Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

19-Mar-2017

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/LACF(2017)21
Unclassified

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- Contribution from Brazil --

4-5 April 2017, Managua, Nicaragua

The attached document from Brazil (CADE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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JT03410967

English - Or. English

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

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-- CONTRIBUTION FROM BRAZIL[1] --

1. Cartel prosecution is a top investigative priority in Brazil.[2] Since 2004, the former Secretariat of Economic Law ("SDE", whose activities are now performed by the General Superintendence – "SG") put into action several initiatives to fight cartels. Notwithstanding that huge effort by the Brazilian investigative branch, the Tribunal of the Brazilian Competition Authority (the Administrative Council of Economic Defense, "CADE") was still drowned in judgments of merger cases. At that time, the Law 8.884/94 provided a post notification system of merger cases and there was no fast-track proceedings of analysis. Official data indicate that, from the years 2000 and 2012, approximately 95% of Cade's Tribunal decisions related to merger cases, 3% to unilateral conducts and only 2% to concerted conducts. With the entry into force of Law 12.529/2011, in May 2012, which established a new pre-merger notification system and a fast track proceeding of merger cases that knowingly raise no competitive concerns, CADE's Tribunal was finally able to concentrate its efforts to judging mainly anticompetitive conducts cases. Official data indicate that, in 2013 (a transition year), 73% of Cade's Tribunal decisions still related to merger cases, 10% to unilateral conducts and 17% to concerted conducts. From 2014 on, it is possible to notice a major shift in that percentage. Between 2014 and 2016, only 30% of Cade's Tribunal decisions

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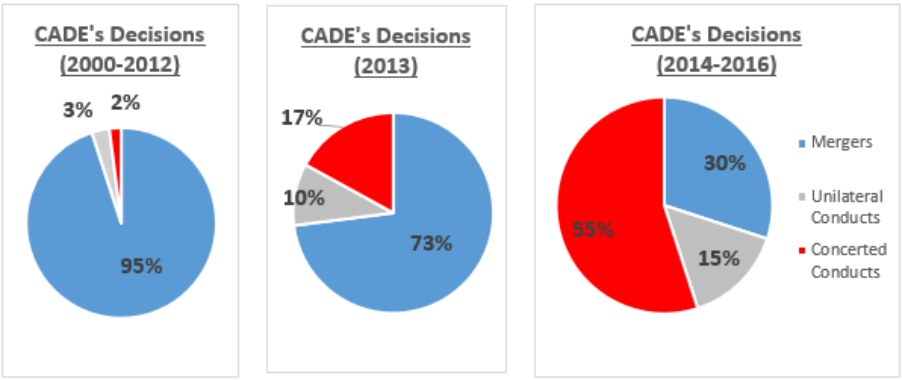
[2] The prosecution of cartels in Brazil is carried out at three levels: administrative, criminal, and civil. The administrative prosecution is performed by Cade.7 In the criminal level, the state and federal Public Prosecution Services8 are entitled to investigate and bring to courts actions against the defendants when there is sufficient evidence.9 In the civil level, injured consumers can file lawsuits in courts against the cartel participants to obtain an order to cease the antitrust violation and to receive damages.

related to merger cases, 15% to unilateral conducts and 55% to concerted conducts (i.e., 70% regard anticompetitive conducts). That addressed the CADE's efforts to consolidate one of the three cornerstones[3] of an effective cartel prosecution system: the fear of severe fines.



2. A strong cartel prosecution is not exclusive in Brazil. It can certainly be noticed in the international seara an expansion of the fight against cartels (detection and punishment) in various jurisdictions. The different Competition Authorities may have not only different competition systems and organizational structures and natures (criminal, civil, administrative or hybrid), but also different objectives with regard to the sanctions applied to the cartel cases. This intrinsically carries a deep and extensive debate about the sanctions' objectives and dosimetry.

3. The sanction's objectives around the world may vary from (i) restorative/reparatory/compensatory, (ii) punitive or (iii) injunctive/deterrent/dissuasive.[4] In our understanding, the Brazilian Competition system provides for a punitive and a detterent sanction's objective, not a reparatory one. Article 37 of Law 12,529/2011 establishes that the penalty for legal persons for breaches of the economic order shall be "0.*1% to 20% of the value of gross revenues of the company, group or conglomerate obtained in the last fiscal year prior to the Administrative proceeding, in the branch of business activity in which the infraction occurred, which will never be inferior to the advantage obtained, when it is possible to estimate it.*". That wording, in our opinion, is embodied by the punitive and dissuasive sanction's objectives, specially taking into account the existence of Article 47[5], which specifically provides legal basis for the reparatory private damages actions (either by the consumers or the

3 HAMMOND, Scott D. Cornerstones of an effective leniency program. In: ICN Workshop on Leniency Programs, Sydney. 2004.

4 OECD, Quantification of harm to competition by national courts and competition agencies, 2011 "*Competition law enforcement pursues three systematically different, yet substantively interconnected, objectives. The first one is injunctive, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that that conduct ceases in the future. The second objective is restorative or compensatory, i.e. to remedy the injury caused by the anti-competitive conduct. The third one is punitive, i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions*".

5 Art. 47 of Law 12.529/2011. "*The aggrieved parties, on their own accord or by someone legally entitled and referred to in Article 82 of Law No. 8078, of September 11th, 1990, may take legal action in defense of their individual interests or shared common 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 proceeding, which will not be suspended due to Tribunal action*".

Public Prosecution Office) and Article 45, which indicates that the advantage obtained or envisaged by the violator is one of the eight elements in sanctions' dosimetry in Brazil.[6]

4. In addition, there may be a debate on whether and how a valuation of damages and/or of the undue advantage of the cartel[7] should be taken into account at the time of the sanction's dosimetry. It is our understanding is that the calculation of the damages or the undue advantage should not be mistakenly viewed as a synonym to the calculation of the sanctions, because it is only one of the elements in the sanctions' dosimetry, not the sanction itself. Take for instance a bid rigging cartel case, in which market allocation agreements were made and implemented, but finally did not result in any benefit to the cartelists (either because another independent competitor won the contract separately or because the bid was ultimately cancelled). In that situation, if the damage/undue advantage calculation is considered to be a synonym to the sanction, there would be no fines applied. That situation would not punish a anticompetitive behavior that harms the economic public order and would not reflect the social reproach of a cartel. Additionally, that would not be proportionate to the best punitive administrative techniques. Alternatively, if the damage/undue advantage obtained or envisioned is taken as one of the various elements of the sanction dosimetry, as expressly provided by the Brazilian Competition Law (Law 12.529/2011), there would still be possible to apply the appropriate fine, possibly with a mitigating factor in that situation, since the cartel was not finally accomplished and implemented. That is important especially considering that in Brazil anticompetitive practices shall be considered violations to the economic order, regardless of fault, even if not achieved.[8]

5. During a large period in Brazil, CADE's jurisprudence was pacific in understanding that the estimation of damages and the undue advantage gained on the cartel were only elements of the sanctions' dosimetry, not the real sanction. The sanction by itself was typically calculated based on a percentage of the turnover in the year prior to the initiation of the Administrative Procedure. However, since 2016 some Commissioners of CADE's Tribunal have raised different perspectives on the topic, specially taking into account the final wording of the above mentioned Article 37 of Law 12,529/2011: "*which will never be inferior to the advantage obtained, when it is possible to estimate it*".

6. Briefly, by one side, the arguments raised by some Commissioners of CADE's Tribunal in Brazil for the need to proceed to the calculation of the damages whenever applying sanctions are the following: (i) the need of more adequate sanctions to the cartel cases; (ii) the greater adherence to the specific cartel cases; (iii) the attempt to increase the deterrence of future cartel cases; (iv) the punishment of the cartel cases in an higher amount of damages and/or undue advantage obtained by the cartel; (v) the attempt to

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6 Art. 45 of Law 12.529/2011. "*In the application of the penalties set forth in this Law, the following shall be taken into consideration: 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 – any recurrence*".

7 Technically, it is important, in our opinion, to differentiate the advantage received (that which would unduly result from the cartel, obtained directly by its authors) from the damage caused (the negative effect on the economy and those directly affected by the conduct).

8 Art. 47 of Law 12.529/2011. "*The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively*.".

avoid disproportionate sanctions (either upper ow lower); and (iv) the possibility to establish an arbitrary standard of damages presumption[9].

7. By the other side, the arguments raised by the other Commissioners of CADE's Tribunal in Brazil for the inadequacy to proceed to the calculation of the damages whenever applying sanctions are the following: (i) the strong difficulty to accurately measure the harm in cartel cases; [10] (ii) the high costs to pursue the quantification methods;[11] (iii) the inexistence of straightforward and automatic routines for that purpose;[12] (iv) the final result would be inherently flawed;[13] (v) the likelihood of those sanctions based on actual damages to the contested in the national courts[14], (vi) the deterrence effect of cartels in Brazil should be seen in a broader picture, including the possibility of criminal and civil liability, alongside with other sanctions by CADE, which does not necessarily apply one fines as penalty.[15]

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9 In that regard, the USA and the European Commission, for example, provide for fixed arbitrary overcharges presumptions, varying from 10 to 30%.

10 According to the OECD, "*Accurately measuring harm to competition is difficult even in the best of cases*". (OECD, 2011).

11 According to the OECD, "*Measuring harm in practice is difficult even in straightforward cartel cases because of data requirements and the need to construct a convincing (...) scenario. The more difficult cases will likely require substantial inputs from skilled and experienced analysts with detailed knowledge of the industries too. (...) The most often used methods (...) typically require relatively large data sets*" (OECD, 2011). Additionally, HOVENKAMP highlights that those "*methods have become technically quite demanding*". HOVENKAMP, Herbert. A Primer on Antitrust Damages at 41–50, 52–56, University of Iowa Legal Studies Research Paper (Oct. 1, 2010) and HOVENKAMP, Herbert. Quantification of harm in Private antitrust actions in the United States, *Apud* OCDE, 2011 (HOVENKAMP, 2011).

12 According to the OECD, "*Simple, automatized routines are, hence, not applicable*" (OECD, 2011).

13 According to the OECD, "*Even with such experts, the results could still be considered estimates, with no guarantee of precision. (...) Economists (...) will often disagree about results*" (OECD, 2011). Additionally, HOVENKAMP highlights that those "*Even in the hands of a qualified expert, both (methods) suffer from severe limitations depending on the circumstances. (...) Over the years economists and statisticians have developed control techniques to deal with these problems or others, but no one believes that the methodologies provide more than a rough approximation of reality*" (HOVENKAMP, 2011).

14 According to the OECD, "*Estimates may not be sufficiently precise for some courts. (...) economic theory and empirical analysis will not always result in estimates of harm that are sufficiently reliable and precise to be admitted as evidence. (...) Quantifying harm (...) to a level of precision and reliability that would satisfy a court requires a great deal of data.*" (OECD, 2011).

15 Art. 38 of Law 12.529/2011. "*Art. 38. Without prejudice to the penalties set forth in Article 37 of this Law, when so required according to the seriousness of the facts or public interest, one or more of the following penalties may be imposed: I - the publication, in half a page and at the expenses of the perpetrator, in a newspaper indicated by the judgment, of the extract from the conviction, for a period of two (2) consecutive days for one (1) to three (3) consecutive weeks; II - ineligibility for official financing and for participation in biddings when the objective is acquisitions, divestitures, performance of works and services, provision of public services, in the federal, state, municipal and Federal District public administration, as well as in indirect administration entities, for a term of not less than 5 (five) years; III - the registration of the wrongdoer with the National Registry for Consumer Protection; IV - recommendation to the respective public agencies so that: a) 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; b) the violator be denied installment payment of federal taxes owed by him, or that tax incentives or public subsidies be cancelled, in full or in part; V - the company divestiture, transfer of corporate control, sale of assets or partial interruption of activity; VI - the wrongdoer be prohibited from carrying on trade on its own behalf or as representative of a legal entity for a period of five (5) years; and VII - any other act or measure required to eliminate harmful effects to the economic order*."

8. That interpretation lead to some divergences in at least five judgments in CADE`s Tribunal.

9. Firstly, in the Administrative Proceeding n° 08012.003824/2002-84 ("THC2 Salvador"), the votes of the Commissioners Gilvandro Araújo and João Paulo Resende highlight those different perspectives. The dispute about whether a certain fee charged by one port terminal was justified or anticompetitive. If considered as anticompetitive, the amount charged as fee would be the advantage obtained illegally. Even though it was not a cartel case and even if the calculation method of the undue advantage obtained was obvious, some divergences were initially raised.

10. Secondly, in the Administrative Proceeding n°. 08012.001029/2007-66 ("Sodium perborate"), for the first time, Commissioner Joao Paulo Resende drafted a fine calculation based on an estimate of the undue advantage allegedly obtained by the offender. In order to make that estimation, the Commissioner made use of series of arbitrary assumptions in the calculation. Although the method was rationale and justified, the assumptions made were debatable, and the other Commissioners opted to calculate the fines based on the objective method given by the law, which is "0.*1% to 20% of the value of gross revenues of the company, group or conglomerate obtained in the last fiscal year prior to the Administrative proceeding, in the branch of business activity in which the infraction occurred*". Following that second judgment, Commissioner João Paulo has been systematically adopting this methods of calculations, attempting to estimate the undue advantage obtained through the use of some arbitrary presumptions. The Commissioner acknowledges that this calculation is not an exact one, but an approximation, arguing that the Brazilian Competition Law allows an estimation instead of the exactly advantage obtained for fine purposes. The basis for that interpretation abides in the final wording of Article 37 of Law 12.529/2011, above mentioned "*which will never be inferior to the advantage obtained, when it is possible to estimate it*".

11. The third and the fourth cases paved out more discussions on the topic. It is the case of the Administrative Proceeding n° 08012.009645/2008-46 ("Special food bid-rigging") and the Administrative Proceeding n° 08012.005255/2010-11 ("DRAM"). Both of these cases provide a look to the new arguments brought by other Commissioners, which decided to look more in-depth about this issue and build a majority opinion against the calculation of damages and undue advantage whenever sanctioning a cartel case. The majority of the Commissioners reckon that the legal criteria is safer, more objective and effective than the attempts of estimation of the advantage obtained, especially considering a future judicial review and the absence of a non-arbitrary way of defining the method for estimation. The majority of the Commissioners argue that, given the myriad of methods and the hurdles for obtaining data and evidence that could support a choice for one method in spite of others equally consistent from an economic theoretical view, a decision of sanctioning based on an advantage-obtained method would always have flaws and, thereby, be vulnerable to judicial review.

12. Finally, possibly the most significant precedent of these discussions was the fifth judgment, made very recently, in the Administrative Proceeding 08012.002568/2005-51 ("liquified petroleum gas Pará"), embodied with major discussions of the Commissioners Cristiane Alkmin and Márcio Oliveira. The majority opinion was that the undue advantage is to be considered as one of the elements that form the sanction dosimetry. A calculation of the undue advantage made by simply multiplying a percentage of overprice over the annual turnover could ultimately be illegal in Brazil, because it would not take into account the other dosimetry's elements provided in Article 45 of Law 12.529/2011, nor would be reasonable. CADE's Tribunal is bound by the need to analyze other dosimetry's elements, such as the company's financial and economic situation, the good faith, the violation's gravity, the accomplishment of the violation, the degree of injury or danger of injury to the consumer and to the national economy, the negative economic effects of the violation and the recidivism.

13. In this context, considering our focus on the issue of the adequacy (or not) of harm estimation as a synonym of the cartel sanction, it is our opinion that the majority opinion of the Commissioners is correct. We understand that CADE should not identify the estimation of damages or the undue advantage as equal of the sanction itself, but only one of the elements in the sanctions' dosimetry. In order to be effective, the cartel enforcement in a country must represent a credible threat, which means, in general terms, that once the sanction has been applied by the Competition Authority, it should be timely enforced, even after judicial discussion of it. The use of a contentious method of estimation of damages allows increases the inherent risk of judicial review of the decisions by the national courts, which could, consequently, decrease the general effectiveness of antitrust enforcement in the country. All in all, we understand that the Brazilian Competition Authority should choose predictability in the "*trade-off between accuracy and practicability*".

14. Nevertheless, considering that this is a new hot topic in Brazil, there is an open avenue for new and fruitful discussions on the issue. Specially considering that there are two Commissioners vacancies in the moment, there is still room for new arguments and further developments.

15. Finally, it is important to briefly point out some other discussions currently made in Brazil on the topic of cartel sanctioning, which may be further addressed in 2017:

- The fostering of the private antitrust damages actions in Brazil made by CADE through the application of a new bylaw on access of documents and its deterrence effect;[16]
- The image and reputation costs endured by the companies and individuals convicted by CADE and its deterrence effect;
- The criminal charges brought by the State or Federal public prosecutors against individuals and its deterrence effect;
- The claim for CADE to consider in its sanction dosimetry the other pecuniary sanctions applied by other public institutions (for instance, the Public Prosecution Office, the General Controller and the Audit Office);
- The potential double-counting with regard to fines applied by multiple jurisdictions in international cartel investigations;
- The attempt made by the Economic Studies Department of CADE to made predictable damages calculations on a previously convicted cartel ("hydrogen peroxide")[17], before applying that to current cases.

16 CADE. Available at: http://en.cade.gov.br/press-releases/cade-submits-for-public-consultation-resolution-on-procedures-related-to-the-access-to-documents-from-the-antitrust-investigations

17 CADE. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-002-o-caso-dos-peroxidos-no-brasil.pdf