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 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 anticompetitive 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 the 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 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 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-competitive and anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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. More recently, in January 2016, CADE initiated an administrative proceeding against Empresa Brasileira de Correios e Telégrafos (Correios), a state-owned company that provides postal services in Brazil, for alleged sham litigation, naked restraint (by depriving competitors from providing services that Correios itself does not provide) and discrimination practices against competitors.

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 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 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 anticompetitive practices by CADE. Vertical restraints rules apply to agreements between companies of the same economic group whenever the agreements result in anticompetitive 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 anticompetitive 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 anticompetitive practices conduct performed through the abuse of intellectual property rights, and CADE has been consistently stating that the grant of IPRs may lead to anticompetitive 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 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 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 anticompetitive 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.

Additionally, according to CADE Resolution No. 10, issued on 29 October 2014, any associative agreement with a term of over two years in which there is a vertical link between the involved economic groups will be subject to mandatory review by CADE when one of the parties holds at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship (see question 47).

In a recent case, CADE sanctioned auto parts manufacturer SKF for setting a minimum sales price. Pursuant to the decision, resale price maintenance (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 anticompetitive merger or dismissing an anticompetitive 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.

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 anticompetitive given the low market shares of the distributors).

Additionally, according to CADE Resolution No. 10, issued on 29 October 2014, any associative agreement with a term of over two years in which there is a vertical link between the involved economic groups will be subject to mandatory review by CADE when one of the parties holds at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship (see question 47).

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 anticompetitive 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 should 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 an 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 anticompetitive 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.

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.

More recently, in 2014, CADE sanctioned fuel distributor Raízen Combustíveis (formerly Shell Brasil) for abuse of dominance. According to the decision, the company set resale prices and established the standardisation of accounting systems, prices and profit margins of competing fuel stations.

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 out in CADE 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 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. In the 2014 *Raízen Combustíveis* (formerly Shell Brasil) case, CADE highlighted that the conduct of the company facilitated access to sensitive information, reducing the costs of a possible coordination between gas stations.

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

CADE 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 antitrust authority has dismissed an anticompetitive 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-competitive and anticompetitive 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-competitive and anticompetitive 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-competitive and anticompetitive effects.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently offer discounts to its customers) 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-competitive and anticompetitive effects.

27 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-competitive and anticompetitive effects.

28 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 interbrand competition is usually addressed by CADE in its decisions.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

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-competitive and anticompetitive effects.

30 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 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 anticompetitive effects (eg, facilitate collusion), those should be balanced against possible benefits that could result from the conduct.

31 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-competitive and anticompetitive effects.

32 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. 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-competitive and anticompetitive

effects. Please note that following complaints presented by Brazilian shopping comparison websites and Microsoft, the DG launched in 2013 three antitrust probes against Google relating to:

- Google's allegedly abusive behaviour in displaying its own specialist search services more favourably than competing services;
- Google's use of content from competing specialist search services in its own offerings; and
- the portability of online search advertising campaigns from Google's AdWords to the platforms of competitors.

During 2015, the DG heard Google employees and sent questionnaires to several companies about the alleged misconduct, and a ruling on the case was pending as of 28 January 2016.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

CADE has not had the opportunity to review this issue, including 'platform bans', 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-competitive and anticompetitive effects.

34 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 out in CADE Resolution No. 20/99.

35 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-competitive and anticompetitive effects.

36 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-competitive and anticompetitive effects.

37 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-competitive and anticompetitive effects.

38 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-competitive and anticompetitive effects.

39 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.

40 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-competitive and anticompetitive effects.

41 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-competitive and anticompetitive effects.

42 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).

In June 2015, AmBev settled an investigation regarding its exclusivity practices and refrigeration policy with regards to distributors. Under AmBev's policy, AmBev would provide refrigerators to its distributors, which conversely would have to meet certain criteria, including not storing competitors' drinks in AmBev's refrigerators. Under the settlement, AmBev agreed to limit relationships of exclusivity to 8 per cent of the point of sales per region, as listed in the agreement. Moreover, in relation to such exclusive distributors, AmBev agreed to limit exclusivity to 10 per cent of their sales volume. AmBev also committed to alter its refrigeration policy. The settlement provides that AmBev shall not require distributors to sell only one brand of AmBev beers per refrigerator or to demand exclusivity in exchange for providing refrigerators.

43 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-competitive and anticompetitive 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.

Update and trends

Recent developments

Besides the settlement with AmBev (see question 42), CADE executed another settlement involving vertical restraints in 2015. The settlement involved Aperam, a monopolist in the production of stainless steel in Brazil, which has been investigated for discriminating buyers by fixing favourable prices and commercial conditions to its affiliated distributors. Aperam was also being investigated for attempting to discourage imports with the goal of increasing prices. Besides establishing the payment of a settlement sum of 5,574 million reais, the settlement provides guidelines on the relationship between Aperam and its distributors. Under the settlement, Aperam cannot:

- distinguish distributors when granting advantages;
- limit imports by its distributors; and
- impose fines to distributors that no longer want to be exclusive.

CADE ended the investigation against Intercement (a cement formerly Camargo Corrêa Cimentos SA) for alleged anticompetitive conduct that consisted of creating difficulties to competitors by imposing continuous increases to the price of slag, refusal to deal and slag hoarding. Even though CADE found evidence that there was anticompetitive conduct, the authority ended the investigation because such conducts had already been examined and sanctioned under the cement cartel case. While adjudicating the case, CADE's Tribunal ordered the DG to investigate allegations that exclusivity .clauses in agreements between large cement producers and slag manufacturers were hindering the access to slag by small cement producers.

Anticipated developments

There are two major – and conflicting – trends that currently contribute to defining CADE's stance in vertical 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 recent years and is expected to play a major part in every important unilateral practice 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 apparently at odds 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 counterintuitive 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 that 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 between these 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 vertical practices arena.

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-competitive and anticompetitive 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-competitive and anticompetitive 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 was significant uncertainty on determining the need for an antitrust filing of associative agreements in Brazil. CADE has recently issued secondary legislation on this subject. CADE Resolution No. 10, issued on 29 October 2014, provides that any associative agreement with a term of over two years and in which there is a vertical link between the involved economic groups should be previously notified to CADE when one of the parties controls at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship.

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.

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 2015 CADE's tribunal adjudicated 52 anticompetitive conduct cases. Out of the 39 cases where the defendants were found guilty of an infringement, less than five were related to vertical restraints. Moreover, there are several 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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).

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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 anticompetitive 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.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
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