efficiencies.

The methodology for defining the relevant market is mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the 'SSNIP test', aiming to identify the smallest market within which a hypothetical monopolist could impose a small and significant non-transitory increase in price – usually taken as a price increase of 5 to 10 per cent for at least 12 months. Supply-side substitutability is also sometimes considered for market definition purposes. As for measures of concentration, reference is made to both the CRX index and the Herfindahl-Hirschman Index (HHI).

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Under the rule of reason, CADE undertakes detailed market analysis, including assessment of market shares, market structures and other economic factors. The Antitrust Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. Such a presumption provides some guidance to private parties as it would be unlikely for CADE to find a violation in the absence of market power.

In a recent case, CADE sanctioned auto-parts manufacturer SKF for setting a minimum sales price. In its decision, CADE found that resale price maintenance will be deemed illegal unless defendants are

able to prove efficiencies; however, there would be a presumption of legality in cases where the supplier has a market share of under 20 per cent and it is not among the four biggest market players (the C4 Index).

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

As with sellers' market share, CADE also takes into account buyers' market share while conducting its review. For example, in a case related to the mobile service provider market, CADE investigated whether an undertaking, through an exclusivity clause in its contracts with large retailers, had foreclosed sale channels to competitors. In its decision, CADE held that although the defendant held 35 per cent of the market, its conduct did not have the potential to harm competition, as there were several other sale channels available to its rivals (ie, distributors had low market shares). The same conclusion was reached by CADE in cases affecting the market for pesticides and drugs (exclusive agreements not being deemed to be anti-competitive given the low market shares of the distributors).

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

There are no block exemptions or safe harbours in the Antitrust Law. The 20 per cent rebuttable presumption of market power contained in the law can be adopted by private parties as an indication of when CADE would be likely to find a given practice to be problematic, even though CADE has already ruled that a low market share is not in itself a fact that enables the authority to conclude that there are no anti-competitive effects.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

In recent years, CADE has reviewed a variety of cases involving vertical practices, especially concerning manufacturer's suggested (maximum or minimum) retail price (MSRP). According to CADE's traditional view, a supplier may recommend that resellers charge a given price for goods or services. However, for such practice to be legal, a supplier may not stop supplying goods or put pressure on resellers charging or advertising below or above that price; also, recommended price lists shall be available to the final consumer.

CADE also has taken into account whether the structure of the affected market creates incentives for all the resellers to follow the suggested prices (conditions of entry, and other factors that may affect rivalry, eg, scope of competition among resellers).

The landmark MSRP case in Brazil is known as the *Kibon* case, adjudicated by CADE in 1997. The complaint was filed by the Bakery Association of the State of São Paulo, which stated that the price list sent by Kibon to its resellers affected the freedom of its members to charge prices for ice-cream. The agency did not find a violation of the Antitrust Law as they were only recommended prices and Kibon did not put pressure on resellers to charge such prices. CADE also highlighted the fact that there were no sanctions imposed on resellers that offered below the set prices and no threats to stop supplying such resellers. The same conclusion was reached by CADE in 1999, while reviewing a case involving price lists by Volkswagen to its resellers, and again in 2011, while reviewing a case involving book publishers.

In all these decisions CADE stressed the fact that MSRP and retail price maintenance (RPM) can differently affect competition and must be assessed under different standards. While MSRP is not harmful to competition, RPM could be and should be assessed under the rule of reason.

Under the rule-of-reason standard, CADE dismissed a RPM case in 2011 regarding a producer of water filters and purifiers, Everest, and its distributors. Although Everest adopted RPM practices, CADE concluded that the market structure did not generate anti-competitive effects. The agency also stated that RPM was conceived to avoid having discount retailers free-riding on the service provided by other retailers and there were potential efficiencies associated with the practice.

More recently, in 2013 CADE sanctioned auto-parts manufacturer SKF for setting minimum resale prices. According to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement would be found regardless of either the duration of the practice (in this case, distributors followed orders for only seven months) or the fact that distributors followed or did not follow the minimum sales prices, as CADE considered the conduct to be illegal by object.

- 20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

The framework for the review of RPM and other vertical restraints set forth in CADE's Resolution No. 20/99 does not assess the duration or rationale of the conduct (eg, to launch a new product or brand). However, in the *SKF* case referred to above, CADE stated that the launch of a new product, for example, could be viewed as a legitimate reason to impose RPM for a short period of time such as three months.

- 21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Pursuant to CADE's Resolution No. 20/99, RPM can facilitate collusive behaviour. CADE addressed the links between RPM and collusion in 1999, when it sanctioned the steel bars cartel. CADE concluded that there was evidence that defendants had implemented a RPM policy in order to facilitate the monitoring of the cartel agreement. Also, during the adjudication of the *SKF* case, CADE highlighted that RPM may lead to collusion among buyers or suppliers.

- 22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

CADE's Resolution No. 20/1999 and CADE's case law list as efficiencies reduction of transaction costs, preventing free-riding and improving distribution of a given product. Although it is standard practice to present efficiencies in connection with RPM investigations in Brazil, such claims have never been accepted by CADE. In fact, there is no case in CADE's case law in which the Brazilian anti-trust authority has dismissed an anti-competitive practice based on efficiency arguments.

- 23** Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the

specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

- 24** Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

- 25** Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

- 26** Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

- 27** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

CADE has assessed this issue in connection with a few cases involving 'radius clauses' imposed by shopping centres forbidding the tenant from operating within a given distance from the mall. While reviewing those cases, the agency assessed the potential pro-competitive effects of the exclusivity clause, eg, protection from free-riders and strengthening of competition by the formation of different tenant mixes, but concluded that the negative effects outweighed the potential benefits. Furthermore, in a case involving Microsoft's exclusivity agreement with its distributor TBA, for the selling of its products to the Brazilian federal government, CADE viewed the practice as unlawful since it concluded that it would exclude TBA's competitors from the affected market. Intra-brand and inter-brand competition is usually addressed by CADE in its decisions.

- 28** Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Pursuant to CADE's Resolution No. 20/99, any restriction on customers to whom a buyer may resell should be reviewed under the rule of reason. Thus, even if such restriction may give rise to potential anti-competitive effects (eg, facilitate collusion), those should be balanced against possible benefits that could result from the conduct.

29 How is restricting the uses to which a buyer puts the contract products assessed?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

30 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The Antitrust Law provides no clear-cut guidance on the subject. There are, however, three pending investigations at CADE's Directorate General against Google regarding allegedly abusive vertical restraints on the internet market (see question 5).

31 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

32 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The Antitrust Law provides no clear-cut guidance on the subject and no relevant precedents have provided a framework for the review of selective distribution agreements. However, it is likely that such agreements would be assessed as refusals to deal and territorial restraints, under the structure set forth in CADE's Resolution No. 20/99.

33 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

34 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

35 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific

characteristics of each case, and balance potentially pro- and anti-competitive effects.

36 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

37 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

CADE has not dealt with the possible links between selective distribution systems and resale price maintenance policies.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

In a case involving Microsoft's exclusivity agreement with its distributor TBA, for the selling of its products to the federal government, CADE viewed the practice as unlawful since it concluded that it would unreasonably prevent intra-brand competition.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

CADE has reviewed important cases involving arrangements made by Souza Cruz and Phillip Morris – both tobacco companies – with their respective dealers to prohibit the display of competitors' products and in-store advertisements. CADE settled the case with both companies, putting an end to a pending antitrust investigation that was initiated in 2005. Souza Cruz agreed to pay 2.9 million reais, while Philip Morris paid 250,000 reais.

Moreover, while reviewing a distribution agreement in the merger review process, CADE found that a clause preventing resellers from commercialising competing products in certain sales channels would unreasonably limit competition (*Gatorade* case).

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects. Moreover, since requirements to buy a full range of the supplier's product bear similarities to tying arrangements, CADE would probably assess both under a similar framework.

CADE generally requires four conditions to find an infringement for tying:

- dominance in the tying market;
- the tying and the tied goods are two distinct products;
- the tying practice is likely to have a market-distorting foreclosure effect; and
- the tying practice does not generate overriding efficiencies.

43 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

The Antitrust Law provides no clear-cut guidance on the subject. However, CADE adjudicated a case involving McDonald's franchise agreement (Administrative Proceeding No. 08012.003005/2002-37), and in its decision it indicated that franchise agreements could be subject to antitrust review whenever they raised anti-competitive concerns. Although case law is limited, since vertical agreements are reviewed under the rule of reason, it is likely that CADE would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Under the Antitrust Law the types of qualifying business transactions subject to review include the formation of 'a joint venture, an association or a consortium'. Such transactions must be submitted

for review if executed by parties that meet the turnover thresholds and produce effects in Brazil. Law No. 12,529/11 provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction: one party must have Brazilian revenues in the last fiscal year of at least 750 million reais and the other 75 million reais – both acquirer and seller, including the whole economic group, should be taken into account. As for the effects test, it is met whenever a given transaction is wholly or partially performed within Brazil or, if performed abroad, it is capable of producing effects within Brazil.

There is still significant uncertainty on determining the need for an antitrust filing of associate contracts in Brazil. CADE has yet to issue secondary legislation on this subject, but meanwhile the agency has provided some direction through case law. In recent cases involving licensing agreements by Monsanto, CADE's DG took the view that non-exclusive licensing agreement that did not contain non-compete clauses, did not provide for transfer of assets and did not create corporate relationships would not require antitrust approval in Brazil. CADE's tribunal, however, reviewed the cases and ruled that from a procedural perspective, the criteria to establish whether licensing agreements meet the thresholds are complex and should be further discussed by CADE's commissioners with the purpose to promote consistency regarding its precedents, and on substance, the Monsanto transactions were subject to antitrust review in Brazil.

When assessing an agreement containing vertical restraints, CADE's DG can either clear it without conditions or send it to the tribunal for judgment with a recommendation of conditional clearance or that it is blocked. At the end of the procedure a reasoned decision is published. In 2013, the average review period for fast-track and ordinary cases was of 18 and 78 days respectively.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

According to article 9, paragraph 4, in connection with article 23 of Law No. 12,529/11 parties may consult CADE regarding the legality of ongoing business conduct, subject to the payment of a fee of 15,000 reais and to the submission of supporting documents. This procedure is not available for parties to consult on whether certain transactions meet the notification threshold.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

The first step of a formal investigation is taken by the DG, which may decide, spontaneously (*ex officio*) or upon a written and substantiated request or complaint of any interested party, to initiate a preliminary inquiry or to open an administrative proceeding against companies or individuals, or both, which may result in the imposition of sanctions. Once the DG has concluded its investigation, the defendants may present final arguments, after which the DG may choose to dismiss the case, subject to an *ex officio* appeal to CADE's tribunal. Upon verifying the existence of an antitrust violation, the DG sends the case files to CADE for final judgment. The case is then brought to judgment before CADE's full panel at a public hearing, where decisions are by majority vote. CADE may decide to dismiss the case, if it finds no clear evidence of an antitrust violation, or impose fines or order the defendants to cease the conduct under investigation.

Update and trends

One of the most significant decisions in the area of vertical agreements is the *SKF* case, which involved minimum resale price maintenance. The decision is important because it marks CADE's change of approach from 'rule of reason' to a modified per se test, in which the conduct is presumed to be illegal, and parties would in theory have an efficiency defence. This new approach shows a scepticism towards the role of efficiencies in vertical practices.

CADE has also reviewed important cases involving exclusivity arrangements. Most of them have involved Unimed, a physicians' cooperative and one of the largest health insurance companies in Brazil. Unimed affiliates contract with local physicians and hospitals

for the provision of health-care services, and often such providers are prohibited from affiliating with any other health plan. CADE prohibited such exclusivity arrangements in cases where Unimed held a significant market share (usually around 50 per cent). CADE has imposed sanctions on Unimed in more than 70 of these cases and recently settled another 39 investigations on the condition that Unimed terminates the exclusivity clauses. This outcome was a milestone for CADE, since proceedings relating to similar exclusivity clauses accounted for almost a third of the sanctions imposed by the agency since 1994.

Enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

According to CADE's annual report, in 2013 CADE's tribunal adjudicated 38 anti-competitive conduct cases. Out of the 22 cases where the defendants were found guilty of an infringement, nine related to vertical restraints. Moreover, there are approximately 70 pending investigations for alleged abuse of dominance affecting Brazil, including allegations of sham litigation in the pharmaceutical and auto-parts markets.

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

CADE has the power to declare a contract or some of its provisions invalid or unenforceable if they are found in violation of antitrust law. In this scenario, the contract's remaining dispositions shall not be affected. In cases where it is possible and enough to end anti-competitive effects, CADE might request only the modification of some clauses.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The Antitrust Law applies to corporations, business and trade associations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company's or group of companies' pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. Moreover, the fine must be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 5 per cent of the company's turnover in connection with vertical restraint violations.

Law No. 12,529/11 further provides that directors and other executives found liable for anti-competitive behaviour may be sanctioned from 1 to 20 per cent of the fine imposed against the company. Under the Antitrust Law, however, individual liability for executives is dependent on proof of guilt or negligence, a significant burden for CADE to meet. Historically, CADE has investigated the involvement of individuals in cartel cases, but it has rarely done so in vertical restraint cases. Other individuals and legal entities that do not directly conduct economic activities are subject to fines ranging from 50,000 to 2 billion reais. Individuals and companies may also be fined:

- for refusing or delaying the provision of information, or for providing misleading information;
- for obstructing an on-site inspection; or

- for failing to appear or failing to cooperate when summoned to provide oral clarification.

Apart from fines, CADE may also:

- order the publication of the decision in a major newspaper at the wrongdoer's expense;
- prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;
- include the wrongdoer's name in the Brazilian Consumer Protection List;
- recommend that the tax authorities block the wrongdoer from obtaining tax benefits;
- recommend to the intellectual property authorities that they grant compulsory licences of patents held by the wrongdoer; and
- prohibit an individual from carrying out market activities on its behalf or representing companies for five years.

As for structural remedies, under the Antitrust Law CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to end the detrimental effects associated with the wrongful conduct. The Antitrust Law also includes a broad provision allowing CADE to impose any 'sanctions necessary to terminate harmful anti-competitive effects', which allows CADE to prohibit or require specific conduct. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provisions may prompt judicial appeals.

The record fine for vertical anti-competitive restraint was imposed in 2009. The investigation, initiated in 2004, involved a loyalty programme developed by AmBev, Brazil's largest beer producer (with a 70 per cent market share). The programme, named *To Contigo*, awarded points to retailers for purchases of AmBev products, which then could be exchanged for gifts. CADE concluded – based on documents seized during an inspection at AmBev's premises – that the programme was implemented in a way that created incentives for exclusive dealing, foreclosing competitors from accessing the market. On this occasion, CADE imposed a fine of 352 million reais (equivalent to 2 per cent of its turnover in 2003). AmBev challenged CADE's decision before the judicial courts and a final decision is still pending (Administrative Proceeding No. 08012.003805/2004-10).

Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

After an investigation is initiated, the DG will analyse the defence's arguments and continue with its own investigation, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even conducting inspections and dawn raids. For the purposes of obtaining information from suppliers

domiciled outside its jurisdiction, CADE has several cooperation agreements with foreign authorities.

Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and hard-copy material. In 2009, a computer forensics unit was created by the Ministry of Justice for the purpose of analysing electronic records obtained in dawn raids and by other means. Traditionally Brazil's antitrust authorities have resorted to dawn raids exclusively in cartel cases.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Pursuant to article 47 of the Antitrust Law, victims of anti-competitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Civil Code also establishes that any party who causes losses to third parties shall indemnify those that suffer injuries (article 927). Plaintiffs may seek compensation of pecuniary damages (actual

damages and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.

Individual lawsuits are governed by the general rules set forth in the Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective rights is relatively restricted. State and federal prosecutors' offices have been responsible for the majority of civil suits seeking collective redress, most of which related to consumer rights complaints.

CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued by the agency, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts.

Parties should expect it to take at least four years from the start of a suit until a final decision of the Superior Court of Justice. Successful parties may recover their legal costs at the end of the suit.

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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