# The Dominance and Monopolies Review

Third Edition

Editor
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Law Business Research

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# Chapter 3

# BRAZIL

*Ana Paula Martinez*[1]

## I INTRODUCTION

At the administrative level,[2] antitrust law and practice in Brazil is governed by Law No. 12,529/11 (the Competition Law), which entered into force on 29 May 2012 and replaced Law No. 8,884/94.[3] The new Competition Law has consolidated the investigative,

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Thiago Nascimento dos Reis for conducting the research needed to update this chapter.

2 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. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990 (the Economic Crimes Law), as amended by Law No. 12,529/11, and Law No. 8,666/1993 (the Public Procurement Law). Federal or state public prosecutors have sole enforcement responsibility, and act independently of the administrative authorities. 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 reported individuals. In recent years, Brazil has developed a widely recognized programme for criminally prosecuting anti-competitive conduct – primarily cartels – and criminal and administrative authorities frequently cooperate in parallel cases.

3 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat for 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 Defence (CADE). The SDE was the chief investigative body in matters related to anti-competitive practices, and issued non-binding opinions in connection with merger cases. The SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anti-competitive investigations. CADE was structured solely as an administrative tribunal,

prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defence (CADE). CADE's structure includes an Administrative Tribunal for Economic Defence (the Tribunal) composed of six Commissioners and a President, a Directorate-General for Competition (DG) and a Department of Economic Studies. The DG is the chief investigative body in matters related to anti-competitive practices. The Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review.[4] There are also two independent offices within CADE: CADE's Attorney General's Office, which represents CADE in court and may render opinions in all cases pending before CADE; and the Federal Public Prosecutor's Office, which may also render legal opinions in connection with all cases pending before CADE.

The first Brazilian competition law dates back to 1962, but it was only in the mid-1990s that the modern era of antitrust in Brazil began, after the country shifted to a market-based economy. Among other reforms, in 1994 Congress enacted Law No. 8,884, which governed Brazil's administrative antitrust law and policy until 2011. From 1994 to 2003, the Brazilian antitrust authorities focused primarily on merger review and substantial resources were devoted to the review of competitively innocuous mergers. In 2003, the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement and placed hard-core cartel prosecution as the top priority, making use of investigation tools such as dawn raids and leniency applications. A more recent development of Brazil's competition law enforcement is related to an increasing number of abuse of dominance cases, which is first and foremost a symptom of a system that is no longer in its infancy.

The basic framework for abuse of dominance in Brazil is set by Article 36 of the Competition Law. CADE has not yet issued a regulation under the new Competition Law covering unilateral conduct, and has been resorting to legislation issued under the previous regime and precedents. 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 a given statement is codified 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.

Although abuse of dominance could also be considered a criminal violation under Article 4 of Law No. 8,137/90, punishable in the case of individuals but not corporations by a criminal fine and two to five years' imprisonment, no criminal sanction has to date been imposed against individuals for abuse of dominance practices.

composed of six Commissioners and a President, which made final rulings in connection with both merger reviews and anti-competitive practices.

4 On average, judicial courts confirm over 70 per cent of CADE's decisions.

## II YEAR IN REVIEW

In 2014, CADE adjudicated 57 administrative proceedings, out of which 18 were dismissed, while in 39 other cases CADE found an infringement in relation to at least one defendant. In 2014, CADE also adjudicated five preliminary investigations and in most cases followed the opinion issued by the investigative agency (DG), dismissing the cases given the lack of evidence of anti-competitive behaviour. The number of cases where sanctions were imposed is the highest registered in the past five years – CADE found an infringement in 22 cases in 2013 and in only two in 2012. Such an increase is certainly due to the fact that, under the new Competition Law, CADE's Tribunal has been able to focus on anti-competitive matters, rather than on simply reviewing competitively innocuous mergers. In 2015, until 8 April, the Tribunal has reviewed 14 administrative proceedings and found 12 antitrust violations.

Of the 39 cases sanctioned by CADE in 2014, 36 referred to cartel practices, two solely concerned abuse of dominance, while the last case referred both to allegations of influence to adopt uniform practices and resale price maintenance practices in the fuel retail market. Out of the 23 investigations dismissed by the Tribunal, six referred to alleged cartels, 15 to abuse of dominance, one to influencing the adoption of uniform practices and abuse of dominance, and one was kept confidential. Regarding the 14 administrative proceedings adjudicated by CADE in 2015, until 8 April, all but two referred exclusively to alleged cartel practices.

Specifically regarding abuse of dominance, in February 2014, CADE found against two companies for raising rival's costs in the market for transporting money. The defendants were both vertically and horizontally related to the complainants, which alleged that the defendants were charging unreasonable fees to allow them to offer the transportation services to one specific client (Caixa Econômica Federal), with respect to whom the defendants had an exclusive arrangement in the vertically related market. Fines imposed were of 2.72 million reais[5] and 318,180 reais[6] (the percentage such amounts represent of the turnover of the companies was kept confidential).

The issues that deserved special attention from Brazil's competition authority in 2014 in connection with unilateral practices are related to regulated industries, exclusivity clauses and sham litigation. Also, it is worth listing the investigations covering alleged abuse of dominance practices that were settled by the defendants in 2014.

5 Administrative Proceeding No. 08012.006272/2011-57; Defendant: Proforte SA Transporte de Valores, and Protege; adjudication date: 19 February 2014.

6 Administrative Proceeding No. 08012.009757/2009-88; Defendant: Rodoban Segurança e Transporte de Valores Ltda; adjudication date: 5 February 2014.

### i Regulated industries

In 2014, CADE was particularly active in its review of alleged abuse of dominance practices in regulated industries, with special a focus on telecommunications and port services.[7]

***Telecoms***

*New investigations*

In January, the DG opened an administrative proceeding against the telecoms company Oi to investigate whether it cut telephone connection cables used by rival GVT. Oi is also being investigated for allegedly intervening with GVT's data traffic and making it difficult for customers to switch to the rival operator.[8] In November, the DG also opened a preliminary inquiry to investigate Oi's alleged practice of not contracting with independent internet service providers (ISPs) and instead offering access directly to customers. Oi argues that the 2013 revised regulatory regime allows it to offer customers direct access to the internet without the need to go through an independent ISP.[9]

*Dismissed investigations*

In April, CADE's Tribunal dismissed an investigation concerning Embratel's alleged discriminatory treatment when negotiating access to its satellite capacity. In doing so, the

7 In 2014, CADE also dismissed two investigations concerning the energy sector. Both referred to claims that the companies in charge of distributing electric power in the States of Pernambuco (CELPE) and São Paulo (Eletropaulo) denied access to an essential facility, power poles, preventing the complainants from providing TV cable services. There were also claims of discrimination against non-vertically integrated TV cable companies in the poles' rent prices against rivals. The Tribunal dismissed the investigations due to lack of evidence of wrongdoing on 19 February 2014. See Administrative Proceeding No. 08012.002716/2001-11; and Administrative Proceeding No. 08012.002716/2001-11. During 2014 CADE has also continued its investigation into whether vertically integrated sugar producer Cosan is raising rivals' costs by limiting freight capacity in the State of São Paulo. See Administrative Proceeding No. 08700.011102/2013-06; Defendants: Rumo Logística Operadora Multimodal SA and Cosan SA Indústria e Comércio. Finally, in March 2015, the DG closed a 2013 inquiry involving alleged market foreclosure practices. The Denmark-based inspection and certification services provider, Baltic Control, alleged that the National Association of Cereal Exporters (ANEC) and the Supervisors and Controllers Association of Brazil (ASCB) were blocking the entry of new rivals in the inspecting of cereals for export sector. According to Baltic Control, ANEC required companies to associate with ASCB to hire inspection services; in its turn, ASCB was demanding certifications not compatible with the services provided in the market. The authority found no evidence of anticompetitive practices; Baltic Control subsequently required CADE to reopen the probe. Administrative Proceeding No. 08700.009620/2013-51; Defendants: Associação das Supervisoras e Controladoras do Brasil – ASCB and Associação dos Exportadores de Cereais – ANEC.

8 Administrative Proceeding No. 08700.010110/2012-46.

9 Administrative Proceeding No. 08700.006532/2014-89.

authority relied primarily on the fact that the complainants did not depend on Embratel's satellite capacity to provide their services, as there were other options available.[10]

In November, the Tribunal then dismissed an administrative inquiry against Oi by concluding that restrictions placed on calls from landlines to mobile phones in the early 2000s did not amount to an antitrust violation. Commissioner Márcio de Oliveira argued that it was not reasonable to assume that Oi was attempting to steal mobile phone clients because the markets were substantially different, especially in light of the difference of between 1,000 per cent to 5,000 per cent in the prices charged for both services. Commissioner Oliveira said that calls to Oi's mobile services were also blocked and therefore there was no discrimination.[11]

*Sanctions imposed*

In March 2015, CADE convicted Oi for abuse of dominance due to its practice of monitoring clients' phone calls to the call centre of its competitor Vésper, verifying their demands and offering specific plans to avoid the migration of its clients to its rival. The two-to-one decision imposed a fine of 26.5 million reais for antitrust violations, in addition to the 11.5 million reais fine previously imposed by the National Telecommunications Agency (ANATEL) for the same conduct.[12]

***Ports***

*New investigations*

In October 2014 the DG initiated an administrative proceeding into the Tecon port operator's extra levies to store imported cargo in its terminal in the State of Rio Grande do Sul.[13] According to the SG, the practice could amount to an antitrust violation.

*Recommendation to impose sanctions*

In October 2014, the DG recommended that CADE's Tribunal sanction four port operators responsible for loading and unloading ships, and for storing goods until cleared for export or internalisation due to abusive practices in the ports of Salvador (Bahia), Rio Grande (Rio Grande do Sul) and Santos (São Paulo). The defendants in all four cases hold high market shares in the markets for handling and movement of cargo. The practices under scrutiny refer to port operators charging rates for alleged additional services not covered by other rates, allegedly discriminating against customers and raising rival's costs.[14] The four cases are now pending before the Tribunal for final adjudication.

10 Administrative Proceeding No. 08012.006438/2009-94.

11 Administrative Proceeding No. 53500.004704/2003.

12 Administrative Proceeding No. 08012.003918/2005-04; adjudication date: 11 March 2015.

13 Administrative Proceeding No. 08700.008464/2014-92; Defendant: Tecon Rio Grande SA.

14 Administrative Proceeding No. 08012.003824/2002-84; Defendant: Tecon Salvador SA; Administrative Proceeding No. 08012.005422/2003-03; Defendant: Tecon Rio Grande SA. Administrative Proceeding No. 08012.001518/2006-37; Defendant: Rodrimar SA. Transportes, Equipamentos Industriais e Armazéns Gerais; Administrative Proceeding No.

*Judicial review*

In February 2015, a federal judge annulled a 2005 decision by CADE that sanctioned a logistics company for charging an allegedly illegal fee based on the argument that the antitrust authority lacked jurisdiction over the issue.[15]

**ii Exclusivity clauses**

During 2014 CADE dealt with a series of cases involving exclusivity clauses. In February, the DG denied Vigor's appeal of its decision to dismiss a complaint into the alleged breach of competition rules by Kellogg's due to its exclusive agreement to supply Danone with cereal for yogurt–cereal combination products, which did not contain an explicit exclusivity clause.[16]

In May 2014, the DG recommended that the Tribunal impose sanctions on 10 shopping centres and eight shopping administrators for radius clauses in lease contracts with shopkeepers in Porto Alegre (Rio Grande do Sul)[17] and São Paulo (São Paulo).[18] According to CADE's investigative unit, although not forbidden *per se*, the radius clauses contained in these contracts were not of reasonable scope and duration. Final adjudication of the cases was pending at the time of writing.

The Tribunal dismissed a similar case on 4 April 2014 in view of a violation of the applicable statute of limitations. Although not reviewed by the court, the facts of the case referred to a radius clause in a contract between McDonald's and a shopping centre preventing the latter from contracting with the fast-food chain Bob's, a competitor of McDonald's.[19]

In July 2014, CADE dismissed, for lack of evidence of misconduct, a case against a hospital in Rio Claro (São Paulo) for allegedly having offered doctors who worked exclusively at the hospital an extra 25 per cent on top of their income.[20]

Last, in November 2014, CADE opened a preliminary inquiry into music publisher Universal Music to examine whether clauses in contracts with online shops were

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08012.009690/2006-39; Defendant: Rodrimar SA. Transportes, Equipamentos Industriais e Armazéns Gerais.

15 Federal Court of the 3rd Region (TRF-3); Appeal No. 0014995-56.2005.4.03.6100/SP; Appellants: Santos Brasil Participações SA and Marimex Despachos Transportes e Serviços Ltda; adjudication date: 26 February 2015.

16 Administrative Proceeding No. 08700.005241/2013-92.

17 Administrative Proceeding No. 08012.012740/2007-46; Defendants: Administradora Gaúcha de Shopping Center SA and others.

18 Administrative Proceeding No. 08012.012081/2007-48; Defendants: Multiplan Empreendimentos Imobiliários SA and others.

19 Administrative Proceeding No. 08012.000751/2008-64.

20 Administrative Proceeding No. 08012.005205/2009-09; Defendants: Irmandade da Santa Casa da Misericórdia de Rio Claro and AMESC – Associação dos Médicos da Santa Casa; adjudication date: 16 July 2015.

abusive.[21] Online music providers heard by the authority stated in February 2015 that the publishing contracts signed with Universal do not contain exclusivity clauses.

### iii Sham litigation

Sham litigation complaints have also set the tone for CADE's activity in 2014. In February 2014, the Tribunal dismissed complaints of sham litigation against Evonik Degussa for having filed several lawsuits against a rival to protect its intellectual property rights relating to hydrogen peroxide production. CADE concluded that Degussa had legitimate reasons when it approached the courts.[22]

At the end of April, the Tribunal dismissed a sham litigation inquiry relating to claims that opticians trade unions were lobbying for legislation to restrict the sale of sunglasses to qualified opticians. CADE concluded that the defendants did not resort to illegal means to petition and that holding them liable in the case would mean impairing their political rights.[23]

In June, the Tribunal followed Commissioner Octaviani's opinion and dismissed an investigation into whether tube manufacturer Saint-Gobain had promoted spurious claims to prevent competitors from taking part in public bids, as well as whether the company had disclosed incorrect information to customers with the aim of discouraging them from buying from other tube manufacturers.[24]

In August, the DG recommended the imposition of sanctions against the pharmaceutical company Eli Lilly, as it concluded that the company had filed before the courts contradictory and misleading legal claims aimed at artificially extending its intellectual property rights regarding Gemzar, a drug used in cancer treatment.[25]

In contrast, the DG dismissed a sham litigation case against Niely Cosmeticos as it concluded that the hair products company's claims were not objectively baseless and misleading, and that the subject under discussion was of a solely private nature.[26]

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21 Administrative Proceeding No. 08700.003132/2014-11.

22 Administrative Proceeding No. 08012.012726/2010-48; adjudication date: 5 February 2014.

23 Administrative Proceeding No. 08012.010648/2009-11; Defendants: Associação Brasileira da Indústria Óptica (Abióptica), Sindicato do Comércio Varejista de Material Óptico, Fotográfico e Cinematográfico do Estado de São Paulo (Sindióptica/SP) e Sindicato do Comércio Varejista de Material Óptico, Fotográfico e Cinematográfico do Estado do Rio Grande do Sul (Sindióptica/RS). Another case that analysed the boundaries between lobbying and sham litigation, including extensive references to US precedents and doctrines, was the Administrative Proceeding No. 08012.010075/2005-94; Defendant: Sindicato Intermunicipal do Comércio Varejista de Combustíveis e Lubrificantes do Estado do Rio Grande do Sul and others; adjudication date: 1 October 2014. The practice under scrutiny referred to a trade union's efforts to restrict fuel stations from opening up in malls and other large retail spaces. The Tribunal concluded that the defendant's attempts to influence the congressmen were legitimate.

24 Administrative Proceeding No. 08012.004572/2007-15.

25 Administrative Proceeding No. 08012.011508/2007-91.

26 Administrative Inquiry No. 08012.003303/2011-18.

In October, CADE also dismissed sham litigation and predatory prices allegations against a textile-dye manufacturer.[27]

Finally, in February 2015, CADE dismissed a complaint against nutritional supplements company CMW, agreeing that the legal claims filed by the company before the courts were not objectively baseless, after analysing US courts' relevant case law.[28]

### iv Settlements

CADE has settled several important unilateral investigations in 2014. On 14 May 2014, the Tribunal approved two settlements, one in an inquiry investigating the alleged exclusive relationship of supply of drug sales data to IMS by ABAFARMA and the other with Bematech in a proceeding related to the allegation of resale prices maintenance for printers.[29] Neither settlement involved the payment of fines.

On 23 July 2014, CADE also signed a settlement with Redecard SA, through which the company committed to refrain from impairing facilitators' activities and paid a fine of 7.45 million reais.[30] On 6 August 2014, credit card operator Hipercard and supermarket chain Bompreço settled with the authority a probe into allegations of exclusive arrangements between both agents.[31] CADE accepted commitments from the companies to stop the alleged anti-competitive practices and did not require them to plead guilty or pay fines.

In December 2014, anaesthesiologist cooperatives in seven states settled antitrust probes with CADE in connection with investigations for, *inter alia*, requiring exclusivity for its members.[32]

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27 Administrative Proceeding No. 08012.007189/2008-08; adjudication date: 1 October 2014.

28 Administrative Inquiry No. 08012.007213/2011-04; Defendant: CMW Saúde & Tecnologia Importação e Exportação Ltda. Other ongoing sham litigation cases are: (1) investigation into whether Sanofi-owned Genzyme has attempted to block competitors from entering the market for drugs that treat high phosphate levels in the blood (Administrative Proceeding No. 08012.007147/2009-40); (2) analysis of Brazilian Association of Steel Importers' (ABRIFA) claims that the Brazilian Steel Institute (IABr) has launched lawsuits to block imports of steel rebar (Administrative Inquiry No. 08700.007831/2012-79); and (3) complaint by TCT Mobile that Sweden's Ericsson is trying to exclude it from operating on cell phones and tablets markets by seeking injunctions over standard-essential patents, which must be licensed on fair, reasonable and non-discriminatory (FRAND) terms (Preparatory Proceeding No. 08700.008409/2014-00).

29 Administrative Inquiry No. 08012.009876/2007-79; Administrative Proceeding No. 08012.010829/2011-54; Defendants: Bematech SA and Fagundez Distribuidoras Ltda. The other defendant on this proceeding, Fagundez Distribuidora Ltda was acquitted by CADE's Tribunal on September 3, 2014, due to lack of evidence of wrongdoing.

30 Administrative Proceeding No. 08012.004089/2009-01.

31 Administrative Proceeding No. 08012.006209/2010-30.

32 www.cade.gov.br/Default.aspx?3b0e1ced071cf032c472c590ac95.

Finally, in April 2015, Brazil's only stainless-steel maker paid 5.57 million reais to settle a proceeding relating to allegations of blocking imports and discriminating against independent distributors.[33]

### v Other

Following complaints presented by Brazilian shopping comparison websites and Microsoft, the DG launched in 2013 three antitrust probes against Google relating to: (1) Google's allegedly abusive behaviour in displaying its own specialist search services more favourably than competing services, (2) Google's use of content from competing specialist search services in its own offerings, and (3) the portability of online search advertising campaigns from Google's AdWords to the platforms of competitors.[34] During 2014, the DG heard Google employees and sent questionnaires to several companies about the alleged misconduct – issuance of statements of objections are expected in late 2015.

## III MARKET DEFINITION AND MARKET POWER

Brazil's Competition Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market.[35] 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. The 20 per cent threshold is relatively low compared with practices in other jurisdictions, specially the United States and the EU. CADE has traditionally interpreted the expression 'group of companies' to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

The new CADE is yet to issue secondary legislation setting formal criteria for the analysis of alleged anti-competitive conduct, and the agency has been relying on regulations issued under the previous law, primarily CADE Resolution No. 20/1999.

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33 Administrative Proceeding No. 08700.010789/2012-73; Defendant: Aperam Services & Solutions SA.

34 (1) Administrative Proceeding No. 08012.010483/2011-94; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda; Defendant: Google Brasil Internet Ltda; (2) Administrative Proceeding No. 08700.009082/2013-03; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; Defendants: Google Inc and Google Brasil Internet Ltda; and (3) Administrative Proceeding No. 08700.005694/2013-19; Plaintiff: Microsoft Corporation; Defendant: Google Inc. The first complainants are part of a wider coalition, known as FairSearch, which has also promoted antitrust cases against Google in other jurisdictions.

35 Under the original wording of Brazil's previous competition law, the law presumed a market power to exist if the parties jointly held a share of at least 30 per cent of the market. In 1995, less than one year after the 1994 statute's entry into force, Congress amended the law to reduce the presumption to 20 per cent.

Annex II of CADE Resolution No. 20/99 sets criteria for the definition of the relevant market in terms of both product and geographic dimensions. The methodology 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).

## IV ABUSE

### i Overview

Article 36 of Brazil's new Competition Law deals with all types of anti-competitive conduct other than mergers. The statute did not change the definition or the types of anti-competitive conduct that could be prosecuted in Brazil under the previous law. The Competition Law prohibits acts 'that have as [their] object or effect' (1) limitation, restraint or, in any way, harm to open competition or free enterprise; (2) control over a relevant market of a certain good or service; (3) an increase in profits on a discretionary basis; or (4) engagement in market abuse. Article 36 specifically excludes from potential violations, however, the achievement of market control by means of 'competitive efficiency'. Under Article 2 of the Competition Law, practices that take place outside the territory of Brazil are subject to CADE's jurisdiction, provided that they produce actual or potential effects in Brazil.

Article 36, Section 3o, contains a lengthy but not exclusive list of acts that may be considered antitrust violations provided they have as their object or effect the aforementioned acts. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Enumerated vertical practices (they could be abusive if imposed unilaterally) include RPM and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

Annex II of CADE Resolution No. 20/99 generally provides for the review of unilateral conduct under the rule of reason, as it might have pro-competitive effects. In theory, the authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers. In practice, however, there has been no case in which the authorities have concluded that harmful conduct was legal in view of the efficiencies derived.

### ii Exclusionary abuses

*Exclusionary pricing*

Annex I of CADE Resolution No. 20/99 defines predatory pricing as 'deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels'. This definition specifically sets as a condition for the finding of predatory pricing the possibility or likelihood

of recoupment of the losses. Given such stringent standards, CADE has never found any conduct to be an abuse of dominance on the basis of predatory pricing. Margin squeeze may be a stand-alone abusive behaviour, and generally requires a differential between wholesale and retail prices that impedes the ability of a vertically integrated firm's wholesale customers to compete with it at retail level. CADE has been particularly concerned with alleged margin-squeeze practices in the telecommunications sector.

***Exclusive dealing***

In recent years, CADE has investigated and imposed sanctions against numerous exclusive arrangements. Exclusive dealings and other contractual provisions can constitute violations of Article 36 of the Competition Law if they lead to the foreclosing of competitors from accessing the market. Most of the cases have involved Unimed, a physicians' cooperative with operations in 75 per cent of the country. 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 and imposed sanctions against Unimed in all cases where it held a high market share (usually around 50 per cent). CADE has sanctioned more than 70 of these cases – including a fine of 2.9 million reais imposed in 2013 against a Unimed cooperative in the south of Brazil, doubled for recidivism[36] – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses.[37]

The most important exclusive dealing decision was issued by CADE in 2009. The investigation, initiated in 2004, concerned a loyalty programme instituted by AmBev, Brazil's largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme, named 'Tô 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, preventing competitors from accessing the market; there was no extensive discussion of the distinction between fidelity and volume rebates. The agency based its findings on documentary evidence seized in an inspection conducted at AmBev's premises. CADE imposed what is still the record fine in connection with an abuse of dominance case:

36 Administrative Procedure no. 08012.010576/2009-02.

37 On 19 February 2014, CADE's Tribunal closed an investigation into whether a Unimed cooperative in the State of Bahia had prevented local physicians from affiliating with other health plans after concluding there was no evidence of such exclusivity. Administrative Proceeding No. 08012.008739/2007-17; Defendant: Unimed de Itabuna.

352 million reais. AmBev challenged CADE's decision before the judicial courts and a final decision is still pending.[38,39]

***Tying and other leveraging practices***

Annex I of CADE Resolution No. 20/99 defines tying as the practice of selling one product or service as a mandatory addition to the purchase of a different product or service. Similarly to the European Commission's approach, CADE generally requires four conditions to find an infringement for tying: (1) dominance in the tying market; (2) the tying and the tied goods are two distinct products; (3) the tying practice is likely to have a market-distorting foreclosure effect; and (4) the tying practice does not generate overriding efficiencies.

CADE recently dismissed two probes related to allegations of tying arrangements in World Cup events due to lack of evidence. In December 2014, the DG closed an inquiry aimed at investigating whether Match Services – a Swiss company chosen by FIFA to provide 'hospitality' services in the 2014 World Cup – tied the sale of rooms to game tickets and inflated the price of accommodation.[40] More recently, in March 2015, the DG closed an inquiry into whether the Brazilian Soccer Confederacy and a tour operator tied the sales of tickets to packaged tours for the 2006 World Cup in Germany.[41]

***Refusal to deal***

Annex I of CADE Resolution No. 20/99 includes as an example of anti-competitive practices refusal to deal. Brazil's antitrust agency acknowledges that, as a general rule, even monopolists may choose their business partners. Under certain circumstances, however, there may be limits on this freedom for dominant firms to deal with rivals, particularly including refusal to license intellectual property rights. CADE Resolution No. 20/99 considers denial of access to an essential facility as a particular type of refusal

38 Administrative Proceeding No. 08012003805/2004-10; Defendant: Companhia de Bebidas das Américas – Ambev; adjudication date: 22 July 2009. The amount of the fine was equivalent to 2 per cent of the total turnover of the defendant in the year preceding the initiation of the investigations. AmBev has challenged the decision before the judicial courts and a final decision is still pending (Judicial Courts, 16th Circuit, 2009.34.00.028766-7).

39 Another alleged exclusionary case involving AmBev had to do with an alleged practice to raise rival's costs by introducing a proprietary reusable bottle in the market. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have a standard size (600ml), allowing all market players to coordinate their recycling (for reuse) programmes. AmBev introduced a 630ml proprietary bottle, which was physically very similar to the 600ml bottle, allegedly causing confusion in the recycling programme of rivals and raising costs for points of sale that also offered AmBev's competitors' products. In November 2010, AmBev agreed to stop commercialising the 630ml bottle through a consent decree with CADE (Administrative Proceeding No. 08012.001238/2010-57).

40 Administrative Inquiry No. 08700.007338/2013-30.

41 Administrative Inquiry No. 08012.002019/2006-67. Defendants: Confederação Brasileira de Futebol, Irontour Agência de Viagens Ltda. – Planeta Brasil.

to deal. Under CADE case law, for an infringement to be found, access to the facility must be essential to reach customers, and replication or duplication of the facility must be impossible or not reasonably feasible.

In April 2014, the Tribunal dismissed an inquiry into elevator manufacturer Thyssenkrupp, which was under scrutiny for allegedly denying maintenance companies access to software to repair elevators.[42] In September, CADE closed an investigation into logistics companies controlled by Vale active in the Port of Itaguaí (Rio de Janeiro). The case was filed in 2005 by Brazilian National Water Transport Agency (ANTAQ) after the defendants allegedly refused to transport loads from exporters. The authority found, however, that exporters were able to contract with the defendants and that the transport restrictions were due to lack of idle capacity.[43] On 22 December 2014, CADE dismissed an inquiry concerning the alleged refusal of Rima Industrial to supply metallic magnesium to other companies that need it in order to operate. The authority reasoned that the fact that Rima asked companies to present an environmental licence as a condition to supply the ore was not enough for a refusal to deal finding, even though such licence was not required under Brazilian law.[44] Finally, in January 2015, the DG recommended the dismissal of an investigation into Brazilian helicopter manufacturer Helibrás, which was accused of refusing to supply technical manuals and replacement parts to maintenance company Líder Signature.[45]

***Resale price maintenance***

Annex I of CADE Resolution No. 20/99 establishes resale price maintenance *(*RPM) as a potentially illegal conduct when it refers to either minimum or maximum prices. According to CADE, RPM may increase the risk of collusion in the upstream market and also a manufacturer's unilateral market power.

In January 2013, in a landmark abuse-of-dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price.[46] Pursuant to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be *per se* illegal. Elaborating further, the reporting commissioner Vinícius Marques de Carvalho, who later became CADE's president, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence – in fact, there is no instance in CADE's case law clearing an anti-competitive merger

42 Administrative Inquiry No. 08700.004336/2007-41.

43 Administrative Proceeding No. 08012.004397/2005-02. Defendants: Companhia Portuária Baía de Sepetiba and MRS Logística SA; adjudication date: 3 September 2014.

44 Administrative Inquiry No. 08700.000671/2014-07.

45 Administrative Proceeding No. 08012.007505/2002-48.

46 Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.

or dismissing an anti-competitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF's total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of the commissioners, departs from previous decisions issued by Brazilian authorities on RPM and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.[47]

### iii Discrimination

Annex I of CADE Resolution No. 20/99 makes reference exclusively to price discrimination, even though non-price discrimination practices could also be subject to Brazil's Competition Law provided they unreasonably distort competition. The imposition of dissimilar conditions to equivalent transactions would be deemed an antitrust violation to the extent that it is predatory or otherwise excludes competitors from the relevant market.

CADE has recently initiated two investigations for alleged discriminatory practices. In November 2013, the DG launched a probe into Brazil's national postal service provider ECT for alleged abuse of dominance practices through discrimination in the market for express parcel.[48] In April 2014, the DG also started an investigation about Petrobras' alleged preferential discounts to its integrated natural gas distributor, harming the competing gas distributor Comgás.[49] There is also an ongoing proceeding into an alleged abuse of dominance by Petrobras for ensuring favourable contractual terms to gas stations affiliated with a specific chain.[50]

### iv Exploitative abuses

Unfair trading practice may, in theory, be punished under Brazil's Competition Law. The previous law provided as an example of anti-competitive practice the charge of 'abusive prices, or the unreasonable price increase of a product or service'. This example was excluded from the current Competition Law because CADE has traditionally taken the view that excessive pricing would only be considered an antitrust infringement if it had exclusionary purposes. In recent years, CADE has reviewed more than 60 cases dealing

47 More recently, in March 2015, CADE's councillors had the opportunity to delve into RPM in a proceeding related to the alleged influence of a fuel distributor to have its retailers standardising their prices. The case provides an interesting discussion on the difference of RPM and the practice of incentivising cartelisation in downstream markets. Administrative Proceeding No. 08012.004736/2005-42; Defendants: Shell Brasil Ltda and Odon de Oliveira Mendes; adjudication date: 11 March 2015 For further details of this analysis check Administrative Proceeding No. 08012.011042/2005-61; Defendant: Shell Brasil Ltda and others; adjudication date: 12 November 2014.

48 Administrative Inquiry No. 08700.009588/2013-04. Defendant: Empresa Brasileira de Correios e Telégrafos – ECT.

49 Administrative Inquiry No. 08700.002600/2014-30.

50 Administrative Proceeding No. 08012.005799/2003-54.

with alleged abusive pricing, most of them related to pharmaceuticals, and dismissed all the complaints in view of the absence of an exclusionary purpose.

## V REMEDIES AND SANCTIONS

### i Sanctions

Brazil's Competition Law applies to corporations, associations of corporations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company's or 'group of companies'[51] pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. CADE Resolution No. 3/2012 broadly defines 144 'sectors of activity', which includes, among others, beverages and agriculture. 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. 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 abuse of dominance violations. On rare occasions (all related to cartel investigations), CADE has proceeded to calculate the harm resulting from the conduct.

The Competition Law further provides that directors and other executives found liable for anti-competitive behaviour may face sanctions of 1 to 20 per cent of the fine imposed against the company. Under the new Competition 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. Historically, while CADE has been investigating the involvement of individuals in cartel cases, it has rarely done so in abuse of dominance cases. Recently, in July 2014, CADE settled an investigation with six individuals who allegedly participated in the development and implementation of the aforementioned Tô Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.[52]

Other individuals and legal entities that do not directly conduct economic activities are subject to fines ranging from 50,000 to 2 million reais.

Individuals and companies may also be fined for: (1) refusing or delaying the provision of information, or for providing misleading information; (2) obstructing an on-site inspection; or (3) failing to appear or failing to cooperate when summoned to provide oral clarification.

51 The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. CADE was expected to issue regulation defining the criteria that would be applied to distinguish when fines would be imposed against the company, the group of companies, or the conglomerate, but has not yet done so.

52 Administrative Proceeding No. 08012.010028/2009-74; Defendants: Felipe Szpigel, Bernardo Pinto, Paiva, Rodolfo Chung, Ricardo Tadeu, Marcelo Miranda and Marcelo Costa.

### ii Behavioural remedies

At any stage of the investigation, CADE may adopt an interim order to preserve market conditions while a final decision on the case is pending.[53] An interim order may be adopted only if: (1) the facts and applicable law establish a *prima facie* likelihood that an infringement will be found (*fumus boni iuris*); and (2) in the absence of the order, irreparable damage may be caused to the market (*periculum in mora*). CADE has been adopting interim orders in connection with a significant number of solid abuse of dominance cases. Recently, in April 2015, following a request by the natural gas distributor Comgás, CADE adopted an interim measure ordering Petrobras to cease discriminatory treatment in the supply of gas to Gemini Consortium, which is run by Petrobras, White Martins and GásLocal.[54]

Apart from fines, CADE may also:

*a* order publication of the decision in a major newspaper at the wrongdoer's expense;

*b* prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;[55]

*c* include the wrongdoer's name in the Brazilian Consumer Protection List;

*d* recommend that the tax authorities block the wrongdoer from obtaining tax benefits;

*e* recommend that the IP authorities grant compulsory licences of patents held by the wrongdoer; and

*f* prohibit an individual from exercising market activities on its behalf or representing companies for five years.[56]

The new Competition 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. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

### iii Structural remedies

Under the Competition Law, CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects

53 Article 87 of the Competition Law.

54 Administrative Proceeding No. 08012.011881/2007-41.

55 In 2012, CADE, for the first time, imposed this sanction in connection with an abuse of dominance case (see Administrative Proceeding No. 08012.001099/1999-71; Defendants: Comepla Indústria e Comércio et al.; adjudication date: 23 May 2012).

56 The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision.

associated with the wrongful conduct. CADE has never resorted to structural remedies in connection with abuse of dominance cases.

## VI PROCEDURE

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.

After an administrative investigation is initiated, the DG will analyse the defence arguments and continue with its own investigations, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even conducting inspections and dawn raids. 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 paper data. In 2009, a computer forensics unit was created by the Brazilian agencies for the purpose of analysing electronic information obtained in dawn raids and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

Once the DG has concluded its investigation in the administrative proceeding, the defendants may present final arguments, after which the DG will send the files for CADE for final judgment with a recommendation to impose sanctions against the defendants or to dismiss the case.

At the Tribunal, the case is assigned to a reporting commissioner. While the reporting commissioner reviews the case, CADE's Attorney General may issue an opinion on the case. The reporting commissioner may also request data, clarifications or documents from the defendant, any individuals or companies, public entities or agencies prior to issuing its opinion. After doing so, the case is brought to judgment before CADE's full panel at a public hearing, where decisions will be reached by a 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, or both. CADE's decisions are subject to judicial enforcement if they are not complied with voluntarily.

At any phase of the proceeding, CADE may enter into a cease-and-desist commitment (TCC) with the defendant whereby the defendant undertakes to cease the conduct under investigation. Should a defendant enter into a TCC, it will not necessarily result in an admission of guilt as to the practice under investigation, nor necessarily require the payment of a settlement sum. The case is put on hold if and to the extent that the TCC is complied with, and sent to CADE's archives after a predetermined time if the conditions set out in the TCC are fully met.

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies. In February 2009, Brazil's former administrative antitrust investigative agency (SDE) and Brazil's federal police launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the US Department of Justice and the European Commission. Brazil's antitrust authorities have executed cooperation

agreements with the US Department of Justice, the European Commission, and Canada, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases.

## VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil[57] has been on the rise over the past five years. This may be due to reasons such as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, CADE; as well as the increasing general awareness of competition law in Brazil.

Pursuant to Article 47 of Brazil's Competition 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 Brazilian Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation in the form of pecuniary damages (for actual damage 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.[58]

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. As in other jurisdictions, both corporations and individuals may be sued individually (e.g., by competitors, suppliers, or direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations. The pass-on defence is not applicable to misconduct against consumers;[59] for other cases, there are no statutory provisions or case law issued to date.

Individual lawsuits are governed by the general rules set forth in the Brazilian 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, and only governmental and publicly held entities are allowed to file. State and federal prosecutors' offices have been responsible for the

57 A more detailed version of this section was published at *CPI Antitrust Chronicle*, 'Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency', Mariana Tavares de Araujo, Ana Paula Martinez, 16 April 2013; https:// www.competitionpolicyinternational.com/private-antitrust-enforcement-in-brazil-newperspectives-and-interplay-with-leniency/.

58 Punitive damages are not expressly provided for in the Competition Law, but some plaintiffs have been awarded those as well.

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

majority of civil suits seeking collective redress, most of which related to consumers' rights complaints.

In 2010, CADE, Brazil's antitrust court, for the first time included in an infringement decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.[60] Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country. As would be expected, follow-on litigation depends on the strength of CADE's case. 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.[61]

## VIII FUTURE DEVELOPMENTS

There are two major – and conflicting – trends that currently contribute to defining CADE's stance in abuse of dominance cases. The first is the increasing availability of an apparatus that enables the competition authority to employ economic analysis and evidence. The use of economics in Brazil has grown in competition matters dramatically over the recent years and is expected to play a major part in every important abuse of dominance case. The creation of the Department of Economic Studies within CADE by the 2011 Competition Law is certainly a watershed event in that respect.

Nonetheless, some recent cases seem to point out a second trend that is at odds, apparently, with the ever-growing sophistication of competition analysis. That trend could be defined as an enhanced scepticism or outright disregard for the role of efficiencies in vertical practices. The reason the latter trend is counter-intuitive and somewhat paradoxical in light of the larger role currently played by economics in antitrust analysis is obvious: standard economic analysis would recommend caution against 'over-enforcement' regarding unilateral conduct. Still, it seems CADE has not been (and will continue not to be) shy about intervening.

It will be very interesting to follow future developments and see the interplay of those two undercurrents: it can be hoped that in the end they will balance out and we will have a CADE that is more proactive but still selective in the abuse of dominance arena.

Furthermore, there are three openings at CADE and the term of another commissioner will expire in August 2015. Any speculation on the likely position of CADE in dominance cases to be adjudicated in the near future is therefore difficult.

60 Administrative Proceeding No. 08012.009888/2003-70; adjudication date: 1 September 2010.

61 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 violation and therefore did not award any compensation to the plaintiffs. See the decision rendered by the 14th Chamber of the State Court of São Paulo in Public Civil Action No. 0029912-22.2001.403.6100.

# Appendix 1

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Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil's federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), alongside the US Department of Justice, and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a nongovernmental adviser to the ICN. Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review (GCR)* named her on its lists 'Top Women in Antitrust' and '40 under 40'. *Chambers & Partners*, *The Legal 500* and *Who's Who Legal* listed her among the world's leading competition practitioners. In 2015, she has been selected as one of the top five lawyers globally in merger clearance matters in 2014 by *GCR*, which awarded her 'Lawyer of the Year – Under 40' one year before. Ms Martinez is admitted to practise in New York and Brazil. She holds master of laws degrees from both Harvard Law School and the University of São Paulo (USP) and a PhD degree in criminal law from USP.

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