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Foreword

This OECD report served as basis for the peer review of Brazil carried out by the OECD Competition Committee on 27 November 2018. The peer review was requested by Brazil as part of the process to become Associate to the OECD Competition Committee. The lead reviewers were Ms. Alejandra Palacios, Mexico, Ms. Jill Walker, New Zealand, Ms. Bitten Thorgaard Sørensen, Denmark and Tembinkosi Bonakele, South Africa. The Delegation from Brazil in charge of answering questions during the peer review session was formed by: Mr. Alexandre Barreto, CADE's President, Mr. Paulo Burnier, CADE Commissioner, Ms. Paula Farani, CADE Commissioner, Mr. Guilherme Mendes Resende, CADE Chief Economist, Mr. Diogo Thomsom de Andrade, CADE Deputy Superintendent and Mr. João Manoel Pinho de Mello, Secretary of the Ministry of Finance's Secretariat for the Promotion of Productivity and Competition Advocacy (SEPRAC).

This is the third report on competition policy in Brazil prepared by the OECD as part of a peer review process. The report focuses on the extent to which the laws, institutions, policies and enforcement practices in Brazil are in line with the OECD competition policy instruments. The report concludes that Brazil's competition regime is equipped with strong powers and enforcement tools.

The main groups of recommendations in the report concern the following:

- At an institutional level, the separation between the Tribunal (the decision-making body) and the General Superintendent (GS, the investigative authority) should be strengthened to ensure that the Tribunal does not take the role of a second investigative body.

- There have been relatively few abuse of dominance investigations by CADE since the introduction of the new Competition Law and even fewer decisions of the Tribunal. As part of the actions aimed at strengthening its enforcement interventions against abuse of dominance cases, CADE should consider establishing separate units within the GS for investigating this kind of cases. Moreover, CADE should give higher priority to abuse of dominance investigations and rely less on settlement negotiations to conclude cases in order to generate a body of case law in this area.
- CADE should review its settlements regime. CADE should negotiate settlements during the investigation at the GS and before the case is discussed at the Tribunal to ensure there are administrative efficiencies and resource savings. The level of discount granted should reflect the administrative efficiencies generated by the settlement procedure. More generally, the discounts available in cartel settlements should reflect the levels observed in other jurisdictions. CADE should only accept settlement agreements in straightforward cases that raise no novel or complex legal issues.
- CADE should clarify the methodology for calculating fines. For instance, by setting an approach that relies on readily identifiable data and avoids having to engage in complex calculations regarding the profit derived by a company from its competition law infringement.

The report was prepared by the consultant Hilary Jennings, with inputs from Pedro Caro de Sousa, Antonio Capobianco, James Mancini, Iratxe Gurpegui and Sabine Zigelski from the OECD Competition Division. Iratxe Gurpegui co-ordinated the process and the session at the Competition Committee, under the supervision of Antonio Capobianco (Deputy Head of the Competition Division). The report was translated into Portuguese by Christine Park. Ms Sofia Pavlidou and Ms Tanya Dyhin provided assistance and formatted the report. The peer review process was extensively supported by Noemy Melo Colin, Fabio Lopes de Sousa from CADE's International Unit and Christine Park, CADE's external consultant.

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Executive Summary

Brazil's competition regime was successfully overhauled in 2011 with the introduction of the new Competition Law. The reforms were a significant improvement for Brazil's competition law and policy. The changes rationalised the institutional framework by creating a single autonomous competition agency and introduced a pre-merger notification system. The new Law effectively modernised antitrust enforcement in Brazil and reformed several important areas previously identified for improvement, including in the previous 2005 and 2010 OECD Peer Reviews. Most of the reforms streamlined competition law and policy in Brazil, consistent with international practices.

The Administrative Council for Economic Defense (CADE) is now an integrated and leaner institution, removing the inefficiencies of the previous system, which had three different enforcement agencies. It is well regarded domestically and internationally within the practitioner community, with peer agencies and within the Brazilian administration. CADE integrates investigation and decision-making into one agency, but separates the powers between two different entities. The General Superintendence (GS) is tasked with initiating and conducting investigations, while the Administrative Tribunal is responsible for adjudicating the cases investigated by the GS.

Advocacy functions are carried out by both CADE and the Ministry of Finance's Secretariat for the Promotion of Productivity and Competition Advocacy (SEPRAC) and the Secretariat of Fiscal, Energy and Lottery Monitoring (SEFEL), formerly the Secretariat for Economic Monitoring.

CADE's has committed and professional staff. This is despite the resource constraints that have carried over from the previous system. The need for additional staff was identified as a

priority throughout the reform process, both because Brazil was considered one of the most understaffed competition enforcement regimes and because the new pre-merger notification system would require decisions to be taken within strict statutory deadlines. The 200 additional positions that formed part of the reforms did not materialise immediately due to wider government budget cuts. CADE therefore continues to be understaffed. Moreover, CADE lacks its own civil service career path and is dependent upon requests for officials from other government departments, which impacts on its ability to recruit and retain staff. Nevertheless, CADE has managed to increase its staffing levels in recent years, but not yet to the levels anticipated by the 2011 reforms. This has made it difficult to clear the backlog of investigations and reduce the length of investigations, some of which have taken up to a decade. Recruitment and staffing challenges also affect CADE's ability to recruit PhD economists and develop its case handlers' expertise and knowledge of competition economics.

The focus of CADE's activities in the first few years following the introduction of the new Competition Law was on implementing the new pre-merger notification regime. Cartel enforcement was subsequently stepped up in 2014. CADE has modernised its cartel enforcement programme through the development and expansion of its leniency programme, improved inter-institutional co-operation with other Brazilian authorities, and the development of intelligence tools and investigative techniques. Indeed, CADE imposed its highest ever fine in 2014 in a cartel investigation. It has made progress with reducing the long delays in its cartel investigations, but the length of investigations continues to be a challenge.

The prosecution of bid rigging in public procurement has long been a priority for Brazil's competition authorities, and CADE has a dedicated bid-rigging unit with the General Superintendence. This enforcement stream has intensified with the amendment to the leniency programme that extends immunity to bid-rigging cartels under the Public Procurement Law and the signature of co-operation agreements with numerous criminal law enforcers and prosecutors at the Federal and State levels. Since 2015 much of CADE's big-rigging activities has focused on the "Car

Wash Operation”, where it plays a significant role in the investigation into the largest corruption and cartel scheme in Brazilian history.

There have been relatively few abuse of dominance investigations by CADE since the introduction of the new Competition Law and even fewer decisions of the Tribunal. This is due, in part, to the priority given to the new merger regime and cartel enforcement in recent years, as well as the lack of dedicated conduct teams within the General Superintendence, and resource constraints more generally. However, CADE has started to prioritise abuse of dominance investigations and is devoting more resources, including dedicated staff, to both concluding pending abuse of dominance matters and launching new abuse of dominance cases. It is also expected to have more economic and quantitative analysis conducted by the Department of Economic Studies in these matters to support the investigations by the GS and the Tribunal’s decisions.

CADE has successfully implemented the new pre-merger notification system and addressed a number of challenges that the new system posed by publishing guidelines and training its staff to increase their capacity to conduct economic evaluations of complex mergers. However, there are a very high number of notifications, coupled with a high number of transactions resolved through CADE’s fast-track procedure, which suggests that the notification thresholds could be modified.

CADE has a full complement of investigative and remedial powers. The split between the investigative function of the General Superintendence and the decision-making role of the Tribunal was designed to address the inefficient structure of the previous system with three different agencies carrying out three different and independent analyses over the same issue. In the new structure, the two bodies are separated physically within CADE and also through Chinese walls. However, in practice, there is some blurring of the line between investigation and decision-making. The Tribunal may play a more active role in its review of the decision of the General Superintendence, by conducting what amounts to an additional investigation with the collection of evidence. The Tribunal can also negotiate settlements directly with parties to an investigation. Also its role in mergers

challenged by the General Superintendent gives it a more substantive role in a second-phase review.

Settlements, referred to as cease-and-desist agreements, are used extensively to resolve both cartel cases and conduct cases. Unusually, compared with international practices, settlements can be negotiated up until the Tribunal issues a final decision. Arguably, this undermines the administrative efficiencies that flow from settling before the agency finalises its investigation. In the case of cartels, CADE considers it an important complement to its leniency programme, which provides amnesty only for the first-in applicant. There has been an increasing number of cease-and-desist agreements in cartel investigations approved over the years. Indeed, CADE has modified its settlement procedures to increase the incentives for companies to co-operate and that has proved very effective. It provides for discounts of up to 50% for parties that settle in cartel cases, depending when settlement is proposed and their place in queue. These discounts are high compared to international standards.

In non-cartel settlements, there is no finding of an infringement and pecuniary contributions have traditionally been low. This coupled with the fact that most abuse of dominance cases are settled, means that there is a lack of precedents and, therefore, legal certainty in an enforcement area where there are already few investigations.

In addition to its use of settlements, CADE has imposed a significant number of fines for infringements of the Competition Law. The amounts of fines seem, however, to be low. There is an on-going debate, internally and externally, over the methodology for the calculation of the fine. This includes discussion on how to determine the field of economic activity in relation to the turnover of the company, and whether the fine should take into account the financial gains made from the infringement. A further problem is that the fine can only be imposed by reference to the last year of an infringement. There has been a very public divergence of views within CADE, both within the Tribunal and between a minority of the Tribunal and the GS over the methodology for calculating fines. This has created uncertainty over the fining policy and the implications for settlement negotiations. The adoption of

guidelines on this issue is eagerly anticipated by private practitioners as well as CADE's staff.

CADE uses a range of sanctions and remedies, in addition to fines. This includes measures such as debarment from tendering for public contracts. Interestingly CADE has ordered divestitures as a sanction in a handful of competition cases, including cartels.

Criminal prosecutions for cartel cases appear to be on the increase, although many cases involve corruption or other economic crimes, rather than being "pure" cartel cases. Some of these cases have resulted in criminal convictions and jail sentences. However, the calculation of the statute of limitations in criminal cases coupled with the length of the investigations and prosecutions, means that the majority of criminal defendants convicted for cartel crimes never serve their sentences.

Successful private enforcement actions for anti-competitive conduct are limited, despite the fundamental elements of the framework being in place. Challenges in obtaining evidence are a key hurdle, along with the drawn out and costly court processes. In addition, the three-year limitation period is interpreted as starting from when the injured parties were made aware of the misconduct. CADE has introduced various initiatives to facilitate and encourage private enforcement. In two key cartel cases it sent its decisions to the injured parties. It has also adopted a Resolution on its discovery policy to define the rules of access to documents and information arising from leniency and cease-and-desist agreements. There are also pending legislative proposals to incentivise private actions.

Brazil has a commendable record on advocacy. The functions are shared across CADE, SEPRAC and SEFEL. Between them they undertake an impressive array of advocacy activities including: competition assessments of existing and draft regulations, studies and sector assessments to feed into public policy debates, market studies, the publication of academic journals and publications and trainings specifically targeted at tackling bid rigging in public procurement. While there are different views on where the advocacy function would be best placed, CADE and SEPRAC and SEFEL have committed to closer

technical co-operation and to identify relevant subjects for a common advocacy agenda.

In addition to its other advocacy activities, CADE has developed and updated several guidelines, which have been well received by private practitioners. However, the current focus of the guidelines seems to be more on procedural than on substantive legal matters.

Brazil is fully engaged with international competition policy institutions, such as the OECD's Competition Committee and the International Competition Network (ICN), as well as regional fora. CADE is committed to pro-active co-operation with other competition authorities and has entered into a number of co-operation agreements. CADE's international co-operation has been particularly successful, especially in merger cases, where it makes frequent use of confidentiality waivers. There is also active co-operation in cross-border cartel investigations. Neither the Competition Law nor any of CADE's bilateral co-operation agreements with other competition agencies allow it to exchange confidential information with other enforcers without the prior consent from the parties, nor do they allow CADE to offer investigative assistance should a foreign agency require it.

Despite some areas for improvement, Brazil has demonstrated that it has not only successfully implemented the new and improved competition regime, but that in so doing it has consolidated its position among the main antitrust jurisdictions around the world.

1. Introduction

In a letter dated 7 December 2017 addressed to the OECD Secretary General Angel Gurría, Brazil expressed its interest in becoming an Associate in the Competition Committee. Brazil, through CADE in particular, has been an exemplary Participant to the Competition Committee where for many years they have shared their extensive experience and knowledge with the other members of the Committee.

This is the third report on competition policy in Brazil prepared by the OECD as part of a peer review process. The report focuses on the extent to which the laws, institutions, policies and enforcement practices in Brazil are in line with the OECD competition policy instruments¹.

¹ 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings; 2012 Recommendation on Fighting Bid Rigging in Public Procurement; 2011 Recommendation concerning Structural Separation in Regulated Industries; 2009 Recommendation on Competition Assessment; 2005 Guiding principles for Regulatory Quality and Performance; 2005 Best practices on Information Exchange; 2005 Recommendation concerning Merger Review; 1998 Recommendation concerning Effective Action against Hard Core Cartels; 1979 Recommendation on Competition Policy and Exempted or Regulated Sectors Available at: www.oecd.org/daf/competition/recommendations.htm.

2. Context

2.1. History of competition law and policy in Brazil

Brazil has a long history of enforcing competition law and policy, culminating in the most recent reforms in 2011. Attempts to introduce competition law in Brazil started as early as the 1930s during the industrialisation process and then with the enactment of a competition law in 1962. The 1962 Act (Law 4137/62) created the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica – CADE). CADE was charged with, among other things, preventing “...*the abuse of economic power manifested by means of... the complete or partial elimination of competition.*” However, Brazil’s economic policies at the time were characterised by pervasive government intervention in the market. Most of the country’s largest industrial, transportation, and financial enterprises were state owned and industrial policies focused on price control and subsidies. Consequently, the law was largely unenforced and had little effect.

The enactment of the 1988 Constitution signaled a shift towards more market-oriented policies by the government. Economic liberalisation followed in the 1990s, with a series of reforms, including privatisation, price liberalisation and deregulation. New, independent regulatory agencies for telecommunications, electricity, petroleum and natural gas, surface transportation and air transport were created. Privatisation did not occur in all areas, however. The government remains active in some sectors, notably in oil and gas through its control of Petrobras, the dominant firm in that sector, in electricity generation and transmission and in banking.

In 1994, a new competition law (Law 8.884/1994) was introduced as part of this package of economic reforms. This law introduced post-merger control and created the Brazilian Competition Policy System (BCPS). This comprised three agencies: the Secretariat for Economic Monitoring (Secretaria de Acompanhamento Econômico - SEAE) a unit within the Ministry of Finance, and the Secretariat of Economic Law of the Ministry of Justice (Secretaria de Direito Econômico – SDE) and CADE,

which became an independent agency vested with decision-making powers, reporting to the Ministry of Justice. SDE initiated all conduct investigations (anti-competitive agreements and abuse of dominance) and submitted reports and recommendations to CADE for decision. SEAE also had investigative powers in conduct investigations begun by SDE, and both analysed and submitted reports to CADE on proposed mergers. CADE could complement investigations conducted by SDE and SEAE in either conduct or merger cases.

While competition law regimes in many emerging economies may still struggle to achieve enforcement goals, the Brazilian regime has largely been considered a success. Cartel conduct has been criminalised in Brazil since 1990 and amendments to the Law 8.884/1994 introduced leniency provisions and the power to conduct dawn raids in 2000. An amendment introduced in 2007, clarified the procedures for settling conduct cases and authorising settlements in cartel cases. Its cartel enforcement programme is widely respected both in Brazil and internationally. Other improvements also sought to reduce the institutional overlap, with the SDE concentrating on anticompetitive conduct investigations, with special focus on cartel enforcement, and the SEAE focusing on merger analysis. Measures to improve merger review included a number of measures, such as the introduction of a fast track procedure for simple merger cases, consent decrees that prevented complex transactions from being closed prior to CADE adjudicating the case, and the adoption of briefs by CADE, which were a compendium of decisions in similar cases with the same interpretation, the purpose of which was to provide firms with legal certainty and to shorten decision-making process.

Despite the fact that these measures considerably enhanced the success of Brazil's competition law regime, as well as imposing some large fines particularly for cartel conduct, there were inherent inefficiencies in the system. Most of these related to the mandatory post-merger review system, the overlapping functions of the three agencies, CADE's inability to initiate independent investigations and the lack of resources. The 2005 and 2010 OECD Peer Reviews of Brazil's Competition Law and Policy identified several recommendations for improving

competition in the country, notably through legislative reform as well as proposals that did not depend on new legislation.

2.2. The 2011 Reform of Brazil's Competition Law

The reforms introduced in 2011 with the enactment of Law 12.529/11, which came into force in May 2012, addressed a number of procedural difficulties and overlapping competencies in the former legislation.

The most dramatic change was the institutional reform of the BCPS. Most of the functions conducted by the three agencies were consolidated into CADE. SDE no longer exists as a separate entity and its antitrust functions were transferred to a new CADE General Superintendence (SG), composed of a Superintendent General and two deputy Superintendents. SEAE's conduct and merger review functions were also transferred to CADE's SG. SEAE's (today replaced by the Secretary for the Promotion of Productivity and Competition Advocacy ("SEPRAC") and the Secretary of Fiscal, Energy and Lottery Monitoring ("SEFEL") responsibilities for competition advocacy and promoting competition policies to government agencies have continued, however. CADE now has sole responsibility for competition law enforcement, initiating and deciding on administrative proceedings related to competition law violations, as well as reviewing mergers.

CADE's new structure consists of an Administrative Tribunal, the investigative branch of the General Superintendence, and Department of Economic Studies. The Tribunal is in charge of decision-making. The General Superintendence is entrusted with launching and carrying out investigations, with responsibility for all antitrust and merger review functions previously undertaken by SDE and SEAE. The Department of Economic Studies is responsible for conducting economic analyses and providing greater economic certainty on the competitive effects of CADE's decisions in the market.

In line with the Recommendations made in the 2010 OECD Peer Review of Brazil's Competition Law and Policy, the new Law created longer-term appointments for CADE's Commissioners, to improve independence and autonomy. The

new law established four-year (non-renewable) terms for the President and Commissioners. In addition, their terms are staggered, to avoid simultaneous replacement of all or most of the commissioners at a single point in time and the possibility that a quorum could not be convened.

The new Law also introduced pre-merger notification, to deal with problems arising from the previous post-merger notification regime, which had procedural and substantive ramifications. A procedural effect was to lengthen the review process. A substantive implication was the effect on remedies available to CADE if it found the merger unlawful. Specifically, CADE's ability to prohibit a transaction entirely was complicated by having to undo a consummated merger, a notoriously difficult task, which may have accounted for the very small number of prohibitions. Furthermore, the system undermined the effectiveness of remedies imposed by CADE. Due to the reluctance of parties to divest part of the acquired assets once the merger has been consummated, CADE usually opted for behavioural rather than structural remedies. With the new Law, Brazil has joined a majority of jurisdictions in which clearance by the competition authority is mandatory before notifiable deals can be implemented. The Law also provides for significant changes regarding the notification thresholds and sets out more straightforward statutory time periods for the review of transactions.

Regarding the enforcement of anti-competitive practices, the new Law introduced significant changes related to the criteria for the setting of fines and to the leniency programme. The old law provided for fines ranging from one% to 30% of the gross turnover of the company. As a result, fines had been climbing to hundreds of millions of US dollars. The new Law amended this to fines between 0.1%-20% of the turnover of the company or group in the field of economic activity in which the violation occurred. The intent was clearly to have some proportionality between the size of the fine and the violation committed, by reducing the basis for the penalty from total turnover to turnover in the activity affected by the practice. Also, it clearly reduces the range of the possible fines within this new basis.

The new Law also modified the Brazilian leniency programme. It eliminated the current rule that leniency is not

available to the “leader” of a cartel. Furthermore, leniency protection now explicitly extends to the criminal conduct related to the practice. The old law only referred to the crime of cartelisation, while related crimes such as conspiracy or bid rigging are now also expressly covered by the leniency agreement. Regarding the criminal prosecution of individuals, the new Law establishes that violators will now be subject to both (rather than either) fines and imprisonment, which in practice increases the sanction from the previous minimum penalty under the old law which comprised only fines.

The need for additional staff was an important feature of the reform. Brazil had long been viewed as one of the most understaffed competition enforcement regimes – considering technical staff per unit of GDP or population – in the world. Indeed understaffing was arguably the most serious problem for the BCPS, compounded by high employee turnover, leading to a backlog of investigations. The new Law’s provisions impose tighter timeframes and consequently require a larger number of case handlers. As a result, the law provided for 200 new positions, which would more than double the previous combined staff of the merging authorities. However, in light of government budget cuts, the staff increase mandated by the Law did not come to fruition immediately.

The new Law modernised antitrust enforcement in Brazil and reformed several important areas previously identified for improvement, including in the previous 2005 and 2010 OECD Peer Reviews. Most of the reforms streamlined competition law and policy in Brazil and were consistent with international best practices.

At the same time, the new Law has presented a number of challenges. It introduced a major institutional change alongside significant changes to the law that would have to be implemented and enforced. In addition, there were some problematic legal provisions, either carried over from the old Law or introduced into the new Law, that posed challenges for regulatory authorities and practitioners alike. Nevertheless, with the 2011 reforms Brazil introduced a new and improved regime that would enable it to consolidate its position among the main antitrust jurisdictions in the world.

3. Institutional design and arrangements

3.1. Competition policy institutions

This section of the report describes the institutions engaged in competition law enforcement and competition advocacy. The new competition law rationalised the Brazilian Competition Policy System (BCPS), and consolidated the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one autonomous agency – CADE. The SEAE (now replaced by SEPRAC and SEFEL) remained within the Ministry of Finance working as a competition advocacy bureau, a role it had played under the old regime but which is now further emphasised with an enhanced legal mandate.

3.1.1. Conselho Administrativo de Defesa Economica (CADE – Administrative Council for Economic Defence)

Law 12.529/11 which came into force in May 2012 consolidated the investigatory functions of SDE and SEAE into one single agency, a new CADE. The investigative, prosecutorial and adjudicative functions are therefore now combined into one independent agency. Under this new institutional design, CADE is responsible for enforcing competition law at the administrative level, and is organised into three divisions: the Office of the Superintendent General (GS), the Administrative Tribunal and the Department of Economic Studies.

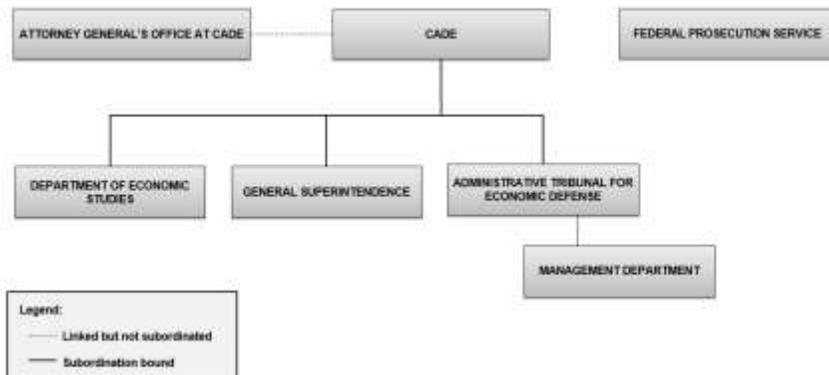
The previous competition Law (8884/94) established CADE as an “independent federal agency”, structurally linked to the Ministry of Justice for budget and oversight purposes. However, the Ministry is not involved in the day-to-day management of CADE and CADE is autonomous as regards its enforcement and adjudicatory functions.

CADE now has the power to launch and carry out investigations and is the decision-maker. This structure combines investigation and adjudication into one single agency, but separates these powers into two different divisions: a new General Superintendence which is responsible for initiating and

conducting investigations; and a new Administrative Tribunal (the equivalent of the old CADE Commission, or Conselho) which is responsible for adjudicating the cases investigated by the GS, and all cases are subject to judicial review . 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 for the Administrative Tribunal in connection with all cases pending before CADE and is responsible for the criminal prosecutions.

CADE is well-regarded within the competition practitioner community both nationally and internationally, the business community, and within the Government administration due to its technical capabilities. It is considered one of the most efficient public agencies in Brazil and its international standing as a leading competition authority both regionally and globally reinforces this domestic view that it is a model public agency.

Figure 1. CADE's organisation chart



The General Superintendence

The General Superintendence is headed by the General Superintendent, supported by two deputy General Superintendents, one responsible for mergers and unilateral conduct, the other responsible for cartel investigations. The General Superintendent, like CADE's President, Commissioners and Attorney General, is appointed by the President of the

Republic following Senate approval. The appointment is for a two-year term with the possibility of reappointment.² The General Superintendent is empowered to approve mergers that do not raise competitive concerns; to forward a non-binding opinion to CADE's Tribunal³ challenging merger cases that it considers: (i) should be rejected, (ii) should not be unconditionally cleared or (iii) there are no conclusive elements regarding the effects of the merger on the market. In addition, the General Superintendence conducts investigations of anti-competitive practices.⁴

The ability for the General Superintendent to approve mergers was a key rationalisation of the previous system. Simple cases which pose no competition concerns may now be decided by one single authority (the GS) rather than having to go through three as before under the old Law, and sometimes more, given that CADE Attorney's Office and the Federal Prosecutor could also provide opinions on merger cases.

The General Superintendence is composed of nine units. The organisational chart of the GS is based on the Structural Contingency Theory (SCT)⁵. This means that the GS has certain flexibility on how different tasks are allocated to the units and can re-organise the units to adapt to changing workloads and demands. Currently, five units deal with mergers and unilateral conduct, three are responsible for anti-cartel (and bid rigging) investigations, and one is a general cartel screening and intelligence gathering unit. Most staff have legal backgrounds and are public servants recruited from other bodies in the Brazilian Administration (CADE does not have a specific civil service career path like other public bodies – see below). The General Superintendent's Cabinet has one technical co-ordination unit that covers the assessment of leniency applications. In addition, there is a unit in the Cabinet that screens all complaints to determine

² Article 12 Law 12.529/2011.

³ Article 161, RICADE (CADE's Internal Regulation).

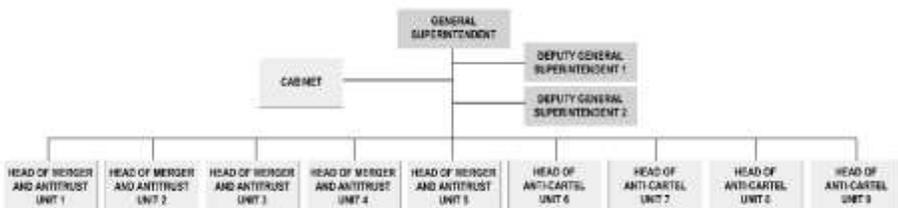
⁴ Article 13 Law 12.529/2011.

⁵ The Structural Contingency Theory conceives organisations as open systems that interact with the context in which they function and the structures are expected to vary depending on their particular context.

whether or not to proceed to an investigation. This provides for separation between the decision whether or not to proceed to an investigation and the team actually conducting the investigation.

Of the five mergers and unilateral conduct units, there is a mergers screening unit that screens all mergers to assess whether they qualify for a fast-track procedure. If not, they are passed over to one of the other four merger and unilateral conduct units. These are divided into sectors: (i) retail and services, education, health, financial markets; (ii) differentiated goods, pharmaceuticals, agribusiness and technology; (iii) basic industries and chemical products; and (iv) regulated sectors.

Figure 2. General Superintendence organisation chart



There was a general perception that combining mergers with unilateral conduct in the same units inevitably meant that more resources are in practice devoted to merger review given the statutory deadlines. Consequently, there are fewer resources working on unilateral conduct investigations. In the absence of more staff, and as a stopgap, one staff member in each of these units has been made responsible for unilateral conduct cases. However, it is doubtful that this will redress the balance towards more unilateral conduct investigations.

Of the three cartel units in the GS, one deals predominantly with bid rigging cases, one with domestic cartels and the other mainly with international cartels, although there is an increasing mix of domestic and international cases. The bid rigging screening unit houses CADE's Cerebro project – a data-mining tool that was set up in the wake of international interest in and discussions on the use of screens as a tool to detect cartels. It is also being used to look at pricing behaviour after cartel cases but there are

currently limitations with the quality of the data. Cerebro is also intended to screen for potential unilateral conduct cases. This screening unit also organises dawn raids and processes the electronic evidence collected during dawn raids.

CADE has set up a “Chinese-wall” between the Administrative Tribunal and the GS to preserve each institution’s independence. In this sense, the Administrative Tribunal only becomes aware of the case once the investigation at the GS has been concluded. This institutional setup should ensure that the investigation by the GS is confidential, based on technical grounds and is not influenced by any political, economic or other interest.

The Administrative Tribunal

The Tribunal consist of seven Commissioners: six Commissioners and a President. The Presidency has a technical advisory team as well as specific units responsible for international relations, public relations, strategic planning and special projects and auditing. The Commissioners also have two advisors each to assist them.

Commissioners serve a four year, non-renewable, term and their terms are staggered, to avoid simultaneous vacancies and the possibility that a quorum cannot be convened.⁶ The Commissioners and CADE President are appointed by the President of the Republic and approved by the Senate following an interview conducted by the Senate’s Commission of Economic Affairs.⁷

Before the new Law was enacted, a Commissioner’s post was sometimes vacant for a significant period while the President and the Senate considered nominations. The new Law permits a new Commissioner to be appointed to complete the term of office of the previous Commissioner to avoid the possibility that a quorum cannot be convened. The minimum quorum for the Tribunal is three provided four Tribunal members are present.

⁶ Article 6 Law 12.529/2011.

⁷ *ibid.* This is the same process for the General Superintendent and CADE’s Attorney General.

In the past, CADE Commissioners were traditionally lawyers or economists, and indeed the Law sets out that they should have a background in law or economics (Article 6). Recent appointments have moved away from this procedural requirement. For example, the current CADE President has a background in management and public administration, and is well-versed in navigating Brazil's federal public administration and bureaucracy, and is credited for CADE securing a significant increase to its budget for 2018 and brokering an agreement with the Central Bank on their respective mandates.

Some concerns were expressed with how appointments are made and the potential for political influence given that Commissioners and the President are identified and selected by the government rather than going through an open application system. There is a perception that the appointment system has become more politicised in recent years and that this is due, at least in part, to the increased influence that CADE has had in Brazil since the new Law came into force, which has caught the attention of politicians. However, CADE's performance, its technical staff and its embedded institutional practices appear to have offset most concerns about the latest round of Tribunal appointments who are not as technical as previous appointees. In an era where political appointments have become more commonplace in Brazil, CADE is considered one of Brazil's least politicised public agencies.

Staggered start and end dates for the terms of Commissioners was a sensible solution to the danger of there being so many vacancies in the Tribunal that a quorum could not be convened. However, in practice, the current Government has delayed the appointment of some Commissioners and four will have to be appointed in 2019. This has raised further unease about the potential for politicisation of the new appointments as well as concerns about maintaining the technical expertise and precedent-setting value of the Tribunal's decisions with so many Commissioners being replaced in one go.

The Administrative Tribunal is CADE's decision-making body in charge of rendering final and binding administrative decisions in both merger and conduct cases. This includes approving settlement "cease and desist" agreements (TCC in its acronym in Portuguese) and reviewing interim measures adopted

by the Reporting Commissioner or by the General Superintendence. The Tribunal is also responsible for setting and approving CADE's Internal Statute – RICADE – which organises CADE's functioning, means of deliberations, rules of procedure and the organisation of CADE's internal services. Brazil lists the Tribunal's main activities as:

- To judge administrative proceedings of anti-competitive conducts
- To judge merger cases with recommendation from the General Superintendence for remedies or for disapproval
- To claim and judge merger cases approved without restriction by the General Superintendence
- To analyse and judge merger cases in which there was appeal by third parties against the decision issued by the General Superintendence
- To approve Cease and Desist Agreements – TCC in its acronym in Portuguese – and Merger Control Agreements – ACC in its acronym in Portuguese – and to determine to the General Superintendence to monitor the fulfilment of these Agreements
- To appreciate, on appeal level, preventive measures adopted by the Reporting Commissioner or by the General Superintendence
- To elaborate and approve CADE's Internal Statute – RICADE – which organises CADE's functioning, means of deliberations, rules of procedure and the organisation of CADE's internal services

The President represents the authority and is responsible for its administrative management. The President also chairs the Tribunal and the judgement sessions and determines the organisation of the Tribunal's agenda. Moreover, the President also chairs the distribution sessions, in which the proceedings are assigned to the Commissioners by drawing lots.

Department of Economic Studies

The Department of Economic Studies (DEE in its Portuguese acronym) is responsible for advising the Tribunal and the General Superintendence and providing them with economic analysis and studies. The new Law specifically provides for the DEE, with a Chief Economist, as one of CADE's bodies, alongside the Tribunal and the GS.⁸ This elevates it from its previous role as an advisory body to the Presidency and Plenary since its creation in 2009. The new Law gives the DEE more autonomy and it now has two main areas of activity: (i) to advise the GS and the Tribunal on the instruction and analysis of administrative proceedings related to the economic analysis of mergers and anticompetitive conducts; and (ii) undertaking economic studies to ensure CADE's decisions are taken on the basis of the latest technical and scientific thinking. Brazil lists the DEE's activities as:

- To elaborate and analyse economic technical opinions;
- To monitor the instruction of proceedings;
- To conduct sectorial studies in order to keep CADE updated on the evolution of specific markets;
- To conduct studies about the effects of CADE's decisions in certain markets;
- To propose and elaborate analysis guides for the different proceedings analysed by CADE;
- To elaborate and publish its own technical studies such as articles, working papers etc.;
- To disseminate the theoretical knowledge of economics and its application to competition defence for CADE's technical staff.

The DEE's ability to conduct in-depth economic analysis has been constrained by a lack of staff and a need for more highly-skilled PhD economists. Nevertheless, the number of staff has improved in the last years. The Department now has 25 staff,

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Articles 17 and 18 Law 12.529/2011.

compared to 12 in 2016 and 8 in 2013. The majority are civil servants on loan from other bodies, others are interns and some are consultants funded through a United Nations Development Programme (UNDP) to work on research projects, as well as administrative staff. The DEE is headed by a PhD Chief Economist and a Deputy Chief Economist leading teams who are now separated by function in line with CADE's functions (merger, conduct cases and advocacy/market studies/working papers), with staff evenly distributed across each.

The emphasis of the DEE has been to improve staffing levels and conduct more detailed technical analysis in cases and improve its ability to do *ex post* evaluations. The DEE has issued an increasing number of non-binding economic opinions on CADE's mergers and conduct cases in the last few years, from 23 in 2015 to 27 in 2016 and 36 in 2017. These are published online. There is also now more econometric analysis and simulations in complex merger cases, and an increasing number of working papers are produced that provide competition advocacy recommendations to government. The DEE also produces reviews of CADE's decisions, which consolidate and systematise CADE case law on specific markets in order to improve transparency and raise public awareness of CADE's decisions. Seminars are organised with external academic speakers to engage in discussion on economic tools and familiarise CADE staff with economic theories and concepts.

The DEE's input to CADE's casework is structured around its interactions with the GS and the Tribunal. There is a monthly meeting with both to discuss which cases require economic analysis and staff are allocated accordingly. In general, the Department looks at all the economic issues of the case but may focus on one particular aspect. A report is then prepared for the GS. In most instances, when a case reaches the Tribunal the DEE will already have provided its input. The Tribunal may however request more analysis, for example testing remedies.

Attorney General's Office

The Attorney General's Office is linked to the Tribunal, but is not part of CADE's staff. It is part of the Brazilian Office of the General Attorney and provides legal advice to federal agencies

and represents those agencies in court. Some autonomous agencies, including CADE, have their own Attorney General assigned to them.

The Attorney General is appointed by the President of the Republic following Senate approval.⁹ The Attorney General serves a two-year term, which can be renewed once. The Attorney General's statutory duties are to provide legal advice to CADE, render opinions on cases pending before the Tribunal for judgment on procedural and substantive grounds, defend the agency in court, arrange for judicial execution of its decisions, monitor behavioural remedies, and (with the Tribunal's approval) enter into settlements of cases pending in court.¹⁰ The Attorney General's office does not review investigations unless there is a specific request from the case team.

The Attorney General's Office at CADE has 20 staff (12 attorneys, 5 civil servants and 3 non-civil servants).

Representative of the Federal Public Prosecution Service to CADE

The Federal Public Prosecutor's Office is created by the Brazilian Constitution (Article 128) as a wholly independent branch of the government. A member of the Public Prosecution service is appointed to render opinion on conduct investigations conducted by CADE.¹¹ The office is therefore an external body within CADE. There are numerous constitutional guarantees that make the Federal Prosecution Service independent and not subject to the Government.

The Prosecutor General appoints a member of the Public Prosecutor's Office to render opinion on conduct investigations at CADE. In advance of each Tribunal judgement (and before the Reporting Commissioner submits his/her report), the file goes to the Prosecution Service to issue its opinion. This non-binding opinion covers both process and substance. It is given to the parties and is made public. At the Tribunal Hearings, the public

⁹ Article 16 Law 12.529/2011.

¹⁰ Article 15 12.529/2011.

¹¹ Article 20 12.529/2011.

prosecutor presents the Service's opinion after the parties' statements. In addition, the Prosecutor can proactively recommend to the Reporting Commissioner that the case needs further instruction and recommend that it be sent back to the GS. In all cases with a criminal element, the Public Prosecutor recommends that the Tribunal forward the case to the Prosecution Service for criminal prosecution.

The Federal Prosecutor at CADE can also recommend that the Tribunal forward the case to the Prosecution Service for public civil actions (i.e. collective redress actions).

The Public Prosecutor's office consists of a member and a deputy member (both Federal Public Prosecutors) and, currently, 5 technical advisors (lawyers) to assist them. However, the members are not exclusively dedicated to CADE's matters.

Agency human and financial resources

Staff supporting CADE's functions

In 2018, CADE consisted of 385 staff, 293 of whom are civil servants, 40 are non-civil servants assigned to a position of responsibility and the rest are contractors or interns. There are 137 non-administrative staff working on competition enforcement, and 86 in management roles. Of these, 70 have a legal background and 29 are economists. Regarding the non-administrative staff, 87 work on merger review and 86 work on anticompetitive conduct practices (5 dedicated to unilateral conducts). CADE was allocated 200 new posts of Federal Public Policy and Management Officers (EPPGG) under the new Law to reflect the expansion of its competences but due to federal government budget constraints, they remain vacant.

CADE does not have its own career path within the civil service and depends upon officials from other government bodies, as well as non-civil servants assigned to positions of responsibility. In 2016, a Bill (33/2016) to establish a specific CADE career path of Analysts in Economic Defence and Administrative Analysts was approved by the House of Representatives but was subsequently vetoed by the President of the Republic due to budget cuts being imposed across the board

by the government and a preference for hiring from existing career paths rather than creating new ones.

However, although these requests for civil servants are binding on the agency receiving the request, many institutions are reluctant to release officials due to staffing constraints. In addition, there is an issue with civil servants from other public bodies not being sufficiently attracted to the positions and lacking the financial incentives to move when many are approved in other selective processes that offer higher remuneration. Despite these challenges, CADE has had an 11% staff increase via this civil service request avenue. During 2018, CADE has focused on three means of increasing its staffing. First through the recruitment of civil servants aligned with the Civil House of the Presidency of the Republic; second the recruitment of civil servants from other agencies; and third, the recruitment of new EPPGG posts.

CADE has a relatively high staff turnover of 13.3%, but this appears to be diminishing over time now that more new posts are being recruited. The staff is positive about institutional changes brought about by the new Law and the improvements this has made to CADE's structure and human resources management. A number of staff have been there for more than five years, having moved over from the former SDE and SEAE, but the average length of staff tenure at the new CADE is only four years.

CADE's budget and financial resources

According to the Law (Article 29), CADE makes an annual budget proposal to the Ministry of Justice, which forwards the request to the Ministry of Planning, Budget and Management to be included in the annual budget bill for approval by the Congress. The annual budget in 2017 was BRL 36 390 757 (Brazilian reais) (approx. USD 18 million* (United States dollars)). The budget has remained relatively stable since the new law came into force. It was considered a budgetary constraint

* All original figures in BRL converted to USD using the purchasing power parity rate for the year in question, or otherwise 2017 data (OECD (2019), Purchasing power parities (PPP) (indicator). doi: 10.1787/1290ee5a-en (Accessed on 22 January 2019)).

given the pressures on CADE's operations in a country the size of Brazil, and in comparison to other government agencies in Brazil. In 2018, a significant budget increase of BRL 20 million (approx. USD 9.9 million) was awarded, which was the result of discussions with the Ministry of Finance, the Ministry of Planning and the Congress to demonstrate that for every dollar invested in CADE's enforcement activities, it collects more than 20 times that in fines and pecuniary contributions from settlement agreements.¹² The additional budget will be invested in funding 80 places on a new MBA programme in competition law and economics (20 places will be made available to officials from other government agencies), hiring more consultants and advisors for specific cases, training, and projects to make CADE more responsive, such as new software and equipment.¹³ It is CADE's aim is to make this budget increase permanent going forward.

The general impression was that CADE's autonomy would be bolstered by greater independence from the Ministry of Justice's budgetary supervision. In particular, the need for pre-authorisation from the Ministry for international travel is considered out-of-step with CADE's otherwise autonomous activities and management. It is also a constraint on CADE's participation in international meetings and conferences where staff would benefit from the discussions and interactions with its peers. Some Commissioners and staff have in the past paid their own travel expenses to get around the Ministry of Justice's travel approval system, which assesses whether there are sufficient funds in the budget to cover the travel costs. It is not clear why this system of Ministry checks and balances is necessary for international travel compared to other management functions that are wholly within CADE's remit. A draft Bill before the Congress on regulatory agencies would amend the system and make CADE, and other regulators, a budgetary unit giving it much more administrative autonomy, both on resource management and budget decisions, meaning it would no longer have to seek the

¹² *Interview with Alexandre Barreto, President of Brazil's CADE*, pp 3-4, The Antitrust Source, June 2018, www.antitrustsource.com.

¹³ *ibid*, p 4.

approval of the Ministry for travel expenses. However, the timing of the adoption of the Bill is unknown.

Strategic planning and prioritisation

Strategic planning

A strategic planning process was introduced in 2017. CADE's mission is "to watch for the maintenance of a healthy competition environment in Brazil". Its vision is "to be recognised as essential to the functioning of the Brazilian economy". CADE published its Strategic Plan 2017-2020 after three rounds of internal consultations and discussions. There are 11 strategic goals and 31 indicators. The goals are relatively broad and cover most of CADE's activities. The published goals are as follows:

Figure 3. CADE's goals



Source: CADE

These overarching goals are refined into strategic initiatives, which in turn are divided into specific projects. Among them, it is worth mentioning projects to (i) monitor merger reviews, including a project to evaluate the effectiveness of CADE's merger reviews; and (ii) develop a rolling *ex post* evaluation of CADE's enforcement activities.

Other organisational priorities include securing more staff, a permanent budget increase and improving relationships with other government bodies. The latter includes concluding agreements with all state level as well as federal prosecutors to establish closer communication in order to improve the exchange of information with CADE, as well as techniques and procedures to deter and detect cartels. This would add to the impressive number of co-operation agreements and Memoranda of Understanding that CADE has concluded to date, including most recently with the Central Bank and SEPRAC and SEFEL to build on the success of the agreement with the Central Bank.

CADE is also part of the wider Brazilian Public Administration's Multiannual Plan (PPA), which determines public policies over a four-year period and the measures to achieve these which are set out in a series of goals. CADE's input to the 2016-2019 PPA is set out in Goal 146: "*Strengthen competition defence and consumer protection by scaling up and providing more effectiveness to the public policies*". This goal is broken down into a targeted set of objectives focused on the timeliness of CADE's enforcement activities, as follows:

Table 1. CADE's targets

Target	Indicator
Review mergers in a timely manner, maintaining the average timeframe of review of fast-track proceedings below 30 days, prioritising the resolution of competition concerns by means of agreements.	Average time for review of mergers under the fast-track merger procedure and percentage of mergers approved with Merger Control Agreements (ACCs) by the Tribunal.
Investigate violations against the economic order in a timely manner so that the number of cases under investigation for more than five years does not exceed 20% of the backlog.	Percentage of ongoing cases involving anticompetitive practices within the General Superintendence for more than five years.
Increase the effectiveness of the fight against anticompetitive practices through the increasing use of investigation techniques and process management.	Percentage of cases involving anticompetitive practices concluded or with recommendation of closing by the General Superintendence.

Source: www.planejamento.gov.br/assuntos/planeja/plano-plurianual.

Case prioritisation

The GS has the autonomy to open investigations into any sector or markets that might potentially harm competition. That said, cartel enforcement, and bid rigging in particular, has been a clear priority since the enactment of the new Law. It was also a priority under the old Brazil Competition Policy System, when the Secretariat of Economic Defense (SDE) under the Ministry of Justice was focused on both investigating bid rigging in public procurement proceedings and building institutional knowledge in order to help procurement authorities to identify and avoid bid rigging in procurement tenders.

Another priority was to clear the backlog of cases carried over from SDE, some of which had been ongoing for over 15 years and were not particularly robust. CADE also gives priority to complaints and investigations in infrastructure sectors, the financial services sector, and products and services that are important to consumers (such as fossil fuels, cooking gas, healthcare and some agricultural products). In addition, the digital economy has emerged as another priority sector given a number of high profile cases involving technology companies, disruptive innovators and online platforms. Unilateral conduct cases have also been identified as an area where CADE will likely take

additional efforts to launch new investigations and conclude pending abuse of dominance matters.

In practical terms, as noted above, there is a screening unit within the GS's Cabinet that screens investigations and acts as a gatekeeper for all complaints. The unit liaises with the intelligence, leniency and sectoral co-ordination teams in the Cabinet to determine whether and how to progress a case to the investigation phase, after which a case is assigned to one of the case units. The separation between the Tribunal and the GS means that resourcing decisions are in practice made by the GS.

CADE's ability to set its own priorities means it has the discretion to focus on cases in line with its stated priority markets and anti-competitive practices. However, the large number of settlements (TCCs) that are concluded in case investigations means that it is arguably lacking a body of case decisions from the Tribunal to guide the GS's case prioritisation in practice.

3.1.2. Secretariat for Productivity and Competition Advocacy (SEPRAC) and the Secretariat for Fiscal Affairs, Energy and Lottery (SEFEL)

The new Competition Law removed the merger function from the Ministry of Finance's Secretariat for Economic Monitoring (SEAE), but SEAE kept its advocacy role.¹⁴ In line with the OECD's 2010 Peer Review recommendations to set up a mechanism to enable SEAE to participate in the legislative reform of the regulated sectors, the new Law specifically provides for SEAE to participate in the legislative-making process by issuing opinions for changes to draft laws in the case of regulated sectors. The new Law also authorised SEAE to issue opinions on legislative proposals before Congress. This function is normally carried out at the invitation of the Ministry of Finance. The new law also gave SEAE a role in reviewing existing laws and regulations at the federal, state, municipality and federal district levels. Therefore, SEAE's main functions under the new Law are as follows:

¹⁴ Article 19 Law 12.529/2011.

- Issue opinions on aspects relating to the promotion of competition for changes to draft laws in the case of regulated sectors.
- Issue opinions on aspects relating to the promotion of competition on legislative proposals before Congress.
- Carry out studies to evaluate competition in various sectors of the Brazilian economy, either on its own initiative or at the request of CADE, the Consumer Rights Department or the Ministry of Justice.
- Carry out industry studies to inform the Ministry of Finance's participation in the creation of sectoral public policies.
- Provide statements on the competitive effects of trade measures.
- Review existing laws and regulations at the federal, state, municipality and federal district levels.
- Provide input to the responsible government entity so that it can, at its discretion, amend the legislation identified as having anti-competitive effects.

SEAE historically had an important role in competition advocacy due to its position within the Ministry of Finance, which until the mid-1990s was a central player in the regulation of the Brazilian economy. SEAE was responsible for monitoring public service prices before sector regulators were established and expressing its opinion on regulatory decisions and privatisation of state-owned companies.¹⁵ The involvement of the Ministry of Finance in policy-making in several parts of the economy gave SEAE a prominent position from which to conduct intra-governmental advocacy. The location of SEAE within the Ministry of Finance – a powerful government ministry – and the reinforcement of its advocacy functions by the new competition Law, arguably put SEAE in a prime position to influence anti-competitive government restraints.

¹⁵ Decree No. 1849/1996 / Decree No.6531/2008, Article 12.

In January 2018, a Ministry of Finance decree (9,299/2018) replaced SEAE with two more focused bodies: the Secretariat for the Promotion of Productivity and Competition Advocacy (SEPRAC) and the Secretariat for Fiscal Monitoring, Energy and Lottery (SEFEL). The SEPRAC will be responsible for the competition advocacy tasks defined in Article 19 of Competition Law. In turn, the SEFEL will be responsible for:

- drafting and promoting fiscal policies
- overseeing lottery regulation
- assessing the regulatory impact of public policies in the energy sector
- promoting competition within the direct federal public administration.

The decree does not change previous SEAE (now SEPRAC) jurisdiction related to competition advocacy; the changes are structural.

SEPRAC has a total staff of 40 employees. From this total, 32 work in the technical area. Of the technical staff, are 19 economists, two are lawyers and 11 graduated in other areas. SEFEL has a total staff of 77 employees, of which 7 work on competition advocacy. Four of these are economists and three graduated in other areas. SEPRAC and SEFEL share the same administrative area and therefore they have eight administrative staff between them.

4. Substantive issues: Content and application of the competition law

This section of the report discusses the content and application of the competition law to horizontal and vertical agreements, abuse of dominance and mergers.

The legal framework for competition law in Brazil is primarily governed by Law No. 12,529, of 30 November 2011, the Competition Law, while the Economic Crimes Law (No. 8,137, of 27 December 1990) and the Public Procurement Law (No. 8,666 of 21 June 1993) set out the criminal provisions applicable to certain antitrust violations under Brazilian law.

The rules set out in the Competition Law are supplemented by regulations issued by CADE. The most relevant pieces of regulation issued by CADE currently in force are: (i) Resolution No. 1, which sets forth CADE's Internal Rules and procedural rules applicable to both mergers and conduct investigation; (ii) Resolution No. 2, which sets forth additional rules governing the Brazilian merger control system; (iii) Resolution No. 17, which sets out the filing criteria for "associative agreements" that are subject to merger review in Brazil; (iv) Resolution No. 12, which governs the consultation process before CADE, allowing parties to inquire about interpretations of the law; and (v) Resolution No. 13, which establishes rules for the investigation of failure to file with CADE transactions that are subject to merger control in Brazil, as well as for the determination of a post-closing filing of transactions that do not meet the applicable thresholds under Brazilian merger control rules. More recently, CADE has issued guidelines on specific topics, such as remedies, horizontal mergers, gun jumping, leniency and compliance.

In principle, the Competition Law and Laws No. 8,137/1990 and 8,666/1993, as well as CADE's regulations and guidelines, apply across the board to all sectors, although there has been considerable debate about CADE's jurisdiction over the financial sector in Brazil (see section 8.7 below).

4.1. Conduct cases

The substantive provisions of the new Competition Law relating to anti-competitive conduct have not been significantly amended from the previous law. Articles 20 and 21 of Law 8884/94 have been merged into Article 36 of the new Competition Law. This deals with all types of anti-competitive conduct other than mergers. Unlike the laws of many other countries, Brazil's law does not contain separate provisions dealing with anti-competitive agreements and unilateral conduct. Article 36 provides that, regardless of intent, any act that has the object or is able to produce anticompetitive effects, even if such effects are not achieved, shall be deemed to constitute a violation. The potential effects that the law refers to are:

- to limit, hinder or in any way restrain competition or free enterprise
- to dominate a relevant product or service market
- to arbitrarily increase profits
- to abusively exercise a dominant position

However, Article 36 specifically excludes the achievement of market control by means of “competitive efficiency” from potential violations. Under Article 2 of the Law, practices that take place outside Brazil's territory are subject to CADE's jurisdiction, provided they produce actual or potential effects in Brazil.

The new CADE has not issued secondary legislation setting out 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's Resolution No. 20/1999. Annex I to this Resolution contains definitions and classifications relating to anti-competitive practices. It differentiates between “cartels” and “other [horizontal] agreements.” It does not specifically apply a “per se rule” to the former, but it implies that a stricter standard applies to cartel conduct. The annex notes that non-cartel agreements may have beneficial, pro-competitive effects, which requires “a more judicious application of the rule of reason.” CADE's approach is therefore that the Competition Law allows for two types of

approaches towards anti-competitive behaviour: a form-based approach and an effects-based approach.

CADE has applied a form-based approach in relation to certain conducts, such as horizontal price-fixing and resale price maintenance, where its view is that the practice under investigation could constitute an infringement regardless of any case-specific analysis of actual or potential effects. While this approach is not to be interpreted as a clear-cut “per se illegal” rule, CADE puts the burden on the party to justify the conduct under investigation, and to demonstrate that the conduct would not produce the alleged anti-competitive effects. CADE’s approach is even stricter when it comes to hard-core cartel cases, where it considers that this conduct represents, in of itself, a violation of the Competition Law.

As regards unilateral conduct, CADE has interpreted the Competition Law such that unilateral conducts must be assessed on their potential or actual competitive effects. Consequently, a conduct is deemed anti-competitive only if its negative effects are not outweighed by its efficiencies. In such cases, the burden is on CADE to establish the anti-competitive effects of the conduct under investigation, while the party presents its efficiency arguments.

4.1.1. Cartels

The new Competition Law addresses horizontal agreements as any sort of agreement among competitors to fix prices and/or quantities, allocate markets, and rig public bids, which comprises cartel practices.¹⁶ Cartel conduct can also be a criminal offense, either under the Economic Crimes Law (Law 8,137/90) or the Public Procurement Law (Law 8,666/93), with prison sentences of up to five years. There is increasing criminal persecution of cartels in Brazil by Federal and State Public Prosecutor’s Offices usually in co-operation with CADE.

Brazil’s competition enforcement built its reputation on hard-core cartel prosecution, and it is one of the most active jurisdictions with respect to cartel enforcement. The focus on cartel prosecution started in 2003, after a decade focused primarily

¹⁶ Article 36 (3)(I) Law 12.529/2011.

on merger review. In 2003, the Brazilian antitrust authorities prioritised hard-core cartel prosecution, making use of investigation tools such as dawn raids and leniency applications. In 2007 SDE established a special group to concentrate on bid rigging and to promote competition in public procurement. This was bolstered by a Presidential decree in 2008 that created the Anti-Cartel Enforcement Day, celebrated annually on 8 October, the day on which the first leniency agreement was executed in 2003. Additionally, in 2009 SDE created its own computer forensics unit to analyse electronic information obtained in dawn raids and by other means. Moreover, several agreements with Federal and State prosecutors were signed. As a result, Brazil's cartel programme has grown steadily over the years.

Cartel prosecution has intensified since 2014. This follows a transition period after the enactment of the new Law when CADE understandably prioritised the implementation of the new pre-merger notification system. Numerous cartel investigations have been launched by the GS and there has been a particular focus on bid rigging, due to CADE's role in the "Car Wash" operation – an investigation into the largest corruption and cartel scheme in Brazil's history (see below).

As a result of the use of more aggressive investigative tools and with more than 45 search warrants served since 2003, CADE has been imposing extremely high fines on both companies and individuals found liable for hard-core cartel conduct. Indeed, the Tribunal imposed its largest ever penalty on companies in a cement cartel in 2014 – totalling BRL 3.1 billion (approx. USD 1.7 billion), along with unprecedented divestment remedies.¹⁷ In addition, the Tribunal brought to an end two

¹⁷ Administrative Proceeding 08012.011142/2006-79.

important international cartel investigations the *Air Cargo* case¹⁸ and the *Marine Hoses* case¹⁹.

¹⁸ See CADE press release “Cade Imposed a BRL 300 million fine against International Air Cargo Cartel” at <http://en.cade.gov.br/press-releases/cade-imposed-a-brl-300-million-fine-against-international-air-cargo-cartel>.

¹⁹ See CADE press release “CADE condemns companies and individuals for involvement in marine hoses’ cartel” at <http://en.cade.gov.br/press-releases/cade-condemns-companies-and-individuals-for-involvement-in-marine-hoses2019-cartel>.

Box 1. Cement Case

In 2014, CADE's Tribunal delivered a final ruling on the cement cartel investigation, which had been in progress since 2006. CADE applied fines to six companies, six individuals and three associations for being involved in a cartel that lasted from 2002 until 2006. The investigation began following a leniency application by a former employee of one of the cement companies. From the evidence collected, CADE concluded that the cartel acted in the Brazilian cement and concrete market by (i) fixing prices and sales quantities and dividing the regional cement and concrete markets in Brazil; (ii) allocating clients and concluding agreements not to compete; (iii) raising barriers to entry for new entrants to the market; (iv) dividing the concrete market through trading shares equivalent to shares in the cement market among themselves; and (v) co-ordinating control of the supply sources of cement. In addition the trade association also lobbied the Brazilian Association of Norms and Techniques to introduce new standards for the cement market. The proposed changes were aimed not at improving the quality of the product, but at creating restrictions on the activities of smaller competitors by bringing them out of the norm.

CADE's Tribunal imposed a record fine of BRL 3.1 billion (approx. USD 1.8 billion). In addition, the Tribunal for the first time imposed structural remedies in a cartel case, which is relatively unusual in such cases. It ordered the divestment of plants and a prohibition of operations in the cement and concrete sectors until 2019.

CADE's rationale was that the cartel had been possible due to a number of mergers and acquisitions in the previous years which went unscrutinised, thereby changing the structure of the market. CADE ordered the sale of assets in the cement and concrete markets by four companies: Votorantim and InterCement would have to sell, respectively, 35 and 25% of their production capacity; Itabita and Holcim would each be obliged to sell 22% of their production capacity. CADE also ordered Votorantim to sell its minority shares in competitor companies active in the cement market

In addition, any new entrants in the cement sector would be subject to a "transparency commitment", allowing CADE to request documents and information at all times and without previous authorisation, to ensure that new entrants would not join the cartelised structure of the market.

The case is currently being challenged in the Brazilian courts.

Table 2. Brazil's anti-cartel effort: 2010-2018

	2010	2011	2012	2013	2014	2015	2016	2017	2018***
Cartel cases opened*								19	6
Dawn raids**			5	2	5	2	2	3	4
Sanctions imposed			1	9	14	16	13	5	8
Settlements approved			2	9	23	40	50	61	28
Fines imposed (BRL and USD equivalent)			BRL 147 874	BRL 493 410	BRL 3 279 14	BRL 210 023	BRL 142 527	BRL 123 933	BRL 453 146
			282 (USD 94 850 7 92)	179 (USD 299 164 659)	8 821 (USD 1 876 72 1 650)	143 (USD 112 952 651)	469 (USD 71 784 3 15)	189 (USD 61 221 3 47)	331 (USD 223 848 261)
Pecuniary contributions from settlement agreements (BRL and USD equivalent)			BRL 50 000 (USD 32 071)	BRL 38 893 0 (USD 44 (USD 23 581 6 46)	BRL 153 432 (USD 075 (USD 87 812 2 08)	BRL 409 650 (USD 188 (USD 220 314 171)	BRL 748 986 (USD 289 (USD 377 228 808)	BRL 844 285 (USD 543 (USD 417 065 829)	BRL 212 017 (USD 177 (USD 104 733 666)

Notes: *Full investigations or administrative proceedings begun; **Warrants issued; *** January through October

CADE has focused on modernising the cartel prosecution system in Brazil, with actions such as the development and expansion of the leniency programme, inter-institutional co-operation with other Brazilian authorities, and the development of intelligence tools and investigative techniques. It has also taken a number of steps to clarify its internal procedures and decision-making processes. In 2017 it updated a number of guidelines (*Guidelines for Settlement Agreements in Cartel Cases* and *Guidelines for CADE's Antitrust Leniency Programme*), as well as its internal rules (RICADE). It has also issued Guidelines on its dawn raid procedures.

CADE has made considerable progress in reducing the long delays that have plagued its cartel enforcement programme, noting: “these cases don’t get better with age.”²⁰ It has closed

²⁰ Global Competition Review, *Ragazzo: Brazil to issue guidance on fines and settlements*, Global Competition Review, 23 July 2012,

numerous cases that were draining resources. CADE has also moved forward with proceedings against targets that are easy to serve, even when it cannot serve all members of a cartel, and prioritised more promising cartel investigations that involve leniency applicants and direct evidence of infringement.

However, the length of cartel investigations continues to be a challenge for CADE. Cartel cases remain open for several years (some up to almost a decade) due to a lack of human resources, bureaucratic formalities (such as notarisation and legalisation of documents), difficulties in serving defendants domiciled abroad, and the volume of investigations that do not involve leniency applicants and thus are less likely to contain evidence of wrongdoing.

Box 2. Recent significant cartel cases

2018: Cathode Ray Tubes

The Tribunal fined two companies for their role in a global cartel in the manufacturing and selling of cathode ray tubes for colour televisions. They were fined BRL 4.9 million (USD 2.4 million). This followed cease-and-desist (TCC) agreements with eight cathode ray tube manufacturers and five individuals, resulting in pecuniary contributions totalling BRL 57.4 million (USD 28 million).

2017: Building maintenance services

The Tribunal sanctioned five companies for bid rigging in the building maintenance services market. The investigation was the result of a leniency agreement signed with one of the companies involved and was initiated following dawn raids carried out in the offices of the investigated companies. The total fines imposed were BRL 11.9 million (USD 5.9 million). CADE also prohibited a company considered to be one of the leaders of the cartel from participating in public bids for a period of five years. Four separate companies signed cease-and-desist agreements (TCCs) and paid an aggregate pecuniary contribution of BRL 33.1 million (USD 16 million).

2017: Fuel resale in the Federal District

An investigation into an alleged cartel in the fuel resale market in Brazil's capital, Brasilia, resulted in CADE working with the Federal Police and Federal District's Prosecution in the so-called "Operation Dubai," to conduct forty-two raids of homes and offices in Brasilia and Rio de Janeiro in November 2015 in connection with the suspected fuel cartel.

The wiretapping carried out by the Federal Police and evidence from the raids confirmed a number of studies that pointed to evidence of a fuel cartel. Further monitoring and analysis by CADE following the raids showed that the prices were continuing to rise. In addition, the GS observed that the Cascol group was the market leader, controlling around 30% of the Federal District's gas stations, and that there was direct evidence both of its participation in the alleged cartel as well as its leadership position in the collusion, whereby it made the competing gas stations follow its guidance and its prices increases.

Taken this into account alongside increased consumer losses and the prices set well above the competitive level, the GS decided that there were sufficient evidence of violations against the economic order, combined with irreparable damage to competition and consumers, to

warrant the adoption of an interim measure in the market until CADE's Tribunal reached a final decision in the proceeding. Consequently the GS adopted an interim measure in January 2016, an interim administrator who would independently manage "BR" gas stations owned by Cascol, accounting for approximately two-thirds of the company's stations. The Interim Administrator would manage the stations independently of the alleged cartel and set their prices without co-ordinating with other competitors. The GS also guided the Interim Administrator to lower prices in the gas stations under his administration, as much as possible respecting the business's economic and financial well-being and considering that the current profit margins were artificially set above competitive levels. The measure was expected to provide the consumers in the Federal District with a wider range of gas stations that would no longer be aligned with the alleged cartel, and that this would engender a competitive response from other resellers, re-establishing reasonable levels of competition in the fuel market.

The interim measure was extended by an additional 180 days in October 2016 before the Tribunal approved a cease-and-desist agreement with Cascol. The company agreed to a pecuniary contribution of BRL 90 million (USD 45 million); it acknowledged its participation in the investigated conduct; agreed to provide documents and fully co-operate with the authority until the end of the investigations; and it was required to implement a compliance programme. Additionally the agreement provided for the divestment of several gas stations under Cascol's management in key points of the Federal District. The aim was to reduce market concentration and to allow for the entry and the development of competitors, mitigating the risks of future collusion in the sector.

Bid rigging in public procurement

The prosecution of bid rigging in public procurement and efforts to reduce the incidence of bid rigging have long been a priority for Brazil's competition authorities. The first leniency agreement was in a bid rigging case in 2003. In 2007 the Minister of Justice enacted an ordinance creating a special unit within SDE with the power to investigate cases of bid rigging in public procurement cases and to promote studies with the aim of helping public procurement authorities to identify and avoid collusion in tenders. It was also tasked with establishing co-operation agreements with other agencies such as the Office of the Comptroller General, the Federal Police, the Public Prosecutors' Offices and the Federal Court of Accounts.

There have been extensive training programmes carried out on detecting and prosecuting bid rigging. Furthermore, CADE is preparing a distance-learning course in partnership with the National School of Public Administration (Enap), with the purpose of replicating lessons related to the prevention and detection of cartels for auctioneers, bidding committees and control bodies throughout the country.

In 2008, SDE launched a brochure, based on OECD material, on preventing and fighting bid rigging, especially designed to procurement agents and authorities, which was disseminated in several States to auctioneers, control bodies, Courts, Federal Prosecution Services and consumers. The brochure is being updated and is expected to be released in December 2018. In addition, in 2017, the GS launched the publication *"Measures to Encourage the Competitive Environment of Bidding Procedures"*, elaborated at the request of the Executive Secretariat of the Federal Government's Investment Partnership Programme, which focuses on large infrastructure projects in the country. This publication highlighted measures for the government to stimulate competitiveness, to design more pro-competitive tenders and to avoid opportunities for communication among bidders. The paper lists the OECD's recommendations on fight bid rigging in public procurement and, based on those recommendations, sets out a list of general and specific recommendations to be observed in public procurements in the infrastructure sector.

And in 2009, at SDE's behest, the Brazilian Ministry of Planning issued a regulation requiring participants in federal public tenders to present a Certificate of Independent Bid Determination (CIBD), stating that they have not engaged in bid rigging. The CIBD was based on a model produced by SDE with assistance from the OECD.

The amendment to the Leniency Programme under the new Competition Law clarified that immunity granted to the leniency applicant extends to "other crimes directly related to the cartel conduct" with explicit reference to the Public Procurement Law. This clarified the doubt that had previously existed as to whether the leniency applicant could obtain immunity related to the crime of "fraud to competition in public procurement

proceeding” – provided for in Article 90 of the Public Procurement Law. This is because this violation was not explicitly mentioned in the leniency rules under the previous competition law. This amendment in the new Competition Law was likely a key factor that has encouraged several companies and individuals to come forward to the GS to admit participation in bid rigging schemes, in exchange for administrative and a more comprehensive criminal immunity. Most notable are the ones related to the Car Wash Operation, where to date 23 leniency agreements have been executed within the scope of this large-scale investigation, which resulted in the opening of several administrative inquiries and formal proceedings by the GS. In addition, CADE has investigated big rigging related to public infrastructure works, health products and services and subcontractors’ services.²¹

Cartel enforcement has stepped up a pace with a special focus on bid rigging. CADE has a dedicated bid-rigging unit within the GS. This originated from a special unit that was created within SDE following a two-year project between Brazil and the OECD to target bid rigging in Latin America.²² The unit within the GS highlights CADE’s on both pro-active and re-active bid rigging investigation tools and enforcement.

CADE has also developed a screening project called Cerebro. This is a platform that allows the integration of large public procurement databases by applying data mining tools and economic filters capable of identifying and measuring the probability of cartels occurring in public bids. This is part of a strong emphasis by CADE in recent years to develop investigative tools and investigative techniques capable of detecting cartels without relying exclusively on leniency techniques.

Cerebro’s data mining tools allow for the automation of the analyses formerly conducted by investigators and case handlers. The objective is both the identification of evidence of cartels in public bids, such as suspicious, implausible facts or

²¹ Paulo L. Casagrande, “Brazilian antitrust policy towards bid rigging: History and perspectives” (CPI, 24 September 2018)

²² OECD-Brazil Project to Reduce Bid Rigging in Latin America 2007-2009.

behavioural patterns, and the provision of relevant information for the investigation of the cases. The economic filters in the platform are based on specialist literature and econometrics. They seek to provide generalised evidence of the existence of cartels based on data related to prices, costs, profit margins, market share and spatial econometrics. Through the identification of companies' behaviour as described in academic articles, CADE derived mathematical models as statistical tests for general use in a kind of reverse engineering process. Some investigations have been started as a result of the Cerebro tool. It is still early days and the courts are considering whether the information it provides is sufficient to meet the threshold for the authorisation a warrant for a dawn raid.

Since 2015 much of CADE's bid rigging enforcement has focused on the Car Wash operation, where it has played a significant role in the investigation into the largest corruption and cartel scheme in Brazilian history. The co-ordinator of the Car Wash operation task force has underscored the importance of the co-operation between CADE and the Public Prosecutor's Office to progress these investigations.²³ In this context, since 2015, CADE has opened administrative proceedings on alleged cartels in public procurement and public infrastructure works.

CADE's involvement in this sprawling investigation has an impact on CADE's caseload and has taken up resources in the cartel area, notably away from *ex officio* investigations. Given that the chronic lack of staffing is often cited as the source of the backlog in antitrust investigations, the increasing workload from the Car Wash investigations will need to be addressed. This is both to avoid resources being diverted from other potentially worthwhile antitrust investigations and to avoid a further backlog of on-going investigations.

²³ Available at www.cade.gov.br/noticias/procurador-da-lava-jato-defende-parceria-entre-cade-e-mpf.

Box 3. Car Wash bid rigging cases

The so-called “Car Wash” (“Lava Jato” in Portuguese) investigations in Brazil were initiated in 2013 and helped uncover one of the most harmful corruption, collusion and money laundering cases in Latin America.

The origin of the operation was a minor money laundering scheme with a small foreign currency exchange and money transfer services office that was using a car wash business in Brasilia as a cover. The initial investigation raised flags of a possible corruption scheme involving a senior director of Petrobras. This was a major turning point in the investigation as criminal plea bargain agreements followed in 2014. These allowed the prosecution of a large corruption scheme involving politicians, senior managers at Petrobras and big construction companies. The corruption and collusion scheme had the following pattern: politicians would appoint high-level directors at Petrobras, who, in turn, accepted bribes in the form of a “commission” in exchange for awarding government contracts. These “commissions” later served to finance political campaigns. In addition, the construction companies involved in the corruption scheme were allocating markets and fixing prices affecting the government procurement.

The “Car Wash” operation has had an important impact in the number of leniency agreements and leniency plus agreements concluded by CADE during 2015-2017. During this period, CADE has almost doubled the number of total leniency agreement signed since 2003. The leniency agreements related to the “Car Wash” investigation have been jointly signed by CADE and the Prosecutor’s Office or the State Prosecutor for both collusion and corruption crimes. This has highlighted the importance for CADE to co-operate and co-ordinate investigations involving practices other than collusion with other public institutions, such as the Public Prosecutor’s Office, the Comptroller General’s Office, and the Court of Accounts.

CADE has opened around 20 on-going bid-rigging investigations as a result of the “Car Wash” operations. In the beginning, the investigations targeted construction companies involved in bid rigging perpetrated in relation to Petrobras contracts in the oil and gas related markets, such as the construction of power plants. The Petrobras investigation unearthed more alleged bid rigging practices in other construction projects, notably the construction of football stadiums (in relation to the 2014 FIFA World Cup in Brazil and the 2016 Olympic Games in Rio de Janeiro) and railroads.

The following cases illustrate some of the bid rigging investigations that CADE has opened in the context of the Car Wash operation.

Petrobras public bids. (Administrative Proceeding n. 08700.002086/2015-14)

The administrative proceeding was opened on 22 December 2015 after the signature of a leniency agreement by CADE's General Superintendence, the Federal Prosecution Services (in the State of Paraná) and two construction companies and the employees of the group. As a result of the leniency agreement information was provided about a cartel in Petrobras' public bids involving several construction companies.

As the investigation developed, CADE also signed three cease-and-desist (TCC) agreements with three other companies.

- UTC Engenharia S.A. (UTC) agreed to a pecuniary contribution of BRL 129.2 million (approx. USD 65 million) – the largest pecuniary fine ever negotiated between CADE and a company. UTC is currently being investigated for not having complied with the TCC agreement.
- Andrade Gutierrez agreed to a pecuniary contribution of BRL 49.8 million (approx. USD 25 million). The company obtained an additional reduction as it signed a leniency plus agreement with CADE regarding an alleged cartel in the market of construction, modernisation and/or renovation of sportive facilities in the context of the 2014 World Cup in Brazil.
- Camargo Corrêa agreed to pay a pecuniary contribution of BRL 104 million (approx. USD 52 million).

The investigation regarding the other investigated parties is still pending

Electronuclear public bids (Administrative Proceeding 08700.007351/2015-51)

A leniency agreement signed by the General Superintendence, the Federal Prosecution services (in the State of Paraná) and the company Camargo Correa led to the opening of this investigation. It involved an alleged bid rigging scheme affecting public bids conducted by Electronuclear to contract works at the Angra 3 nuclear power plant.

CADE signed TCC agreements with:

- Andrade Gutierrez: The documents provided by this provided information that suggested the conduct had started three years earlier than previously assumed. The company agreed to a

pecuniary contribution of BRL 6.1 million (approx. USD 3 million). The company also signed a leniency plus agreement regarding an alleged cartel in the national construction market of the Belo Monte hydroelectric power plant.

- UTC agreed to a pecuniary contribution of BRL 9.9 million (approx. USD 4.9 million). The company confirmed the information already in the file and provided evidence that widened the duration of the conduct by an additional five years.

The investigation regarding the other investigated parties is still pending.

There is also an emphasis on embedding and expanding co-operation efforts between CADE and other Brazilian enforcement agencies in charge of sanctioning illegal acts related to public procurement. Bid-rigging investigations in Brazil can involve multiple agencies, notably: (i) the Office of the Comptroller General, which can apply penalties due to violations of the Anti-Corruption Law (Law No. 12,846/13) and the Public Procurement Law, including debarment from public procurement; (ii) the Federal Court of Accounts, which can also impose fines and debarment; and (iii) the Public Prosecutors Office (both at Federal and State levels), which can instigate criminal investigations against individuals as well as civil lawsuits against companies. It is therefore particularly important that there is a more integrated approach between CADE and these different bodies on leniency and settlement agreements with companies and individuals willing to co-operate in the investigations.

CADE's Guidelines for its Antitrust Leniency Program state that the GS seeks to co-operate with the Office of the Comptroller General and the Public Prosecutors Office during leniency negotiations. However, it notes there is no general rule for this type of co-operation. Nevertheless, the Guidelines highlight the Memorandum of Understanding (MoU) signed in March 2016 between CADE and the Federal Prosecutor's Office at São Paulo, which is an example of inter-institutional co-operation. CADE has also concluded technical agreements with Public Prosecutors from different States in Brazil, which aim at closer communication between the institutions, exchange of information and documents and improvement of investigative

techniques and procedures. Moreover, within the context of the technical co-operation between CADE and the State Comptroller General Office, the competition authority has access since 2010 to the data contained in the Public Expenditure Observatory. This data can be screened through “Cerebro” to detect bid-rigging conducts. These type of agreements that CADE is actively pursuing with other government bodies provide more legal certainty to parties interested in co-operating with the competent authorities in bid rigging investigations.

The Leniency Programme

Brazil has an active and effective leniency programme. In fact, much of the level of anti-cartel enforcement in Brazil can be attributed to the success of its leniency programme. Despite initial scepticism from some local practitioners, SDE was able to put in place a system that provided the necessary assurances to companies and individuals. This, in turn, generated an increasing number of applications for leniency.

The success of SDE’s first dawn raid in 2003 which resulted in strong evidence of a hard-core cartel violation (*Crushed Rock* case²⁴) and SDE’s use of other investigative tools (e.g. wire tapping) in co-operation with the criminal authorities led to two leniency applications that year. Investigations were based on direct evidence of the anti-competitive agreements rather than circumstantial evidence, and as a result the cases were more solid and the fines imposed on companies and individuals were increasingly high. This is probably one of the reasons that encouraged companies to make use of the Leniency Programme, despite initial doubts.

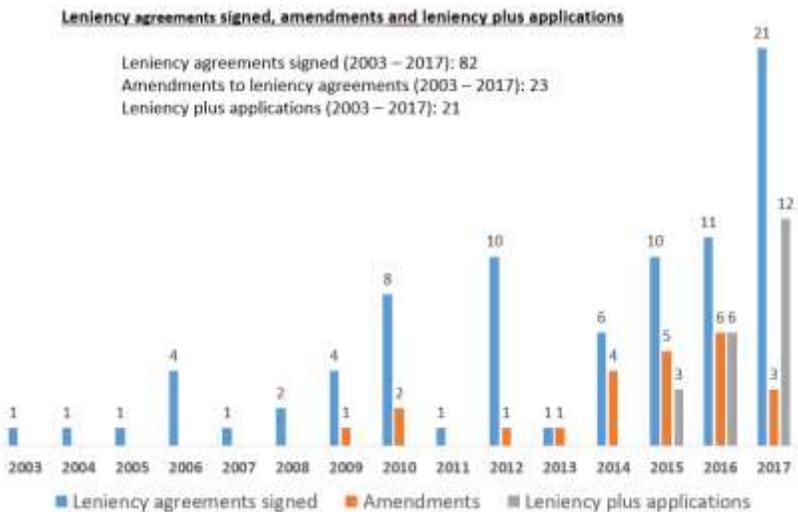
These first agreements involved domestic cartels. After which, there was a significant wave of agreements related to international cartel investigations, including the *GIS*, *Air Cargo*, *Marine Hose*, *Freight Forwarder*, *Compressors* and *CRT Glass* cases. This trend has started to reverse and in 2016 all of the leniency agreements related to domestic cartels – although this is

²⁴ Administrative Proceeding No. 08012.002127/2002-14.

also due to the cartel cases that relate to the “Car Wash” investigation.

In 2016, there was a 510% increase in applications for leniency, compared to the request for markers made in the previous year. The agency signed 11 new leniency and 6 leniency plus agreements, an annual record. Most of these agreements are linked to a single case, that of the state-controlled Petrobras. This record was surpassed in 2017, with 21 leniency agreements. Again, this is partially due to the significant number of cartels related to the Car Wash operation.

Figure 4. Leniency agreements 2003 – 2017



Source: CADE

The Leniency Programme was initially dealt with in Provisional Measure No. 2,055 of 11 August 2000, which was later altered and converted into Law No. 10,149 of 21 December 2000. With the enactment of the new Competition Law, most of the provisions regarding leniency applications were incorporated into the Act.

Article 86 of Law No. 12,529/ 11 authorises CADE’s General Superintendent to enter into leniency agreements under which individuals and corporations, in return for their

co-operation in prosecuting a case, are excused from some or all of the administrative penalties for the illegal conduct under the law. Although the programme is not restricted to cartel conduct, to date, all of leniency agreements signed relate to alleged cartels.

In a significant amendment, Article 87 of the new Law provides that a duly fulfilled leniency agreement also protects co-operating parties from criminal prosecution under Brazil's Economic Crimes Law (Law No. 8,137/90) and related crimes, including the Public Procurement Law. This makes it clearer that criminal immunity granted to a leniency applicant will now be extended to other possible crimes related to the cartel activity. At the outset, there was some criticism that the CADE, being an administrative agency, could not provide criminal immunity. To attempt to minimise any uncertainty, although it is not a legal requirement, the authority has regularly involved the Prosecutors' Office (state-level and/or federal-level, depending on the case) in the execution of the leniency letter. In practice, co-operation between criminal and administrative authorities has worked well in most leniency cases. However, concerns remain that it is not clear how agencies dealing with crimes and corruption work with CADE in terms of criminal immunity, and a concern that companies could end up in a potentially disadvantageous position under a leniency agreement. It will be a challenge to improve legal certainty for leniency applicants in criminal cartel cases.

To benefit from the Leniency Programme, the applicant must satisfy the following conditions:

- The applicant (a company or an individual) is the first to come forward and confess its participation in an antitrust violation.
- The applicant ceases its involvement in the antitrust violation.
- The applicant agrees to provide full, continuing, and complete co-operation to CADE throughout the investigation.
- The co-operation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the antitrust violation.

- At the time the leniency applicant comes forward, CADE has not received sufficient information about the illegal activity to ensure the imposition of sanctions against the applicant.

Brazil has a “winner-takes-all” approach to its Leniency Programme – i.e. administrative and criminal immunity are available only for the first-in leniency applicant.²⁵ Administrative immunity for companies and individuals can be either full or partial, and depends on whether the GS was previously aware of the illegal activity being reported. If the GS was unaware, the party may be entitled to a waiver from any penalties. If the GS was previously aware, the applicable penalty can be reduced by one-third to two-thirds, as determined by the Tribunal, depending on the effectiveness of the co-operation and the ‘good faith’ of the party in complying with the leniency agreement.²⁶ In the leniency agreement, the GS generally states whether it was previously aware of the illegal activity being reported or not.

There are two notable changes to the Leniency Programme under the new Competition Law. Under the previous competition regime, the leniency was not available to the “leader” of the cartel. This rule was eliminated, for two reasons: first, because it is difficult to determine which of the cartel participants was the leader; second, because denying leniency to the leader has the effect of precluding access by CADE (at least at the outset) to the party that probably has the most information about the cartel. Additionally, in line with OECD’s best practices and recommendations, the new Law extends the granting of leniency to criminal liability – not only under the Federal Economic Crimes Act, but also to other possible crimes under other criminal statutes, such as fraud in public procurement.

However, this requirement that the corporate applicant must identify all the individuals, even low-ranking employees, for them to sign the leniency agreement in order to be protected and

²⁵ Subsequent companies and individuals can enter to settlement agreements (TCCs) with CADE and qualify for an administrative fine reduction.

²⁶ Article 86(4) Law 12.529/2011; Article 249 (I and II) RICADE.

also identify individuals working for other cartel members to be included as defendants in the investigation, results in a very large number of defendants in any one case (there have been instances of 70 defendants in a single cartel case). This significantly extends the length of the administrative proceedings, and it can also cause delays in joint international investigations. Moreover, given that there are an increasing number of foreign individuals being investigated in Brazil, CADE has to locate the individuals (who may no longer be working for the same company) and serve process through a central authority (the Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional (DRCI)) or through consular and diplomatic channels. This can be a lengthy process on its own, adding to the problem of the length of investigations.

The Leniency Programme also contains a ‘leniency plus’ provision, by which any co-participant in a cartel who comes forward with evidence regarding another collusive conduct still unknown to the CADE will be granted a reduction of one-third on the penalties imposed in the original investigation. Additionally, said co-participant also enjoys full amnesty for the second practice (for which it was the first-in). CADE clarified its leniency plus programme in 2017, so that companies that are the first to enter settlement proceedings, as well as using its leniency plus program, will perceive a discount ranging from 53.3%-66.7% as first proponents of a settlement. Companies that are second-in for settlements that use leniency plus will receive a reduction of between 50%-60% for settlement in the first case on top of the leniency plus for the second investigation. Subsequent settlement applicants will receive up to 50% of reduction for that investigation, when combined with a leniency plus agreement.

The level of co-operation required by CADE is typically higher than that expected in US or European investigations. This has been flagged as overly burdensome by some private practitioners. It is unclear whether CADE’s requirements are the result of a tendency by other defendants to challenge investigations initiated by CADE. With the increase in the number of cases based on leniency applications and confirmation of the Leniency Programme in Brazil’s courts, this may change in the future.

Moreover, CADE has been increasingly cautious before entering into a leniency agreement. It has requested more evidence of the illegal practice and, for international practices, it has been requesting strong evidence of effects on the Brazilian market. When faced with applications for leniency based on material considered insufficient to prove the communication among the competitors and effects into the domestic market CADE has opted to reject the execution of an Agreement and the initiation of an investigation of the reported violation. It seems that the aim of CADE's SG in being more rigorous and selective is to be able to launch stronger cases with a high rate of success in terms of conviction before the Tribunal and also in terms of the judicial review of its decisions. However, this has had an effect on the length of time taken to obtain conditional leniency agreements – even up to one year – creating uncertainty for business.

The Leniency Program has clearly matured over the years and is now considered a central aspect of the Brazilian competition policy, attracting interest from both domestic and international applicants. Over the course of the years several new investigations have been launched as a direct consequence of the success of the programme.

Settlement of cartel cases

Brazil provides for a settlement procedure for companies involved in cartel activities that failed to qualify for immunity under its first-in leniency programme. Brazil introduced a settlement programme for cartel cases in 2007, through an amendment to the 1994 Competition Law²⁷ and amendments to CADE's Resolutions. The new Competition Law in 2011 made few changes to the rules for anti-competitive investigations and settlements provided for under the 1994 Antitrust Law, as amended in 2007, delegating to CADE powers to establish complementary rules for settlement agreements through its Resolutions.

Article 85 of the new Competition Law and Articles 219 and 220 of RICADE permit CADE to reach a cease-and-desist

²⁷ Law 11482/07.

agreement (TCC in the Portuguese acronym) with companies and/or individuals in conduct cases. In March 2013, CADE introduced revised requirements for settlements to promote transparency and create incentives for settlement for those applicants who fail to qualify for immunity.²⁸ Under the new rules settling parties must:

- Acknowledge their involvement in the cartel. (Under the previous scheme, only the leniency recipient was required to admit liability).
- Cease their participation in the conduct.
- Pay a pecuniary contribution.
- Provide meaningful collaboration to the GS.

Cease-and-desist proposals may be accepted at any stage of the investigation, even after the GS has concluded its investigation and while the Tribunal reviews the case before its judgement. The amount of reduction of fines is, however, lower if the TCC has been submitted once the investigation at the GS has been finalised and the case is pending before the Tribunal. Defendants can only try to settle once (a “one-shot game”). CADE may agree to keep the negotiation of a settlement confidential at the request of the parties. However, the full content of the agreement is published on CADE’s website after its ruling. Only its annexes and documents will be kept confidential (including the history of conduct with the detailed description of the conduct) and will be accessed only by the defendants and the authorities.

If the agreement is accepted and signed, this suspends the administrative procedure for the particular defendant involved in the settlement, for as long as the commitment is being performed and is terminated at the end of the established period if all of the conditions provided by the instrument are fulfilled.²⁹ The assessment on whether the parties have, or not, fulfilled the settlement conditions will take place only when CADE issues a final ruling on the case, and therefore, just like the leniency

²⁸ Resolution 5 of 6 March 2013.

²⁹ Article 85 (8) and (9) Law 12.529/2011.

applicant, the settling defendant will be bound to co-operate with the authorities until the end of the investigation.

A scale of discounts is applicable to the sum that defendants wishing to settle must pay. These discounts may vary between:

- 30%-50% for the first TCC applicant
- 25%-40% for the second in
- up to 25% for subsequent applicants (up to the closure of the investigation).

For settlement proposals submitted after the GS has concluded the investigation and forwarded the case to the Tribunal, reductions will be no greater than 15%.

These discounts are in theory based on the fine that would apply to the parties under investigation for the cartel, and are supposed to vary according to (i) the order in which the parties come forward and (ii) the extent and usefulness of co-operation as well as the extent to which that co-operation advanced CADE's case.

CADE issued *Guidelines on Cease and Desist Agreements for Cartel Cases* in 2016, and updated in 2017. These seek to provide more transparency and predictability by setting out the practice and the parameters already used by CADE in the negotiation of cease-and-desist agreements over the last years. The Guidelines also detail the method of evaluation of the level of co-operation of proponents in order to establish the percentage of discount, as well as the criteria used to calculate the "estimated fine". The Guidelines improve transparency on matters such as why a certain discount was applied to one case and not another. Indeed, the Guidelines were voted "Best Soft Law Instrument" in the Concerted Practices Category by *Concurrences – Institute of Competition Law*.

Despite these improvements to CADE's settlement procedure, some challenges remain. A particularly difficult issue is reaching a common understanding on what the "expected fine" would be in case of conviction. This stems from the lack of guidelines on setting fines under the new Competition Law. The

estimate of the expected fine requires the definition of: (i) the relevant revenues to be considered as the basic amount for calculating the fine, which, according to the Competition Law, should be the revenues registered by the company or group in the “business activity in which the violation occurred”; and (ii) the percentage fine to be applied, which, according to the Competition Law, may vary from 0.1% to 20% of the relevant revenues.

There has been considerable debate within CADE, the private bar and the academic community over the definition of “business activity in which the violation occurred”. It is clearly one of the most controversial issues regarding setting fines and negotiating settlements in Brazil nowadays. Some hold that this legal concept should be interpreted to encompass only the products and services affected by the conducts under investigation or the relevant markets affected, while others, including CADE, defend a broader interpretation to include other products and services that may be considered part of the same activity (see section 6.1.1 below).

The requirement for cartel defendants to acknowledge their involvement in the activity under investigation as a requirement for settlement is to preserve the leniency program and deterrence. However, this mandatory commitment may play a key role in a defendant’s decision to settle, considering that a settlement agreement does not provide immunity from possible civil claims for damages or any individuals involved against criminal prosecution, given that cartels are also a criminal offence under applicable Brazilian law. This lack of criminal immunity for individuals who decide to settle has been considered a barrier that may prevent individuals from engaging in settlement negotiations, and may result in a conflict of interest between the company and its employees should the company choose to settle the case with CADE even if the individuals decide otherwise. This is particularly pertinent at the present time, when there is an increasing trend of criminal prosecution for anticompetitive practices.

Nevertheless, the settlement procedure is seen as an important complement to CADE’s leniency programme and the number of cease-and-desist agreements in cartel investigations approved over the years highlights that much use is made of the procedure.

Table 3. Cease-and-desist agreements in cartel cases

	Total number of cease-and-desist agreements approved	Number of cease-and-desist agreement approved in cartel cases	Pecuniary contributions from cease-and-desist agreements in cartel cases
2012	5	2	BRL 50 000 (USD 32 071)
2013	53**	9	BRL 38 893 044 (USD 23 581 646)
2014	36	23	BRL 153 432 075 (USD 87 812 208)
2015	58	40	BRL 409 650 186 (USD 220 314 171)
2016	54	50	BRL 748 986 289 (USD 377 228 813)
2017	70	61	BRL 844 285 544 (USD 417 065 829)
2018*	32	28	BRL 212 017 177 (USD 104 733 666)

Note: *January to October; ** 42 of these were signed with Unimed (a large medical co-operative) in the same Tribunal judgement session to close cases related to exclusivity requirements in the provision of medical services.

The development of CADE's settlement procedure has sought to protect the value of its leniency programme. It is considered a tool to make enforcement more efficient and quicker in order to resolve problems in the market, as well as a tool to uncover other potential cartel cases. This, of course, depends on consistency across the teams within the GS conducting individual settlement negotiations as well as within the Tribunal when it is negotiating settlements.

Criminal prosecution of cartel conduct

Apart from being an administrative offense, a cartel is also a crime in Brazil under the Economic Crimes Law (No. 8,137/1990). Article 4 II of that law prohibits as a crime: "agreements among competitors designed to fix prices or quantities, divide markets, or control supply or distribution channels." The law applies only to individuals and not to corporations. Violations are punishable by a fine and imprisonment of two to five years. In addition, the Public Procurement Law (No. 8,666/93) specifically targets fraudulent

bidding practices, punishable by a criminal fine and imprisonment from two to four years.

CADE does not have authority to enforce the criminal law. That falls to federal and state prosecutors (there are 26 states and a Federal District in Brazil). In addition, the police (either local or federal) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who have the discretion to file criminal charges against the reported individuals.

The former SDE, and now CADE, have invested in establishing inter-institutional co-operation with the criminal authorities and they co-operate closely. When CADE initiates a cartel investigation it routinely asks prosecutors to begin a parallel criminal investigation. Prosecutors are also invited to sign leniency agreements, thereby ensuring that the applicant will not be subject to parallel criminal prosecution. In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the then SDE in joint criminal and administrative investigations. This arrangement became a template for co-operation with other state prosecutors.

In December 2007, the Federal Police established an "Intelligence Centre for Cartel Investigations" to advance co-operation efforts in joint criminal and administrative investigations of cartels. Co-operation agreements with state prosecutors led to the creation in 2009 of a "National Anti-Cartel Strategy", a permanent forum comprised of both criminal and administrative antitrust authorities to discuss the implementation of the country's criminal anti-cartel laws. In November 2013, CADE executed a co-operation agreement with the Federal Police setting the framework for co-operation under the new antitrust law.

CADE has now signed 20 technical co-operation agreements with criminal law enforcers, such as the Federal Prosecutors and the Federal Police, which aim at integrating and improving investigations that involve both anti-corruption and antitrust matters. This has facilitated co-operation in the Car Wash

operation cases. Agreements signed with state prosecutors has also led to co-operation that has led to the disclosure of other cartels.³⁰

Data on criminal prosecutions of cartels is incomplete. According to academic research, there are currently more than 350 executives facing criminal proceedings in Brazil for alleged cartel offenses and there is a final criminal decision sentencing 19 executives to pay a criminal fine for cartel offenses.³¹ Many of these cases are on appeal. However, some of the cases have resulted in criminal convictions and even jail sentences³² In 2014, a criminal court sentenced one defendant in an international cartel case to serve 10 years and 3 months in prison, and also handed down damages of approximately USD 130 million. Even though the maximum statutory prison term for cartel offenses is of 5 years, the judge found the defendant guilty on multiple counts (collusion and criminal conspiracy). Another 21 executives were sentenced to serve jail terms of two and a half to five years and three months for cartel offenses.³³ These decisions highlight that criminal courts regard cartel conduct as a serious violation that justifies the imposition of jail sentences.

4.1.2. Vertical agreements

The framework for the assessment of vertical restraints in Brazil is set by Article 36 of the new Competition Law, as described above, which deals with all types of anti-competitive

³⁰ For example CADE's collaboration with the Federal Prosecution Service of the State of Parana regarding the signing of a leniency agreement in the context of the Car Wash operation, resulted in the disclosure of a cartel in the public bids for the concession to operate the Belo Monte hydroelectric plant.

³¹ See <http://pensando.mj.gov.br/wp-content/uploads/2013/03/Volume-47-Relat%C3%B3rio-Final.pdf> p 26.

³² See the fuel cartel in the municipality of Vitoria/Espirito Santo - Criminal Suit n. 024.08.009660-5).

³³ Martinez, AP and Araujo, MT “ Anti-Cartel Enforcement in Brazil: Status Quo & Trends”, in Zarzur C, Katona K and Villela, M (ed.) *Overview of Competition Law in Brazil* (2015, IBRAC/Editora Singular, São Paulo) p 266.

conduct other than mergers. 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 in the Competition Law. However, Annex I of CADE's Resolution No. 20/99 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 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.

Annex II of CADE's Resolution No. 20/99 outlines the 'basic criteria for the analysis of restrictive trade practices', including:

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

Vertical restraints are analysed through a rule of reason approach based on: the assessment of market power; the potential negative effects of the alleged anti-competitive conduct; and efficiencies. In practice, no case has yet been decided on the basis that harmful conduct was justified by pro-competitive efficiencies.

Article 36 of the new Competition Law provides that a dominant position is presumed when a company or group of companies controls 20% or more of a relevant market. This

provides some guidance to private parties, as it would be unlikely for CADE to find a violation in the absence of market power.

As a result, CADE prosecutes few vertical restraints that are not also considered abuses of dominance. The major types of vertical restraints that have been adjudicated by CADE are conditioned discounts, exclusive agreements, resale price maintenance and tied sales.

Resale price maintenance (RPM) is treated differently following a decision by CADE in 2013 to sanction auto parts manufacturer SKF for setting a minimum sales price.³⁴ As a result of this decision RPM is now deemed illegal unless the 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. This position, taken by the majority of the Commissioners, departs from previous decisions that had adopted a rule of reason approach towards RPM.

Box 4. Vertical restraints cases

2018 – Anfape – car auto parts

This investigation started in 2009, following a complaint filed by the national association of manufacturers of auto parts, Anfape, against three car manufacturers, claiming that they were abusing their intellectual property rights by enforcing these rights in the aftermarket. Anfape asserted that these could only be enforced in the primary market, i.e. in the market for the manufacture of cars, and therefore these rights should not be used by automakers in the secondary market for spare parts. The enforcement of these rights would constitute an abuse of the dominant position of the car manufacturers, with the effect of foreclosing the market. In a very tight vote, the majority of CADE's Commissioners voted to dismiss the matter, indicating that there was no reason to distinguish the intellectual property rights in the primary and secondary market. The Tribunal also stated that there was insufficient evidence to establish an abuse of the intellectual property rights by the car manufacturers.

³⁴ Administrative proceeding 08012.001271/2001-44.

2018 – Online Travel Agents

The GS investigated hotel price parity clauses applied by Booking.com, Decolar.com and Expedia to ensure that these companies' sites would show more advantageous conditions to consumers compared to the sales channels of the hotel or competing platforms. The three companies signed a settlement agreement with CADE after a negotiation with the GS. The inquiry was suspended as a result. The agreement stipulated that the three companies would cease the use of price parity clauses in relation to offline sales channels and competing platforms. However, the GS recognised that the use of such clauses in relation to the online website of the own hotel would be justified to avoid a free rider effect.

2009 – AmBev

The investigation involved a loyalty programme developed by AmBev, Brazil's largest beer producer, which had a 70% market share. The programme 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. CADE imposed a fine of BRL 352 million (approx. USD 272 million). This is the record fine by CADE for an anti-competitive vertical restraint. The decision was challenged in court and was settled in 2015 with the execution of a judicial agreement between AmBev and CADE, under which AmBev committed to end its loyalty programme and pay BRL 229.1 million (approx. USD 177 million).

4.1.3. Abuse of dominance

Article 36 (IV) of the new Competition Law prohibits a company from abusing its dominant position on the market. Article 36(3) contains a non-exhaustive long list of acts that may be considered antitrust violations, provided they have the object or effect of distorting competition. Listed practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

Article 36(2) of the law also establishes that a dominant position is presumed when a company or a group of companies is able to individually or jointly change market conditions or when it

controls 20% or more of the relevant market.³⁵ This ‘dominance presumption’ is not absolute, however, as CADE must take into account market conditions (such as barriers to entry, rivalry, customers’ buying power, among others) to reach a conclusion on whether the company or group of companies hold a dominant position in a specific market. Article 36 further provides that CADE may amend the 20% threshold ‘for specific sectors of the economy’, although to date the agency has not formally done so.

The 20% threshold in the law is not only low but is also out of step with practice in the majority of other jurisdictions where market share is not considered a good proxy for market power. In any event, CADE has typically assessed of dominance on a case-by-case basis. Moreover, CADE generally considers the 20% market share threshold as a ‘soft’ safe harbour, i.e., a rebuttable presumption that the investigated company does not hold a dominant position if its market share is below 20%. While CADE acknowledges that market shares alone are not sufficient to determine whether a given company is dominant, there is a tendency in practice to rely on market shares given the legal presumption set out in Article 36. For example, in a case of alleged predatory pricing by Siemens in public bids for the servicing of technical equipment, Siemens’ dominance was presumed exclusively on the basis of the company’s market share (33.8%).³⁶ CADE concluded that there was no violation following an assessment of the competitive effects of the alleged conduct, which found that there were low barriers to entry to the market. Arguably had CADE considered these low entry barriers as part of a market power assessment, it might have concluded that the company did not hold a dominant position and closed the case at an earlier stage. Similarly in other cases involving medical co-operatives, for example, the defendants were presumed to hold

³⁵ Annex II of CADE’s Resolution No 20/99 sets criteria for the definition of the relevant market in both product and geographic dimensions.

³⁶ Administrative Proceeding No. 08012.000478/1998-62.

a dominant position based on their market shares, which were 24% in one case³⁷ and 32.32% in the other.³⁸

While the low threshold does not appear to be causing problems, CADE's approach does give rise to a degree of uncertainty for business. Moreover a statutory definition of dominance based on market shares does not reflect international best practice.

To date CADE has not issued internal regulations or guidance setting out criteria for the analysis of abuse of dominance under the new competition regime. It has instead relied on regulations issued under the previous law (Resolution No 20/1999), and precedents. However, there is no concept of binding judicial precedent. CADE's Commissioners are therefore not obliged to follow past decisions when deciding cases. CADE's Internal Regulations (RICADE) stipulate that legal certainty is only achieved if CADE rules in the same way at least 10 times, after which a given statement is codified through a binding statement. There are currently nine binding statements, eight of which relate to merger review. Binding Statement No. 7 sets out that it is a competition infringement for a physicians' co-operative with a dominant position to prevent its affiliated physicians from being affiliated with other physicians' co-operatives and health plans.

Annex II of CADE's Resolution No 20/99 provides for an effects-based approach to the review of unilateral conduct. An abuse of dominance under Article 36 will therefore only exist when the alleged efficiencies do not outweigh the anticompetitive effects. CADE's general framework of analysis is therefore to (i) assess whether the investigated company holds a dominant position in the relevant market; (ii) evaluate the (actual or potential) negative effects to competition arising from the conduct; and (iii) assess potential efficiencies. However, so far CADE has not yet accepted efficiency arguments in any of its cases.

Since the adoption of the new Competition Law, CADE's enforcement of abuse of dominance provisions has been rare.

³⁷ Administrative Proceeding No. 08012.007205/2009-35.

³⁸ Administrative Proceeding No. 08012.001503/2006-79.

There are a number of reasons for this. CADE's initial focus in the first years following the introduction of the new Competition Law was on implementing the new pre-merger notification system. The emphasis subsequently shifted to its cartel enforcement programme in 2014. The CADE's involvement in the Car Wash operation has also absorbed significant resources and been a priority given the national importance of the investigation. Consequently, there have been relatively few unilateral conduct investigations and decisions.

In addition, combining the mergers and unilateral conduct cases into the same units has inevitably been a constraint on the number of abuse cases that can be investigated. Traditionally, officials investigating abusive conduct need to pause their investigations to give priority to incoming merger reviews, which have firm deadlines to be completed. The length of abuse of dominance investigations has also had an effect on the willingness of complainants to come forward to CADE with possible cases.

Aside from resource constraints, CADE has also lacked the analytical expertise required to undertake the rigorous quantitative analysis involved in complex abuse cases. CADE has rarely conducted detailed quantitative assessment to measure the net effects on competition or defined objective, economic-based tests for determining an infringement of the abuse of dominance rules. CADE recognises that there is a need to develop its case handlers' expertise and knowledge of competition economics. Despite the increased staffing in the Department of Economic Studies, there is a concern that there are very few PhD economists who can handle complex unilateral conduct cases. Furthermore, it can also be argued that although unilateral conduct is housed together with merger review in the same units within the GS, it is not possible to achieve the scale effects that can be achieved in merger review, where even complex economic analysis can be standardised.

This issue with economic expertise is not just confined to the case handlers, but has an impact on the Tribunal as well. Cases from the GS are randomly assigned to a Reporting Commissioner. This means that a complex economic case may be assigned to a non-economist, who is then tasked with preparing their report for the Tribunal, with limited recourse to additional economic

expertise. While the report is not binding on the rest of the Tribunal, it may lack the necessary in-depth economic analysis to inform the Tribunal's deliberations in these types of cases.

This is however a trend that seems to be shifting as CADE directs more resources towards concluding pending abuse of dominance matters and occasionally launching new dominance cases. Allocating one staff member in each of the five merger and unilateral conduct units to abuse cases may give a boost to CADE's stated commitment to more abuse of dominance investigations, although it may not be sufficient to resolve the problem structurally. Indeed CADE recently opened four abuse of dominance probes against Google, which highlights that the agency has placed more emphasis on these types of conduct and the need for more resources to be allocated to abuse cases.

Furthermore, both the GS and the Tribunal have asked the Department of Economic Studies to carry out more detailed economic analysis in a larger number of matters to support the Department's opinions. In addition the Department has conducted a variety of studies on competition policy as well as market studies of particular sectors. The objective is to use these studies to complement the evidence in investigations into market definitions, competitive effects, efficiencies and the design and enforcement of remedies. For example in one of the two abuse of dominance investigations opened in 2015 against Uber, the taxi hailing app, the Department of Economic Studies report of Uber's impact on the individual transport of passengers concluded that Uber's entry into the market had positive effects on consumers and was used as the basis to dismiss the Preliminary Investigation against Uber.³⁹

³⁹ Administrative Inquiry 08700.019060/2015-97.

Table 4. Abuse of dominance cases (figures) 2012-2018

	2012	2013	2014	2015	2016	2017	2018**
Abuse of dominance cases opened*						1	3
Sanctions imposed by the Tribunal	1	5	2	2	3	None	2
Settlement agreements approved	3	43	5	8	3	6	5
Fines imposed (BRL and USD equivalent)	N/A	BRL 5 920 214 (USD 3 589 547)	BRL 3 037 608 (USD 1 738 483)	BRL 41 056 255 (USD 22 080 485)	BRL 32 214 530 (USD 16 224 928)	NA	BRL 5 761 411 (USD 2 846 060)
Pecuniary contributions from settlement agreements (BRL and USD equivalent)	BRL 101 621 132 (USD 65 182 700)	BRL 3 021 025 (USD 1 831 710)	BRL 9 450 000 (USD 5 408 422)	BRL 7 690 024 (USD 4 135 775)	BRL 2 774 2 16 (USD 1 397 241)	BRL 271 346 (USD 134 041)	BRL 30 463 236 (USD 15 048 433)

Note: *Full investigations or administrative proceedings begun, ** January through October

In terms of the sectors involved, CADE has been active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services, healthcare, port services and oil and natural gas (the latter as a result of the Petrobras monopoly). The digital economy and new technology cases are also on the increase (see reference in previous section to the online travel agency investigation that was settled). The General Superintendent has noted that although CADE is now focused on this area, the challenge is to assess how the market is going to evolve and therefore how much the agency should intervene.⁴⁰

⁴⁰ MLex Market Insight, 11 April 2018, *Unilateral conduct probes to get boost in Brazil; digital economy a priority, CADE official says*, <https://mllexmarketinsight.com/insights-center/editors->

Box 5. Abuse of dominance cases

Financial services

In March 2016, CADE launched a number of administrative inquiries to investigate whether large-scale financial institutions, card issuers and payment acquirers restricted competition through exclusivity arrangements and refusals to deal with competitors. The agreements were thought to reinforce the dominant position of credit card providers Cielo and Rede to the benefit of their controlling banks.

- The first inquiry examined whether credit card networks Elo, Alelo, American Express (Amex), Hipercard and Ticket had exclusive relationships with payment acquirers Rede, Cielo or with issuers Banco do Brasil, Bradesco and Itaú.
- The second inquiry into banks Banco do Brasil, Bradesco and Itaú-Unibanco, which were accused of refusing to process the receivable amounts schedule from competitors of Rede and Cielo, their controlled entities.
- The third inquiry investigated whether Rede and Cielo discriminated against competitors by employing encryption technology in their pinpad equipment, preventing access by smaller competing payment acquirers.

On 5 April 2017, CADE settled two of these investigations:

- Itaú-Unibanco and Hipercard settled the first inquiry, agreeing to allow access to new payment acquirers and to meet certain targets during a two-year period.
- Rede settled the third inquiry by undertaking to allow competitors to access its pinpads, on a non-discriminatory basis, as long as Rede was given reciprocal treatment. On 28 June 2017, Cielo and Elo also settled the cases, on similar conditions.

CADE dismissed the investigation against Alelo, Amex and Ticket in July 2017, finding that these credit card networks had on their own initiative opened their processing networks to other acquirers, voluntarily ceasing all contractual and de facto exclusive arrangements with acquirers.

[picks/antitrust/latin-america/unilateral-conduct-probes-to-get-boost-in-brazil-digital-economy-a-priority,-cade-official-says](https://picks.antitrust/latin-america/unilateral-conduct-probes-to-get-boost-in-brazil-digital-economy-a-priority,-cade-official-says).

Natural gas

In 2013 CADE opened an investigation into whether the Gemini Consortium, a joint venture involving Petrobras, White Martins and GNL Gemini, benefited from cross-subsidies or lower prices for gas supplied by its shareholder Petrobras, raising rivals' costs. Although the creation of Gemini had been approved by CADE in 2006, some of the restrictions imposed were overruled by a federal court.

In April 2015, CADE's SG considered the gas-supply agreement between Petrobras and Gemini risked giving the consortium an unlawful advantage over competitors, and, therefore, issued an injunction, confirmed by the Tribunal, to prevent state-owned oil company Petrobras from supplying the consortium at lower prices. On appeal, the injunction was confirmed by the Brazilian Superior Tribunal of Justice.

The Tribunal concluded, by majority, that Petrobras and White Martins gave the consortium an unjustified preferential treatment in natural gas supply pricing, allowing it to undercut prices charged by rivals, leading to market foreclosure.

Gemini Consortium members were fined a combined BRL 21.5 million (USD 11.6 million). The Tribunal imposed behavioural sanctions, whereby the companies were ordered to comply with the terms of the injunction or, alternatively, Petrobras could opt to operate the Gemini Consortium at unsubsidised prices, pursuant to Petrobras' new price policy, including equitable commercial conditions with those operated by Petrobras to Comgás, such as discounts and contractual adjustments, in line with the principle of non-discrimination.

Healthcare

CADE has investigated and imposed sanctions against numerous exclusive dealing arrangements. Many of these have involved Unimed, a physicians' co-operative with operations in 75% of the country. Unimed affiliates contract with local physicians and hospitals for the provision of healthcare services, and often these 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%). CADE has sanctioned more than 70 of these cases – including a fine of BRL 2.9 million (USD 1.8 million) imposed in 2013 against a Unimed co-operative in the south of Brazil, doubled for recidivism.

It has settled another 39 investigations on the condition that Unimed terminated the exclusivity clauses. The most recent conviction concerned Unimed in the Missões region, in southern Brazil, where it was also imposing exclusivity arrangements. In February 2016, CADE also reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system.

Settlement of abuse of dominance cases

The settlement procedure under Article 85 of the Competition Law and CADE's regulation (RICADE, Articles 219 to 223) allow legal entities or natural persons to enter into settlement agreements (Cease and Desist Agreements or TCCs in the Portuguese acronym) (with CADE regarding any type of antitrust offense. Therefore the settlement procedure applies to abuse of dominance cases as well as cartels.

The settlement negotiation procedure, which is set out in Resolution 1/2012 is predominantly the same for abuse cases as for cartels, with a few notable differences. First, the filing of a settlement proposal does not implicate an admission of the facts nor of the wrongfulness of the investigated conduct. This is in contrast to cartel settlements where there is a mandatory admission of the facts involved. It also has implications for potential damages claims, as claimants will not be able to rely on the settlement decision to establish the anti-competitive conduct in the civil courts. Second, as opposed to cartel settlements negotiations, it is not necessary to offer a pecuniary contribution to the Fund of Diffuse Rights. Where a pecuniary contribution is required, similar uncertainties arise as in the case of cartel settlements over the fine and level of the pecuniary contribution.

As seen in Table 4 above, most abuse cases are settled and there are consequently few decisions handed down by the Tribunal.

Defendants in abuse of dominance cases have the same incentives to settle as defendants in cartel cases. In abuses cases, there is the added incentive that settlements have not historically involved particularly high pecuniary contributions.

CADE's policy is to encourage the execution of settlements to close investigations in abuse of dominance cases, just as it is in cartel cases. The view of the GS is that settlements have provided a quicker solution to the problem in the market, particularly where the information and analysis is not readily available. This is considered preferable to continuing to prosecute for another three to four years, or more. The Tribunal has also underscored the importance it attaches to settlement agreements in abuse of dominance cases. For example, in February 2017 the Tribunal entered into a settlement agreement with Instituto Aço Brasil in the context of an investigation into sham litigation practices⁴¹. A similar statement was made in June 2016, when the Administrative Tribunal entered into a settlement agreement with Ediouro Publicações on sham litigation practices.⁴²

The disadvantage of this extensive reliance on TCCs as a way to resolve abuse cases is that there is a lack of precedents and, thus, legal certainty in an enforcement area where there are already few investigations. Moreover, in the few cases that do reach the Tribunal, if there are differences of opinions between the Commissioners, this makes it more difficult to have a clear position on the issues. This preference for settlements arguably exacerbates the lack of rigorous standards for the review of effects in guidelines or case law and has led to inconsistencies in the application of abuse of dominance rules.

The General Superintendent is optimistic that with more expertise and resourcing there will be fewer settlements in abuse cases and more full-fledged decisions by the Tribunal.

⁴¹ Administrative Proceeding 08012.001594/2011-18.

⁴² Administrative Proceeding 08012.005335/2002-67.

4.2. Mergers

4.2.1. Overview

General Framework

One of the reasons for the adoption of the new Brazilian Competition law in 2012 was the inadequacy of the post-merger control regime, which was based on a notification system with overly broad criteria and under which mergers and acquisitions could be notified to CADE after being implemented.⁴³

The new Competition Law aimed to tackle these problems by introducing structural and technical modifications, including a pre-merger notification system and new thresholds for triggering merger notification duties. According to Article 88 of the new Competition Law and the Inter-ministerial Ordinance 994 of May 30, 2012, the filing thresholds are:

- Gross annual turnover or total trading volume in Brazil, in the year prior to the transaction, equivalent to or above BRL 750 million (approx. USD 370 million), by at least one of the groups involved in the transaction.
- Gross annual turnover or total trading volume in Brazil equivalent to or above BRL 75 million (approx. USD 37 million) in the same period, by at least another group involved in the transaction.

CADE is also competent to review mergers that do not meet these thresholds, as discussed in the sub-section below on residual jurisdiction. This competence should be exercised within the year following the merger.

In line with CADE's concern with the technical quality and accuracy of its decisions, the agency has invested in the technical training of its staff to increase their capacity to conduct

⁴³ The Explanatory Memorandum is available at: www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=65A779D7E33E7AF394E9D7CA64DF3B95.proposicoesWeb2?codteor=339118&filename=PL+5877/2005.

economic evaluations of complex mergers. CADE's Department of Economics Studies (DEE) is responsible, among other things, for advising the General Superintendence and the Tribunal in their evaluation analysis of administrative proceedings as regards the economic aspects of mergers.⁴⁴

CADE has also published a number of guidelines on merger control, including Horizontal Merger Guidelines ("Guideline H") (2016); the Guidelines for the Analysis of Previous Consummation of Merger Transactions – Gun Jumping (2015); and, more recently, Guidelines on Competition Remedies, which aims at gathering best practices regarding the design, application and monitoring of remedies by CADE.⁴⁵

Residual Jurisdiction

CADE's procedure for reviewing non-notifiable mergers is set out in Resolution No. 13, of June 23, 2015.⁴⁶ There are no specific criteria for CADE regarding the selection by CADE of mergers it wants to review despite them not meeting the notification thresholds.

To date, three cases have been reviewed under CADE's residual jurisdiction. In all three, CADE decided to review the case given the parties' high market shares, even though the notification thresholds were not met: (i) the *Greca Distribuidora / Betunel / Centro Oeste Asfaltos* merger⁴⁷; (ii) the Mallinckrodt Group

⁴⁴ The Opinions elaborated by the Department of Economic Studies in this regard are available in Portuguese at: www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/publicacoes-dee/pareceres-do-dee-em-atos-de-concentracao-e-conduta.

⁴⁵ These Guidelines were published, on 16 October 2018. They are available in Portuguese at [www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias do Cade/copy of Guia Remdios.pdf/view](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias%20do%20Cade/copy%20of%20Guia%20Remdios.pdf/view).

⁴⁶ Available in Portuguese at www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucaondeg-13-2015.pdf/@@download/file/Resolu%C3%A7%C3%A3o%20n%C2%B0%2013-2015.pdf.

⁴⁷ Merger File No. 08700.006497/2014-06.

acquisition by Guerbe⁴⁸; and (iii) the All Chemistry acquisition by *SM Empreendimentos*⁴⁹. The former two cases were cleared unconditionally. The latter is still under review.

Local Nexus

Under Brazil's merger notification thresholds, it would be possible, theoretically, for mergers or joint ventures without direct effect in Brazil to be subject to Brazilian merger control. For example, the thresholds could be met if two multinationals with operations in Brazil acquired joint control of a company with limited activities in another country, no matter how distant from Brazil.

However, Brazilian merger control applies only to transactions that generate or may generate significant effects in the Brazilian market. This will be the case when: (i) the acquired company has revenues in Brazil, whether through local sales or exportations; or (ii) the relevant geographic market of the transaction can be classified as global and the acquiring company or its economic group will have the opportunity to commercialise its products or services in Brazil.

As a result, international transactions by companies without substantial assets in Brazil may nonetheless be subject to a mandatory filing in Brazil, but only if these transactions involve economic groups with significant business volume in Brazil and there is an effective possibility of commercialisation of the merged entity's products in the country.

Gun-jumping

Mergers that qualify for review cannot be consummated before a clearance decision is granted. Parties to the transaction are therefore expected to remain completely independent, with no interference in each other's activities or any disclosure of competitively sensitive information among each other

⁴⁸ Merger File No. 08700.005959/2016-21.

⁴⁹ Merger File No. 08700.005972/2018-42.

The Competition Law allows merging parties to request a provisional authorisation from CADE in order to close the deal while clearance is still pending in some exceptional circumstances. In order to request such authorisation, the parties would have to prove that: (i) the transaction does not entail any risk to competition in the relevant markets; (ii) the required closing measures are totally reversible; and (iii) the target would suffer severe and irreversible financial losses should closing take longer to occur (for example the target is in financial distress).

CADE has been extremely reluctant to grant such requests. As of October 2018, only one authorisation has been granted, which was in the Excelente/Rio de Janeiro Aeroportos transaction. The transaction, cleared in December 2017, involved the acquisition of control over an airport concession and, due to the applicable regulatory framework, waiting for CADE's clearance could imply the failure of meeting financial obligations for operating an airport in Rio de Janeiro and interrupting activities in that airport.

Gun jumping can lead to the fines ranging from BRL 60 000 to BRL 60 million (approx. USD 29 639 to 30 million) and the transaction being declared null and void, as well as the opening of an administrative proceeding to investigate potential antitrust violations.⁵⁰

In the event that CADE suspects gun-jumping, it will carry out a gun-jumping investigation under an Administrative Proceeding for Assessment of a Concentration Act (APAC). The APAC is carried out by the GS and is subsequently sent to the Tribunal for ruling.

There are no provisions under the Competition Law that permit carve-out agreements as a means of avoiding gun-jumping. CADE officials have said they do not tolerate carve-out practices. In 2016 CADE fined Cisco Systems Inc. and Technicolor S/A for closing a transaction without CADE's final approval, stating that the carve-out agreement amounted to gun-jumping. The parties paid a BRL 30 million (approx. 15 million USD) negotiated pecuniary contribution.

⁵⁰ Article 88 (3) Competition Law.

4.2.2. Merger Review in Practice

Between 2012 (when the Competition Law was enacted) to 2017, CADE assessed 2 588 merger cases. Of that number, 46 cases were the subject of objections by the GS and referred for further investigation to CADE's Tribunal.

In 2017 alone, CADE assessed 378 merger cases. From this total, 355 were approved without restrictions, 5 were approved with remedies, 9 were non-admissible (out of scope), 6 were filed (archived) and 3 mergers were blocked.

Review times and procedures

CADE has a maximum of 330 days to review a merger. If CADE does not review the merger within this deadline, the merger will be automatically approved. Since the new Competition Law entered into force, less than 1% of all the cases reached this limit and none was approved due to the expiry of the deadline.

The new Competition Law and CADE's Internal Regulations (RICADE) provide well-defined processes and strict timeframe for merger review. The maximum waiting period under Article 88 of the Competition Law is 240 days. This deadline can be extended by 60 days at the request of the parties and by no more than 90 days, based on a reasoned decision of the Tribunal.

CADE's Resolution No. 16/2016, sets out that the GS's decision on fast-track cases should be issued within 30 days of filing or amendment. In addition, there is a 15 day waiting period after the decision is published in the Official Gazette by the GS, during which the clearance can be challenged before the Tribunal within 15 days by any interested party or the relevant regulatory agency. The Tribunal itself can request to review the matter within the same deadline, in both fast-track and non-fast-track cases. For ordinary cases, parties should also take into account the time necessary for submitting drafts of the filing form with the GS before it deems the filing valid. Once the filing form is considered complete, the GS publishes a notice in the Official Gazette and starts to evaluate the notification

The final decision on fast-track or non-fast track or complex merger is by the General Superintendent, who can

approve the merger outright, which is normally the case for fast-track procedure cases or ordinary cases that are not considered as harmful to competition. Complex cases will certainly take longer, and will be analysed by CADE's Tribunal if challenged by the GS or called back by one of CADE's Commissioner.

If the GS decides to challenge a transaction, it must demonstrate the details of its concerns and recommend the Tribunal either approve the deal with restrictions or block it. A Reporting Commissioner will be randomly assigned to the case. The parties have 30 days to present a formal defence to the Tribunal. Afterwards, the Tribunal's randomly assigned Reporting Commissioner can ask for any extra information they deem relevant, including non-binding opinions by the Department of Economic Studies or the Attorney General's Office. The Reporting Commissioner will prepare a report and the decision vote, which is then submitted to the full Tribunal during a public session. The final decision at the tribunal is taken by a majority vote.

The replacement of the former post-merger assessment procedures has led to significant improvements in the appraisal of mergers within the agency. Since the implementation of the new regime, fast-track cases are decided in an average of 15 days, and ordinary cases are reviewed in an average of 96 days. The average time for analysing a merger in 2017 was 30 days, significantly better than the 154 day average in 2011, before the entry into force of the new Competition Law.

In 2017, the average time for issuing a decision in merger cases was 30 days, despite the fact that there were a large number of complex transactions under analysis. Fast-track mergers (approximately 83% of the total) were assessed in an average of 15 days⁵¹. The previous years' average was maintained, and a steady balance between new notifications and concluding previous assessments was reached.

⁵¹ DAF/COMP/AR(2018)20. Annual Report on Competition Policy Developments in Brazil submitted by Brazil to the OECD Competition Committee for the meeting held on 6-8 June, 2018.

Fast-track procedure

CADE's Resolution No. 02/2012 outlines the rules and procedures involved in the merger review process.⁵² In line with the OECD's Recommendations, this Resolution provides for a summary procedure (fast-track procedure), which is applicable to mergers that do not raise material competitive concerns.

Article 8 of this Resolution lists all cases that may be reviewed under a fast-track procedure: conventional joint ventures that do not result in horizontal overlaps, economic player replacement, overlap with low market share (less than 20%), vertical integration with low market share (less than 30% in both upstream and downstream markets), absence of causal link (HHI variation under 200 points) when the market shares of the parties involved are below 50%, and other simple enough cases that are not listed above. The Resolution also establishes a deadline of 30 days for the review of mergers under a fast-track procedure.

Fast-track proceedings represent around 85% of all the approvals of mergers since the current Competition Law was entered into force on 29 May 2012.

Information required

Extensive information has to be provided to CADE upon filing, unless the transaction qualifies for fast-track review. The notification includes information on the parties and their corresponding economic groups, major clients, major suppliers, turnovers, lines of businesses, interlocking directorates, and detailed market information for the past five years concerning all relevant markets horizontally or vertically related to the transaction, including proposed relevant market definitions, estimates of the parties and relevant competitors' market shares, a summary of the competitive dynamics of the affected markets, including entry and exit conditions, rivalry, etc. The extent of this initial information is similar to the information required in a US second request discovery procedure.

⁵² Available in Portuguese at: www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-2_2012-analise-atos-concentracao.pdf/view.

If the case qualifies for a fast-track review, the required market information is much more limited and the filing form is much easier and faster to prepare.

In-depth review

After publication of the merger notification, the GS may directly analyse the notification and render a final decision whenever the case does not require additional measures or the fast-track procedure applies.

The GS may also declare, by reasoned decision, that the transaction is complex and that supplementary evidence will have to be produced. When adopting this decision, the GS may request from the Tribunal an extension of the 240-day period for the analysis of the merger.

Upon conclusion of the supplementary production of evidence, the GS shall either approve the merger without restrictions; or present an objection to the Tribunal, if it considers that the merger should be rejected, approved only subject to conditions, or that there are no conclusive elements as to the effects of that transaction on the market.

CADE's Tribunal will analyse the merger independently, and is under no obligation to follow the GS's recommendations. Since 2012, only 46 out of 2 588 merger cases were subject to a challenge by the GS and forwarded for further investigation by CADE's Tribunal.

Commitments in merger cases

CADE has applied several behavioural and structural remedies in transactions that pose increased risks to competition, particularly in horizontal mergers. Among these remedies are the divestment of productive assets, technology rights and brands, among others.

If the GS considers that remedies are necessary for merger clearance, the merging parties will be informed about the concerns that the transaction raises. In this scenario, the GS may engage in conversations with the merging parties to evaluate their interest in

presenting a remedies proposal to be adopted through a Merger Control Agreement (“ACC”).

ACCs may be submitted to CADE from the moment a merger notification is filed, up until 30 days from the publication of the GS’s opinion that forwards the merger to the Tribunal. If the ACC is proposed by the merging parties before the corresponding opinion is issued by the GS, the ACC is negotiated with it and will be subsequently submitted to the Tribunal for review, with whom parties will be able to negotiate and discuss the ACC, and who will have the final word on the proposal. After the GS issues its opinion, the ACC is negotiated directly with the Tribunal.

Proposed commitments go through a review of proportionality, timeliness and feasibility. Structural remedies that meet these criteria are preferred, because they directly address the competition problem raised by a change in market structures caused by both horizontal and vertical mergers. Structural remedies also entail lower monitoring costs and a smaller risk of distortion of the market. In this context, a structural remedy such as a divestment may probably be more effective than a behavioural remedy, since it addresses the cause of the competition damage directly and will result in lower monitoring costs.

If a structural remedy is not possible, CADE will consider behavioural remedies that comply with the aforementioned criteria of proportionality, timeliness and feasibility. Structural remedies have been used in a few cases, particularly those involving co-operation between competitors or vertical issues.

In mergers where no remedies are identified as being able to mitigate the competition concerns, the transaction can be blocked. Furthermore, CADE may also reject the ACC in the event of lack of sufficient information for the assessment of a proposed commitment’s proportionality, timeliness and feasibility.

Below a few instances of mergers that were approved subject to commitments are described.

Dow/DuPont merger⁵³

This is a merger decision taken in the context of the multijurisdictional filing required by the merger between Dow Chemical (Dow) and DuPont de Nemours (DuPont). The parties negotiated an ACC with CADE, which adopted commitments that align with remedies imposed in other jurisdictions as concerns this transaction. The case was subject to intense international co-operation with foreign competition authorities, which enabled the adoption of a consistent remedies package and the appointment of a common monitoring trustee.

To address concerns regarding the overlap in activity of the parties in the materials science market, the companies committed to divest Dow's acid copolymer global business (which consists of the set of tangible and intangible assets and workforce required to ensure the viability and the competitiveness of the business) and ionomers. Regarding the crop protection market, the companies also proposed to divest assets of DuPont's herbicides and insecticides business. To address concerns regarding the seed market, Dow committed to divest certain assets related to its corn seed business in Brazil.

The proposed ACC also established minimum requirements for potential buyers, in order to ensure that they would be capable of effectively compete with the new company resulted from the global merger. The procedures and deadlines of the divestments are confidential.

Itaú/XP merger⁵⁴

The merger consisted of the proposed acquisition by Itaú Unibanco, Brazil's largest bank, of a stake in XP Investimentos, a financial services firm. The companies committed to strengthen their mechanisms of governance that ensure the independence of the current XP management, in order to maintain the companies' pre-merger incentives. This eliminated CADE's concerns about the possible reduction of XP's competitive pressure on the market.

⁵³ Merger Review n. 08700.005937/2016-61.

⁵⁴ Merger Review n. 08700.004431/2017-16.

Further commitments agreed by the companies aim to mitigate the risks of discrimination or market foreclosure resulting from the reinforcement of vertical integrations between XP and Itaú. XP has committed not to discriminate against investment products offered by Itaú's competitors and is forbidden from adopting exclusivity clauses with other providers of investment products, in order to not hinder the access of other open platforms to these products and to XP's distribution channel. In turn, Itaú committed not to discriminate against platforms that compete with XP if the bank decides to distribute its investment products through open platforms. The agreement also prohibits the targeting of Itaú customers by XP, in order to avoid the reinforcement of the dominant position that that company currently holds.

Both companies agreed to maintain an online complaint channel, managed by an external auditor, which allows third parties to report alleged noncompliance with the ACC and other exclusionary practices. Compliance will be monitored by a Trustee, who will have access to the information provided by the companies.

This was the first merger review in the financial sector by CADE following the signing of the Memorandum of Understanding with the Central Bank of Brazil. In the analysis of this transaction, the two agencies co-operated throughout.

Merger Prohibitions

CADE has prohibited five mergers since 2015: Tigres/Condor⁵⁵ in 2015; Alesat/Ipiranga⁵⁶, JBS/Mata Boi⁵⁷ and

⁵⁵ Merger Review n. 08700.009988/2014-09.

⁵⁶ Merger Review n n. 08700.006444/2016-49.

⁵⁷ Merger Review n. 08700.007553/2016-83. This merger consisted of the proposed acquisition of the total shareholding of Fratelli Dorazio Investimentos Ltda. (actual Mataboi Participações Ltda.) and its wholly-owned subsidiary, Mataboi Alimentos Ltda., by the company JBJ Agropecuária Ltda. CADE's Tribunal decided, unanimously, to prohibit the proposed acquisition. The Tribunal concluded that the merger would result in significant risks to competition in the market of raising and

Kroton/Estácio⁵⁸ in 2017; and Ultragaz/Liquigas⁵⁹ in 2018. A brief overview of some of these decisions is provided below.

Tigres / Condor merger⁶⁰

The transaction consisted of the proposed acquisition of all the shares of Condor Pincéis Ltda. by Tigre S/A – Tubos e Conexões, which CADE thought raised competition concerns in the state property brushes market. The companies negotiated an ACC with CADE, but considered that they could not comply with the structural measures imposed by the competition authority.

Alesat/Ipiranga merger⁶¹

The transaction consisted of the proposed acquisition of the fuel distributor Alesat Combustíveis S/A by its competitor Ipiranga Produtos de Petróleo S/A. Alesat was the biggest fuel distributor in the relevant geographic markets, and had the capacity to compete with Ipiranga, Petrobrás and Raízen, the three companies that operate at a national level.

CADE found that regional markets would be negatively affected by the merger. Since the structure of the distribution fuel market affects the resale market, the acquisition of Alesat by Ipiranga would generate a significant impact in the capacity of fuel distributors to compete in the relevant geographic markets. CADE also concluded that Ipiranga's market share in a post-merger scenario increased the likelihood of abuses of market power in

slaughtering of cattle and the market of retail of fresh bovine, and that no behavioural or structural remedies could be identified in order to mitigate these risks.

⁵⁸ Merger Review n. 08700.006185/2016-56 consisted of a proposed merger between Estácio Participações S/A by Kroton Educacional S/A. This case will be detailed further.

⁵⁹ Merger Review n. 08700.002155/2017-51.

⁶⁰ Merger Review n. 08700.009988/2014-09.

⁶¹ Merger Review n n. 08700.006444/2016-49.

11 states and in the Federal District (corresponding to approximately 65% of the operation).

The Tribunal required the divestiture of Alesat's assets in the problematic markets. The parties did not accept this. The Merger Control Agreement presented by parties was in turn rejected by the Tribunal's majority, because it did not present sufficient remedies to address the concerns identified. The transaction was consequently prohibited.

Kroton/Estácio merger⁶²

This transaction consisted of the proposed merger of the two largest Brazilian private higher education institutions – Kroton Educacional S.A. and Estácio Participações S.A.

CADE concluded that the merger raised competitive concerns related to on-site education markets, due to the lack of sufficient rivalry in eight Brazilian municipalities: Macapá, Campo Grande, Niterói, São José, Santo André, São Luís, Belo Horizonte and Brasília.

Furthermore, one of the merging parties (Kroton) held already 37% of the distance education modality market (EAD), which would have increased to 46% after the transaction. The Tribunal considered that Kroton had strong brands in the on-site modality, such as Anhanguera and Pitágoras, which leverage EAD. Therefore, the merger raised concerns regarding increased market power by the parties. CADE also considered that the remedies presented by the parties did not satisfactorily address the concerns identified.

Ultragaz/Liquigaz merger⁶³

On February 28, 2018 CADE's Tribunal prohibited the sale of Liquigaz, owned by Petrobras, to Petrobras' competitor Ultragaz. CADE's Tribunal considered that the proposed

⁶² Merger Review n. 08700.006185/2016-56 consisted of a proposed merger between Estácio Participações S/A by Kroton Educacional S/A. This case will be detailed further.

⁶³ Merger Review 08700.002155/2017-51.

acquisition would increase the ability of Ultragas to abuse its market power in the Liquefied-Petroleum Gas (LPG) market.

The opinion of Cade's General Superintendence in 2017 highlighted that the transaction could result in high market concentration. Ultragas and Liquigás have, respectively, the largest and second largest domestic market shares of LPG. In a post-merger scenario, the new company would hold more than 40% of sales in many of the Brazilian States. The merger would eliminate a strong competitor in a market where four already companies held more than 85% of the supply market share prior to the transaction.

5. Enforcement procedures

This section describes the processes employed to investigate and prosecute violations of the Competition Law and outlines the process and the timeline followed by CADE in antitrust cases. The merger control procedure was outlined in Section 4.2 above

5.1. Overview of the process in conduct cases

The new Competition Law provides for a more detailed description of the procedural rules regarding the investigation and a clearer distinction of the different types of procedures that can be initiated by the GS. These procedures are (i) a “Preparatory Procedure of Administrative Inquiry” (Preparatory Procedure); (ii) an “Administrative Inquiry”; and (iii) an “Administrative Proceeding for Imposition of Administrative Penalties for Infringements of the Economic Order”.⁶⁴ CADE’s internal Regulation (RICADE) provides specific sets of rules applicable to each of the procedures. The choice of which proceeding to initiate depends on the level of evidence that the GS holds in relation to potential violations of competition law.

These proceedings can be initiated: (i) *ex officio*; (ii) based on a substantiated complaint made by any interested party; (iii) as a result of “informative documents”; (iv) after the holding of a preparatory proceeding or after the conclusion of an administrative inquiry; or (v) based on a complaint made by a Committee of the National Congress or any of the Houses thereof, SEPRAC and SEFEL, regulatory agencies or CADE Attorney General’s Office. In the latter case, the GS may move straight to an Administrative Inquiry or Administrative Proceeding.⁶⁵

⁶⁴ Article 175 et seq. of RICADE.

⁶⁵ Article 176 RICADE.

5.1.1. Preparatory proceeding

The GS may conduct a Preparatory Procedure in order to determine within a 30-day deadline whether the conduct falls under CADE's jurisdiction and if so, whether it should be subject to further scrutiny by CADE. A decision to close a Preparatory Procedure can be appealed to the GS within five days of the decision. The Tribunal, at the request of a Commissioner, can call back the Preparatory Procedure, in which case they can either confirm the decision to close the procedure or send the files back to the GS in order to start an Administrative Inquiry.⁶⁶

5.1.2. Administrative inquiry

An Administrative Inquiry is initiated by the GS when evidence of an anti-competitive conduct are insufficient for it to open an Administrative Proceeding. The GS has 180 days to conduct the Administrative Inquiry and within ten days of its conclusion must decide whether to close the Inquiry or open formal Administrative Proceedings against the investigated companies and individuals. This time limit can be extended by 60 days through a reasoned order by the GS. The decision to close can be appealed in the same manner as for a Preparatory Procedure. In the case of a call-back by the Tribunal, the Tribunal may (i) confirm the decision to close the procedure; (ii) determine the return of the case file to GS for the opening of an Administrative Inquiry or Administrative Procedure; or (iii) assign a Reporting Commissioner⁶⁷ to determine within 30 days whether to confirm the decision to close or decide on the commencement of an Administrative Proceeding and the production of evidence, which may be carried out by the GS. If the Reporting Commissioner decides on the commencement of an Administrative Proceeding once the GS has concluded its investigation, the Reporting Commissioner may decide to produce additional evidence which may be carried out by the GS.⁶⁸ An Administrative Proceeding at the Tribunal follows the same formal procedure as at the GS.

⁶⁶ Article 180 RICADE.

⁶⁷ Article 185 § 2 RICADE.

⁶⁸ Articles 181-185 RICADE.

5.1.3. Administrative proceeding

When the Administrative Proceeding is initiated as a result of a previous Administrative Inquiry the final technical note of the latter constitutes the charges brought against the party. The respondent or party subject to the investigation has 30 days to present their defence and specify the evidence it intends to produce and identify the witnesses. Based upon the complexity of the case, the respondent may request for an extension of 10 days to present its defence⁶⁹. The GS has 30 days after the deadline for the presentation of the defence to determine what evidence it deems pertinent. The GS may also exercise its evidentiary powers under the Competition Law. Within five days of the end of this fact-finding stage the GS notifies the respondents to present their final arguments within the following five days. Within 15 days of this deadline, the GS sends the file to the President of the Tribunal, setting out its opinion in a detailed report on whether to dismiss the case or whether there is an infringement.⁷⁰

The proceeding is randomly assigned by the President of the Tribunal to a Reporting Commissioner. The Reporting Commissioner is responsible for reviewing the case and producing a lead report that is submitted for judgement before the Tribunal's Plenary. The Reporting Commissioner can request additional information from the respondents and may request the non-binding opinion of CADE's Attorney General on the legal aspects of the case, and/or the opinion of the Federal Prosecution Service on both process and substance. The Reporting Commissioner may also request data, clarification or documents from any individuals or companies, public entities or agencies prior to issuing their opinion.

When the proceeding is ready for judgement before the Tribunal, the defendants will be notified to present their final arguments within 15 days to the Reporting Commissioner.

Before the case reaches the Tribunal plenary, Tribunal members discuss the merits of the case and the potential solutions on the table. This is to enable full information and disclosure to

⁶⁹ Articles 191-192 RICADE.

⁷⁰ Articles 186-196 RICADE.

the Tribunal members, allowing for quicker, more efficient handling of the case within the Tribunal, and a more in-depth collegial discussion and decision. It is also possible for another Commissioner to ask to do an additional report if the reporting Commissioner's view is likely to be at odds with the rest of the Tribunal. In this case, the Commissioners choose between the two reports presented at the plenary.

The case is then brought before CADE's full panel at a public hearing, during which the respondents' representatives may make oral arguments. The Commissioners and President each have one vote, including the Reporting Commissioner. The decisions are by majority vote or consensus. CADE can decide to:

- Dismiss the case, if it finds no clear evidence of an antitrust violation; or
- Impose fines and/or order the defendants to cease the conduct under investigation;

The judgement sessions are held in public. In addition, they can be listened to live and are available in the online archives. The premise behind this is to ensure transparency in CADE's decision-making, which is important for the institution's accountability, particularly given the recent corruption investigations facing the government. However, this means that where there are disagreements between the Commissioners, these play-out in public and there is a concern that an heterogeneous Tribunal makes it harder to set clear precedents and create legal certainty.

There was a sense from the stakeholders interviewed that there is considerably less consensus now among the Tribunal members. Whereas previously there were likely to be consensus views, the Tribunal is now more like a court in the sense that there are dissenting opinions. This has created uncertainty when negotiating settlements as negotiating with the Reporting Commissioner may not be representative of the views of the Tribunal, as it was before. Similar concerns were raised in the context of merger cases, where the divergent views of the Tribunal resulted in a lack of clarity in the approach and extended the length of the review process. Continuity of views across Tribunal was highlighted as a challenge.

During the judgement session, the Tribunal reaches a final decision that is published in the Federal Official Gazette within five days from the judgement session. The full content of the reasoned decision is also made public through a redacted version of the Reporting Commissioner's report in the public case file. Additional reports presented during the judgement session by other members of the Tribunal are also made public in the case file. Failure to comply with the decision is subject to judicial enforcement by the Attorney General's Office.

Both the Preparatory Procedure and the Administrative Inquiry are kept confidential if it is in the interest of the investigation, which is at the discretion of the GS. In the case of horizontal agreements, it is common practice that the investigation is dealt with *in camera* until the GS has sufficient elements to start an Administrative Proceeding. For abuse of dominance cases initiated by a complaint, the GS may inform the concerned parties of the allegations and request their comments and relevant information. The respondents will therefore be immediately informed about either a Preparatory Procedure or an Administrative Inquiry.

The respondents are informed straight away about the launch of an Administrative Proceeding. If parties under investigations have not been duly informed about the opening of an Administrative Proceeding, the conclusions of the investigation are invalidated on the basis of lack of due process.

In the case of non-confidential investigations, the order initiating the investigation is made public when it is put on the official system for the management of CADE's electronic documents – the Electronic System of Information (SEI) – which makes all non-confidential case files available online for consultation by the general public. The launch of Administrative Proceedings are made officially public by publication of the notice of initiation of the investigation in the Official Gazette.

Case review meetings may be conducted with the respondents or interested parties. This can be at the request of CADE, the respondents or the interested third parties. A brief record of the subject of meeting and attendees will be made available to the public case records.

In 2014 CADE introduced an IT organisational reform with the implementation of the SEI, the Electronic Information System, making all of CADE's administrative and case proceedings paperless. This important step brings increased efficiency and productivity internally and provides online access to CADE decisions.

5.2. Separation of investigation and decision-making

CADE's institutional structure provides for a separation between the investigative arm – the General Superintendent – and the Tribunal, which is the adjudicator. A Chinese wall exists between the GS and the Tribunal. The GS is responsible for conducting the investigation and the Tribunal will only be informed about findings and possible agreements signed within the context of the investigation once the GS concludes its analysis.

The system however provides for a more involved role for the Tribunal in the review of cases from the GS, the negotiation of settlements and merger control agreements. Upon receiving a case from the GS, whether it is a challenged merger or an antitrust administrative proceeding, the Tribunal has the opportunity to do its own in-depth review of the case, and collection and review of evidence. There is also the possibility for the Tribunal to call back the GS's decision to close an Administrative Inquiry and for a Reporting Commissioner to transform the Administrative Inquiry into an Administrative Proceeding with production of evidence.

The Tribunal can also negotiate settlements in either cartel or conduct cases. Unlike in the GS, where it is for the GS to set the period for negotiation, CADE's Internal Regulation provides for a deadline of 30 days for a Reporting Commissioner to conduct the negotiation. This is extendable for another 30 days. If further measures are needed, however, the period can be suspended. However, it is common for several suspensions to occur, and some negotiations in the Tribunal may last years. This again implies that the Tribunal take on a more active role than normally associated with an adjudicatory body.

A number of private practitioners interviewed for the review identified the Tribunal's tendency to reopen Merger

Control Agreements concluded by the GS. This affects the timing of the review.

There was a general impression that there is a blurring of lines between the role of the GS and the Tribunal in terms of investigation and fact-finding roles.

5.3. Investigative powers

CADE considers that it has sufficient and effective investigative powers. It has a mix of “soft” and “hard” tools. At the softer end of the scale, the GS and the Tribunal can request copies of documents and information enclosed in any pending or concluded administrative proceedings by other bodies of the Federal Executive that may be related to potential anti-competitive conduct, as evidence in its investigation.⁷¹

The harder tools range from information requests to dawn raids. Both the GS and the Tribunal can issue requests for information, which may include requests for clarification, issuance of questionnaires to third parties. The GS can also request oral explanations from any individual or legal entity, whether private or public and hearing of witnesses. If the individual or the legal entity refuses to comply with the request, CADE may impose a fine.

The GS can also conduct an inspection, at the headquarters or at any office or branch of a company under investigation, where inventories, objects, papers of any nature, as well as commercial books, computers and electronic files may be searched. An inspection is dependent on the agreement by the company. This agreement is necessary because according to the Brazilian Constitution, the same law making a home inviolable is extended to any company’s office or establishment. This legal barrier can only be removed by agreeing to an inspection or by a court order (see paragraph below). Inspection powers are generally not used.

The GS may also request, through CADE’s Attorney General, a search warrant (dawn raid) in the federal court to search for

⁷¹ Competition Law, Article 9, items VIII and XVIII (for the Tribunal), and Article 13, item VI, a) and b) (for the GS).

objects, papers of any nature, as well as commercial books, computers and electronic files in the interest of an administrative investigation. This situation is different from the inspection in the sense that the company cannot refuse to allow the search in case of a federal court order. In practice, due to difficulties within the court system to grant warrants for dawn raids, the GS usually depends on evidence provided in leniency agreements to convince the federal judges to authorise them. To date all requests by CADE's Attorney General to the courts for a dawn raid warrant under the new Competition Law have been granted. CADE issued a Guideline on Dawn Raids Proceedings in 2017. CADE conducted 14 dawn raids during the period 2013 to 2017.

The GS does not have the power to perform or request wiretapping or email monitoring. This is only possible in criminal investigations through specific court authorisation.

These powers are enforced by Articles 40 to 42 of the Competition Law. CADE is therefore equipped with a range of investigative powers and is ready to enforce them with the imposition of penalties for non-compliance.

5.3.1. Settlement agreements

The Competition Law and CADE's Internal Regulation (RICADE) (Articles 224 to 236) allow legal entities or natural persons to enter into cease-and-desist agreements with CADE regarding any type of antitrust offense. Cease-and-desist proposals may be accepted at any stage of the investigation, up until CADE reaches a final infringement decision. By means of these agreements, CADE agrees to halt investigations against the TCC signatories as long as the signatories comply with the terms of the referred agreement and agree to the commitments expressly provided in the TCC.

The procedures for settlements have been described in the sections above on settlements in cartel cases and settlements in abuse of dominance cases.

Settlements are a means for both competition agencies and parties to save time and resources. From the agency's perspective: it saves time and resource that would otherwise be required to investigate and prosecute conduct in a fuller procedure, produce

fully reasoned decisions, and/or litigate cases before the courts. For defendants, major benefits include a reduced fine, greater ability to reach an acceptable resolution in a defined time frame and the ability to avoid a lengthy, costly investigation and litigation that can distract management and generate negative publicity be deployed in the investigation.

CADE's settlement policy is considered a success in relation to anti-competitive practices in Brazil, notably in investigations involving cartel practices. It is considered an important complement to the leniency programme, which is available only to the first-in applicant. However, the fact that settlements for either cartel or conduct cases can be reached after the GS has concluded its investigation and while the Tribunal reviews the case before its judgement is unusual, when compared to other jurisdictions. It raises a question about the efficiency savings that normally underpin a settlement programme. There would not be any cost saving for the GS' investigation if a settlement is agreed once the file has been transferred to the Tribunal for judgement. The system arguably presumes a resource saving for the Reporting Commissioner's review. However, this implies that the Tribunal may conduct something more akin to a second-look investigation in addition to its adjudicatory function.

There are some key differences between CADE's settlement system for cartel cases and abuse of dominance cases. Settlements in cartel cases require acknowledgement of participation in the conduct. This is not the case in settlements of abuse cases and there is no infringement decision. Therefore CADE's procedure in abuse of dominance cases more closely resembles a commitment decision than a settlement procedure in other jurisdictions. However, in some cases, the most serious abuses of a dominant position are *a priori* excluded from the scope of commitment decisions in several jurisdictions. In these cases, it is generally considered that the nature of the infringement calls for the imposition of a sanction. Also, pecuniary contributions have not been historically very high in abuse of dominance settlements.

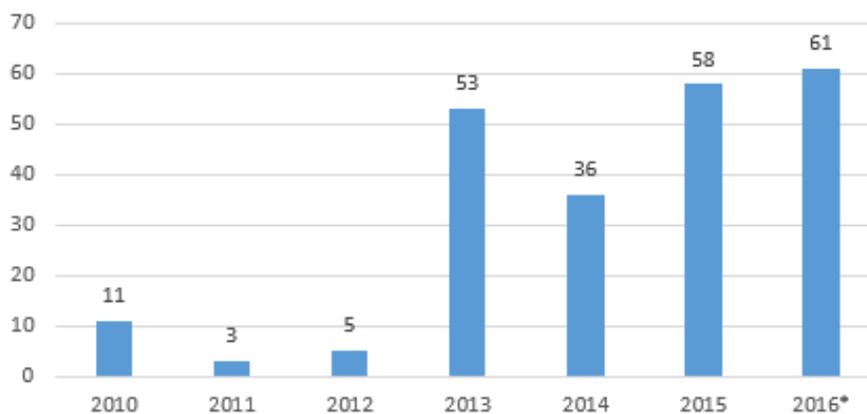
The discounts available in cartel settlements are high compared to the amounts applied in many other jurisdictions. If the settlement proposal is presented while the case is still at the GS, there are four pre-defined discounts for pecuniary

contributions. The first defendant in a cartel investigation to execute a settlement agreement will have a discount of between 30%-50% of the applicable fine; the second one, from 25%-40%; from the third defendant onwards, the discount shall not be higher than 25% of the applicable fine. The exact degree of discount depends on a number of factors, especially the degree of collaboration by the defendant with the investigation in terms of evidence and information. If the proposal is made before the Tribunal, the maximum discount is 15%. By contrast, in many other jurisdictions the maximum discount is 10% to reflect the severity of a cartel infringement.

CADE's emphasis has been on the use of the settlement procedure as an evidence-gathering tool, to enable CADE to identify and condemn a greater number of companies implicated in anti-competitive conducts, particularly cartel conduct. By making co-operation a requirement for settlement, in a system where not all defendants settle in practice, it has been used as a tool to speed up the fact-finding phase against the remaining defendants/ investigated parties in cartel cases.

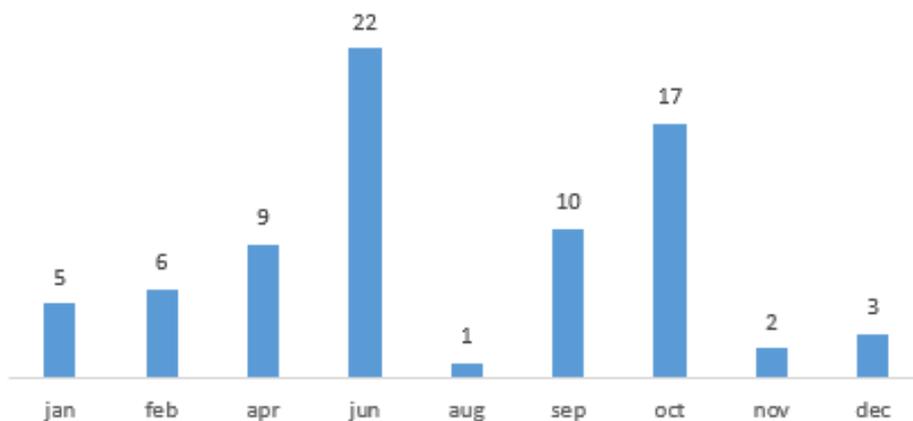
The number of TCCs has increased over the years. In 2012, CADE signed five cease-and-desist agreements and by 2017 that number had risen to 69. In 2016, CADE collected nearly BRL 800 million (approx. USD 403 million) of pecuniary contributions resulting from settlements. In 2017, the pecuniary contributions resulting from settlements totalled almost BRL 850 million (approx. USD 420 million).

Figure 5. Requests for Cease and Desist Agreements (TCC) judged by the Administrative Tribunal (2010-2016)



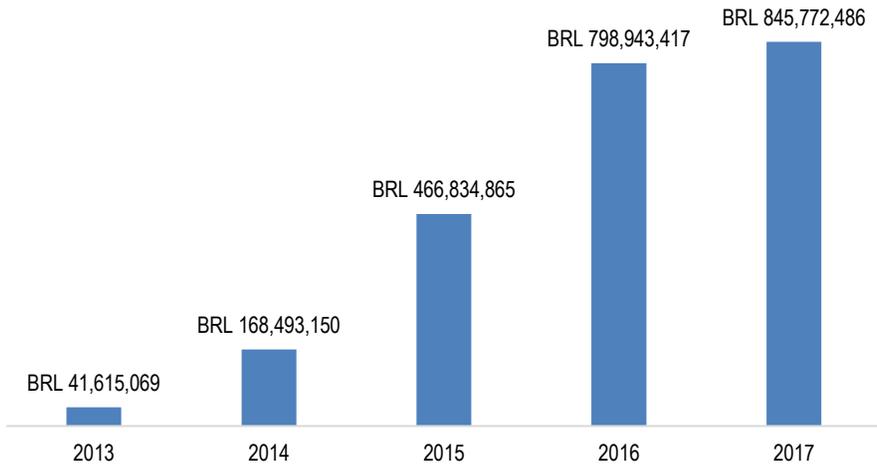
Source: CADE's General Superintendence.

Figure 6. Requests for Cease and Desist Agreements (TCC) judged by the Administrative Tribunal in 2017 (75)



Source: CADE's General Superintendence.

Figure 7. Pecuniary contributions resulted from Cease and Desist Agreements



Source: CADE's General Superintendence.

6. Sanctions and remedies

6.1. Sanctions

Articles 37 and 38 of the Competition Law sets out the sanctions that can be imposed in the event of a competition infringement.

Article 45 of the Competition Law lists the factors that must be taken into consideration when determining the sanctions for a competition infringement. These include: (i) the seriousness of the violation; (ii) the good faith of the transgressor; (iii) the advantage obtained or envisaged by the violator; (iv) whether the violation was consummated or not; (v) the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties; (vi) the negative economic effects produced in the market; (vii) the economic status of the transgressor; and (viii) recidivism, which will lead to a doubling of the fine^{72, 73}.

Under the Competition Law, the following sanctions can be imposed:

6.1.1. Fines

Brazil sanctions legal entities and individuals for competition infringements, both substantive and procedural. The Brazilian Fund, managed by the Ministry of Justice, collects fines and pecuniary contributions for the Defence of Diffuse Rights. The collected amount is redirected to Brazilian society by means of actions that seek to repair damage to the environment, consumers, assets and rights of an artistic, aesthetic, historical, tourism, landscape and economic nature, and other diffuse and collective interests.

⁷² Article 37(1) Law 12.529/2011.

⁷³ Article 45 Law 12.529/2011.

Substantive Infringements

Companies can be fined 0.1%-20% of their gross turnover in the field of economic activity where the infringement took place during the year before the investigation began. The amount of the fine will never be lower than the advantage the infringing company derived from the infringement, whenever it is possible to calculate the amount of that benefit. When the turnover of the company in the economic sector where the infringement took place is not available, CADE may take into account the total turnover of the relevant company or group of companies.

In the case of individuals, or legal entities for which it is impossible to rely on gross turnover as the basis of the sanction, they shall be fined in amounts between BRL 50 000 (approx. USD 24 700) and BRL 2 billion (approx. USD 988 million). Furthermore, if an executive was negligently or wilfully responsible for the infringement, they may be subject to a fine of 1%-20% of that applied to the infringing 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. This provision linking the fine of the company and the fine of the director is unusual, not least because the company's turnover and director's income or assets may not be linked in practice.

In cases of gun jumping in merger review, the transaction can be declared void and the parties are liable to a fine ranging from BRL 60 000 to BRL 60 million (approx. USD 30 000 to USD 30 million), under Article 88, paragraph 3 of the Competition Law. The amount of the penalty will depend on the economic condition, intent and bad faith of the parties involved, as well as the anti-competitive potential of the transaction, among others factors.

Procedural Infringements

The competition law includes a number of penalties for procedural infringements. These include:

- Fines of BRL 20 000 to BRL 400 000 (approx. USD 9 900 to USD 198 000) for preventing, obstructing or hindering the performance of inspections duly authorised by CADE

during a preparatory procedure, administrative investigation, administrative proceeding or any other proceeding.⁷⁴

- Daily fines of BRL 5 000 (approx. USD 2 500) for refusal, failure or unwarranted delay in supplying information or documents requested by CADE. This fine can be increased up to 20 times, if necessary, to ensure effectiveness. In the case of a foreign company, the Competition Law establishes that its subsidiary, branch, affiliated company or office located in country shall be jointly liable for the payment of such fine.⁷⁵
- Fines from BRL 5 000 to BRL 5 000 000 (approx. USD 2 500 to USD 2.5 million) for providing misleading or false information, documents or statements made to CADE.
- Fines of BRL 500 up to BRL 15 000 (approx. USD 250 to USD 7 410) for every unjustified absence of the defendant or third parties, when subpoenaed to provide clarification in the course of the investigation or administrative proceeding.

Additional Observations

A number of observers noted, during the OECD fact-finding mission, that there is an on-going debate, both within CADE and externally, over the appropriateness of the various grounds to determine fine amounts (e.g. how to establish the field of economic activity in which the infringement occurred, or the benefit derived from the competition infringement). An often voiced concern was that a more objective methodology on how to calculate fines was necessary as well as clear guidelines.

In response to the uncertainty about what constitutes a “field of business activity”, CADE adopted Resolution No 3/2012, which established 144 fields of activity based on industrial classification used by other government authorities and work

⁷⁴ Article 42 Law 12.529/2011.

⁷⁵ Article 40(3) Law 12.529/2011.

carried out by the Department for Economic Studies. The classification is so broad that it may include the whole turnover of a company. Moreover if two or more fields of activity listed in the Resolution are affected, their turnover will be added to the calculation of the basis of the fine. CADE may resort to the total turnover, whenever information on revenue derived from the relevant ‘sector of activity’ is unavailable. This classification system has proved difficult to apply in practice.

A problem, which was often identified, was that the fine could only be imposed by reference to the last year of an infringement. This often leads to fines being too low, since most conducts last longer than that – sometimes substantially so. CADE argued that there is a safeguard against this in the law – in the form of a ‘floor’ based on the benefit the infringing company derived from its conduct – but the effects of such a safeguard seem to be limited given the difficulties in determining what that benefit was, and doubts about whether looking at the benefit derived from the infringement is mandatory or merely optional.

There has been a very public divergence of views within CADE, both within the Tribunal and between a minority of the Tribunal and the GS over the methodology for calculating fines. The minority view in the Tribunal is that the agency’s practice of basing fines on a percentage of a company’s revenue from the year before the beginning of the administrative procedure fails to account for the companies’ gains and the damage the behaviour may have caused to the market. This results in smaller fines for companies that engaged in anticompetitive conduct for years, compared to companies whose anticompetitive conduct lasted for only months.

There is also disagreement over whether the fines should take into account the financial gains made from the infringement. Although in a minority, the Commissioners strongly in favour of this method argue that quantifying the impact of a company’s conduct on a market is more important than the size of the company. They also argue that CADE’s settlement agreements lack a standard method for calculating the pecuniary contribution, which creates legal uncertainty. The majority in the Tribunal and the General Superintendent maintain that calculating the ill-gotten gains is difficult to do and could result in court cases with

unpredictable outcomes.⁷⁶ There is also disagreement between the Commissioners in the minority on exactly how the fine should be calculated.

These disagreements have played out in the public Tribunal hearings, and have created uncertainty over the fining policy and the implications for settlement negotiations. There is also uncertainty about what this will mean for the development of fining guidelines by CADE, anticipated in 2019. In principle these are expected to reflect current practice. However, with a suite of new Commissioner appointments in 2019, this could affect the balance of views in the Tribunal.

6.1.2. Reputation and Publicity

The Tribunal may order that an extract of a conviction regarding competition infringements to be published, in half a page and at the expenses of the perpetrator, in a newspaper indicated in the judgment for a period of two consecutive days, for one to three consecutive weeks. This sanction may be imposed independently or cumulatively to other penalties.

6.1.3. Debarring from tendering for public contracts

An additional potential sanction for competition infringements consists of a prohibition to contract with official financial institutions or participate in public bids at federal, state, local and Federal District levels, as well as with indirect administration entities, for a minimum period of five years.

6.1.4. Additional Sanctions

Brazilian competition law also provides for a number of additional sanctions, including any act or measure required to

⁷⁶ The current and previous General Superintendents released a report in favour of the current methodology for calculating the fine, which sides with the majority view in the Tribunal. They cited a number of difficulties with calculating the benefits of an infringement, including the difficulty of the calculation and whether it would be a greater deterrent than the existing policy, rather than creating legal uncertainty. (Reported in MLex, 5 November 2018, *CADE Superintendent, predecessor sceptical of cartel fins calculated by gauging ill-gotten gains*).

eliminate the harmful effects of the anticompetitive conduct. Such sanctions include, but are not limited to:

- The registration of the wrongdoer with the National Registry for Consumer Protection.
- Making recommendations to the relevant bodies to the effect that: (i) a compulsory license over the intellectual property rights held by the wrongdoer be granted, when the violation is related to the use of that right; (ii) the infringing party be denied instalment payment of federal taxes owed by him, or that tax incentives or public subsidies be cancelled in full or in part.
- Prohibiting the wrongdoer from continuing to trade on its own behalf or as a representative of a legal entity for a period of five years.

Furthermore, the infringing company may be compelled to transfer corporate control, to sell assets, or to implement a partial interruption of activity.

6.1.5. Civil Fines

Since the new Law entered into force in May 2012, fines in an amount of almost BRL 4.6 billion (approx. USD 3 billion) have been imposed on individuals, companies and other entities. These fines have addressed a variety of anti-competitive practices, including horizontal and vertical agreements, and abuses of dominant position.

Table 5. Fines 2013-2017

	Horizontal agreements	Vertical agreements	Abuse of dominance
2017: matters opened	32	4	9
• sanctions or orders sought	12	0	1
• orders or sanctions imposed	5	-	4
• total sanctions imposed	BRL 123 933 189 (USD 61 221 347)	-	BRL 3 049 285 (USD 1 506 306)
2016: matters opened	25	5	8
• sanctions or orders sought	11	1	8
• orders or sanctions imposed	13	0	6
• total sanctions imposed	BRL 142 527 469 (USD 71 784 315)	-	BRL 54 110 142 (USD 27 252 708)
2015: matters opened	28	9	17
• sanctions or orders sought	12	2	10
• orders or sanctions imposed	16	0	23
• total sanctions imposed	BRL 210 023 143 (USD 112 952 651)	-	BRL 55 043 152 (USD 29 602 785)
2014: matters opened	35	3	5
• sanctions or orders sought	10	6	14
• orders or sanctions imposed	14	0	24
• total sanctions imposed	BRL 3 279 148 821 (USD 1 876 721 650)	-	BRL 36 420 199 (USD 20 843 999)
2013: matters opened	11	3	6
• sanctions or orders sought	14	1	33
• orders or sanctions imposed	9	5	8
• total sanctions imposed	BRL 493 410 179 (USD 299 164 659)	BRL 5 920 214 (USD 3 589 547)	BRL 22 409 542 (USD 13 587 363)

Note: “Sanctions or order sought” means the number of opinions issued by the General Superintendence that recommended sanctions or orders. “Order or sanctions imposed” mean the number of decisions by the Administrative Tribunal that resulted in sanctions or orders.

Source: CADE’s General Superintendence.

Table 6. Examples of fines and pecuniary contributions imposed by CADE

		Fine	Settlement – pecuniary contribution	Other sanction
Horizontal practices	<i>Building Maintenance Services</i>	BRL 11.9m (approx. USD 5.9m)	BRL 33.1m (approx. USD 16.3m)	Leader of cartel barred from public tenders for 5 years
	<i>Petrobras (investigation remains open for the other investigated parties)</i>		BRL 129.2m (approx. USD 64m) (for one company) BRL 49.8m (approx. USD 24m) (for one company – subsequently reduced through leniency plus) BRL 104m (approx. USD 51m) (for one company)	
	<i>Electronuclear public bids (investigation remains open for the other investigated parties)</i>		BRL 6.1m (approx. USD 3m) (for one company with a reduction through leniency plus) BRL 9.9m (approx. USD 5m)	
Abuse of dominance	<i>Distribution of liquefied natural gas</i>	BRL 21.5 (approx. USD 10.6m)	(Tribunal rejected the companies' settlement proposals)	Dominant company to sign a supply contract with the members of the consortium, in order to facilitate the identification of potential discriminatory practices in the future. CADE proposed alternatively that the companies operate the Consortium in accordance with dominant company's new price policy, based on the principle of non-discrimination and subject to monitoring by independent auditors previously approved by CADE.
Mergers	<i>Sham Litigation cases</i>	BRL 36.6m (approx. USD 18m)	BRL 1.69m (approx. USD 834 837)	
	<i>JBS/RODOPA</i>	BRL 3.5m (approx. USD 1.7m) for the provision of misleading information during the merger review process		

6.1.6. Criminal Penalties

As described in section 4.1.1, competition law infringements such as cartels (including bid rigging) are also considered criminal offenses by the Economic Crimes Law and the Public Procurement Law, and can be sanctioned by between two and five years in jail and/or by fines. Under the Economic Crimes Law, the amount of the fine is fixed on a day/fine-unit basis. The criminal fines may range from ten days to 360 days and the amount of the day/fine may range from 1/30 to 5 times the higher monthly minimum wage in effect at the time the crime took place. The amount may still be increased by 10 times in light of the illicit gains and the economic situation of the defendant. Criminal fines for bid rigging are calculated on the basis of the advantage effectively or potentially obtained by the conduct and may not be lower than 2% of the value or the public procurement or higher than 5% of that value.

There have been very few pure cartel prosecutions, as most cases seem to involve other crimes, such as corruption. Some examples of pure criminal cartel prosecutions are criminal actions No. 2003.71.00.007397-5 and No. 0115992-93.2005.8.21.0027, relating to cartels, which were prosecuted and sanctioned.

An additional issue is the application of the statute of limitations. The statute of limitations is calculated on the basis of, (i) the maximum sentence provided for in the legislation; (ii) the penalty imposed by the judge at the time of the trial in a specific case. In the first scenario, until there is a conviction the maximum statutory penalty is used. In the second scenario, the sentence handed down by the judge will serve as the basis of calculating the statute of limitation. The lengthy court process due to the large number of cases and time taken for appeals, means that in practice sentences are prescribed as a result of the statute of limitations and are therefore not executed.

6.1.7. Remedies

Besides financial sanctions, the Brazilian Competition Law provides that CADE may apply additional measures and orders.

Horizontal Practices

As already described above, measures such as the prohibition to engage in public tenders have been imposed in investigations involving horizontal agreements. In addition, CADE has ordered divestitures as a sanction for competition infringement. The following cases are good examples of this.

In the *Cement Cartel* case, CADE found that the integration between cement and concrete plants was crucial to the functioning of the cartel and to prevent market entry by non-cartel members. As such, the cement companies were required to divest completely any shareholding interest and cross holding in each other. CADE also required the divestment of 20% of concrete production capacity in regions where the condemned companies owned more than one concrete plant.⁷⁷ Lastly, the condemned companies were prevented from carrying joint operations in the cement sector and to acquire any asset in the concrete market for five years.

In the *Fuel Resale* case the cease-and-desist agreement required the divestment of several gas stations under Cascol's management in key points of the Federal District. The aim of this obligation was to reduce market concentration and allow the entry of competitors and development of competition, thereby mitigating the risks of future collusion in the sector. Furthermore, CADE adopted preventive measures in the course of the investigation, including appointing an interim administrator to independently manage the "BR" gas stations owned by Cascol, which accounted for approximately two-thirds of the company's stations.

Vertical Practices

CADE has not yet applied structural remedies for vertical agreements.

However, and in addition to financial penalties, CADE usually imposes or negotiates behavioural obligations in its settlement agreements, such as: (i) termination and prohibition of

⁷⁷ The 20% proportion was defined according to a technical analysis and is believed to be the minimum participation percentage owned by a competitor which will enable effective rivalry in the market.

exclusivity agreements; (ii) obligation to enter into an agreement; (iii) non-discrimination duties; (iv) infrastructure sharing duties; (v) prohibition of imposing or suggesting prices or conditions to resellers or distributors; (vi) prohibition/limitation in the imposition of parity clauses such as Most-Favoured-Nation clauses.

A few examples are provided below.

In a *Payment Cards* case⁷⁸ the cease-and-desist agreement had the goal of ensuring that the relationship between the payment brand Hipercard and the accreditor Rede – both part of the same economic group – was not exclusive. The TCC requires Hipercard to allow Rede’s competitors to operate their credit and debit card transactions through its payment brand for two years. During this period, Hipercard will also have to comply with specific goals related to use of accreditors other than Rede.

In the *Cryptographic Keys in Pinpad Equipment* case⁷⁹ a cease-and-desist agreement was agreed through which Rede committed to provide access, in its Pinpads, to all accreditors, indiscriminately, as long as those accreditors provide reciprocal access to Rede in their devices. Cielo, in turn, committed to request its manufacturers that all Pinpad-type equipment supplied to the market contain the most up-to-date key map available on the market, as made available by the sector association (Brazilian Association of Credit Card and Services Companies - Abecs), and the cryptographic keys of any competitor accreditor that confers reciprocal treatment. Cielo also commits to, whenever a Pin Pad is collected from a commercial establishment and sent for maintenance, update the key map of the equipment prior to its return to the market.

Under the terms of the cease-and-desist agreement in the recent *Online Travel Agencies* case⁸⁰, the investigated companies had to cease the use of broad price parity clauses. On the other hand, and recognising free rider effects in the online hotel

⁷⁸ Administrative Inquiry 08700.000018/2015-11.

⁷⁹ Administrative Inquiry 08700.001861/2016-03.

⁸⁰ Administrative Inquiry 08700.005679/2016-13.

reservation market, online travel agencies were allowed to require parity regarding the offer of accommodation through the hotels' own website.

Abuse of Dominant Position

To date, no structural remedies have been applied to unilateral conduct practices. Instances of abuse of a dominant position have been sanctioned primarily through fines and/or behavioural remedies.

In addition to the fine in the *Distribution of liquefied natural gas* case⁸¹, CADE required the dominant company to sign a supply contract with the members of the consortium, in order to facilitate the identification of potential discriminatory practices in the future. However, there have been difficulties in implementing this measure. As an alternative, CADE has offered the possibility for the consortium members to adopt the dominant company's New Price Policy (NPP), in accordance with a principle of the non-discrimination and subject to monitoring by an independent party subject to prior approval by CADE.

⁸¹ Administrative Proceeding n. 08012.011881/2007-41.

7. Private actions

This section examines the applicable framework for private antitrust enforcement in Brazil, in the context of measures to develop private damages as a complement to public enforcement of anti-competitive conduct.

7.1. The framework for private enforcement

Brazil's competition law framework allows for the initiation of private civil actions against parties that have engaged in conduct it prohibits. Article 47 of the Brazilian Competition Law stipulates:

“The aggrieved parties, by themselves or by someone legally entitled referred to in Article 82 of Law No. 8,078 of September 11, 1990, may take legal action in defense of their individual interests or individual homogeneous interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative procedure, which will not be suspended due to filing of court action.”

Stand-alone actions are allowed in Brazil. This means that a finding by CADE that anti-competitive conduct has occurred is not required for the initiation of civil action, although, as in other jurisdictions, such a finding could be a trigger and source of evidence for civil proceedings. In particular, and in accordance with Article 93 of the Brazilian Competition Law, infringement decisions handed down by CADE are considered extra-judicial enforcement orders, allowing victims of antitrust infringements to use the authority's decision as evidence of harm in court proceedings. And the ability to take private actions is specifically intended to serve as an effective complement to public enforcement.

The potential for collective actions to be filed by groups of firms or consumers is also allowed in Brazil, as established in Article 47 of the Competition Law. Specifically, it applies the

framework for collective redress mechanisms set out in Article 82 of the Consumer Defence Code, which allows certain entities⁸² to represent the injured parties collectively and co-ordinate the calculation of individual damages in the event a favourable judgement is obtained. The Federal Prosecution Service plays a role in any collective action, either by forming a collective action on behalf of injured parties or by overseeing the efforts of another entity to do so. The only private entities permitted to bring actions on behalf of a collective group are associations in existence for more than one year with a specific collective rights mandate.⁸³

The identification of individual members of the injured collective is permitted only during the liquidation and enforcement stage of the proceedings in order to prevent defendants from exercising pressure on individual members to withdraw from the collective. Negotiated settlements to claims are permitted when supervised by the judiciary or through an arbitration process (under Law 9.307/1996).

Notably, the collective action framework in Brazil does not require a direct consumer relationship between the injured parties and the defendants. Thus, there is no barrier to indirect purchaser collective actions, for example actions by final consumers against a supplier of intermediate goods engaged in anticompetitive conduct. Likewise, defendants can argue that claimants transferred all or part of the cartel overcharges down in the value chain and, therefore, did not suffer any damage or the damage was mitigated by the pass-on.

The Competition Law in Brazil does not define a particular limitation period for the validity of private civil claims. As a result,

⁸² Collective actions can only be filed by the Federal Prosecution Office, governments (at the Federal, state and municipality level), government entities and agencies, or associations that represent the rights of members in existence for at least one year (de Magalhães et al (2016), “Private antitrust litigation in Brazil: overview”, *Thomson Reuters Practical Law*, [https://uk.practicallaw.thomsonreuters.com/8-633-8888?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-633-8888?transitionType=Default&contextData=(sc.Default))).

⁸³ Ferrer Haddad et al (2017), “Class Actions: Brazil”, *Getting the Deal Through*, <https://gettingthedealthrough.com/area/82/jurisdiction/6/class-actions-brazil/>

the general limitation period of 3 years set out in the Civil Code (Article 206, paragraph 3, item V) applies. The starting point from which this limitation period is counted is not explicitly defined and is therefore open to a case by case interpretation, for example following the first instance of the alleged misconduct, or following a finding of misconduct by CADE.

In addition to the private damages framework described above, the Federal Prosecution Service of Brazil has the authority, under Article 129, item III of the Federal Constitution, to file a public civil action on behalf of consumers or undertakings harmed by anticompetitive conduct. These actions are motivated by public interest objectives such as the protection of collective rights, and are similar to public civil actions undertaken when other legislation, such as environmental protection laws, are violated. Public civil actions brought by the Federal Prosecution Service are not part of the normal framework for private actions, and any damages paid will be received by the State on behalf of the collectively harmed parties. However, they seek to remedy or address the same notional harm as private actions.

State and Federal Prosecutors' Offices have been responsible for the majority of civil suits seeking collective redress, most of which have been related to consumers' rights complaints.

7.2. Private enforcement in practice

While the fundamental elements of a successful private enforcement legislative framework are in place in Brazil, private actions are not a guaranteed consequence of public enforcement. For example, in 2017, of 15 competition law cases resulting in either convictions, cease-and-desist orders or leniency agreements, collective redress procedures have been initiated for only seven.

Part of the reason for this is because Brazil lacks a strong culture of claiming damages in general.⁸⁴ Claimants can also be discouraged by the drawn out nature and potential cost of judicial

⁸⁴ See submission of Brazil to OECD 2015, *Relationship between Public and Private Antitrust Enforcement*.

procedures and by the fact that courts generally lack familiarity with competition law and its complex legal and economic analysis. Numerous stakeholders have indicated that private actions face a low probability of success in courts mainly due to challenges in obtaining evidence - particularly in relation to leniency applications, and in the limitation period for initiating private actions.

7.3. Challenges in obtaining evidence

Filing a private action before the court in Brazil requires parties to demonstrate that they have been harmed by the alleged misconduct, as well as the duration of the misconduct. Stakeholders have indicated that this evidentiary burden can be substantial, and thus standalone private claims are unlikely to succeed without corresponding CADE proceedings or Federal Prosecution Service assistance.

Despite not being a pre-requisite for private enforcement, an antitrust investigation can produce evidence that a private party would find difficult and costly to obtain. In this sense, a pre-existing antitrust investigation can not only help establish that a competition infringement took place, in line with Article 93 of the Brazilian competition law, but can also assist in quantifying compensation of damages resulting from the misconduct.

In this context, CADE has made notable efforts to promote more private actions through the publication of more detailed decisions, accompanied by efforts to pro-actively inform potential injured parties about the infringement so that they may assert their rights against the companies involved in the infringement. In the 2010 industrial gases cartel decision, for example, CADE included for the first time an order that a copy of the decision be sent to potential injured parties for them to recover losses. Following this initiative, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.⁸⁵ Since then, CADE

⁸⁵ See OECD Background Paper in OECD 2015, Relationship between Public and Private Antitrust Enforcement and Martinez Ana Paula and Tavares de Araujo Levy Mariana, Private Antitrust

has continued to encourage victims to file follow-on claims for damages caused by cartels, resulting in increased deterrence of competition law enforcement.⁸⁶

When private claims are being formulated in parallel to CADE proceedings, the ability to obtain evidence from CADE is a matter of on-going debate. Private claimants are currently only able to access case documents once a final decision is made available, and subject to standard disclosure limitations regarding, for instance leniency agreements. Private parties are unable to access any interim case documents or information supporting leniency applications prior to the final decision.

With respect to leniency applications, there are numerous restrictions on the availability of evidence for private actions. This is for good reason, and preserves the incentives of parties to come forward as leniency applicants. CADE's Guidelines stipulate that no documents submitted will be disclosed except in case of a court order or express authorisation from the leniency applicant. Further, the identity of leniency applicants will be kept fully confidential until the leniency agreement is finalised. If a court orders a leniency applicant to disclose materials related to its application in a related civil proceeding, CADE has indicated that it can intervene in favour of protecting the confidentiality of these documents while the investigation is ongoing. Further, once the investigation is completed, CADE can also intervene in civil proceedings to ensure that the release of leniency material is reasonable, proportional and legitimately related to the plaintiff's claim. Finally, leniency applicants who have access to materials regarding other applicants, including the identity of the latter, are not permitted to disclose this information in private actions (again unless a court order is received).

CADE has indicated that the final decision documents and the Reporting Commissioner's report provide sufficient

Enforcement in Brazil: New Perspectives and Interplay with Leniency, CPI chronicle on 16 Apr 2013.

⁸⁶ See <https://thelawreviews.co.uk/edition/the-private-competition-enforcement-review-edition-11/1166414/brazil>.

information for filing a private claim. However, CADE decisions do not have a binding effect on judges as they will decide which information is sufficient to file a private claim.

In order to further support private claims, CADE has issued a Resolution on its discovery policy⁸⁷ which seeks to promote a balance between preserving the incentives for leniency applications while enabling private parties to claim for damages from anti-competitive conduct.

⁸⁷ Resolução nº 21, of 12 September 2018.

Box 6. Litigation regarding the use of leniency documents for civil proceedings

In *Electrolux do Brasil S.A. v. Whirlpool S.A. and Brasmotors S.A.* (2016) (subsequently settled in the Supreme Court), Brazil's Superior Court of Justice issued a ruling on the ability of parties in civil proceedings to access leniency documents. In this case, the defendants argued that since they signed a cartel leniency agreement that included a third party, the agreement and supporting evidence could not be considered in a civil damages case.

While the court agreed that confidentiality in the leniency process was important to preserve incentives for applicants to come forward, it found that limits should apply. Specifically, the court ruled that confidentiality should be maintained after a leniency agreement is finalised only if it is temporary and justified. Further, the court noted that leniency programs provide immunity from, or a reduction in, criminal and administrative penalties but not civil damages. Thus, in the court's view, indefinitely protecting the confidentiality of finalised leniency agreements could hamper civil proceedings and limit the ability of harmed parties to obtain compensation. CADE's current policy on the disclosure of leniency information seeks to address these concerns.

Source: Brazil: STJ Restricts the Confidentiality Extension Granted to Leniency Agreement Provisions Entered into by CADE", *Tauil & Chequer Legal Update*, 16 May 2016, www.mayerbrown.com/brazil-stj-restricts-the-confidentiality-extension-granted-to-lenieny-agreement-provisions-entered-into-by-cade-05-16-2016/

The Resolution formalises CADE's practices with respect to the sharing of information in its file, and is based on a review of international practices. It sets out that all information contained in the agency file is public and can be disclosed, subject to a number of exceptions related to leniency applications, settlement negotiations and sensitive commercial information.

7.4. Challenges arising from the limitation period

Separate to the general problems associated with obtaining evidence, private parties may not be able to use CADE information if it is not available within the three-year limitation period for

private actions⁸⁸ - particularly if the latter is interpreted as when the damaged parties are made aware of the misconduct. For example, the limitation period could be considered to begin when a news report emerges of a leniency application, forcing potential claimants to speculate whether a final decision will be available for use in a civil claim within three years.

Thus, when CADE investigations or leniency negotiations are particularly lengthy, private claimants can be limited to their own information or anything which might be otherwise publicly available, which may be insufficient to meet the requirements for filing a claim. Since unsuccessful claimants may be obligated to cover defendant legal fees if they do not provide sufficient evidence at the outset of a civil action, the limitation period could serve as a substantial disincentive for pursuing private actions.

Two proposals are before the Senate of Brazil to address the challenges associated with the limitation period. First, the Senate Commission for Constitution, Justice and Citizenship is contemplating an amendment that increases the limitation to five years, and defines the point at which the period begins as the point at which unequivocal knowledge of the conduct is available (CADE has proposed interpreting this as the point at which a final administrative or criminal judgment is published).

The second proposal is Senate Bill 283/2016 (Law 283/2016), under analysis in the Committee of Economic Affairs of the Senate, which proposes amendments to Article 47 of Law 12.529/2011 to suspend the limitation period for civil claims when a CADE investigation or administrative proceeding is ongoing.

7.5. The co-ordination of administrative penalties and private damages

Currently, when setting fines CADE does not take into account any settlements between parties accused of anticompetitive conduct and damaged parties, nor does the legal framework (under Law 12.529/2011) oblige leniency applicants to

⁸⁸ See, for example, Russo, R. and A. Candil (2016), “Comment: CADE resolution on confidentiality of leniency documents does little to aid civil suits in Brazil”, *MLex*.

compensate harmed consumers. However, successful leniency applicants are not exempt from liability in civil claims (notwithstanding the difficulties noted above in relation to evidence for private actions in leniency cases). As noted above, in addition to administrative proceedings and private civil claims, parties found in violation of the Competition Law may face public civil actions (i.e. collective redress actions) from the Federal Prosecution Service. Thus, there are three sources of legal liability for parties accused of misconduct in Brazil. Several proposals have been made to improve the co-ordination of CADE penalties and private damages, as well as to enhance the deterrence effect of private damages claims.

One such proposal is contained in CADE's Resolution on the confidentiality of information, described above. The Resolution also suggests that CADE could take into account any settlements made with harmed parties when determining the fines or other penalties to be applied for competition law violations.⁸⁹ The Resolution provides CADE significant discretion as to how fines would be reduced to reflect settlements, and it reflects an effort to maintain incentives to apply for leniency even if a private civil action will be forthcoming.⁹⁰

Another set of potential measures is contained in Senate Bill 283/2016, which as noted above, is currently under consideration by the Senate Committee of Economic Affairs. The proposal calls for a doubling of damages awarded in private civil claims, in order to increase deterrence for anticompetitive conduct and to incentivise private parties damaged by such conduct to pursue civil claims. The proposal stipulates that the doubling of damages does not apply to parties who enter into leniency or cease and desist agreements. Further, it clarifies that these parties are liable only for the damages they specifically caused to the injured parties, and are not jointly liable for the total damages caused by all parties engaged in the conduct in question. These stipulations seek to avoid disincentivising parties to come forward and apply

⁸⁹ Resolution n° 21, of 12 September 2018, s. 12.

⁹⁰ *Ibid.*

for leniency, which a doubling of damages or the imposition of joint liability could do.

8. Competition advocacy

This section examines the respective roles and activities of the Brazil's competition advocacy institutions, notably in terms of intra-governmental advocacy.

Advocacy is one of the primary objectives of Brazilian competition law. As with other economies with long traditions of state owned enterprises and pervasive regulation, it is of primary importance for Brazil to generate and improve a widespread understanding and acceptance of competition principles. A strong competition culture is intended to facilitate ex-post enforcement, and have a general preventive function.

8.1. The institutional set-up for competition advocacy

Three institutions share the mandate for competition advocacy in the Brazilian Competition Defense System: CADE, SEPRAC⁹¹ and SEFEL⁹². SEPRAC and SEFEL are both part of the Ministry of Finance.

The mandates⁹³ of SEPRAC and SEFEL include the drafting of studies that analyse public policies from a competition perspective, as well as self-regulations and normative acts of general interest to economic agents, consumers or service users, and the assessment of regulatory impacts of sectorial public policies. SEPRAC also issues non-binding opinions on bills under review in the National Congress, and on propositions by regulatory agencies (other non-binding opinions and evaluations can be requested by CADE, by the Chamber of Foreign Trade, by the Department for the Protection and Defense of the Consumer from the Ministry of Justice or its successor or by other fora which

⁹¹ SEPRAC is the Secretary for the Promotion of Productivity and Competition Advocacy.

⁹² SEFEL is the Secretary of Fiscal, Energy and Lottery Monitoring.

⁹³ Established by Decree 9.003/2017 (amended by Decree 9.266/2018).

the Ministry of Finance is part of). The institutions can also intervene as *amicus curiae* in administrative and judicial proceedings in Brazil. SEFEL has these competencies for competition advocacy in the energy sector. Both Secretariats have a total staff of 80.

CADE analyses bills with a potential impact on competition in markets. Its advocacy activities include publications, market studies, guidelines, impact assessments, lectures, and close co-operation with sector regulators and other public bodies. Advocacy within CADE is carried out by staff from the Department of Economics Studies (DEE) and by a group of advisors of CADE's Presidency. The total number of advocacy staff is currently 20.

CADE, SEPRAC and SEFEL signed an agreement for technical co-operation in competition advocacy in 2018. The agreement foresees the creation of a formal Committee for Co-operation in Competition Advocacy (C-CAC) that will be responsible for identifying relevant subjects for a common advocacy agenda.

The fact that competition advocacy is shared across a number of institutions in Brazil brings benefits and challenges and representatives of CADE, SEPRAC and SEFEL had different opinions on the shared advocacy responsibilities. While all pointed out that the co-operation between the institutions worked well, CADE would see benefits from having the overall competence, which should come with the staff and budget allocation that is now split between the three agencies. SEPRAC pointed out that it considered itself a very powerful actor. As part of the Ministry of Finance they have access to information on all legislative and regulatory plans and can use their political and budgetary leverage to prompt changes.

Box 7. Summary of Pros and Cons of the shared advocacy competencies in Brazil

Pros:

- Signal for wider commitment of Brazil to competition principles, not limited to the competition agency;
- Increases the number of public officials in charge of competition advocacy and the total available budget;
- The Ministry of Finance is involved in all legislative and policy matters, and can react directly to acts with the potential to limit competition;
- Wider spread of competition knowledge in the government structure;
- The Ministry of Finance has significant leverage to ensure its recommendations are followed;
- Shared competences allow for specialisation in advocacy areas best suited for CADE, SEPRAC and SEFEL respectively;
- CADE may be able to refrain from advocacy initiatives in politically sensitive areas, and remain a neutral actor;
- Joint advocacy initiatives can add emphasis to matters of high relevance to competition.

Cons:

- Risk of uncoordinated and/or duplicative actions;
- Risk of diverging priorities and opinions in advocacy matters and approaches;
- Lack of political independence of SEPRAC and SEFEL, who are part of the Ministry of Finance, bears risks for interventions and priorities that are not strictly based on an objective, competition focused perspective;
- Political changes and changes in leadership can lead to inconsistent application of advocacy instruments over time;
- Competition assessment may suffer from involvement in the political bargaining processes;
- Private actors such as businesses may find it harder to understand the system and to find the appropriate contact for their competition concerns.

8.2. Competition assessment in legislative and administrative processes

The OECD's Recommendation on competition assessment⁹⁴ calls for governments to identify existing or proposed public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives. In addition, the Recommendation calls for governments to establish institutional mechanisms for undertaking such reviews. The OECD Competition Assessment Toolkit⁹⁵ (CAT) explains the rationale to policy makers, and outlines approaches and methodologies.

In Brazil, competition assessment is mainly carried out by SEPRAC and SEFEL. They have the legal prerogative to issue opinions on every bill or public policy that might impact competition, and to issue studies or proposals to influence the design of public policies.⁹⁶ CADE also refers competition assessment questions to them. SEPRAC and SEFEL scan incoming bills with a set of questions that are inspired by the OECD's CAT. Bills with a potential impact on competition are examined in more detail, and, if necessary, opinions are given. These opinions are non-binding, but there is an obligation for the government bodies to justify the reasons for deviating from recommendations that SEPRAC or SEFEL issue. In reality, the work of SEPRAC and SEFEL starts even earlier, as they are already involved in discussions when public policies are designed. This way, they can exercise a pro-competitive influence at a very early stage.

CADE also considers competition assessment to be within its mandate. It monitors the proposition of every bill that might impact competition, such as propositions that aim to modify the competition law, or that aim to establish a minimum price policy. This assessment is undertaken when the bills are proposed. It is

⁹⁴ www.oecd.org/daf/competition/oecdrecommendationoncompetitionassessment.htm.

⁹⁵ www.oecd.org/daf/competition/assessment-toolkit.htm.

⁹⁶ Article 19 Law 11482/07.

conducted by the group of advisors of CADE's Presidency, who have on-going dialogues with governmental bodies, congressmen and advisories involved in the drafting and discussion of the relevant bills, both in the Senate and in the House of Representatives. CADE's close co-operation with a number of regulatory agencies provides additional information on envisaged legal changes and obstacles to competition in specific sectors. CADE's recommendations are not binding. The National Congress is currently discussing a bill that would institutionalise CADE's competition assessment powers. It proposes that whenever a bill touches on competition matters, CADE would have to be consulted, even informally.

However, CADE's competition assessment is not limited to the review of draft bills. CADE uses various approaches to investigate industry sectors and to issue recommendations for pro-competitive change, often in co-operation with sector regulators. CADE has developed a series of publications (CADE's Contributions ("Contribuições do CADE")), which provide competition evaluations in strategic sectors, in partnership with other state bodies that request this evaluation. Three editions have been published so far, on: (i) competition in the petroleum refinery and distribution of liquid fuels sector; (ii) measures to stimulate competition in public bids;⁹⁷ and (iii) pro-competition measures for the fuel sector.

The DEE has developed a series of working documents that also look at the effects of new developments on competition, such as the entry of the taxi-riding app Uber and related regulatory changes,⁹⁸ on the effect of anti-dumping policies in competition,⁹⁹

⁹⁷ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/contribuicoes-do-cade/contribuicoes-cade-ppi.pdf/view.

⁹⁸ Working Document 01/2018 – Competition effects of the sharing economy in Brazil: has Uber's entry affected the market of taxi apps from 2014 to 2016?; and Working Document 03/2015 – Rivalry post-entry: the immediate impact of Uber on taxi rides.

⁹⁹ Working Document 01/2017 – Antidumping and competition in Brazil: an empirical evaluation", which analyses antidumping measures applied to foreign companies as requested by national companies.

and on factors that may affect competition in cement markets.¹⁰⁰ CADE's Journals" ("Cadernos do CADE") aim to discuss specific markets of interest in the Brazilian context. Among the markets discussed to date are retail automotive gas, supplemental health care, higher education services, port services, air cargo and air passenger transportation¹⁰¹.

Another example of CADE's participation in the debate on public policies is its publication on "*Rethinking the fuel sector: pro-competition measures*", published in light of the recent truck drivers' strike. The document presents recommendations to improve the institutional design of the fuel sector, to increase competition and to reduce the possibility for tacit or explicit collusion. This document also addresses specific regulations and recommends, for example, to rethink the existing prohibition of vertical integration in the fuel sector.¹⁰²

¹⁰⁰ Working Document 02/2015 – Market of inputs for cement: structural aspects and empirical exercise", which describes the productive chain of cement and concrete, by reviewing structural aspects that could impact free competition in the sector.

¹⁰¹ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/publicacoes-dee/Mercado_de_transporte_aereo_de_passageiros_e_cargas.pdf.

¹⁰² www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/contribuicoes-do-cade/contribuicoes-do-cade_medidas-28maio2018-final.pdf/view.

Box 8. Positive effects of competition assessment activities

CADE, as well as SEPRAC and SEFEL, have identified successful competition assessment interventions. CADE's studies in the markets of paid passenger transportation and the disruptive effects of innovations, in particular the entry of Uber, addressed some market failures in the sector and identified that certain regulations regarding taxi services had become unnecessary. The recently enacted Law 13.640/2018, which regulates individual paid private transportation, does not restrict the freedom to set tariffs and does not impose major regulatory barriers to entry to this market. Both of which can be perceived as a positive impact of competition advocacy efforts.

Another positive effect in the private passenger transport market is the constant dialogue between CADE and the government of the city of São Paulo, one of the world's largest cities, which ensued after the publication of CADE's studies in the sector. Initially, the local legislative assembly of São Paulo had passed a bill that, if approved by the local government, would have banned rideshare platforms from the municipal market. However, inspired by CADE's previous study, the executive government of the city implemented a working group in order to evaluate Uber's impact on the sector. Additionally, the local government discussed competition issues related to the market and its regulation with CADE's analysts. The result of this co-operation has been the elaboration of a new bill, approved in 2015, that no longer bans rideshare platforms.

SEFEL has recently published an evaluation of the role of competition advocacy in the design of the new legal framework for the natural gas sector. According to the study, competition advocacy promoted the design of rules that allowed for increased competition in the natural gas market. The rules aim to: (i) provide universal access to basic infrastructure in the supply of natural gas; (ii) create compulsory supply rules for natural gas; (iii) hinder cross-ownership between companies that are horizontally and vertically related; (iv) prevented the nomination of board representatives that have a role in other companies in the natural gas productive chain; and (v) create an independent manager.

8.3. Advocacy in public procurement markets

The OECD Recommendation on Fighting Bid Rigging in Public Procurement¹⁰³ calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of bid rigging in public tenders. Public procurement is an essential government activity that affects a country's economy. OECD countries spend approximately 12% of their GDP in public procurement. Brazil has adhered to the Recommendation, and CADE pursues a very active approach to improve public tender procedures and to help prevent and detect bid rigging in public procurement.

In 2008, the then Secretariat of Economic Defense issued a brochure on preventing and fighting bid rigging,¹⁰⁴ based on OECD documents,¹⁰⁵ that targets procurement agents and authorities. It was disseminated in several States to auctioneers, control bodies, courts, federal prosecution services and consumers. The document explains bid rigging, the relevant antitrust laws, and describes suspicious behavior and bidding patterns. It also explains how and when to contact the competition authority. The brochure is currently being updated, with an expected launch later in 2018.

Another publication was launched in 2017, "Measures to Encourage the Competitive Environment of Bidding Procedures",¹⁰⁶ which focuses on large infrastructure projects in Brazil. This publication indicates measures for the government to stimulate competition, to design pro-competitive tenders, and to

¹⁰³ www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm.

¹⁰⁴ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_licitacao.pdf/view.

¹⁰⁵ OECD Roundtable Report: Public Procurement – The Role of Competition Authorities in Promoting Competition (2007).

¹⁰⁶ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/contribuicoes-do-cade/contribuicoes-cade-ppi.pdf/view.

avoid opportunities for communication among bidders. It expressly lists the OECD's recommendations to fight bid rigging in public procurement,¹⁰⁷ and draws a list of general and specific recommendations to be observed in public procurements in the infrastructure sector.

Alongside these publications, CADE has conducted numerous trainings for public procurement officials since 2009, specifically aimed at preventing collusion between bidders. Thousands of procurement officials have been trained. This, together with the improvement of the competition culture in Brazil, is considered by CADE to be one of the contributing factors for the increase of the use of the "report a violation" tool on CADE's website.

In addition, CADE is preparing a distance-learning course in partnership with the National School of Public Administration, to provide lessons related to the prevention and detection of cartels for auctioneers, bidding committees and control bodies throughout the country.

CADE's efforts in the prevention and detection of bid rigging seem exemplary, and are fully in line with the Recommendation on fighting bid rigging in public procurement.

8.4. Market studies

Market studies can be a very effective tool for competition advocacy purposes. Market studies assess whether competition in a market is working efficiently, and propose measures to address any issues that are identified. These measures can include recommendations such as proposals for regulatory reform or

¹⁰⁷ Fighting Bid Rigging in Public Procurement (2016) OCDE; Public-Private-Partnerships and Investment in Infrastructure: Lessons from OECD countries (2014) OCDE; 2012 OECD Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement ; and Competition in Bidding Markets (2007) OCDE.

improving information dissemination among consumers. They can also include the opening of antitrust investigations.¹⁰⁸

CADE's DEE has issued a total of 18 documents in the last five years, ten working papers, five reviews of CADE's decisions in markets of interest, and three sectorial evaluation documents containing proposals to increase the conditions of competition in relevant sectors.¹⁰⁹

The working papers examine specific conditions on the evaluated markets, and other matters of interest for the competition debate. Examples are working papers on competition indicators;¹¹⁰ on the individual transportation market, including matters of regulation, externalities and urban balance;¹¹¹ on inputs for cement markets, examining structural aspects and including an empirical exercise;¹¹² on the economic impacts of the entry of Uber in some regions of Brazil;¹¹³ on the definition of the relevant geographic market for Brazilian hospitals;¹¹⁴ on CADE's capacity to prevent cartels in Brazil based on data collected in the cartel case of peroxides;¹¹⁵ on antidumping measures applied to foreign companies on request of domestic companies;¹¹⁶ on competition indicators to compare market power between different industry

¹⁰⁸ See OECD work stream on market studies, www.oecd.org/daf/competition/market-studies-and-competition.htm.

¹⁰⁹ This material is available in Portuguese at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/publicacoes-dee> (working papers and reviews of CADE's decision) and at: www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/contribuicoes-do-cade (Sectorial evaluation documents).

¹¹⁰ Working paper 01/2014.

¹¹¹ Working paper 01/2015.

¹¹² Working paper 02/2015.

¹¹³ Working paper 03/2015.

¹¹⁴ Working paper 01/2016.

¹¹⁵ Working paper 02/2016.

¹¹⁶ Working paper 01/2017.

sectors;¹¹⁷ on the impact of co-operation between companies on innovation and joint activities in research and development;¹¹⁸ and finally, in 2018, CADE launched a study regarding the competition effects of the sharing economy in Brazil, including an assessment of the entry of Uber in the market for taxi apps between 2014 and 2016.

The published reviews of CADE's decisions are comprehensive and provide a high degree of detail on the jurisprudence as well as the regulatory framework in key sectors of the Brazilian economy. Industries covered were gasoline retail (2014), supplementary health services (2015), higher education services (2016), port services (2017), and passenger and cargo air transportation (2017). The reviews outline CADE's approach to competition problems in the relevant sectors and identify specific market characteristics with a potential to lead to restrictions of competition.

Finally, specific sectorial evaluation documents outline CADE's views and suggestions with regard to improving competition conditions in markets of high economic relevance. The first sector review described and evaluated the competition environment in the sector of oil refining and distribution of liquid fuels (2017). The second presented measures to stimulate the competition environment in public procurement processes. The third presented a set of suggestions to improve the design of the fuel sector (2018), to raise the level of competition and to reduce opportunities for tacit or explicit collusion.

Some of the above mentioned documents were already referred to in the competition assessment related section on advocacy. This just serves to show that the categorisation of activities is not necessarily a strict one, and that different tools can serve multiple advocacy purposes. The volume of documents published by CADE over the last five years is remarkable. The areas and industries that CADE chose to review and monitor prove a sound sense for priorities, and a keen interest to improve the competitive situation in markets of high significance for the

¹¹⁷ Working paper 02/2017.

¹¹⁸ Working paper 03/2017.

economy and consumers. The explanation of enforcement approaches also helps the business community and its legal advisors to better understand and predict the outcome of competition proceedings.

8.5. Guidelines

Competition agencies publish guidelines to foster a better understanding of the competition law and the agency's enforcement approaches. The business community and its legal advisors benefit from these advocacy measures, as they facilitate self-assessment, increase the predictability and transparency of competition enforcement, and improve legal certainty for business transactions that often involve high monetary sums.

CADE has developed and updated several guidelines, in particular: the Horizontal Merger Guidelines (“Guideline H”, 2016);¹¹⁹ the Guidelines for the Analysis of Previous Consummation of Merger Transactions – Gun Jumping (2015);¹²⁰ the Guidelines for Competition Compliance Programmes (2016);¹²¹ the Guidelines on Cease and Desist Agreements (2016);¹²² Guidelines on the Antitrust Leniency Programme

¹¹⁹ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf.

¹²⁰ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/capa-interna.

¹²¹ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf.

¹²² www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/capa-interna.

(2016),¹²³ and Guidelines on Dawn Raids (2017).¹²⁴ Guidelines on Remedies were recently launched (2018).¹²⁵

CADE considers the development of guidelines and the on-going discussion on existing and new guidance to be a permanent task, that benefits the agency as well as the business community. The guidelines also serve as an important part of the institutional memory, and an institutional storage for best practices and policies.

While CADE's readiness to publish guidelines is highly commendable, the current focus of the guidelines seems to be more on procedural than on substantive legal matters. The business community could derive significant added benefit from guidelines on substantive enforcement approaches, such as for vertical mergers, horizontal and vertical competition restraints, market definition, and approaches to abusive practices.

8.6. Interaction with the academia and the general public

CADE uses a number of additional communication and outreach tools to improve its interaction with academics, but also the general public.

Among the publications are CADE's Journals, a series of studies published on CADE's online platform, intended to consolidate, systematise and disseminate the authority's jurisprudence related to specific markets, considering both

¹²³ As available in CADE's press release at: <http://en.cade.gov.br/press-releases/cade-publishes-english-version-of-the-guidelines-on-antitrust-leniency-program>; http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/capa-interna.

¹²⁴ www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias-e-manuais-administrativos-e-procedimentais/manual-de-operacoes-de-busca-e-apreensao.pdf/view.

¹²⁵ Version in Portuguese available at: www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_Guia_Remdios.pdf/view.

economic and competition aspects. Another publication that intends to improve the interaction between theory and practice is the Brazilian Competition Journal (Revista Brasileira da Concorrência). It supports academic research on competition defence topics, disseminates knowledge about competition, and explores relations with other areas of research. The Journal allows for a close interaction between theory and practice regarding relevant topics in competition policy and enforcement in Brazil.¹²⁶

Another advocacy initiative is CADE's national exchange programme (PinCADE), which was launched already in 1999. The authority, in partnership with some of its stakeholders, offers undergraduate and post-graduate students the opportunity to experience the day-to-day work within the antitrust agency and provides classes on competition related subjects. Since the beginning of the project, more than 400 students from all over Brazil have taken part in the initiative. It is considered to be a key tool in promoting a competition culture.

In terms of transparency, CADE has introduced an Electronic System of Information, which is the official system for the management of its electronic documents. Through it, all public case files are available online for consultation by the general public. Quite uniquely in the international scene, CADE's Administrative Tribunal's weekly judgment sessions are streamed live, accessible to everyone on CADE's website. This also helps to disseminate CADE's work to a wider public – the legal and business community, but also the general public and the media.

8.7. Relationship with sector regulators and other public bodies

Competition authorities do not operate in a vacuum. Competition law and policy have to be applied and explained in the context of a set of policies relevant to a jurisdiction. Certain

¹²⁶ In 2017, the Journal had its status upgraded by the Co-ordination for the Improvement of Higher Education Personnel ("CAPES) to the category B1, the third tier of an eight-level national ranking. This puts CADE's Journal amongst the top 10% legal academic journals in Brazil. The Journal's webpage is www.cade.gov.br/revista.

markets are regulated ex-ante, under the supervision of other regulatory bodies; monetary stability is monitored by the central bank, and particular interests, such as consumer or business interests, are represented by associations. This framework provides opportunities as well as challenges to competition authorities, and it is good policy to interact and co-operate with other institutions. This way, competition principles, where applicable, can be introduced and safeguarded, and can be established as a guiding theme for other institutions with an influence on markets.

CADE considers that its collaboration with other agencies and public bodies, whether formally or informally, has been a key tool in the protection and promotion of competition.¹²⁷ CADE has established more than 40 co-operation agreements and memoranda of understanding with other government bodies or agencies. Among these are agreements with the National Institute of Industrial Property (INPI); the National Petroleum, Natural Gas and Bio-fuel Agency (ANP); the National Agency for Supplementary Health Services (ANS); the National Health Surveillance Agency (ANVISA); the National Agency for Electrical Energy (ANEEL); the National Agency for Civil Aviation (ANAC); the National Waterway Transportation Agency (ANTAQ); and the National Agency for Land Transportation (ANTT). Agreements with institutions that are not regulators focus on improved co-operation in the prosecution of cartel or bid rigging offences,¹²⁸ on exchange of data and information relevant

¹²⁷ DAF/COMP/WD(2014)129. Written contribution from Brazil submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014. “Roundtable on Changes in Institutional Design of Competition Authorities”, Note by Brazil.

¹²⁸ For example: **Brazilian Office of the Comptroller General (“CGU”)** - a joint ordinance defines the procedures related to the exchange of data and information between the Federal General Inspector, CGU and CADE in the investigations related to transnational bribery, in light of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; **Prosecution Service of the Federal District and Territories (MP/DFT)** – co-operation agreement for closer communication between Cade and MPDFT with a view to greater agility and effectiveness in actions to repress cartel

to competition proceedings,¹²⁹ or on joint work and the sharing of experience.¹³⁰

While CADE is not in charge of regulation, the authority has independent jurisdiction over competition, even in the markets where regulatory agencies have some competition attributions. In order to avoid conflicting decisions, CADE has an intense agenda of co-operation with these agencies. This is a mutual understanding, and the regulatory agencies also consult CADE on matters related to competition. For example, CADE co-operates intensely with the Brazilian Telecommunication Agency (ANATEL) and ANATEL is consulted in relation to mergers in the telecommunications sector. ANATEL, next to its regulatory functions, is also tasked with the evaluation and promotion of competition in the telecommunications sector. The co-operation and exchange between ANATEL and CADE helps to create common ground in the assessment of

practices and other violations of the economic order; **Federal Prosecution Service of São Paulo (MPF/SP)** - Memorandum of Understanding on institutional co-ordination involving terms of commitment of cease and agreements of collaboration in investigations of infractions against the economic order; **Bank of Brazil (BB)** – co-operation agreement for the exchange of data and information for the prevention and repression of cartels in public bids; **Comptroller General of the State of Minas Gerais (CGE / MG)** - technical co-operation agreement for the exchange of data, information and working methods for the repression and prevention of cartels in public bids.

¹²⁹ For example: **Brazilian Hospital Services Company (EBSERH)** - technical co-operation agreement for the exchange of data, information and working methods; **Federal Revenue Service of Brazil (RFB)** - technical co-operation agreement for the exchange of data, information and working methods.

¹³⁰ For example: **Court of Accounts of the Municipality of São Paulo (TCM/SP)** - agreement of technical co-operation aiming at the exchange of data, information and working methods; **Federal Regional Court of the 4th Region (TRF4)** - technical co-operation agreement with the purpose of providing the Electronic Information System (SEI) for the virtualisation of administrative records; **National Council of Scientific and Technological Development (CNPq)** - agreement of technical co-operation between CADE and CNPq for the provision of technical-scientific assistance.

restrictions to competition and possible solutions.¹³¹ The co-operation with the Central Bank is another notable example of a well-designed system of co-operation in a setting of concurrent merger control competencies.

¹³¹ In the previous regime, while the competition law itself made no exception as to the sectors or markets to which it would apply, the law on telecommunications assigned the investigative functions on competition matters involving telecommunication to the agency responsible for regulating this sector (ANATEL). This exception was repealed under the new law.

Box 9. Co-operation between CADE and the Central Bank

CADE and the Brazilian Central Bank signed a memorandum of understanding in February 2018*. The MoU helps to harmonise the review of mergers and acquisitions involving financial institutions, and to ensure greater predictability of the outcomes. Transactions involving financial institutions require a double “green light” to be cleared, one by CADE, and one by the Central Bank. Both will review the merger independently and according to their respective procedures. The MoU provides for the sharing of information and studies in conducting the reviews of the proposed transactions, with the aim of guaranteeing convergence in the technical parameters adopted for the review. A specific provision provides that, in cases with a potential systemic risk to the financial sector, the Central Bank will inform CADE, and will provide its reasons for the systemic risk assessment. CADE shall approve such transactions based on the Central Bank’s reasoning.

A working group was set up on 21 May 2018 to redefine the parallel merger control procedures, for example, try to align deadlines, establish the different ways in which institutions will co-operate throughout the procedures. The activities of the working group resulted in a report suggesting the adoption of a regulation. Such regulation was submitted to public consultation and will be approved on 21 November 2018. This will bring more transparency and certainty.

In investigations on anti-competitive conduct, the agreement stipulates that CADE consults with the Central Bank on the markets and players regulated by the bank, before imposing sanctions. CADE will use data provided by the Central Bank in its analysis to increase the technical consistency and to co-ordinate decisions. The MoU also includes the commitment of CADE and the Central Bank of Brazil to review their regulations, if necessary. Furthermore, in April 2018, the Federal Senate approved the Bill 350/2015 that establishes the competences of CADE and of the Brazilian Central Bank in the competition defence within the National Financial System and, as mentioned above, aims to consolidate the understanding established in the 2018 MoU.

* <http://en.cade.gov.br/press-releases/cade-signs-memorandum-of-understanding-with-the-central-bank-of-brazil>.

The well-established institutional relations, as well as the co-operation agreements and MoUs, foster inter-institutional trust and promote often informal consultations between these other

institutions and CADE. Regulators have confirmed that the co-operation with CADE is highly appreciated and works well. This helps CADE to monitor the various stages of policy-making, whether *ex-officio* or when consulted by other regulators – from the drafting of a bill to its approval.

Finally, CADE recently signed technical co-operation agreements with authorities responsible for the enforcement of other policy objectives such as consumer protection or the protection of intellectual property rights, aiming to exchange information and to promote joint actions, as well as a better understanding of the respective goals and actions.¹³²

The number of co-operation agreements and MoUs that CADE has in place is impressive. Even more impressive is that these agreements are more than mere statements of intent, and in fact lead to regular exchanges on a formal and informal level. The counterparts of these agreements unanimously spoke very highly of CADE – its technical expertise, its willingness to contribute and share experience, and its independence in competition matters.

¹³² For example: **National Institute of Industrial Property (INPI)** - technical co-operation agreement for the exchange of technical information and improving the relationship between the institutions, www.cade.gov.br/noticias/cade-e-inpi-celebram-acordo-de-cooperacao-tecnica; **SENACON** - technical co-operation agreement between CADE and the National Consumer Secretariat, aiming to exchange knowledge and promote joint actions that enhance the performance of activities that ensure effective protection and consumer defense and the strengthening of competition, www.cade.gov.br/noticias/cade-firma-acordo-de-cooperacao-com-senacon.

9. International co-operation

Under Article 2 of the Brazilian Competition Law, the competition regime applies to conduct or practices which are performed on the territory of Brazil or that produce effects there. This implies that Brazil has jurisdiction on competition cases even where the actual conduct may have taken place outside the country but Brazilian consumers have suffered as a result of the anti-competitive effects. Increased globalisation means that firms operate beyond the boundaries of their home jurisdiction, and CADE has increasingly conducted investigations involving cross-border conduct.

In terms of investigatory powers, CADE can use the same tools in cross-border investigations to obtain and request information that it has in domestic cases. However, there are well-known limitations affecting every agency when they need to access information in cases involving foreign firms and conduct. The increasing cross-border nature of antitrust enforcement creates a number of challenges for CADE's investigations, such as lack of access to information, evidence or individuals located abroad, or inability to discuss the investigation with other agencies if that requires sharing of confidential information. Such challenges can be addressed through effective international co-operation.

9.1. Co-operation tools available to Brazil

To address these challenges, CADE relies on three measures: (i) informal co-operation with other agencies; (ii) confidentiality waivers granted by the parties to an investigation; and (iii) bilateral co-operation agreements. More generally, Brazil is involved in co-operation with other jurisdictions in a number of multilateral fora.

9.1.1. Informal co-operation with other agencies

CADE regularly co-operates informally with other competition authorities. In cartel investigations, the Brazilian competition authority regularly relies in its investigations on

information obtained through contacts and discussions with foreign agencies. International co-operation plays a significant role in CADE's enforcement especially against international cartels. In its reply to the Secretariat fact-finding questionnaire, Brazil clarified that co-operation in cartel cases usually takes place through informal discussions by e-mail or telephone in order to exchange experiences and general views with regard to case investigations and on how to address practical issues arising during the investigation.

In the context of mergers, CADE frequently holds informal discussions with its international counterparts. The initial co-operation generally involves the exchange of procedural information, co-ordination of the timing of the investigations and the exchange of general views about the case. When it comes to complex mergers, especially those requiring the adoption of remedies, CADE regularly engages in co-operation with its international counterparts on a number of issues ranging from theories of harm to the design, the implementation and the monitoring of the remedies. Co-operation in these cases aims at minimising the risks of contradictory or inconsistent remedies, at preserving the sovereignty of the countries affected and the independence of the competition authorities involved. Co-operation can involve the exchange of information about the remedies, both before and after the decision on the merger.

9.1.2. Confidentiality waivers

CADE can only exchange confidential information with other agencies and deepen international co-operation if it has been granted a waiver of confidentiality by the parties in an antitrust or merger investigation.

In cartel investigations which have been initiated thanks to a leniency application, it is not uncommon for the signatory of a leniency agreement to grant a confidentiality waiver allowing CADE to share documents and detailed information on the conduct with other investigating authorities. In the course of a cartel investigation, however, CADE can also request international legal assistance through the Ministry of Justice's Department of Assets Recovery and International Legal Co-operation.

Similarly, the parties involved in a merger review are often willing to grant to the competition authority an authorisation to exchange more detailed and/or sensitive information with international counterparts.

Box 10. Co-operation in Bayer/Monsanto

A recent example of effective co-operation in a merger case is the Bayer/Monsanto merger, approved with remedies by CADE in February 2018. The merger analysis benefitted from intense international co-operation between CADE and competition authorities from other jurisdictions, including the United States, the European Commission, India, Russia and South Africa. In total, 29 jurisdictions were notified of the transaction.

Co-operation with the competition agencies was only possible thanks to waivers that allowed the involved agencies to discuss common concerns in the design of remedies. Effective co-operation allowed CADE to issue a Merger Control Agreement (ACC in its acronym in Portuguese) encompassing structural remedies and complementary behavioural remedies in order to mitigate the competition concerns identified during the investigation.

Source: <http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto>

According to CADE, confidentiality waivers are used frequently, especially in merger reviews. This is of great assistance to the competition authorities in the analysis of the transaction. The success of waivers in Brazil is also due to the fact that CADE has developed and published a draft bilingual version of a model confidentiality waiver, which is available on CADE's website. The model waiver is regularly used by companies and is largely inspired by the work of the OECD and the ICN.

9.1.3. Bilateral co-operation agreements

Over the years, Brazil has entered into a number of bilateral co-operation agreements with close trading partners. The first co-operation agreements were entered into in 2003 by the old

Brazilian Competition Defence System with the governments of the United States and Argentina.

In more recent years, CADE signed co-operation agreements with the following authorities:

- Autoridade da Concorrência from Portugal (2005)
- Canadian Competition Bureau (2008)
- Fiscalía Nacional Económica from Chile (2008)
- Federal Antimonopoly Service of Russia (2009)
- European Commission (2009)
- Autorité de la Concurrence of France (2011)
- Chinese State Administration for Industry and Commerce (2012)
- Instituto Nacional de Defensa de La Competencia from Peru (2012)
- Superintendencia de Control del Poder de Mercado from Ecuador (2013)
- Superintendencia de Industria Y Comercio from Colombia (2014)
- Korea Fair Trade Commission (2014)
- Japan Fair Trade Commission (2014)
- Competition Commission of South Africa (2016)
- Comisión Federal de Competencia Económica from México (2016)
- National Development and Commission Reform (NDRC) and the Ministry of Commerce (MOFCOM) from China (2017)
- Ministerio de Economía, Industria y Comercio from Costa Rica (2018)
- Comisión Nacional de Competencia from Paraguay (2018).

Besides the co-ordination of enforcement activities, in line with the OECD Recommendation on International Co-operation, some of the agreements CADE has entered into contain explicit provisions regarding both the avoidance of conflicts and the

consideration of the other agency's interests (comity principle). As an example of application of such clauses, the United States Department of Justice has contacted CADE informing that, during a preliminary investigation into a proposed merger, they were contemplating contacting a Brazilian company, not a subject of the mentioned investigation, requesting information and documents on a voluntary basis.

To the knowledge of the Secretariat, however, none of these co-operation agreements allow CADE to share confidential information or include an information gateway, nor do they allow CADE to offer investigative assistance to a foreign agency in its investigation. CADE has confirmed that the only way in which it can exchange confidential information with other agencies is when authorised by the relevant parties.

9.1.4. Participation of Brazil in multilateral fora

The wide participation of CADE in international competition fora is worth highlighting, as it has allowed Brazil to acquire knowledge and expertise while, at the same time, allowing its peers to benefit from Brazil's experiences by means of presentations, policy discussion and roundtable debates.

Brazil is an active Participant to the OECD Competition Committee and has been for more than 20 years (it first became an Observer in 1997). By way of example, in 2016/2017 Brazil has attended all the meetings of the OECD Competition Committee, its Working Parties and of the OECD Global Forum on Competition. In all these occasions, Brazil was always represented by the Head of the competition authority; it submitted a total of nine written submission to a variety of substantive topics and contributed significantly to many more policy roundtables orally. In 2014, when the OECD adopted the Council Recommendation concerning International Co-operation on Competition Investigations and Proceedings, Brazil actively participated in its drafting and, in November 2014, became an Adherent to it. Brazil has also adhered to a number of other OECD competition instruments, including the 1998 Recommendation on Hard Core Cartels, and the 2012 Recommendation on Fighting Bid Rigging.

Besides its participation in the OECD Competition Committee, CADE is actively involved in the ICN as a member of the Steering Group and as a Co-Chair of the Cartel Working Group, and in the Forum of the BRICS' Competition authorities. Brazil, for example, is hosting the 2019 ICN Cartel Workshop and has hosted in the past a number of ICN conferences (including an Annual Conference in Rio de Janeiro in 2012) and workshops. Within the framework of the BRICS, it hosted the 5th Annual Conference and it will host the 1st meeting of the Working Group on competition issues on digital markets in 2018. In the context of the BRICS, Brazil has negotiated renewals of the co-operation agreement with the Chinese agencies and with Russia, which were signed during the 5th BRICS International Competition Conference held in Brasilia in November 2017.

Furthermore, CADE has recently become a member of the programme *Competencia y Proteccion al Consumidor en America Latina (COMPAL)*, linked to the United Nations Conference on Trade and Development (UNCTAD), whose aim is to strengthen co-operation ties between competition authorities in Latin America. CADE is also an active participant in the discussions of the group *Alianza Estratégica Latinoamericana*, which organises frequent co-operation calls or in person meetings to discuss topics of common interest between the competition agencies from the region. CADE has also a very effective capacity-building co-operation with the US Federal Trade Commission and the Competition Bureau of Canada. Moreover, Brazil is active in a number of other multilateral fora dealing with competition law and policy, such as: Mercosur, the World Bank and the Inter-American Development Bank.

9.2. International co-operation in practice

Discussions with CADE and with other stakeholders in Brazil have identified international co-operation as an area where Brazil has been extremely successful in recent years. Since the entry into force of the new Competition Law until 2017, CADE has engaged in co-operation activities with 30 competition authorities from 28 different jurisdictions. Since 2012, CADE has conducted 50 international co-operation activities with several

countries involving merger reviews, anticompetitive conduct cases and benchmarks.

Co-operation is especially dynamic in merger cases. In 2012, CADE engaged international co-operation activities in three merger reviews. In 2016, CADE co-operated in the analysis of 27 merger cases. In 2017, 20 cases were the object of some form of international co-operation. According to internal information from CADE, the merger teams review an average of 55 international mergers per year, out of which approximately 50% result in some co-operation with foreign competition authorities. The same internal data from CADE show that 24% of CADE's non-fast-track mergers require CADE to engage in co-operation with one or more foreign agency.

Recent examples of effective international co-operation are the AT&T/Time Warner and Dow/DuPont cases in 2017 and the Bayer/Monsanto case in 2018. These cases demonstrate the fundamental role that international co-operation has, especially in the definition, design and implementation of merger remedies. There is also active co-operation in cross-border cartel investigations, which is geared at co-ordinating the planning and execution of the initial phase of the investigation by the agencies involved, to avoid uncoordinated actions by one agency jeopardising the effectiveness of another agency's investigation.

Box 11. Co-operation in dawn-raids

An early example of effective co-operation outside the area of mergers dates back to 2009, when a leniency agreement signed with the former Secretariat of Economic Law resulted in a deepening of an international cartel investigation on compressors used in refrigeration. Based on evidence of a cartel brought to CADE by a Leniency Agreement, in February of 2009, dawn raids were conducted in order to collect evidence in companies' offices and executive's houses located in Brazil, the United States and Europe. This is the first case decided by CADE in which there was international co-operation for the conduction of dawn raids.

Source: <http://en.cade.gov.br/press-releases/cade-condemns-cartel-in-the-international-market-of-refrigerator-compressors>.

Co-operation between CADE and its overseas counterparts usually takes place through emails and telephone calls. If the agencies are allowed to exchange confidential information because the parties have granted a waiver, only the case handlers involved in the investigation and a representative of the international unit will have knowledge of and access to the confidential information. This information will be used exclusively to better understand if the CADE analysis of the case is well-founded, and not for purposes other than those for which it was collected and exchanged. Moreover, if co-operation requires the exchange of confidential documents, a number of additional safeguards are put in place, i.e. the exchange will take place through encrypted documents shared by e-mail or through confidential letters shipped via the diplomatic service.

10. Conclusions and recommendations

Brazil's competition regime has gone from strength to strength. The new Competition Law in 2012 successfully modernised antitrust enforcement and reformed several important areas previously identified by practitioners, academics and international organisations – including in the 2010 OECD Peer Review – for improvement. These changes have rationalised the institutional framework, modernised the enforcement system and established a pre-merger notification system in line with the majority of other jurisdictions. While these are significant changes to the system, they are a product of the evolution of the BCPS. These reforms were a necessary step forward and have enabled Brazil to consolidate its position among the leading competition jurisdictions.

The enormity of the changes cannot be understated. Setting up a new agency, overhauling merger review, and amending key areas of antitrust enforcement are all challenging tasks. The implementation of the reforms over the last six years demonstrates that Brazil has risen to the challenge. It has made significant efforts from the outset to get the system in place, provide clarity, assuage concerns and to issue decisions more in line with international standards.

In 2013 and 2014, the focus was on consolidating the new Competition Act and introducing a merger notification system. In 2015 and 2016 there was an increased emphasis on the interpretation of the Act to promote its efficacy through the development of guidelines and adoption of internal resolutions. Attention in 2017 and 2018 has turned to trying to implement the Act more efficiently through the increasing use of settlement agreements, particularly in cartel cases.

However, a number of challenges remain. This is to be expected, as it is only with practice following the entry into force of the new Law that it is possible to identify what would benefit from further adjustment and improvement.

Brazil is fully committed to the successful implementation of its now mature legal and regulatory structure. These efforts are recognised domestically as well as internationally.

The following identifies areas where Brazil could improve its compliance with OECD best practices recommendations relating to competition policy and otherwise further improve its competition regime.

10.1. Institutional and administrative issues

10.1.1. Ensure better separation between investigation and decision-making

The new Law addressed the inefficiencies of the old structure, which had split jurisdiction between three competition agencies, by creating a single new agency. The choice of merging investigative and adjudicative functions into a single agency offered efficiency benefits but raised potential concerns over procedural fairness if the investigator was also the decision-maker. This was dealt with by separating these powers into two separate divisions. The investigative arm – the General Superintendence – to launch and conduct investigations, and a Tribunal in charge of decision-making. These are separated physically within CADE and also through Chinese walls.

In practice, however, the Tribunal has a much more involved role in the investigations than its functions of reviewing the decisions of the GS and the adjudication of challenges mergers and antitrust proceedings would imply. The Tribunal's review of decisions by the GS can lead to a Reporting Commissioner conducting what may amount to elements of an additional investigation, including the collection of evidence. Settlements can also be negotiated directly with the Tribunal. The Tribunal is also tasked with the analysis of mergers challenged by the GS, essentially giving it a more substantive role in a second-phase review.

This blurs the line between investigation and decision-making, and risks undermining the procedural fairness safeguards of separating out these functions. In addition to adding to the length

of investigations, it is not an efficient organisation of roles and resources.

- The separation between the Tribunal and the GS should be strengthened to ensure that the Tribunal does not apply a new fact-finding phase after the GS has concluded its investigation, which would undermine efficiency gains of the institutional set-up defined by the new law. The roles of both should be more clearly delineated, such that the Tribunal acts more like a decision-maker rather than a second investigative body.

10.1.2. Avoid divergent views in the Tribunal leading to legal uncertainty

The Tribunal's public judgement sessions are considered a strength to ensure transparency in decision-making. However there are concerns that sometimes very different views on substantive issues among the Commissioners expressed in this public setting could lead to uncertainty and cases being treated differently given that the Reporting Commissioner has a key role in managing the review of an administrative proceeding or the negotiation of settlements and Merger Association Agreements.

A key feature of the Tribunal is that the Commissioners and President have diverse backgrounds and professional experience. These differences of approaches and expertise contribute to the in-depth discussions on cases, which in turn should lead to better and stronger decisions.

However, there is no principle of binding precedent and substantive guidelines on some key issues have yet to be developed. As a result, Commissioners can depart from approaches and decisions in a previous series of cases. This can create uncertainty and destabilise the Tribunal's role to steer and guide competition policy and enforcement. It makes it harder develop guidance that builds on and reflects existing practice.

- The Tribunal should apply the principle that divergence by the Commissioners from an established line of cases should be clearly motivated.

- Guidelines should be developed to reflect established practice in previous cases and decisions. This would frame the Commissioners' analysis in future cases.

10.1.3. Establish a more transparent appointment system for CADE Commissioners and General Superintendent

The appointment system for the CADE's President and Commissioners and the General Superintendent could be made more transparent. Currently, there is no formal application system for interested candidates. Tribunal members are nominated by the Government. This risks the perception that the process is politicised, particularly when nominees have limited relevant experience.

- When a Commissioner or Superintendent leaves CADE, the position should be advertised to allow all interested and qualified candidates to apply. The Government should nominate candidates that have applied for the position.

10.1.4. Preserve the staggered Commissioner appointment system

The new Competition Law introduced a staggered appointment system and increased their mandate from two to four years (non-renewable). This lessened the danger of there being too many vacancies in the Tribunal that a quorum could not be constituted. It also ensured continuity within the Tribunal. However, the Government has delayed the appointment of some Commissioners and in 2019 it will have to appoint four Commissioners in one go, plus the General Superintendent (who has a two-year term).

- A new Commissioner should be appointed immediately (e.g. within three months) after the previous Commissioner steps down. This would not require a change in the law, just a change in current practice. If this is not possible, the out-going Commissioner should continue beyond the end of their term until a new Commissioner is appointed.
- As mentioned in the 2010 peer review, the Superintendent General's post is highly important as it controls the

agency's investigative agenda. His terms should be extended to four years.

10.1.5. Create dedicated conduct units within the General Superintendence

CADE does not have a core body of staff dedicated to the investigation of conduct cases (notably, abuse of dominance cases). These cases are dealt with by the same teams responsible for merger investigations. However, resources in these units are automatically prioritised on merger investigations given the statutory deadlines involved. Abuse of dominance cases are overlooked as a result. This has been a contributing factor to the small number of these investigations, most of which are settled, leaving little room for full-fledged enforcement. A recent internal reorganisation has allocated one staff member in each of the merger review units to abuse cases. This is a good first step, but with a head of unit also overseeing mergers, any abuse cases is likely to slip down the priority list.

- CADE should consider establishing separate units within the GS for investigating abuse of dominance cases.

10.1.6. Devote adequate resources to competition enforcement

Staffing levels are generally recognised as an area for improvement. CADE's professionalism and commitment is well-established and its performance is impressive, especially given that it has implemented all of the changes in the new system, on staffing levels that have not increased significantly from the old system.

There is a need for more economists, particularly highly-skilled PhD economists. This would improve the CADE's ability to conduct detailed quantitative assessments, which is necessary for abuse of dominance cases. Increased economic expertise would also enable it to conduct more *ex post* evaluations of its actions to feed in to future case assessments.

Like many competition agencies, CADE has a high turnover of staff, especially among the more junior-levels. Allegedly, the reason for that phenomenon is the higher salaries in

the private sector and the fact that there is no dedicated civil service career path for CADE employees. CADE's permanent staff is seconded from other government departments. They can be called back to their home department at any time and the lack of career path makes CADE positions less attractive. This makes it difficult to develop an effective and predictable HR policy and long-term planning.

- The 2018 budget increase should be translated into an increase in human resources. This should focus in particular on (i) strengthening the economic department with PhD qualified economists and (ii) embedding more economists into the enforcement units to support on-going economic analysis on cases.
- As mentioned in the 2010 OECD Peer Review, Brazil should create a dedicated career path for CADE's permanent staff. This would allow CADE to offer a more predictable and stable career for its young professionals. The proposal in Bill (33/2016) to establish a specific CADE career path of Analysts in Economic Defense and Administrative Analysts, should be reinstated and adopted.

10.1.7. Improve arms-length separation of CADE from the Ministry of Justice

CADE is administratively connected to the Ministry of Justice for budget and oversight purposes. However, CADE is an independent agency and the Ministry is not involved in the day-to-day management of CADE or in setting its enforcement agenda. CADE submits its budget proposal to the Ministry of Justice, which in turn submits it to the Ministry of Planning for approval by Congress.

Despite CADE's autonomy in all other areas, the Ministry of Justice has budgetary supervision of CADE's foreign travel expenditure. It is not clear why this system of Ministry pre-authorisation is necessary for international travel compared to other management functions that are wholly within CADE's remit.

There is a draft bill before the Congress that would amend this system and make CADE and other regulatory agencies

separate budgetary units. This would give CADE more administrative autonomy. However, the timing of the adoption of the Bill is unknown.

- The draft bill establishing regulatory autonomy should be adopted swiftly to eliminate the requirement for mandatory approval for foreign travel expenditures.

10.2. Competition enforcement

10.2.1. Increase the number of investigations into potential abuses of dominance

The abuse of dominance has not been a priority enforcement area for CADE since the new Competition Law entered into force. There have been few investigations and fewer full-fledged decisions by the Tribunal, as most cases are settled. Priority was understandably allocated to the implementation of the new mandatory notification system in the first years after the introduction of the new law. Subsequently, CADE's cartel enforcement programme was the main focus, particularly due to the number of cases that flowed from the Car Wash operation. This pressure combined with the lack of a dedicated abuse of dominance enforcement team, and a lack of economic expertise to be able to conduct the in-depth analysis required, has limited the number of abuse cases that CADE has been able to investigate.

The practice of settling the majority of abuse of dominance cases to speed up lengthy investigations has some disadvantages. Namely, there are few precedents to give guidance to business in this complex area of law.

- CADE should give higher priority to abuse of dominance investigations.
- As mentioned above, CADE should create dedicated enforcement teams to deal with abuse cases and strengthen its economic expertise by hiring more PhD economists.
- CADE should rely less on settlement negotiations to conclude abuse of dominance cases in order to generate a body of case law in this area.

10.2.2. Reduce the length of conduct investigations

The length of CADE's investigations continues to be a challenge. Considerable efforts have been made to reduce the backlog of cases from the previous regime, but investigations can still take several years to complete. In abuse cases, the length of investigations may act as a deterrent for potential complainants to come forward. In cartel cases, the volume of investigations combined with CADE's staffing constraints and bureaucratic formalities has led to some cases taking up a decade to complete.

CADE's Internal Regulation provides for timeframes for different steps in the various investigation procedures. However, these timeframes can be prolonged and in practice there are numerous extensions resulting in investigations and negotiations taking several years to complete.

The length of investigations and backlog of cases increases pressure on CADE to settle as many cases as possible, which has created an over-reliance on the settlement mechanism.

- CADE should commit to resolving cases within a reasonable timeframe. CADE should follow more closely the deadlines set out in its Internal Regulation, or revise them to provide for more realistic timeframes that it can commit to in different types of investigations.

10.2.3. Improve the scope and application of CADE's settlement policy ("Cease-and-desist agreements")

CADE relies extensively on settlements (cease-and-desist agreements) to resolve its investigations. In cartel investigations settlement agreements are a complementary tool to the Leniency Programme (which provides amnesty only for the first-in applicant). In conduct investigations, the settlement process does not require an admission of liability and there is no finding of an infringement.

CADE has modified its settlement procedures to increase the incentives for companies to co-operate and that has proved very effective. There are, however, downsides to CADE's extensive use of settlements. There is the potential for a negative effect on deterrence, given that discounts are generous and

companies know they can settle right up until the Tribunal's final decision. If a settlement can be concluded with the Tribunal after the General Superintendence has concluded its investigation, this impacts on the administrative efficiencies and resource savings that typically justifies a settlements policy. Also, there seem to be many hybrid cases (i.e. cases where some companies settle and other do not) where the resource savings are less significant than in those cases where all parties settle.

Settlements are not reviewed by the courts and there is no infringement decision in non-cartel settlements, making their value as legal precedent much weaker. This reduces legal certainty and can slow the development of competition law. In addition, the absence of a finding of infringement in non-cartel cases can have negative effects on follow-on private damages actions. There also appear to be different settlement conditions across cases depending on which Reporting Commissioner is the leading the negotiation, which creates uncertainty in the process and outcome.

Furthermore, the extent of discounts provided in the context of cartel settlements is very high by international standards. The discount at the level of the General Superintendence can go up to 50% for the first applicant, 40% for the second, and 25% for subsequent applicants. It is up to 15% if the case has already been passed to the Tribunal. By comparison, settlements in the European Union entitle companies to a 10% reduction in the fine, which the parties are unable to negotiate with the competition authority. In non-cartel cases, the pecuniary contributions required by CADE have, typically, been quite low. These lower levels of pecuniary contributions could lead to a weakening of the deterrent effects of enforcement actions.

- Settlement agreements should be negotiated during the investigation at the General Superintendence and before the case is discussed at the Tribunal to ensure there are administrative efficiencies and resource savings. The level of discount granted should reflect the administrative efficiencies generated by the settlement procedure.
- Reduce the discounts available in cartel settlements in line with levels in other jurisdictions.

- Only accept settlement agreements in straightforward cases that raise no novel or complex legal issues.
- Prioritise settlement agreements in cases where all the parties are willing to settle, and only exceptionally settle in hybrid cases.
- Establish parameters and guidelines for pecuniary contributions in non-cartel cases.

10.2.4. Establish a definition of dominance in line with international practice

The Competition Law establishes a market share threshold of 20% for establishing dominance. In practice this statutory definition based on market shares does not appear to be overly problematic, but it does give rise to a legal uncertainty because it is not clear when CADE might rely on this legal presumption to establish dominance. Moreover, market power should be based on a rigorous assessment of the factors affecting competitive conditions in the market under investigation, of which market shares is one criteria. The 20% threshold is also low compared for example to the general rule of thumb in other jurisdictions where a company is unlikely to be dominant if it has a market share under 40%.

- Remove the market share definition of dominance in the Competition Law.
- Alternatively, CADE should adopt guidelines and commit to applying a clear analytical framework to assess dominance.

10.3. Merger control

10.3.1. Review the suitability of the merger notification thresholds

In Brazil, the vast majority of notified mergers raise no issues and are subject to fast track-proceedings under the pre-notification system's current notification thresholds. However, the number of transactions that raise no issues and are subject to simplified analysis in Brazil seems to be exceptionally high, particularly for a regime that also allows the competition

agency to review mergers falling below the merger notification thresholds. It is notable that around 85% of all merger notifications are subject to fast-track analysis. It is also remarkable that only 46 out of 2 588 mergers notified since 2012 (i.e. 1.7%) have ever reached the last stage of in-depth analysis; and that in 2017, a year with a record number of prohibited mergers, only 2% of transactions were not cleared unconditionally.

In addition, Brazil only has turnover thresholds and does not take into account other notification criteria, such as the value of the assets involved in the transaction. A number of OECD countries are considering the assets value of a transaction as a criterion for merger notification to bring their merger control regimes in line with the challenges posed by the digital economy. Many IT/digital companies have low turnovers but high asset values and capitalisation which may take their M&A activities under the radar of merger review.

- Brazil should regularly review its merger notification thresholds. In tandem, a study on the impact of higher notification thresholds should be presented to the Government to consider a reform of the merger thresholds to reduce the number of non-problematic filings. This reform would ensure CADE's resources are deployed effectively, reduce regulatory costs on business and make Brazil's merger control more efficient.
- Extend the deadline that CADE has to open an investigation against non-notifiable transactions from 12 to 24 months. This would provide a safety net in the event that an increase in the thresholds would prevent CADE from reviewing a problematic merger.
- Introduce a new notification threshold based on the value of the assets involved in the transaction.

10.3.2. Ensure that only objectively quantifiable and readily accessible criteria are used as merger notification thresholds

In addition to its turnover-based merger control thresholds, Brazil applies an effects test to determine whether a merger should be notified. The 2005 OECD Recommendation on Merger Review

recommends that countries should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction, and use clear and objective criteria to determine whether and when a merger must be notified. The 2002 ICN Recommended Practices set out that a transaction's nexus to the jurisdiction should be based on activity within the territory. These Recommended Practices also provide guidance on what notification criteria are clear and objective, particularly as regards local nexus. Examples of criteria that are not objectively quantifiable or readily accessible to the parties are market share and transaction-related effects – such as the effects test relied on by Brazil in addition to its merger notification thresholds.

- Brazil should consider adopting a sufficient local nexus test that is clearer and more objective than its current effects test.

10.4. Civil penalties and sanctions

10.4.1. Ensure that sanctions for anti-competitive conduct are sufficiently deterrent

The OECD Recommendation Concerning Effective Action against Hard Core Cartels recommends that members impose effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in competition infringements, particularly cartels.¹³³

On paper, Brazil imposes significant penalties on companies that infringe the competition law. However, in practice the amount of fines imposed on infringing parties seems to be low. A number of reasons were identified for this, including: (i) the fine can only be imposed by reference to the last year of an infringement; (ii) while there is a theoretical floor for the amount of the fine corresponding to the benefit a company derived from the infringement, this is hard to implement; (iii) there is no set methodology to calculate the fine; (iv) CADE relies heavily on cease-and-desist agreements, and the rebates in fine amounts

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provided in these agreements (in relation to cartels) are very generous by international standards.

- Amend the Competition Law to make the duration of the infringement a criterion for the setting of the fine so that longer-term infringements are sanctioned more severely than shorter-term ones.¹³⁴
- Revise the settlement procedure and limit the use of settlements (see Recommendations above).
- Clarify how fines are calculated (see Recommendations below)

10.4.2. Clarify the methodology for calculation of fines

The methodology for calculating the amount of fines for infringements of the Competition Law is unclear. There is uncertainty over what constitutes a “field of economic activity” in relation to the turnover of the infringing company and CADE’s classification system of 144 economic sectors has proved difficult to apply in practice.

There is also uncertainty about whether and how to calculate the benefit derived from the infringement. Calculating the illicit benefit that the offender obtained as a result of its anti-competitive conduct is extremely difficult. It also increases the cost and complexity of proceedings, as well as the possibility of successful judicial challenges to otherwise valid infringement decisions. Consequently, most jurisdictions rely solely on proxies to the size of the infringing company or to the impact of the infringing conduct, for example, the amount of sales or turnover

¹³⁴ At the international level, there are two main methodologies to achieve this: either take into account the turnover of the infringing company during the whole period of the infringement as the basis of the penalty; or take into account the turnover of the infringing company in a given year, and multiply by the number of years the infringement lasted. (See OECD (2018) Pecuniary Penalties for Competition Law Infringements in Australia, particularly section 3.4, available at www.oecd.org/daf/competition/Australia-Pecuniary-Penalties-OECD-Report-2018.pdf). Brazil should consider adopting a provision for setting fine amounts along these lines.

of the company in the market where the infringement took place. This occurs even in jurisdictions where the primary law identifies the harm caused or the benefit derived from an infringement as relevant to the calculation of a fine amount, such as the Australia and the United States.

- Adopt a streamlined approach to setting fines that relies on readily identifiable data and avoids having to engage in complex calculations regarding the profit derived by a company from its competition law infringement.
- Clarify what is meant by the “field of economic activity where the infringement occurred” by reference to the market or products involved in the infringement.
- Amend the Competition Law to remove reference to the “benefit from the infringement”. In conjunction, amend the Law to include the duration of the infringement to be included as a criterion in setting the amount of the fine to enable higher fines to be set (as per Recommendation above).

10.4.3. Link fines for individual to individual’s income

The calculation of the amount of the fine that can be imposed on a director who was negligently or wilfully responsible for the infringement is based on the turnover of the company. This is unusual because there is often no link between the turnover of the company and the director’s income or assets.

It is unclear what deterrence effect such a fine would have on individual directors. At the extreme, it is possible that they would be saddled with oppressive penalties, which increases the risk of courts overturning CADE’s sanction decisions.

- Individual fines should be linked to individual income or assets.

10.4.4. Include director disqualification orders as a sanction

It is unclear whether the sanction in the Competition Law prohibiting the wrongdoer from carrying on trade on its own behalf or as representative of a legal entity for a period of five

years, constitutes the power to impose a director disqualification order. Director disqualification is a common penalty around the world, especially for individuals involved in collusive tendering cases.

Director disqualification provides a civil or administrative sanction against individuals involved in cartels that avoids the complexity and uncertainty of a criminal process. Disqualification is much less expensive to society than imprisonment. In addition, disqualification is gaining growing popularity in light of concerns that very high corporate fines do not achieve deterrence.¹³⁵

- Clarify or amend the law to enable directors to be disqualified from managing companies as a sanction for their involvement in competition infringements.

10.5. Criminal penalties

10.5.1. Bring more criminal prosecutions against pure competition infringements

Criminal sanctions against individuals involved in infringements of competition law have been adopted by many jurisdictions around the world. They vary from pecuniary fines to imprisonment. A tenet of criminalisation is shifting sanctions away from corporations and toward the individuals who engage in anticompetitive conduct such as price-fixing.

In Brazil, some infringements of the economic order can be sanctioned with between two and five years in jail and/or with criminal fines. While there have been a number of criminal prosecutions for conduct involving the infringement of the economic order as prescribed, for example, by Law 8.137/1990, Law 8.666/1993 and Decree-Law 2.848/1940, it appears there have been few pure cartel prosecutions, as most cases seem to involve other crimes, such as corruption. The deterrent effect of the criminalisation of infringements to the economic law is diminished if there are no prosecutions.

¹³⁵ OECD (2016) Sanctions in Antitrust Cases DAF/COMP/GF(2016)6, p. 33-34.

- Brazil should bring criminal cases against serious infringements of the economic order, such as hard-core cartels, even if they do not also infringe other criminal provisions.

10.5.2. Amend the rules on the statute of limitations

The rules on the statute of limitations undermine the effectiveness of criminal enforcement of competition infringements. In particular, the actual duration of the statute of limitations in individual cases depends on the sanction imposed in that given case, instead of the maximum statutory sanction. Given the length of competition investigations and prosecutions coupled with the typically short duration of criminal sanctions, by the time the sentence is passed, the statute of limitation has extinguished the criminal sanction. Therefore, the majority defendants convicted of criminal cartels never serve their sentences.

- Brazil should consider modifying its rules on the statute of limitations so that its duration does not depend on the penalties imposed in individual cases. Instead, the length of the statute of limitations should be set clearly in advance. This will ensure that criminal cartels can be effectively prosecuted and punished.

10.6. Other sanctions

10.6.1. Clarify and limit the use of structural remedies as a sanction in conduct cases

CADE has ordered divestitures as a sanction for competition infringement in a handful of cases, including cartels in one instance. Divestitures are more commonly used in the context of mergers, where they may nonetheless only be ordered with the consent of the parties. This reflects concerns with the legitimacy and ability of competition agencies to try to change the market structures.

In the context of cartel cases, structural remedies raises questions about the legitimacy of a competition agency to restructure markets as a sanction for cartels when that market structure would be lawful in the absence of that conduct.

Moreover, there is the potential for the competition agency to make a mistake in its decision or assessment of the market given that the remedies are not negotiated with the defendant.

- Clarify the conditions when structural remedies may be imposed.
- Avoid using structural remedies in cartel cases.

10.6.2. Replace the minimum with a maximum debarment period from public tenders

The Competition Law provides for a sanction that debars wrongdoers from participating in public procurement procedures and obtaining funds from public financial institutions for a minimum period of five years. This can be applied at CADE's discretion.

A minimum debarment period of five years may disincentive CADE from using this sanction, particularly if, in practice, this set time is excessive relative to the infringement. The length of debarment period and the market to which it applies should be commensurate with the seriousness of the infringements because eliminating a competitor will foreclose competition. This in turn may lead to higher prices or lower quality, a counter-productive result, which is the opposite of what a debarment instrument is intended to deliver.¹³⁶

- A maximum debarment period should be established so that CADE can, at its discretion, impose debarring for periods up to that maximum.

10.7. General policy issues

10.7.1. Increase legal certainty and predictability through substantive guidelines

CADE has issued a number of procedural guidelines (e.g. leniency, settlements) but has not issued much substantive guidance. The lack of substantive guidelines in key areas, such as the methodology for calculating fines and criteria for the analysis

¹³⁶ OECD (2016) Sanctions in Antitrust Cases DAF/COMP/GF(2016)6, p. 36.

of abuse of dominance cases, has led to inconsistent decisions and approaches within CADE.

Issuing substantive guidance improves transparency for parties to investigations and also the courts who will be able to anticipate the likely approach to addressing competition issues and expect the agency to follow it unless there is a good reason for not doing so. Further, guidance can increase transparency regarding an agency's approach to both enforcing the law and interpreting it. Importantly, guidance can also foster consistency of approach within an agency on the substantive competition assessment of a particular issue. The development of substantive guidelines provides a closed forum through which to have full and frank discussions to iron out differences and come to an institutional position. All of which increase legal certainty and predictability for business.

- CADE should publish more substantive guidelines to improve transparency, predictability and legal certainty for businesses and to improve consistency of approach internally. Possible topics that would benefit from more guidance are: the calculation of fines, vertical restraints, horizontal co-operation between competitors and abuse of dominance.

10.7.2. Clarify the respective advocacy powers and the roles of CADE and the Ministry of Finance (SEPRAC and SEFEL)

The new Competition Law assigned advocacy powers to the Ministry of Finance (SEPRAC and SEFEL). Absent a formal bar in the law, CADE continues to consider advocacy one of its core functions. This shared advocacy competency could lead to inconsistencies, notably in relation to their respective intra-governmental advocacy activities and the conduct of competition assessments on existing and proposed policies and regulation, as well as industry sectors. There is a risk that they have divergent approaches to prioritisation, methodologies, and therefore outcomes. There are, however, considerable benefits to having two strong competition advocates with complementary role in different parts of the administrative system. It reinforces their respective actions and messages, and will strengthen their

competition assessment interventions, in line with the OECD's 2009 Recommendation on Competition Assessment.

- Improve co-operation on advocacy between CADE and SEPRAC and SEFEL in practice. The new Committee for Co-operation on Competition Advocacy could provide a useful forum in this regard. They should establish and apply a common methodology for competition assessment, and issue joint advocacy opinions and speak with one voice on issues of mutual interest.
- In order to avoid duplication of tasks, Brazil should consider assigning different responsibilities to SEPRAC and SEFEL and CADE. SEPRAC and SEFEL may be best-placed to conduct competition assessment for proposed bills and regulations, while shielding them to the extent possible from political influence and ensuring an objective approach to competition assessment. CADE's knowledge of industries and its specialist staff might be best placed to identify and review existing competition restraints in industry sectors that suffer from a lack of competition. It would also be well-placed to undertake building a "competition culture" type advocacy.

10.7.3. Strengthen the framework for private actions

To date, the extent of successful private enforcement activity in Brazil has been limited and public enforcement remains the primary method of punishing and deterring anti-competitive conduct. However, various initiatives at the level of CADE and policy makers demonstrate that intention to strengthen private enforcement.

CADE forwarded its decision in two key cartel cases to the injured parties. It has also recently developed a Resolution on its discovery policy to define the rules of access to documents and information arising from leniency and cease-and-desist agreements. The purpose of which is to encourage private actions while balancing the impact of transparency on the incentives of parties to come forward with evidence to CADE.

Senate Bill 283/2016 aims to boost private actions by introducing double damages for antitrust infringements, except for

those parties who signed a leniency agreement or a cease-and-desist agreement with CADE. It will also improve legal certainty by defining that the statute of limitation for civil actions will be counted from the final decision rendered by CADE.

- Brazil should pursue measures to incentivise private actions, notably through the swift adoption of Senate Bill 283/2016. At the same time, it must balance these measures against the need to protect the effectiveness of its public enforcement, notably, the operation of CADE’s leniency programme.

10.8. Improve the regulatory framework for international co-operation

It is increasingly necessary for competition agencies to share information with other competition enforcers across national borders in order to tackle anti-competitive practices or transactions. However, this is not always possible without a confidentiality waiver from the parties. According to the OECD 2014 Recommendation on International Co-operation, to which Brazil is an Adherent, in order to improve the ability to exchange confidential information, competition agencies should consider the possibility of adopting so-called “information gateway” provisions, i.e. provisions allowing for the exchange of confidential information between competition authorities without the need for prior consent from the source of information.

Neither the Competition Law nor any of CADE’s bilateral co-operation agreements with other competition agencies allow it to exchange confidential information with other enforcers without the prior consent from the parties, nor do they allow CADE to offer investigative assistance should a foreign agency require it. While at the moment this does not seem to have hampered CADE’s cross-border enforcement activities, it might become more of a challenge as CADE’s international enforcement intensifies.

- Brazil should consider adopting a national information gateway or enter into second generation co-operation agreements (which provide for an information gateway), in line with the 2014 OECD Recommendation on International Co-operation.

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