

**INTERNATIONAL BAR ASSOCIATION
18TH ANNUAL COMPETITION CONFERENCE | FLORENCE, ITALY
SEPTEMBER, 19-20 2014
CARTEL ENFORCEMENT IN BRAZIL: *STATUS QUO***

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I. Overview of Brazil's Antitrust System

1. Brazil's antitrust system features both administrative and criminal enforcement. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. Private enforcement actions may also be initiated through the judicial courts by aggrieved competitors or damaged parties.

2. At the administrative level, antitrust law and practice in Brazil is governed by Law No. 12,529/11 ("Antitrust Law"), which entered into force on May 29, 2012 and replaced Law No. 8,884/94. Law No. 12,529/11 has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defense ("CADE").³ CADE's current structure includes (i) a Tribunal composed of six Commissioners and a President; (ii) a Directorate-General for Competition ("DG"); and (iii) an Economics Department. The new DG is the chief investigative body in matters related to anticompetitive practices. CADE's Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review. Finally, there are two independent legal officers within CADE: (i) CADE's Attorney General, who represents CADE in court and may render opinions in all cases pending before CADE; and (ii) the Federal Public Prosecutor, who may also render legal opinions in connection with all cases pending before CADE.⁴

3. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/90 ("Brazil's Economic Crimes Law"), as amended by Law No. 12,529/11, and Law No. 8,666/93 ("Brazil's Public Procurement Law"). Federal and/or state public prosecutors have sole enforcement responsibility, and act independently of the administrative authorities. The police (local or federal) may initiate investigations of anticompetitive conduct and report the results of their investigation to prosecutors, who

³ Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat of Economic Monitoring of the Ministry of Finance ("SEAE"), the Secretariat of Economic Law of the Ministry of Justice ("SDE"), and the Administrative Council for Economic Defense ("CADE").

⁴ The Anglo-American concept of binding judicial precedent (*i.e.*, *stare decisis*) is virtually non-existent in Brazil, 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 only achieved if CADE rules in the same way at least 10 times, after which they codify a given statement via the issuance 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.

may indict the reported individuals. In recent years, Brazil has developed a widely recognized program for criminally prosecuting anticompetitive conduct – primarily cartels – and criminal and administrative authorities frequently cooperate during its respective parallel investigations.

4. Finally, parties engaged in anticompetitive conduct may be subject to civil suits in Brazil. The general framework for private antitrust litigation in Brazil is set forth in the Antitrust Law and in Law No. 10,406 of January 10, 2002 (“Brazil’s Civil Code”).⁵ Pursuant to Brazil’s Antitrust Law, victims of anticompetitive conduct may seek recovery of their losses, in addition to other types of relief, such as court injunctions to cease the illegal conduct.⁶ Pursuant to Articles 186 and 927 of Brazil’s Civil Code, anyone who through a voluntary action or omission causes damages to another party is obligated to compensate the aggrieved party.

II. Legal Framework, Enforcement and Policy on Cartel Enforcement in Brazil

Administrative Level

5. Article 36 of the Antitrust Law prohibits acts ‘*that have as [their] object or effect*’ (i) limitation, restraint or, in any way, harm to open competition or free enterprise; (ii) control over a relevant market of a certain good or service; (iii) an increase in profits on a discretionary basis; or (iv) engagement in market abuse. The law is written broadly to apply to all forms of agreements and information exchange of sensitive commercial information, formal and informal, explicit and implicit. Under Article 2, practices that take place outside the territory of Brazil are subject to CADE’s jurisdiction, provided that they cause actual or potential effects in Brazil.

6. CADE can prosecute individuals and companies, as well as business associations and non-profit entities for alleged anticompetitive conduct with actual or potential effects in Brazil. As for individuals, employees and former employees may be held accountable for any anticompetitive conduct in which they took part. Officers and directors may also be held accountable, not only for directly participating in the

⁵ In cartel cases such lawsuits are filed by private parties (as well as entities with legal standing to represent claim on behalf of private parties in class actions) seeking damages for anti-competitive behavior.

⁶ Courts orders may have a very broad scope and can include prohibitions on a defendant selling a product, changes to pricing conditions or any other contractual provisions with related parties are modified. Such injunctions can be provisional or final.

conduct, but also for failing to act when aware of any illegal conduct within the company.

7. Corporations can be fined 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.⁷ CADE has not yet issued secondary legislation clarifying in which cases the agency will resort to the group's revenues instead of taking into account only the turnover of the defendant. CADE's Resolution No. 3/2012 lists 144 "sector of activities" to be considered for purposes of fine calculation. CADE may resort to the total turnover, whenever information on revenue derived from the relevant "sector of activity" is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct.⁸

8. Directors and other executives found liable for anticompetitive behavior may be sanctioned from 1 to 20 per cent of the fine imposed against the company. Under the Antitrust Law, individual liability for executives is dependent on proof of guilt or negligence, which makes it hard for CADE to find a violation on the part of the company's executives. Under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices performed by the company. Considering the stiff sanctions that have been imposed to legal entities by CADE to date, this provision has been nearly forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

9. Other individuals; public or private legal entities; any association of persons or *de facto* or *de jure* legal entities, including trade or professional associations, legally incorporated or not, which do not perform business activities, may be fined between BRL 50,000 to BRL 2 billion.⁹

10. Apart from fines, CADE may also: (i) order the publication of the decision in a major newspaper at the wrongdoer's expense; (ii) prohibit the wrongdoer

⁷ As for the relevant turnover year, assuming, for example, that an investigation starts in 2013, CADE would impose fines over the 2012 turnover.

⁸ CADE has very rarely resorted to this provision when setting fines and, when it did, the fine imposed was less than the equivalent to the maximum percentage of the defendant's turnover allowed by the law.

⁹ According to Article 45 of the Antitrust Law, the following shall be taken into account when setting fines: (i) degree of gravity of the infringement; (ii) good faith of the defendant; (iii) gain obtained or aimed by the defendant; (iv) whether the conduct has been consummated or not; (v) degree of actual or potential harm to competition, Brazilian economy, consumers or third parties in general; (vi) detrimental economic effects caused by the conduct in the market; (vii) economic situation of the defendant; and (viii) recidivism. Finally, if the defendant was already sanctioned by CADE for antitrust offenses in the last five years, fines must be doubled.

from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years; (iii) include the wrongdoer's name in the Brazilian Consumer Protection List; (iv) recommend to the tax authorities to block the wrongdoer from obtaining tax benefits; (v) recommend to the IP authorities to grant compulsory licenses of patents held by the wrongdoer; and (vi) prohibit an individual to exercise market activities on its behalf or representing companies for five years. As for structural remedies, under the law, CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease 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 a specific conduct from the undertaking at issue. CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

Criminal Level

11. Under Brazil's Economic Crimes Law, individuals (but not corporations) may be punished for cartel conduct with a criminal fine *and* imprisonment from two to five years. This penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market that is essential to life or health. As for bid rigging, Article 90 of the Public Procurement Law provides for a jail term of two to four years *and* the payment of a criminal fine.

12. Foreign executives may also be subject to Brazil's criminal system as long as their conduct produces effects in Brazil. In fact, some of the criminal proceedings and settlements executed in Brazil involved foreign executives who had to pay a monetary sum and appear every other month before a Brazilian consulate located in their country of residence.

Leniency Program

13. The DG is the antitrust agency with power to execute the leniency letter. Later on, while adjudicating a case, CADE's Tribunal must verify whether the applicant complied with the terms and conditions provided in the leniency agreement and, if this was the case, confirm the full or partial immunity granted by the DG.

14. The applicant must fulfill the following requirements to benefit from full or partial leniency: (i) the applicant (a company or an individual) is the first to come

forward and confesses its participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant agrees to fully cooperate with the investigation; (iv) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; and (v) at the time the applicant comes forward, the DG had not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

15. Companies and individuals will be eligible for full or partial leniency depending on whether the DG was aware of the illegal conduct at issue. If the DG was unaware, the party may be entitled to a waiver from any penalties. If the agency was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the parties' good faith in complying with the Program's requirements. Directors and managers of the cooperating firm will be sheltered both from administrative and criminal sanctions if the individuals sign the agreement and fulfill the same requirements.

16. Under the previous law, leniency was not available to the cartel leader; such requirement was eliminated from Law No. 12,529/11. Such change does not necessarily mean that the authority will disregard the roles played by each cartel participant in determining whether to grant leniency or not – Article 86 of Law No. 12,529/11 provides that the authority may grant leniency if the program requirements are fulfilled. On the other hand, Brazil's Leniency Policy already provided that the leadership requirement was interpreted in a very limited way. Therefore, from now on, the authority will not be required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party.

17. Further, a grant of leniency under the previous antitrust law extended to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement. Law No. 12,529/11 broadens the leniency grant to extend to these crimes as well. In the past, CADE and the SDE had been able to prevent that criminal charges for other conducts were pressed against individuals that had confessed their participation in a cartel due to their close cooperative relationship with the criminal authorities. Still, such amendment significantly enhances legal certainty and therefore tends to increase incentives for the Leniency Program, in particular for individuals involved in domestic bid-rigging cases.

Settlements

18. In March 2013 CADE issued revised settlement rules, which raise imperative issues for the parties to ongoing cartel investigations.¹⁰ One of the most important provisions in the new Regulation refers to the requirement that the parties acknowledge their involvement in the investigated conduct. Such requirement would apply for all cartel cases, and not only for those initiated through a leniency agreement, as it is today. There has been some criticism to preventing defendants from pleading *nolo contendere*, as it could decrease the incentives for settlements where CADE does not have a strong case, where it could also be in the government's best interest to do so. The provision does not refer to a "confession" and the requirement "to acknowledge participation" may allow for some flexibility with respect to its terms, compared to a strict "confession" requirement. Still, since the amendment to the criminal statute, this may prevent individuals from settling with CADE, since "acknowledging its participation" in connection with the administrative investigation may compromise their respective defenses in criminal investigations in case the conduct at issue continued until after May 29, 2012. This situation is specific to Brazil, where there is dual enforcement by administrative and criminal authorities with respect to individuals. Differently therefore, than jurisdictions such as the United States, that is purely criminal, or the EU, that is exclusively administrative, where the investigated party has to deal with only one investigation in each jurisdiction and does not have to take into account the consequences of its strategy in another parallel case.

19. The Regulation also introduces a scale of discounts that will apply to the settling sum that defendants that wish to settle are required to pay. Reductions may vary between (i) 30% and 50% for the first to propose to settle; (ii) 25% to 40% for the second in; and (iii) for up to 25% to the other parties that come after. For settlement proposals submitted after the DG has concluded the investigation the reductions may be no greater than 15%. Those discounts are in theory based on the fine that would apply to the parties under investigation for cartel and are supposed to vary according to (i) the order in which the parties come forward; and (ii) the extent and usefulness of what the parties provide in cooperation (that is also mandatory now) with the authorities. Clearly the purpose of providing benchmarks is to increase transparency and predictability for the parties, however, since CADE is yet to issue sentencing guidelines, and case law for hard-core cartel cases is still limited, these standards may be of little help.

¹⁰ Brazil's Settlement Program for cartel investigations was introduced in 2007, through an amendment to the previous antitrust law. This represented a remarkable improvement as early cooperation on the part of the defendants saves public resources, cuts down litigation, provides expedited treatment and more certainty and transparency to the business community. Settling also proves beneficial for the defendant, as it often means a more efficient use of resources on the part of the company.

20. With respect to the negotiation rules, as it was the case before, defendants can propose to settle at any stage of the investigation, regardless of whether the case is being handled by the DG or the Tribunal. The general rules are: (i) defendants can only try to settle once (“one-shot game”), and (ii) the negotiation period is for 30 days, renewable for another 30 days. The negotiation process may be confidential at the discretion of CADE. The revised Settlement Regulation now provides that the negotiation will take place at the DG for all cases still under investigation, differently than before, where the entire procedure was conducted at the Tribunal.

21. Finally, pursuant to the 2007 rules, the investigation was suspended for the parties that settle, during a specified period of time for the conditions set forth to be fulfilled, after which, they would be excluded from the proceedings. Under the new Regulation though, the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE adjudicates the case, and therefore, just like the leniency applicant, the parties that settle will be bound to cooperate with the authorities until the end of the investigation.

Status Quo

22. Since Law No. 12,529/11 entered into force in May 2012, CADE has imposed sanctions in connection with 36 investigations, most of which were cartel cases. CADE has stepped up sanctions and has imposed fines that average 15% the annual gross revenues of the defendant in cartel cases. Fines have been considerably higher when the case is supported by direct evidence.

23. The record fine imposed in connection with a cartel case was roughly US\$1,5 billion, in 2014, against the cement industry.¹¹ In the same case, CADE also imposed structural remedies and recommended that the tax authorities prohibited the defendants from obtaining tax benefits. When adjudicating other investigations, in addition to fines, CADE has been ordering the publication of the decision in a major newspaper and the inclusion of the wrongdoer’s name in the Brazilian Consumer Protection List. Other relatively common sanctions include the prohibition of defendants in bid-rigging investigations from participating in public procurement procedures, and defendants in other cartel cases from obtaining funds from public financial institutions for five years.

¹¹ The second largest fine imposed by CADE in connection with a cartel case was roughly US\$1 billion for the cartel in industrial gases in 2010. The third largest fine, roughly US\$ 170 million, was imposed in 2005 for the steel bars cartel.

24. Brazil's antitrust authorities set forth the prosecution of cartels as its top priority in 2003, since then roughly 40 leniency agreements were signed. The majority of the leniency agreements were related to alleged members to international cartels. In 2013, CADE adjudicated the air cargo case, which was one of the first high profile international cartel investigations initiated through a leniency agreement in Brazil in 2006. The parties were fined on approximately US\$ 125 million, the fourth largest imposed by CADE to date.

25. Approximately 100 settlements have been executed by CADE since 2007 when CADE issued its revised Settlement Regulation,¹² 25 or so of which in connection with cartel investigations. Parties to international cartel investigations, such as the marine hose and the compressors cases, have also settled with CADE. The 2007 Settlement Regulation also included rules on Settlements for other types of anticompetitive conduct, which had been in place since 1994.

26. More than 300 executives face criminal proceedings in Brazil suspected of engaging in cartel activity. In past years, at least 40 executives have been found guilty by criminal courts of cartel involvement, and one of the prison sentences handed down was superior to the five year maximum term provided by the law (this was due to a finding of aggravating circumstances pursuant to Brazil's Criminal Code of Justice).

27. The authorities' interaction and cooperation with public prosecutors also gave CADE the ability to tap into the different investigation tools and resources available through the police and prosecutors – for instance, the use of wiretaps. CADE and the prosecutors have frequently cooperated since the beginning of the investigation and have conducted joint dawn raids in several cases. Since 2010, dawn raids were conducted in approximately 15 cartel cases.

III. Private Enforcement

Legal Framework

28. The framework for private antitrust litigation in Brazil is set forth in the Antitrust Law and in the Civil Code. Pursuant to Brazil's Antitrust Law, victims of anticompetitive conduct may seek recovery of their losses, in addition to other types of

¹² 42 of these settlements referred to investigations of Unimed cooperatives' alleged practice of requiring exclusivity relationships from its affiliated physicians in different Brazilian cities. Unimed is Brazil's largest health-care network, with operations in 75 per cent of the country.

relief, such as court injunctions to cease the illegal conduct. Pursuant to Articles 186 and 927 of Brazil's Civil Code, anyone who, through a voluntary action or omission, causes damages to another party is obligated to compensate the aggrieved party.

29. Aggrieved parties are entitled to pecuniary damages, which are awarded according to the extent and gravity of the proven damages (actual damages and lost profits).¹³ Under recent case law, companies may also be entitled to compensation for moral damages, usually derived from losses related to its reputation in the market.

30. While theoretically there are only single damages in Brazil, injured third-parties may resort to provisions contained in the Civil Code and Brazil's Consumer Protection Code to require the payment of double damages, as the payment of a supra-competitive price was due to an antitrust misconduct. Such possibility constitutes an additional incentive for private enforcement in Brazil.

31. Brazil's Civil Code and Brazil's Consumer Protection Code set forth the possibility of joint and several liability in civil law suits. Under both statutes, if more than one tortfeasor contributed to the event, their liability will be joint and several, without apportionment, *i.e.*, each cartel member may be held liable for the entire cartel-related damage. This means that an aggrieved party may bring suits against all cartel members, jointly or separately. The satisfaction of the entirety of the awarded damages by one of the jointly liable tortfeasors releases the remaining tortfeasors from liability before the aggrieved party (Brazil's Civil Code, Article 275). However, if the aggrieved party has only been partially compensated by one of the joint tortfeasors, it may claim the balance from the other tortfeasors (Brazil's Civil Code, Article 277). Pursuant to Articles 283 and 934 of Brazil's Civil Code, the joint tortfeasor who single-handedly compensated all damages awarded to the aggrieved party may seek partial or total contribution against other joint tortfeasors.

32. The pass-through defense is not accepted in consumer (end user) related claims,¹⁴ but there are no statutory provisions and no court precedents regarding how this defense would be treated in other areas. A plaintiff in a suit for damage needs to prove actual and direct damages, so the argument that any above-normal pricing was passed on by a plaintiff direct purchaser to indirect purchasers would probably be

¹³ A claimant can only claim damages for actual losses and/or for what it reasonably has lost as future expected earnings or profits directly related to the action/omission at point (no consequential damages). In other words, the claimant must demonstrate that the damages are the direct and immediate effect of the actions or omissions of the defendant. No consequential or indirect damages shall be awarded. Also, Brazilian law does not provide for punitive damages although plaintiffs are increasingly presenting such requests before courts as a kind of "moral damage".

¹⁴ See Brazil's Consumer Protection Code, Article 25.

accepted as a defense to reduce (but probably not to exclude) indemnification. However, the burden would likely be on the defendant to prove that any above-normal pricing was in fact passed on.

33. Under Article 206, § 3^o, of Brazil's Civil Code, the statute of limitations for private damages claims is three years¹⁵, but case law is not yet settled whether it should be counted from (a) the date in which the violation occurred (*actio nata* doctrine) or (b) when the claimants became or could reasonably have become aware of the illegal conduct. In recent cases, the courts have adopted the latter criterion and have established that the year in which CADE presses charges marks the beginning of the three-year period – this has been the criteria in at least three cases that we are aware of: industrial gases cartel, cement cartel and the subway cartel.

34. A second discussion may arise regarding what is the period of time for which damages can be sought when dealing with continuous long term relationships, such as distribution agreements. Again, neither statute nor case law provides clear criteria: courts could consider either the entire period, provided there is continuity and/or concatenation of actions, or three years prior to the last violation or the knowledge thereof.

Status Quo

35. CADE's decisions are public and available at its website, which means that any third party has access to them and potential claimants may be aware of a matter and file for damages before courts. In 2010, CADE took a step further and, for the first time, included in a cartel decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.¹⁶ Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country. 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 reexamined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts.¹⁷

¹⁵ If the claim arises from a direct contractual relationship between plaintiff and defendant and if the case can be construed as a breach of contractual obligations, then it could be argued a five (5) year statute of limitations, but some precedents indicate that three years most likely will prevail (e.g. REsp. 1.238.737).

¹⁶ See Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010. In a previous cases (sands extractors cartel), CADE ordered for a copy of the decision be sent to the defendants' actual clients, to make them aware of the imposition of the sanction.

¹⁷ In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, concluded that there was no antitrust

36. No final ruling has been issued in connection with a lawsuit on damages in cartel cases. Lawsuits in the following industries are pending decision in court: cement, industrial gases, compressors (leniency), fuel retail, sand extraction, steel bars and subway trains (leniency).¹⁸ The first court instance in the case against steel bar producers awarded approximately BRL 60 million in damages. In one of the lawsuits that followed the adjudication of the industrial gas cartel case, the first court instance judge issued an injunction, under which the defendants were prohibited from selling with any surcharges. Effective enforcement against cartels began in Brazil in 2003. Since then, CADE has imposed fines and other sanctions for cartel conduct in approximately 100 cases.

violation and therefore did not award any compensation to the plaintiffs. On average, however, judicial courts confirm over 70 percent of CADE's decisions.

¹⁸ See MLEX on 5.27.2014: *“Public prosecutors in São Paulo have launched a new civil action against engineering companies and civil servants for alleged bid-rigging in the contracts for the maintenance of the city’s subway lines. (...) Prosecutors want the defendants to pay 2.5 billion reais in compensation and are seeking to block the companies from taking part in public tenders for three years. The civil complaints involves 11 companies: Siemens, Bombardier, Alstom, (...). According to the action, the defendants are jointly liable to pay back 1.9 billion reais in damages for the fraudulent contracts in addition to 576.5 million in moral damages.”*