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Firm Bidder Exclusion and Individual Director Disqualification: the Brazilian experience between 2012 and 2022 and some additional reflections for international antitrust practice – Paper by Amanda Athayde & Renan Cruvinel

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Firm Bidder Exclusion and Individual Director Disqualification: the Brazilian experience between 2012 and 2022 and some additional reflections for international antitrust practice[1]

By Amanda Athayde[2] and Renan Cruvinel[3]

SUMMARY: The prominence of the application of antitrust fines may have come to a crossroad. Fines seem not to have achieved their ultimate goals, either to punish current and previous practices or to deter future antitrust violations. Are there unexplored boundaries for a more effective antitrust sanctions, specially taking into considerations the non-monetary sanctions? This paper presents three different groups of arguments to defend the applicability of non-monetary sanctions, notably, (i) overdeterrence, (ii) underdeterrence and (iii) general enforcement, which may result into new perspectives to strengthen the competition policy. With that general reflection for international antitrust practice, the paper digs in two out of the eight non-monetary sanctions provided in article 38 of the Brazilian Competition Act. The research is intended not only to stimulate the search for more efficient mechanisms to prevent and punish anticompetitive conduct in Brazil, but also to establish a starting point so that legal scholars and law enforcers around the globe can define if, when how and with which nuances non-monetary sanctions can and/or should be imposed in the antitrust context.

[1] The full Working Paper in English analyzing all eight non-monetary sanctions in the Brazilian experience and a general overview of the imposition of non-monetary antitrust sanctions is available at the following link at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4282215. This full Working Paper in English is a result of a recently published book in Portuguese: ATHAYDE, Amanda et. al. Sanções não pecuniárias no antitruste /organização Amanda Athayde. -- 1. ed. -- São Paulo: Editora Singular, 2022. In such research, each of the nine papers included in the book investigated the national and international experience regarding the enforcement of a specific type of penalty other than fines aiming at identifying the justification and rationale that led to the authorities to impose these non-monetary penalties in both contexts.

[2] Amanda Athayde is a Professor at the University of Brasilia (UnB) in Business Law, Trade, Competition and Compliance. Counsel of Pinheiro Neto Advogados in the Competition, Compliance and (effective 2023) International Trade practice areas. PhD in Business Law from the São Paulo University (USP), BA in Law from the Federal University of Minas Gerais (UFMG), BA in Business Administration in the UNA Centre. International student in the Université Paris I – Panthéon Sorbonne. Author of books, several papers and book chapters in Business Law, Competition, International Trade, Compliance, Immunity/Leniency Agreements, Trade Remedies and Public Interest, Anticorruption. As Trade Analyst, worked in 2013 in the early negotiation of international cooperation and facilitation investment agreements. From 2013 to 2017, she was the Head of the Leniency Unit and Chief of Staff at CADE's General Superintendence, responsible for all the leniency negotiations regarding the cartel cases. In 2017, Amanda was nominated to join the Public Prosecution Office, as a legal advisor on the competition cases to be judged at CADE's Tribunal. From 2019 to April 2022, she was the Undersecretary of Trade Remedies and Public Interest of the Secretariat of Foreign Affairs of the Ministry of Economy in Brazil. Co-founder of the network Women in Antitrust (WIA) Brazil. Host of the Podcast "White Coffee Business Law" - Direito Empresarial Café com Leite. Pedro's (2018) and Lucas's (2018) mother.

[3] Renan Cruvinel is a Lawyer and researcher expert in Compliance, Financial Regulation, and Antitrust, with experience both in the public and private sectors. Master in Business Law from the São Paulo University (USP) and BA in Law from the Federal University of Brasília (UnB).

Introduction

The prominence of the application of antitrust fines may have come to a crossroad. Monetary sanctions for individuals and legal entities responsible for antitrust violations are the ones mostly imposed by antitrust authorities around the world. That seems not to have achieved the ultimate goals of those fines, either to punish current and previous practices or to deter future antitrust violations. Recidivism, underdeterrence, overdeterrence, companies' payment of fines for their employees: those are some of the topics of concern that arise in the competition area.

Is the antitrust really contributing to a more compliance business environment? Or is it only turning a blind eye to the antitrust goal to improve the functioning of the markets? Which are the unexplored boundaries for a more effective antitrust sanctions, specially taking into considerations the non-monetary sanctions typically provided by the antitrust laws? Have them been overlooked or underestimated? Which are their risks to be assessed? Do they provide for a better outcome, or do they result in a more tormentors antitrust area, so we would continue to be better off without it? In summary: may the non-monetary sanctions contribute efficiently to the antitrust practice around the world?

All those questions have haunted these authors for the last years. That is the reason why this paper focus on non-monetary antitrust sanctions that may be imposed separately or cumulatively to the fines when the severity of the facts or the general public interest so requires. Section I presents a proposal for organizing the theoretical discussion. We propose three different groups of arguments to defend the applicability of non-monetary sanctions, notably, overdeterrence, underdeterrence and general enforcement, which does not refer to a specific case. That may result into new perspectives to strengthen the competition policy. Section II provides the Brazilian a brief overview of two out of the the eight non-monetary sanctions available in the Brazilian Competition Act ("Law 12,529/2011: company bidder exclusion and individual director disqualification.

The research is intended not only to stimulate the search for more efficient mechanisms to prevent and punish anticompetitive conduct in Brazil, but also to establish a starting point so that legal scholars and law enforcers around the globe can define if, when, how and with which nuances non-monetary sanctions can and/or should be imposed in the antitrust context. The goal is to advance the discussion to identify material and procedural aspects that not only discourage the antitrust authorities to impose these non-monetary sanctions, but that can also make them less effective when applied, to the detriment of maximum deterrence with minimal negative social impacts. As a result, it will be addressed some of the barriers for imposing non-monetary sanctions already provided for by the laws.

1. A Proposal for Organizing Tte Theoretical Discussion: underdeterrence, overdeterrence and general perspective on the applicability of non-monetary sanctions

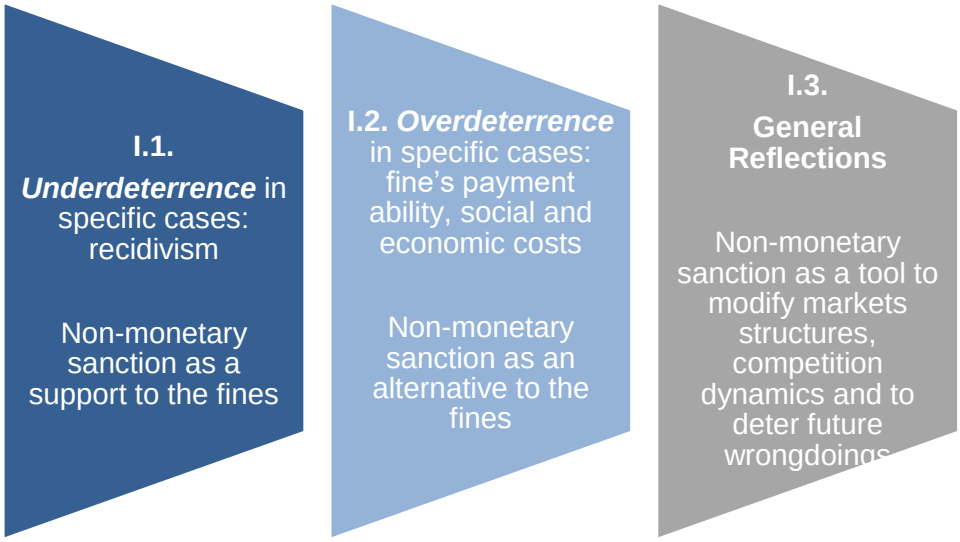
Fines have been, historically, the main sanction used by antitrust authorities globally. To further understand the potential deterrence power of non-monetary sanctions, this paper has a premise that it is necessary to go beyond an economic perspective of antitrust sanctions and enforcement[4].

[4] In this regard, see: Posner, Antitrust: cases, economic notes and Other materials 545-572 (2d ed. 1981). Schwartz, Private enforcement of the Antitrust laws (1981); Landes, Posner e Easterbook, Contribution Among Antitrust Defendants: A legal economic analysis, e Fischel e Easterbrook, The Economic Structure of Corporate Law (1996), among other papers.

The approach currently taken by most legal scholars, influenced by BECKER and COASE[5], is centered on the adequate fines to be imposed by competition authorities. We assume[6] a diversion from that straight direction, that an optimal sanction should have not only the highest level of deterrence, but also the lowest social costs. Having that in mind, it would be possible to then investigate how authorities could apply different scopes, natures and types of sanctions to reach an optimal enforcement point.

May the non-monetary sanctions contribute efficiently to the antitrust practice around the world? We propose three different groups of arguments to defend the applicability of non-monetary sanctions, notably: (I.1) underdeterrence; (I.2.) overdeterrence; (I.3.) general perspective. The image below illustrates the suggestions of how a non-monetary sanction can contribute to an optimal sanction:

Image 1 - Arguments to defend the applicability of non-monetary sanctions



Source: the authors.

1.1. Underdeterrence as an argument to defend the applicability of non-monetary sanctions

Fines are no longer the only alternative for antitrust authorities. Even though fines are an important deterrence mechanism, in certain cases they seem to be insufficient to create the incentives needed to hinder anticompetitive conducts. It may be necessary to impose upon wrongdoers' costs that are higher than the gains obtained from violations and that prevent

[5] The papers that raised the discussion are: Becker, Crime and Punishment: An Economic Approach, 79 J. Pol. Econ. 169 (1968); Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

[6] ATHAYDE, Amanda; OLIVEIRA, Renan Cruvinel de. Sanções não pecuniárias no antitruste /organização Amanda Athayde. -- 1. ed. -- São Paulo: Editora Singular, 2022. Pp. 11-74. The authors verified increases in monetary sanctions imposed by antitrust authorities, and assumed their insufficiency to deter anticompetitive practices, to reach different perspectives to analyze non-monetary sanctions as means to strengthen antitrust enforcement. The authors did not identify any studies that demonstrated a correlation between an increase in monetary sanctions and an actual decrease in the number of violations to the economic order.

recidivism. Non-monetary sanctions may increase the severity of the sanction and serve as allies to support the sanction's enforcement.

Otherwise, neither the administrators, nor the board of directors, shareholders or stakeholders will have enough incentives to prevent unlawful conducts given that their costs are tolerable[7]. It is necessary to prevent a company from raising prices of goods and services to cover costs arising from an antitrust conviction, even excessively high costs. Therefore, the need to adjust deterrence tools for them to create more disincentives for wrongdoing becomes evident.

Legal scholars defend those non-monetary sanctions are generally seen as complementary to fines, with the purpose of reducing incentives for wrongdoings, either from a learning perspective[8], or from the perspective of the effectiveness of the fines imposed[9].

Scholars also defend targeting individuals[10], as a feasible course of action, so that sanctions cannot be undertaken by companies, considering the individual situation of the person responsible for the violation. Sanctions imposed to individuals should be adequately measured to withstand potential judicial questioning[11].

[7] GINSBURG, Douglas; WRIGHT, Joshua. ANTITRUST SANCTIONS. Competition Policy International, Columbia, v. 6, n. 2, p. 3-39, 2010. Available at: https://www.law.gmu.edu/assets/files/publications/working_papers/1060AntitrustSanctions.pdf. Last Accessed on: April 4, 2022. p. 17.

[8] In this sense, read: MACEDO, Alexandre Cordeiro; FRADE, Eduardo. Dimensionamento de sanções antitruste a cartéis. A Revolução do Antitruste no Brasil: a era dos cartéis. São Paulo: Singular, 2018, p. 35. Available at: https://www.iiede.com.br/wp-content/uploads/2018/10/Artigo-Dimensionamento-de-sanc%CC%A7o%CC%83es-antitruste-a-carte%CC%81is-versa%CC%83o-definitiva.pdf. Last Accessed on : April 4, 2022..

[9] In this regard, read, for example: We think it clear the time has come to increase individual sanctions rather than corporate fines. In reality, it is shareholders, not the abstraction called "the corporation," who bear the economic burden—such as it is—of corporate sanctions. It was their agents, however, in management and on the board of directors who violated the law or who may have been in a position to prevent the violation; they should be the focus of the law's efforts to deter price-fixing. GINSBURG, Douglas; WRIGHT, Joshua. Antitrust Sanctions. Competition Policy International, Columbia, v. 6, n. 2, p. 3-39, 2010. Available at: https://www.law.gmu.edu/assets/files/publications/working_papers/1060AntitrustSanctions.pdf. Last Accessed on: April 4, 2022.. p. 5.In the Brazilian perspective, read, for example: SANTOS, Flávia Chiquito dos. Aplicação de penas na repressão a cartéis: uma análise da jurisprudência do CADE. Rio de Janeiro: Lumen Iuris, 2016.

[10] MARTINS, Carlos Frederico Braga; SANTOS, Rodrigo Victor dos. Direito concorrencial sancionador: análise das alternativas à multa corporativa como forma de garantir o efeito dissuasório da pena. In: ATHAYDE, Amanda; MAIOLINO, Isabela; BURNIER, Paulo (org.). Comércio Internacional e Concorrência: desafios e perspectivas atuais. Brasília: Universidade de Brasília Faculdade de Direito, 2019. v. 2. p. 142-169. Available at: https://c91ba030-1e79-4eb0-b196-35407d130c35.filesusr.com/ugd/62c611_e9839ce5ebee4a28aa23c334d4023073.pdf.

[11] In this regard, read, for example: MARTINS, Carlos Frederico Braga; SANTOS, Rodrigo Victor dos. Direito concorrencial sancionador: análise das alternativas à multa corporativa como forma de garantir o efeito dissuasório da pena. In: ATHAYDE, Amanda; MAIOLINO, Isabela; BURNIER, Paulo (org.). Comércio Internacional e Concorrência: desafios e perspectivas atuais. Brasília: Universidade de Brasília Faculdade de Direito, 2019. v. 2. p. 142-169. Available at: https://c91ba030-1e79-4eb0-b196-35407d130c35.filesusr.com/ugd/62c611_e9839ce5ebee4a28aa23c334d4023073.pdf

As for imprisonment sanctions, even though incarceration is a powerful disincentive for anticompetitive conducts perpetrated by businessmen,[12] the fact that criminal decisions naturally take more time to be handed down and are more costly than administrative decisions was not overlooked, considering that the criminal procedure has more safeguards to prevent abuses in the imposition of the imprisonment sanction, given its severity. However, recent evidence indicates that incarceration for cartel conducts is at a suboptimal level.[13]

The high levels of recidivism also indicate that imprisonment is not a sufficiently effective tool to prevent cartels[14]-[15]. Therefore, the increase in the amounts of the fines imposed

[12] MARTINEZ, Ana Paula. Repressão a cartéis: interface entre direito administrativo e criminal. 2013.Universidade de São Paulo, São Paulo, 2013. In Brazil, for example, few individuals are in fact subject to incarceration, even though engaging in cartel is a criminal felony.

[13] In 2019, the OECD recommended that Brazil should foster of criminal investigations for violations against the economic order. From the international entity's point of view, the Brazilian legal system has filed few cases in which cartel practices are the exclusive focus of the government's intention to prosecute. In OCDE. Revisões por pares da OCDE sobre legislação e política de concorrência: Brasil. 2019. Available at: < http://antigo.cade.gov.br/noticias/cade-lanca-relatorio-da-ocde-com-analise-sobre-politica-concorrencial-brasileira/revisoes-por-pares-da-ocde-sobre-legislacao-e-politica-de-concorrencia_-brasil.pdf>. Last Accessed on April 4, 2022.. P. 195-196. Empiric studies confirm that Cade's convictions are at a sub-optimal level. In this regard, read, for example: ROS, Luíz Guilherme. Criando incentivos, a partir da Teoria dos Jogos, para celebração de Termos de Compromisso de Cessação por Pessoas Físicas: Uma análise das Ações Penais da Lava Jato (Dissertação). Universidade de São Paulo. 2020. P. 87.

[14] In this aspect, it is relevant to mention that there is no indication that the significative increase in the imposed fines or the increase in incarceration might have resulted in a significative decline of cartels in the United Kingdom OFFICE OF FAIR TRADING (OFT). The deterrent effect of competition enforcement by the OFT. London: OFT, 2007. Available at: . Last Accessed on : April 4, 2022..http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf. Last Accessed on : April 4, 2022..

[15] A study made by MARTINS and SANTOS demonstrates that the quantitative analysis of the penalties imposed by the European Commission between 2007 and 2017, with the aim of verifying if such punishments fulfilled their goal of reducing recidivism in antitrust violations, showed that even though the average amount of the fines imposed in each case has increased significantly in the last decades, recidivism was the most present aggravating circumstance in the monetary penalties imposed by the European Commission over businesses and corporations sued by the institution, and 25 cases of recidivism were identified in decisions regarding cartels and abuse of dominance since 2000. The authors also ensure that, reassuring the apparent absence of correlation between the amount of fines and dissuasion, while in the time period between 1969 and 2009 only 24% of cartel decisions imposed by the Commission convicted at least one recidivistic defendant , in the period between 2006 and june 2011 the recidivism level was equally higher and was present in 40% of decisions, even though the penalties imposed by the Commission had a spiked increase in their amount. At last, the authors warn that the inefficacy of high-penalty model has been addressed by several critiques in the international arena, leading to an "increased international concern with the inefficacy of currently used antitrust sanctions, since, inside a notion of general prevention, they should not only avoid recidivism, but also disencourage the commission of antitrust violations, vigorously" In: MARTINS, Carlos Frederico Braga; SANTOS, Rodrigo Victor dos. Direito concorrencial sancionador: análise das alternativas à multa corporativa como forma de garantir o efeito dissuasório da pena. In: ATHAYDE, Amanda; MAIOLINO, Isabela; BURNIER, Paulo (org.). Comércio Internacional e Concorrência sobre GERADIN, Damien; SADRAK, Katarzyna. "The eu competition law fining system: a quantitative review of the commission decisions between 2000 and 2017". Tilec discussion paper. 2017. desafios e perspectivas atuais. Brasília: Universidade de Brasília Faculdade de Direito, 2019. v. 2. p. 142-169. Available at: https://c91ba030-1e79-4eb0-b196-35407d130c35.filesusr.com/ugd/62c611_e9839ce5ebee4a28aa23c334d4023073.pdf sobre

together with the (real or theoretical) risk of incarceration of individuals involved in the conducts has not been enough to prevent violations against the economic order, which urges for the need to search for new non-monetary and no incarceration means of sanction[16] to ensure future deterrence.

1.2. Overdeterrence as an argument to defend the applicability of non-monetary sanctions

Fines imposed have real-life consequences. Sanctions must not be greater than the social cost arising from the wrongdoing[17], considering that such costs might result in an increase in costs passed-on to consumers[18] or disproportionately burden companies' administrators, harming the economic environment[19]. It is important to balance between sanctions imposed and negative social costs arising from such sanctions, potentially identified when excessively high fines are imposed, which may risk the continuity of the company's activities and harm its stakeholders.[20].

Legal scholars defend that the imposition of excessively high fines may hinder licit, pro-competitive business decisions[21], which makes the joint imposition of both monetary and

GERADIN, Damien; SADRAK, Katarzyna. "The eu competition law fining system: a quantitative review of the commission decisions between 2000 and 2017". Tilec discussion paper. 2017.

[16] OLIVEIRA, Renan Cruvinel de. Definindo Sanções Ótimas a Práticas Anticompetitivas e Corruptas: a punição a indivíduos por meio de mecanismos alternativos. Revista de Defesa da Concorrência - RDC, Brasília, v. 8, n. 2, p. 144-163, dez. 2020. Available at: https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/493. Last Accessed on : April 4, 2022..

[17] COOTER, Robert; ULEN, Thomas. Law and Economics. Boston: Addison-Wesley, 2012, p. 469.

[18] KOBAYASHI, Bruce H. Antitrust, agency, and amnesty: an economic analysis of the criminal enforcement of the antitrust laws against corporations. George Washington Law Review, v. 69, n. 5-6, pps. 715-744, 2001.

[19] Ginsburg and Wright, however, ensure that there are no empirical evidences suggesting that consumers anywhere are paying the costs of an overzealous cartel hunting. GINSBURG, Douglas; WRIGHT, Joshua. Antitrust Sanctions. Competition Policy International, Columbia, v. 6, n. 2, p. 3-39, 2010. Available at: https://www.law.gmu.edu/assets/files/publications/working_papers/1060AntitrustSanctions.pdf. Last Accessed on : 4 abril de 2022. p. No mesmo sentio, ver MARTINEZ, Ana Paula. Repressão a cartéis: interface entre Direito Administrativo e Direito Penal. São Paulo: Singular, 2013.

[20] In our view, this concern is in line with an institutionalist view of social interests. SALOMAO FILHO, Calixto. O novo Direito Societário. 4ª Ed. São Paulo: Malheiros, Cap. 2 – "Interesse Social: a nova concepção". SALOMÃO FILHO, Calixto. "Sociedades Comerciais. Contratualistmo, institucionalismo e análise estruturalista do interesse social", In Teoria Crítico-Estruturalista do Direito Comercial – Obras Selecionadas, São Paulo: Marcial Pons, 2015, pp. 159-172. NEDER CEREZETTI, Sheila C. A lei de recuperação e falência e o princípio da preservação da empresa: Uma análise da proteção aos interesses envolvidos pela sociedade por ações em recuperação judicial 2009 (Tese de doutorado). Para maiores detalhes, recomenda-se ouvir o podcast Direito Empresarial Café com Leite. #EP9. Available at: https://open.spotify.com/episode/73wUWsZZsJCMwLRKfbmW0B?si=FhITWyAfSBe01KOKUu3j_w. Last Accessed on : April 4, 2022..

[21] According to Kobayashi, "Under optimal penalties theory, excessive expected penalties must be avoided. The effects of higher than optimal penalties are collectively called overdeterrence. Overdeterrence can result when socially efficient behavior is deterred, e.g., when the benefits of the deterred crime would have outweighed the costs. In addition, socially efficient behavior can be deterred when there is a possibility of legal error, i.e., when the criminal law is erroneously applied

behavioral (obligations to do/refrain from doing) sanctions[22] more adequate, to the benefit of companies and their stakeholders.

1.3. General reflections defend the applicability of non-monetary sanctions

According to a structuralist perspective, the Law has the purpose of defining market structures[23], aiming at shaping such structures around centers of power that impart anticompetitive conducts and hinder markets. Non-monetary sanctions can also be viewed as tools to restructure markets, that point to the deterrence of future anticompetitive violations and to the withdrawal from market of companies and individuals that are non-compliant with the antitrust legislation.

Non-monetary sanctions may be able then to create structures that prevent new violations. Restructuring the markets' competitive dynamics could, therefore, consist in one of the purposes of non-monetary sanctions, fostering new entrances and, in consequence, raising the level of rivalry in the markets affected by the violations.[24]. Some scholars defend that fighting the concentration of economic power is key to create new socioeconomic structures that prevent abuses and future violations[25], as well as implement a compliance culture, which would lead to effective deterrence, given that violations would no longer be

to legal behavior. Finally, higher than optimal penalties induces corporations to make excessive expenditures on avoidance of sanctions, and detecting violations by their agents. This latter cost is especially relevant when considering corporate criminal liability". KOBAYASHI, Bruce H. Antitrust, agency, and amnesty: an economic analysis of the criminal enforcement of the antitrust laws against corporations. George Washington Law Review, v. 69, n. 5-6, 715-744, 2001.

[22] The concern over agency costs in the evaluation of optimal antitrust penalties also brings attention to the fact that there is a distinction between the level of penalties necessary for ideal dissuasion and the efficient allocation of such penalties over corporations and individuals. The simple optimal antitrust penalty standard ignores this distinction, and also many other complications, incorrectly, as it pushes an excess of punishment. GINSBURG, Douglas; WRIGHT, Joshua. Antitrust Sanctions. Competition Policy International, Columbia, v. 6, n. 2, p. 3-39, 2010. Available at: https://www.law.gmu.edu/assets/files/publications/working_papers/1060AntitrustSanctions.pdf. Last Accessed on : April 4, 2022.. p.

[23] One of the greatest proponents of the aforementioned structuralist school of thought, in Brazil, is professor Calixto Salomão Filho. SALOMÃO FILHO, Calixto. Direito concorrencial. Malheiros Editores, 2013. E SALOMÃO FILHO, Calixto. O Novo Direito Societário: eficácia e sustentabilidade. Saraiva Educação SA, 2019. Para maiores detalhes, ouvindo o próprio Professor Calixto, sugere-se o podcast Direito Empresarial Café com Leite. #EP30. Available at: https://open.spotify.com/episode/0bntEZ8NvnhO6jGLHqf96i?si=7hQ5Hr_cT6mfrQ7poN7oVQ. Last Accessed on : April 4, 2022..

[24] Forced controlling-interest alienation, for example, has been addressed by Ana Frazão as an efficient measure against economic wrongdoing, since it modifies the structure of the affected markets, by promoting the entrance of new players and bringing fresh air into the market with new practices, at the same time, it ensures the corporate continuity and the fulfillment of the corporate social purpose. (Ana Frazao em FRAZÃO, Ana. Arquitetura da corrupção e as relações de mercado. JOTA. 2016). In this sense, Calixto Salomão and Fábio Comparato argue that controlling shareholders, whether formally or empirically, must be punished in situations in which the control is exerted disregarding the corporate social purpose, such as in cases regarding unlawful conducts, by being deprived of such control, which must be expropriated and granted to another businessperson. (COMPARATO, Fabio Konder; FILHO, Calixto Salomão. O Poder de Controle na Sociedade Anônima. 6ª Ed. São Paulo. Forense. 2014. p. 478)

[25] SALOMÃO FILHO, Calixto. Teoria crítico-estruturalista do Direito Comercial. São Paulo: Marcial Pons, 2015. p. 238.

considered "regular conducts".[26] In this sense, enforcement would no longer be focused towards sanctioning isolated events, but could in fact be a tool to modify markets structures, competition dynamics and to deter future wrongdoings.

2. Brief Overview of two out of the Eight Brazilian Antitrust Non-Monetary Sanctions

Similarly, to the international experience, Brazil has also preferred to impose monetary sanctions to punish individuals and entities involved in anticompetitive conducts[27]. For example, in 2020, CADE collected as fine payments and pecuniary contributions the total amount of BRL 355,277,506.95 (approximately USD 70.3M). The contributions paid within the scope of agreements entered by CADE with defendants amount to BRL 140,906,042.00 (approximately USD 27.9M). CADE's Tribunal also judged 11 administrative proceedings in 2020, which resulted in the conviction for payment of fines that amounts BRL 138,477,556.16 (approximately USD 27.4M). Most of the convictions in administrative proceedings refers to cartel practices[28].

The Brazilian Competition Act ("Law 12,529/2011") is the applicable legal framework for the prevention and repression of violations of the economic order in Brazil. Article 37 provides for pecuniary sanctions for individuals and legal entities responsible for the violations, which are the ones mostly imposed by the CADE. Moreover, Article 38 provides additional sanctions to fines to be imposed when necessary to punish certain anticompetitive behavior by companies and their representatives or to deter new wrongdoers.[29] This Chapter focuses two out of the eight non-monetary sanctions provided in Article 38 of the Brazilian Competition Act (items II and VI). Comparing CADE's

[26] According to Calixto Salomão, the economic theory acknowledges that players' rationality naturally leads them to abuse. Given that Law isn't able to discipline economic power, because it is based on rules of conduct (focused on sanctioning isolated actions, and also unable to discipline a continuous activity or a pattern of behavior), corporate structure must then be disciplined by dominance relations. In SALOMÃO FILHO, Calixto. Teoria crítico-estruturalista do Direito Comercial. São Paulo: Marcial Pons, 2015. p. 241.

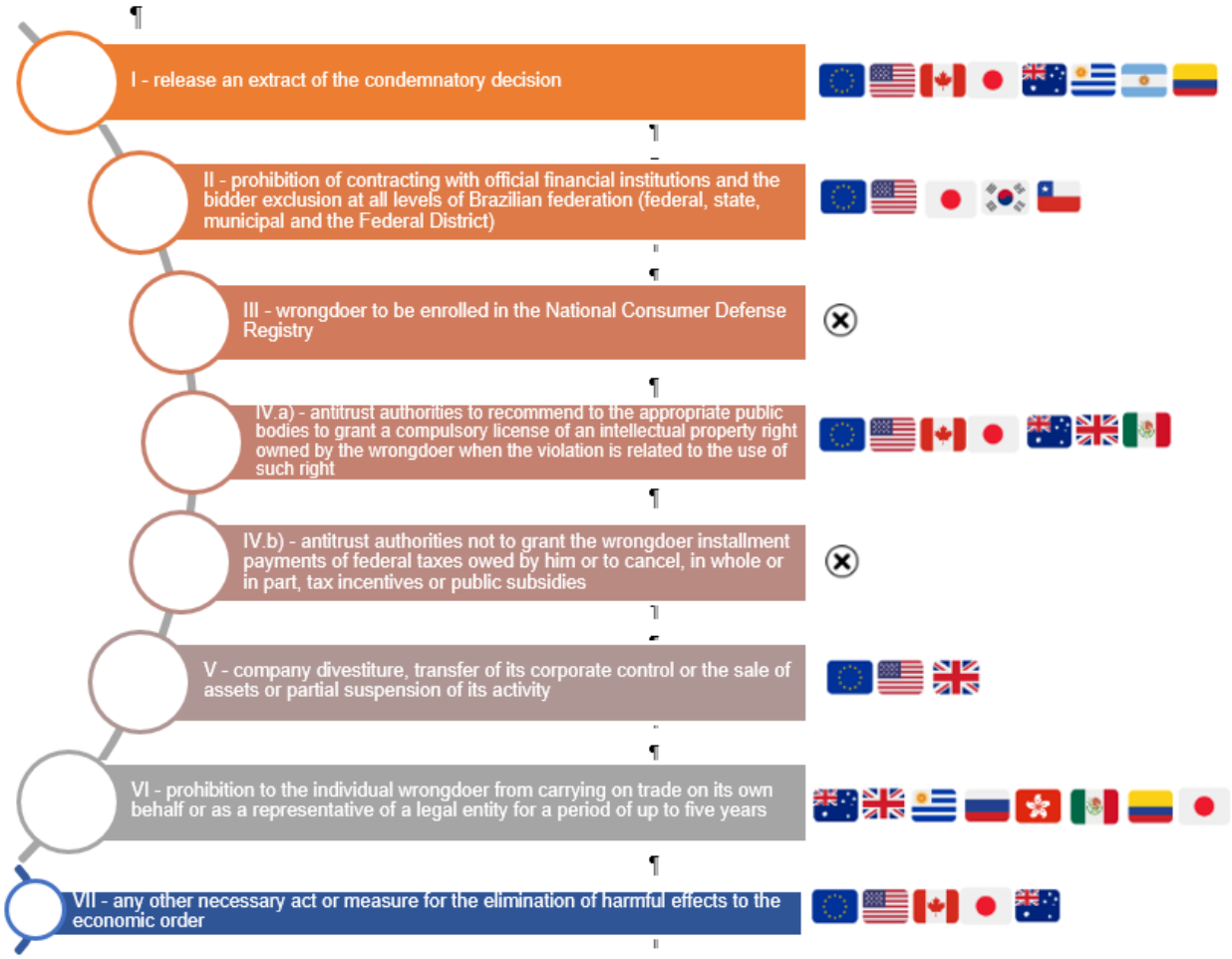
[27] OLIVEIRA, Renan Cruvinel de. Definindo Sanções Ótimas a Práticas Anticompetitivas e Corruptas: a punição a indivíduos por meio de mecanismos alternativos. Revista de Defesa da Concorrência - RDC, Brasília, v. 8, n. 2, p. 144-163, December 2020. Available at: https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/493. Last access on April 4th, 2022.

[28] BRASIL. Administrative Council for Economic Defense - CADE. Relatório Integrado de Gestão 2020. Summarized version. p. 11. Available at: <https://cdn.cade.gov.br/Portal/acesso-a-informacao/auditorias/2020/Relatorio-Integrado-de-Gestao-2020-versao-resumida.pdf>. Last accees on April 4th, 2022.

[29] Articles 39 to 43, in turn, provide for other measures to be taken in relation to the behavior of defendants (individuals and legal entities) in administrative proceedings when they jeopardize the progress of investigations or when they fail to comply with the order of CADE's Tribunal after the judgment of a conduct. Article 44 provides for a specific penalty for SBDC public servants and their service providers regarding the duty of confidentiality they have as a result of their activity. And, finally, article 45 points out the parameters to establish the dosimetry of the penalty. In addition, article 34 of Law 12,529/2011 allows the applicability of the disregard of legal personality incident. According to such provision, the legal personality of the party responsible for the violation to the economic order may be disregarded when there is abuse of right, excess of power, violation of law, fact or illegal act or violation of the companies' bylaws or articles of association. Moreover, the disregard of legal personality will also be applied when there is bankruptcy, state of insolvency, closure or inactivity of the legal entity caused by mismanagement, as set forth by the sole paragraph.

experience with international legislations, it is worth noting that, in certain scenarios, Brazil is aligned with the international best practices, but in others it may be different, either because CADE imposes unusual sanctions or because CADE fails to apply non-monetary sanctions usually imposed by other authorities.

Image 2 – Comparative analysis of the non-monetary antitrust sanctions in the Brazilian Competition Act and other jurisdictions



Source: the authors.

2.1. Article 38, item II of the Brazilian Competition Act and suggestions for enforcing the sanction of prohibiting to enter into a contract with official financial institutions and prohibiting to participate in biddings (bidder exclusion)

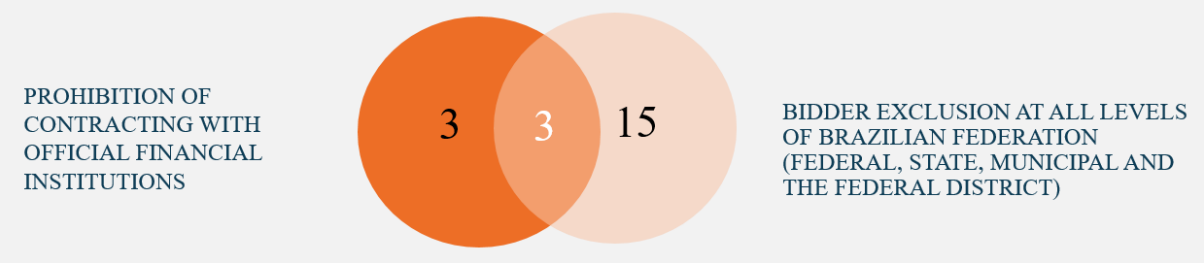
Out of 99 cases in which CADE imposed non-monetary sanctions between 2012 and 2022, item II of article 38 of the Brazilian Competition Act was imposed in 18 cases. There was a decrease in the frequency this non-monetary sanction was imposed over the years by CADE, with a sharp drop after 2014. According to ATHAYDE, GURGEL, MENEZES and ABREU[30] , that sanction is dual, since it may (i) prohibit to enter into a contract with

[30] ATHAYDE, Amanda; GURGEL, Gabriela Silva de C.B; MENEZES, Isabelle Albuquerque; ABREU, Thaiane Vieira Fernandes de. Da pena não pecuniária de proibição de contratar com instituições financeiras oficiais e de participar de licitações com o poder público - inciso ii do art.

official financial institutions and it may also (ii) prohibit to participate in biddings, applied isolated or cumulatively. Those sanctions typically refer to the relations between private agents and the Public Administration, in markets related to public services. The authors argue that, given the severity of such measure, CADE seems to be more careful when imposing it, sometimes replacing it by the sanction set forth by item VII of the Brazilian Competition Act ("any other necessary act or measure for the elimination of the harmful effects to the economic order"), or opting to only for one of the two sanctions, either isolated the (i) "prohibition to enter into contracts with official financial institutions" or isolated the (ii) "prohibition to participate in a bidding", such as provided by the image below.

Taking that into consideration, we understand that Article 38, item II, of the Brazilian Competition Act may be applied in cases where the underdeterrence is the main concern, when fines could be added with this non-monetary sanction, as well as in case of general perspective, since those sanctions could be implemented as a structural modification of the market. This sanction was imposed in most cartel cases, probably because cartels are, for their nature, the most severe anti-competitive conduct, which is why they fulfill at least one of the requirements established in article 38, *caput*, i.e., the severity of the circumstances. If a cartel affects a highly relevant market and a significant number of people, it also fulfills another requirement established under article 38, *caput*, the public interest. On the other hand, there is a concern about the previous evaluation of the decision's impacts on the affected market, which should refrain from unduly interfering in the competitive aspects of such a market. In this sense, the authors noted that CADE has imposed this sanction, especially against cartel leaders, to punish the most severe conduct. At the same time, CADE warned other players about the risks of participating in anti-competitive behavior and avoid eliminating too many players from the market at once, which could lead to supply restrictions in some cases.

Image 3 – Dual application: prohibiting to enter into a contract with official financial institutions and prohibiting to participate in biddings (bidder exclusion)



Source: the authors

Moreover, interesting to note that the **(i)** sanction that provide for a suggestion from CADE to the official financial institutes prohibition of contracting is far beyond the antitrust field. That leads to the fact that other authorities are not bounded by its decision. Therefore, it is essential that any broad sanction that requires measures to be taken by other authorities must be previously aligned so that the sanction is enforceable.

As a reflection for international antitrust practice, considering that jurisdictions such as European Union (especially in Germany, Spain and Portugal), the United States, Japan,

38 da lei n. 12.529/2011. In Sanções não pecuniárias no antitruste /organização Amanda Athayde. -- 1. ed. -- São Paulo: Editora Singular, 2022. Pp. 119-180.

South Korea, Argentina and Chile also have similar provisions to the **(ii)** sanction that provides for the prohibition to participate in biddings (bidder exclusion), it is possible to recommend best practices for this sanction:

- Analyze the proportionality of the sanction, especially with regard to the impact on markets directly and indirectly affected by the decision of the antitrust authority, as well as its socioeconomic consequences.
- Previously to its application, doing a market analysis. By prohibiting certain companies from participating in biddings, there would not be enough companies left able to compete for the provision of services, which could generate adverse impacts on the sector and on the provision of the service itself.
- That sanction could be applied not to all the defendants, but only to the ones mainly involved, typically referred as the leaders of the cartel.
- The duration of the sanction could be designed according to the characteristics of the perpetrated conduct and should not have a standard application of the maximum time.
- Other obligations could be imposed simultaneously to deter such companies to perform new anticompetitive practices, such as an additional imposition to implementing an effective compliance program.
- Extension of the prohibition of participation in bids also to companies in which individuals involved in the previous wrongdoing have any type of shareholding, managerial role or *de facto* representatives, so as the penalty is not bypassed.

2.2. Article. 38, item VI of the Brazilian Competition Act and suggestions for enforcing the sanction of prohibition to conduct business on its own behalf or as a representative of a legal entity

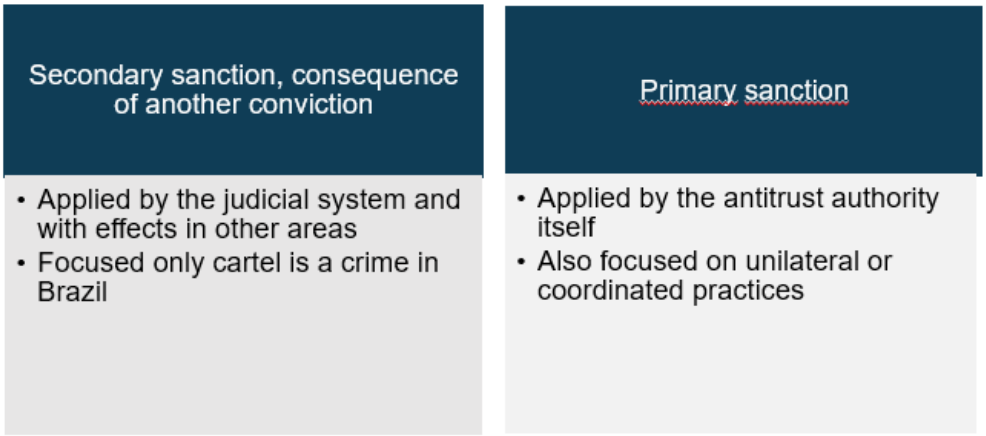
Out of 99 cases in which CADE imposed non-monetary sanctions between 2012 and 2022, item VI of article 38 of the Brazilian Competition Act was imposed in 3 cases. Initially it is important to understand that this is a sanction designed specifically to individuals. This can be understood as a dual sanction: (i) a secondary sanction, consistent of a consequence of another conviction applied by the judicial system; or (ii) a primary sanction, applied by the antitrust authority.

On one side, as a (i) a secondary sanction, an individual may be subject to a secondary sanction due to its prior conviction according to another legislation. That would be the case, for instance, of the Brazilian Civil Code (Art. 1,011), which provides that a conviction of a manager for insolvency crimes, prevarication, bribery, embezzlement, crimes against the financial system, against the competition, the consumers, would not be allowed to be companies' managers. Similarly, the Brazilian Corporation Act (Law No. 6,404/76) provides that individuals convicted for similar crimes would not be allowed to be managers in stock companies (Art. 147). Finally, the Brazil Solvency Act provides that one consequence of the conviction for its crimes would be the disqualification to conduct business activities, the impediment to be a board member and the impossibility to manage business.

By the other side, as a (ii) primary sanction, it would be applied by the authority itself, independently and as a direct consequence of the wrongdoing. Brazil's Competition Act is not the only legislation that provides for such sanction in the country. The Brazilian Central Bank ("BC") as well as the Brazilian Securities and Exchange Commission ("CVM") may apply a sanction to disqualify an individual to act as manager or board member for up to

20 (twenty) years. Similarly, the Financial Activities Control Council ("COAF") may apply disqualification sanctions to individual for up to 10 (ten) years. Also, it is possible that professional entities, based on sectoral private autoregulation applicable to the wrongdoer's job, prohibit him from exercising exclusive activities of the relevant profession. The Brazilian Competition Authority CADE has the competence to apply this type of primary sanction, prohibiting individuals to conduct business on its own behalf or as a representative of a legal entity for up to 5 (five) years.

Image 4 – Primary and secondary effects of the sanction: prohibition to conduct business on its own behalf or as a representative of a legal entity



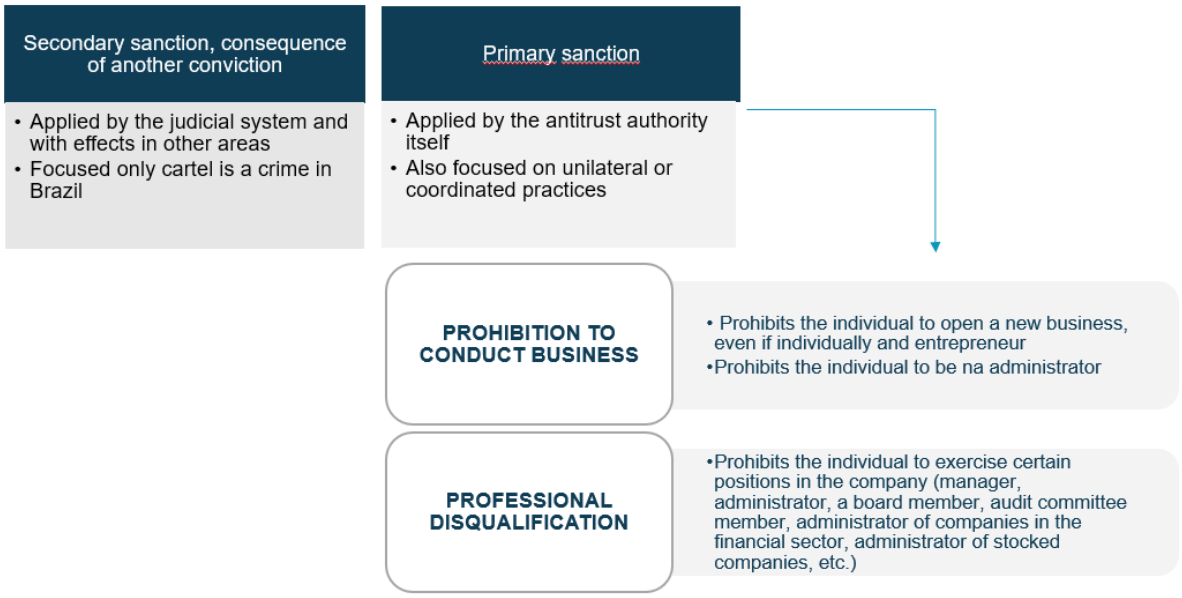
Source: the authors

This (ii) primary sanction may face two possible interpretations. It can be applied as a (ii.1.) prohibition to conduct business, as well as (ii.2.) professional disqualification.

The (ii.1.) prohibition to conduct business has been interpreted by CADE as a prohibition to be an administrator as well as a prohibition even to be a shareholder. It is uncertain, however, the extension of this prohibition. Would it restrict acting as a representative of the company? Would it prohibit the individual to open any other business, even individually as an entrepreneur? Due to the lack of effective application of this sanction by CADE and the Companies' Commercial Registry, those questions remain unanswered. That should not prevent, in our view, the possibility to hold shareholdings without having any business decision power, otherwise that could even undermine the companies' ability to attract capital to perform its activities. The question remains when it relates to a concentrated controller: could an individual prohibited to conduct business be allowed to be a shareholder with control power? The question also remains unanswered.

Additionally, the (ii.2.) professional disqualification sanction specifically relates to specific positions within a company, such as being administrator, a board member, audit committee member, director of companies in the financial sector, administrator of stocked companies, etc. This latest one seems to be narrowly applied, even though its impact may be even more powerful in the individual's sanctioned life.

Image 5– Dual application: prohibition to conduct business on its own behalf or as a representative of a legal entity



Source: the authors

ATHAYDE, CAUHY and DE ASSIS[31] discuss the difficult enforcement of the sanction of (ii.1.) prohibition to individuals to conduct business activities as a tool to deter anticompetitive conducts, for example in cases in which the wrongdoers are foreign, are not managers of companies in which they carried out the conduct or do not intend to conduct business in their own behalf. Given the peculiarities presented by the authors, a possible measure in cases in which the investigated individuals do not hold management positions or will not conduct business activities to ensure enforcement of the sanction, would be its extension to the professional disqualification. As argued by the authors, on one hand, the prohibition of carrying on trade would avoid the convicted individual from establishing a company in his own behalf and from occupying a manager position at companies. The authors of the paper, therefore, point out that the sanction and prohibition to conduct business is not common in foreign jurisdictions.

On the other one, the sanction of (ii.2.) professional disqualification would prevent the convicted individual from exercising certain positions or functions within the company, such as manager and member of the board of directors, or certain positions in specific markets, such as manager of financial institutions or of companies in the capital market, for example. Therefore, the sanctions result in different prohibitions, but both provides for the prohibition of the exercise of management activities. The authors identified in several jurisdictions the sanction of professional disqualification, such as United Kingdom, Australia, Russia, Hong Kong, Argentina, Chile, Mexico, Sweden, Ireland, India, and Japan. However, the authors highlight that the sanction, especially in cases where they

[31] ATHAYDE, Amanda; CAUHY, Bárbara De'Carli; ASSIS, Larrisa Salsano de. Da pena não pecuniária de proibição de exercer comércio em nome próprio ou como representante de pessoa jurídica – inciso vi art. 38 da lei n. 12.529/11. Sanções não pecuniárias no antitruste /organização Amanda Athayde. -- 1. ed. -- São Paulo: Editora Singular, 2022. Pp. 309-368.

extend over time, should be imposed with caution and only in severe cases, given that many years out of the market could make the re-entry of a professional unfeasible.

Applying the disqualification sanction would be relevant on the underdeterrence perspective in as support to enforce antitrust rules to individuals, and it may be an alternative to overdeterrence of companies, whenever the circumstances of the case suggest that the company did all its best efforts to prevent the wrongdoing, but still the person performed it. As a reflection for international antitrust practice, considering that jurisdictions also have similar provisions to the (ii.2.) professional disqualification, it is possible to recommend best practices for this sanction:

- Analyze prior to the application the degree of participation of the individual.
- Analyze prior to the application the position occupied by the individual during the committed wrongdoing.
- Project the probability of recidivism by the individual, considering the evidence of the case.
- Preventing the application in cases where there are no positive outcomes of the sanction in the market, due to the risk of sounding disproportionate if questioned by the judicial system.
- Preventing the application when the professional disqualification may constitute a life penalty for the individual.
- Strengthening of the interconnections with class entities.

The substantive analysis carried out by CADE to explain the imposition of non-monetary sanctions established under article 38, VI, of the Brazilian Competition Act can be attributed to the underdeterrence perspective, which refers both to the public interest and the severity of the circumstances criteria. The decision handed down in the administrative proceeding explained only the grounds related to the severity of the circumstances standard, showcased in the considerations about the very long duration of the cartel, with individual actions taken by the persons involved in the conducts, in the extensive period. As for the analysis of the grounds for the imposition of sanctions established under article 38, VI, two primary purposes can be identified: deterrence, concerning the effectiveness of the sanctions, and punitive, to severely punish the primary wrongdoers involved in the conduct. Additionally, this sanction could be intented to apply more severe sanctions to individuals instead of overenforcing companies, and in this sense this could be seen as an alternative to companies overenforcment as well.

3. Conclusion

Various conclusions may be drawn from the investigation carried out in this paper, which alludes to the book published in Portuguese dedicated to this subject. Non-monetary sanctions are seen over the years as complementary to fines and, by default, applied cumulatively. This is related to the lack of concerns the competition authorities tipycally have with overdeterrence and to a significant focus on the underdeterrence perspective, which seldom meets the general aspect mentioned throughout this paper. Therefore, there is a need to question the need of such a punitive approach and whether it has to advance in proportionality and reasoning of the decisions.

Another conclusion intimately related to the focus on underdeterrence is that more attention is given to the severity of unlawful conduct rather than the effects that the sanctions

imposed may have on the markets affected by the wrongdoing. In other words, there is no structured and organized concern regarding the consequences of the imposition of non-monetary sanctions. That is why a substantive analysis is needed, for example, to prevent the general perspective from being exclusively associated with recidivism, as the authors identified in some cases, in a way that allows decisions to reach their maximal deterrence power while causing minimal adverse impacts.

The authors remark that the sole imposition of non-monetary sanctions without the application of fines could also be possible and potentially an alternative in some cases to prevent overdetterence and to effectivelly asses the core of the wrongoing, alhought it could eventually lead to questioning, either administratively or in the judicial system, if the non-monetary sanction would be too innovative.