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Purchasing Power and Buyers' Cartels – Note by Brazil

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Brazil[1]

1. Buyer power and the Brazilian antitrust legislation

1. One of the objectives of Brazilian antitrust legislation is to prevent the abuse of economic power. According to Article 36, Items I through IV of Law 12529/2011 (the Brazilian Competition Law), a practice is considered an antitrust violation, regardless of fault, if aimed or intended to lessen, distort, or harm free competition or free enterprise in any way; control the relevant market of goods or services (except if as the natural result of being the most efficient player); arbitrarily increase profits; and abuse a dominant position.

2. Thus, under the Brazilian antitrust law, holding economic power does not constitute a violation[2]. However, if players abuse their economic power by changing market conditions in a coordinated or unilateral manner, harming consumers and competition, they commit an antitrust violation.

3. The economic power of players is not only demonstrated through sales but also buyer power, through which a market player – usually an intermediary in the supply chain – can change conditions in the buyers' market and pay less for a good or service.

4. Buyer power can occur in two manners: monopsony power and bargaining power.

5. In case of a monopsony, a player in a downstream market (or players, in the case of an oligopsony) does not take the prices offered by the upstream market but imposes its market power on numerous suppliers.

6. Monopsony power occurs in violations such as buyers' cartels, i.e. fraudulent agreements intended to change the dynamics of a free market. In these, cartelists act as a single buyer to exercise its monopsony power over sellers. Similarly to sellers' cartels, buyers' cartels are described in the Brazilian Competition Law (Article 36, Items I through IV and Paragraph 3, Item I, Subitems "a" through "d"):

> *Art. 36. It is considered an economic crime, regardless of fault, each and every practice carried out anyhow, intended to or which can have the following effects, even if not successful:*
>
> *I. lessen, distort, or harm free competition or free enterprise in any way;*
>
> *II. control the relevant market or goods or services;*
>
> *III. arbitrarily increase profits; and*
>
> *IV. abuse a dominant position.*
>
> *(3) The following practices, amongst others, insofar as they have been provided for in the head of this Article or in its Items, are considered antitrust violations:*

[1] This paper has been written by Diogo Thompson de Andrade, Assistant Superintendent at CADE, and Jade Vinagre e Lima, Advisor of CADE's Office of the Superintendent General; and translated from Portuguese to English by Ariel Menezes and Arianne Mesquita, translators at CADE's International Unit.

[2] Law 12529/2011, Article 36, Paragraph 1: "Being the most efficient player and thus naturally achieving market dominance does not characterise the illegal activity provided for by Item 2 of the head provision of this Article."

I. agree, arrange, manipulate, or collude with competitors, in any way:

a) the prices of goods or services individually offered;

b) the production or trade of a restricted or limited amount of goods, or the provision of a restricted or limited amount, quantity, or frequency of services;

c) the division of parts or segments of a current or potential market for goods or services, by means of, amongst others, allocating customers, suppliers, regions, or periods;

d) the prices, conditions, advantages, or non-participation in government procurement;

7. Conversely, bargaining power generally occurs when one or a few buyers relate with one or a few sellers; hence, buyer power is not imposed unilaterally by one of the sides but is a result of the relationship between the vertically related players.

8. In certain conditions, buyers can arrange to exercise their bargaining power and have better buying conditions with suppliers. These arrangements, however, cannot fake or exceedingly restrain competition. If they do, the practice constitutes an abuse of buyer power and should be investigated and punished by the Brazilian antitrust authority.

2. CADE's probes of buyer power practices

9. Over the years, CADE has been consolidating several methodologies to assess buyer power in its investigations and case law.

10. With regard to buyers' cartels, the authority's Administrative Tribunal has repeatedly taken the position of considering them per se violations. The Tribunal believes that, although buyers' cartels reduce prices for intermediary buyers, they produce effects typical of monopsony power. That is, compared to a competitive market, the cartel results in a smaller amount of bought goods, affecting the end consumer and influencing how prices are set.

11. This practice, thus, leads to allocative inefficiency, as non-consumed goods become deadweight loss and contribute to reducing welfare. Furthermore, in the long term, prices imposed on the supplier market (upstream) could diminish product quality and innovation or even raise prices to offset the initially lower demand. Finally, less competition in the buyer market can increase power and facilitate collusion in the seller market (downstream). Hence, earnings gained with the price reduction are very unlikely to be passed on to consumers since intermediaries have no incentive to do so[3].

12. Therefore, collusive practices in the buyer market – described in Article 36, Paragraph 3, Item I of Law 12529/2011 – are deemed illegal for their potentially harmful effects. Hence, as a rule, CADE ascertains whether there is probable cause to suspect of an anticompetitive agreement.

13. Conversely, in practices involving the exercise of bargaining power, the authority tends to examine whether an agreement is anticompetitive according to the rule of reason. In doing so, it looks at the existence of (i) a dominant position in the buyer market; (ii) potentially anticompetitive effects as a result of the practice; (iii) potential efficiencies,

[3] See Annex I of Technical Opinion no. 083/2020/CGAA6/SGA2/SG/CADE (CADE. Case no. 08700.004404/2016-62, Document SEI no. 0797758, p. 15-20).

which should be passed on to consumers, even if partially; and (iv) more efficiencies than anticompetitive effects (and if they could be obtained through less harmful ways).

14. This methodology is applied once bargaining power creates efficiencies that can be passed on to consumers, especially when it gives rise to countervailing power, which eliminates the effects of a seller's monopoly or oligopoly (upstream market).

15. Nonetheless, practices that result in excessive or unjustified anticompetitive restraints or whose efficiencies, if any, are unlikely to be passed on to consumers, are considered illegal and therefore punished by the antitrust authority.

16. Commissioner Paulo Furquim de Azevedo applied this same rationale in his vote as rapporteur of the Rede Economia case (Case no. 08012.006241/1997-03), examining the legality of an alliance between chemists and pharmacies to buy medicine at cheaper prices:

> *... firstly, does the agreement have an anticompetitive potential? Yes. It tampered with pricing;*
>
> *Is the agreement a naked restraint or a kind of joint venture? Does it have the potential to create efficiencies or benefits to end consumers? Yes. Thus, we will continue the analysis. Otherwise, it would already constitute an illegal agreement.*
>
> *Is the exercise of market power plausible? Yes. It controls 21% of the market, which exceeds the threshold to assume a dominant position. If this were not the case, we would have to dismiss the proceeding.*
>
> *Fourthly, is there evidence that the product creates substantial efficiencies by reducing signatories' costs or improving the quality of products and services? Note common brand appears in Hovenkamp – not as common brand, actually, but as the existence of substantial economies of scale and free rider problems, which are usual in common brands and would warrant it. Thus, I would say yes to item 4. If it is "yes", then the analysis continues; otherwise, it would constitute a violation.*
>
> *Fifthly, ... can the same efficiencies be obtained through alternate, less anticompetitive ways? Certainly. If that is so, it is a violation. (CADE. Case no. 08012.006241/1997-03, Rapporteur: Commissioner Paulo Furquim de Azevedo, 448th Ordinary Hearing, Document SEI no. 0015328, p. 2260-2261).*

17. As the agreement had potential efficiencies, the Administrative Tribunal concluded it was not a per se violation. Nevertheless, considering it could reap potential benefits by alternate and less harmful means, the Tribunal agreed the practice abused bargaining power and was, thus, illegal[4].

18. CADE has also considered other practices as illegal per se, depending on their context. An alliance of hospitals, clinics, and health insurance plans that imposed fixed prices for medical services is an example, as seen below.

3. CADE's experiences with buyer power

19. The Brazilian antitrust authority has faced and debated the issue of companies' buyer power over the last decades.

[4] A similar analysis was employed in Case no. 08012.005135/2005-57, filed by Unidas, a non-profit organisation of health insurance companies. In this case, CADE applied the rule of reason, understanding the joint purchase of medical services did not produce positive liquid effects.

20. In October 2020, CADE held a countrywide event on the fight against cartels in which the importance of this topic was stressed as to competition advocacy. Professor Ignacio Herrera Anchustegui showed many approaches adopted to address buyers' cartels and buying alliances, focusing on the experiences of the European Union, the United States, and Brazil.

21. As for merger control, the Office of the Superintendent General (the investigative arm of CADE) usually examines buyer power increases, especially if this growth can also mean an increase in merging parties' monopsony or oligopsony power[5].

22. With respect to the analysis of violations, although there are fewer cases about buyer power than seller power, the authority has assessed buyer power and deemed it illegal several times. Moreover, some cases pending before the Office of the Superintendent General regard the existence of agreements between buyers, as seen below.

3.1. Buyer power cases heard by CADE

3.1.1. Cartel in the buyer market of cattle for meat (cartel of meat cold stores)

23. One of the first cases of buyers' cartels CADE investigated and deemed illegal involved the meat purchase market.

24. The authority launched the case in 2005, from a complaint filed by Brazil's farming confederation (CAN). According to the claimants, meat cold stores negotiated price-fixing agreements to unify their meat purchase conditions.

25. The participants of these agreements prepared a document establishing discounts imposed on cattle raisers based on cattle's weight and other features. The prices were set during on-site meetings held between the meat cold stores in the city of São José do Rio Preto, inland state of São Paulo, in 2005.

26. In addition to the documents included in the claim, CADE conducted a search and seizure in one of the investigated companies. The authority also requested information from market research institutes on the daily price of fat cattle in the affected market from 01/01/2001 to 31/03/2005.

27. In his vote, the rapporteur of the case, Commissioner Luis Fernando Schuartz, considered it a cartel and a per se violation. Thus, the existence of agreements to fix buying conditions is enough to constitute a violation.[6]

[5] For instance, CADE further investigated monopsony and oligopsony power in the Sadia/Perdigão and Fischer/Citrovita mergers. As to the former, the authority examined merging parties' increased buyer power in the buyer markets of livestock and poultry for slaughter (pigs, chickens, and turkeys). As to the latter, the applicants executed agreements with CADE to address post-merger issues in the buyer market of orange juice concentrate. Both were analysed according to the former Competition Law (Law 8884/94). Recently, the Big/Carrefour merger (Case no.08700.003654/2021-42) also raised antitrust concerns and prompted further scrutiny by the Office of the Superintendent General, which assessed applicants' buyer power and other aspects of the deal.

[6] "I believe the records provide enough evidence that a per se antitrust violation was committed. Although there is no direct evidence of antitrust activity … as it is usually the case with cartels, we can infer from the evidence presented that the practice aimed to lessen competition. Moreover, the evidence met the standard of proof for an administrative proceeding. (CADE. Case no. 08012.002493/2005-16, Rapporteur: Commissioner Luis Fernando Schuartz, Document SEI no. 0183166, p. 106, §40).

28. In the end, CADE convicted four meat cold stores for the practice, imposing fines of 5% of the companies' gross turnover in 2004 (the year before CADE launched the case). In addition to the fines, the Brazilian Fund for De Facto Joint Rights[7] collected over BRL 15 million in financial contributions as a result of a cease and desist agreement executed in 2007 with one company and two individuals who were parties to the case. It was one of the first cease and desist agreements ever executed by CADE.

3.1.2. Cartel in the Brazilian buyer market of orange (orange juice cartel)

29. Another investigated conduct in which CADE found illegal buying agreements was the orange juice cartel.

30. The concerted practice occurred from 1999 to 2006 and involved 22 individuals and 10 companies of frozen orange juice concentrate. The probe revealed anticompetitive agreements to fix prices paid to oranges producers, market allocation schemes, and the exchange of competitively sensitive information.

31. Based on a complaint by the Committee for Consumer Protection, Environment, and Minorities of the Chamber of Deputies of Brazil, the investigation resulted in three administrative proceedings (Cases no. 087010.000729/2016-76, 08700.000738/2016-67, and 08700.000739/2016-10). Moreover, one of the defendants signed a leniency agreement with CADE that gave rise to search and seizures in 2006.

32. Investigators scrutinised four companies, one individual, and one association, which provided evidence of the cartel. Some evidence pointed to the exchange of emails with competitively sensitive information (e.g. prices paid for the input).

33. In reviewing the case, the Tribunal of CADE found a per se violation. As stated in the vote of rapporteur Paulo Burnier, joined by the other commissioners of the Tribunal: "Being it a cartel, i.e. a per se violation, once the violation is proved, there is no need for further analysis, such as about the its effects, since the practice itself entails a harmful potential as the Tribunal of CADE has already evidenced". (Cases no. 087010.000729/2016-76, 08700.000738/2016-67, and 08700.000739/2016-10; Rapporteur Paulo Burnier; Document SEI no. 0447416). The rapporteur considered the reports and evidence were sufficient to prove the cartel, an illegal conduct.

34. However, in 2018, CADE dismissed the case as to 2 companies and 11 individuals for lack of evidence and exempted 2 other firms that were not operating during the investigated period.

35. The authority also dismissed claims against 7 companies and 11 individuals that signed agreements with CADE. In total, eleven cease and desist agreements were entered, resulting in BRL 301 million in financial contributions to the Fund for De Facto Joint Rights.

[7] The Fund for De Facto Joint Rights, managed by the Ministry of Justice and Public Security and the Secretariat for Consumer Protection (Senacon), "has the mission of protecting and repairing harm inflicted to de facto joint rights" (https://legado.justica.gov.br/seus-direitos/consumidor/direitos-difusos/institucional, accessed 11 April 2022). Hence, the resources of the fund are used in projects to prevent or repair harm to the environment, historic and artistic heritage, consumers, the economy, workers, elders and people with special needs, and public property, under the terms of Article 1 of Law 7347/85.

3.1.3. Price fixing in the healthcare industry

36. Over the years, CADE has examined and reviewed several practices related to buyer power in the Brazilian private health insurance market, such as fixing prices for healthcare service payments.

37. As mentioned, CADE's case law has deemed a per se violation the price fixing of medical services by alliances of hospitals, clinics, and health insurance plans. As the alliance has high bargaining power compared to healthcare providers and, consequently, no weakness in relation to the upstream market, the effects of countervailing power would not create efficiencies to justify setting uniform prices and conditions for the services. For that reason, the authority is reviewing the case.[8]

38. In general, CADE's case law on fixing healthcare service prices follows the parameters below:

Table 1. CADE's position on different price-fixing methods

Prepared by:	Type:	Analysis method:	Current rules:
Individual physicians (1)	Purchase and sale	Modified rule of reason	***All physicians** can jointly negotiate *suggested* prices, provided the minimum requirements are met: strikebreakers should not be coerced, strikes should have time limits, floor prices should have price ranges to allow price variation, etc. CADE's position was relaxed with regard to physicians as it noted their weaker position vis-à-vis buying alliances.
Hospitals, clinics, and health insurance plans	Purchase or sale	Per se violation	***Hospitals, clinics or health insurance plans cannot** jointly negotiate the sale or purchase of services or, especially, create price lists.
Price list by CMED (the Drug Market Regulation Chamber of Brazil)	Price ceiling allowed by law	The law allows CMED to disclose a price list for drugs.	The law allows CMED to disclose a price list for drugs.

Note (1): Or organisations that represent physicians (e.g. the Brazilian Federal Medical Council, Regional Medical Councils and Medical Associations).
Source: CADE, 2021, p. 34 (Portuguese only).[9]

3.1.4. ACAPS – Supermarket Association of the State of Espírito Santo

39. In 2014, CADE launched an administrative procedure to investigate an allegation of abuse of dominant position by ACAPS, the Brazilian supermarket association of the State of Espírito Santo, which influenced other players to adopt certain prices.

40. CADE started the investigation on its own motion, based on press releases and media news alleging ACAPS aimed to terminate contracts with company Alelo's meal voucher due to "a disagreement regarding fee reduction as Alelo did not accept to negotiate with the alliance but only with supermarkets individually". Thus, the antitrust authority launched a preliminary enquiry – followed by an administrative enquiry – to probe allegations that ACAP imposed anticompetitive conditions in the relation between its

[8] See Cases no. 08012.005374/2002-643 and 08012.001020/2003-21.

[9] CADE. Cadernos do Cade - Mercado de Saúde Suplementar: Condutas. Ed. Ed. Rev. e Atual. Brasília: Departamento de Estudos Econômicos (DEE), 2021, p. 34.

affiliated supermarkets and Alelo in the meal voucher industry through boycotts, agreements, and fixed fees and business conditions.[10]

41. In 2015, after hearing the parties, the case was settled by the entry of a cease and desist agreement with ACAPS. By the agreement, ACAPS committed to stop the investigated practices: influence the adoption of set prices; coerce or induce affiliates to negotiate fees and business conditions collectively or to intermediate such negotiations; and carry out, encourage, and coordinate boycotts against meal voucher companies. Additionally, the association was liable for a financial contribution of BRL 100,000.00 to the Fund for De Facto Joint Rights.[11]

3.2. Pending buyer power cases

42. In addition to the above, the Office of the Superintendent General of CADE is investigating at least three practices related to buyer power and buyers' cartels – one of them in the international scope, with effects in Brazil:

3.2.1. Cartel in the Brazilian market of animal by-products

43. A noticeable cartel case under review at CADE affected the market of animal by-products between 2009 and 2018. Members of the cartel divided the market, imposed barriers to rivals, and exchanged competitively sensitive information.

44. CADE's probe derived from an investigation carried out by the Prosecution Services of the State of Rio Grande do Sul, brought to the antitrust authority's knowledge by a criminal court of the judicial district of Lajeado, Rio Grande do Sul. The antitrust investigation included tapped calls, bugged conversations, and testimonies, which pointed out to an illegal activity involving rendering plants and shipping carriers.

45. In its technical opinion, the Office of the Superintendent General analysed purchasing power, stressing the agreement strengthened the monopsony power between the companies, dismissing the idea of analysing it as bargaining power.

> *54. Bargaining power also depends on the price elasticity of supply. The less elastic is the supply curve, the lower the supplier's ability to decrease the amount offered if input price decreases, which consequently increases the bargaining power of companies that produce goods in the downstream market. Equally essential is buyer's rivalry level. If buyers aggressively compete amongst them, the input price will be close to the marginal value of the final output, meaning the companies in the downstream market will have less bargaining power.*
>
> *55. Nonetheless, this market structure is not applicable to the case at hand. On the buyer side, this market is an oligopsony that … can be regarded as a monopsony since the respondents colluded by dividing suppliers and fixing prices as if they were a single player in the market.*
>
> *56. Conversely, the suppliers are slaughterhouses and meat cold stores that operate individually and do not have a significant market share to challenge the buyer power of the respondents; alternatively, they can constitute a concentrated market, depending on the region/state covered by the conduct.*

[10] CADE. Case no. 08700.009515/2014-01, Document SEI no. 0004141, p. 1.

[11] CADE. Cease and Desist Agreement Application no. 08700.008213/2015-99, Document SEI no. 0108003, first and third clauses.

46. Recently, CADE approved 4 cease and desist agreements, dismissing claims against 8 companies and 12 individuals that pleaded guilty and committed to cease the practice, cooperate with investigations, and pay financial contributions. The signatories agreed to pay around BRL 18.7 million in financial contributions to the Fund for De Facto Joint Rights.

47. The case is under investigation at the Antitrust Analysis Unit 6 of the Office of the Superintendent General (SG). Once the SG completes the investigation and issues a technical opinion, the case is submitted to the Tribunal of CADE for consideration.

3.2.2. Cartel in the market of broadcasting rights for sporting events

48. In February 2022, the SG launched an administrative proceeding to investigate an alleged international cartel that affected the Brazilian market of broadcasting rights for sporting events and provision of consultancy-related services (Case no. 08700.002012/2021-26). A total of 8 firms (intermediaries of sporting rights and/or television stations) and 37 individuals are subjects of investigation for participating in a conduct that occurred around 2008 through 2017.

49. The conduct could be regarded as a buyers' cartel since the case was launched due to strong evidence that the involved parties signed anticompetitive agreements to fix prices and rig bids in private procurement processes for broadcasting sporting events. The parties allegedly exchanged competitively sensitive information to divide the market with practices such as joint bids, cover bids, and bid suppression.

50. To assess an anticompetitive practice CADE must analyse whether it has (or could have) effects in Brazil. This was the case, as the SG considered the conduct involved mainly procurement processes for broadcasting rights at a global or at least multi-territorial level. Moreover, some of the sports broadcasting rights and related rights were resold or sublicensed to Brazilian broadcasters and/or associated to other sporting events in Brazil.[12]

51. The conduct would have affected sports federations, sports clubs, and other rights holders that posted bid invitations (i) for sporting rights and other related rights or (ii) for the appointment of players, advisers, and consultants to sell the rights along with their owners. Additionally, the lower investment in events licensed for broadcast in the country indirectly affected the Brazilian audience, and event promoters and participants were underpaid due to buyers' coordination, resulting in fewer international events broadcasted in Brazil or with inferior quality.

52. The case is under investigation at the Antitrust Analysis Unit 7 of the SG. Once it completes the investigation and issues a technical opinion, the case is submitted to the Tribunal of CADE for consideration.

3.2.3. Cartel in the market of labour supply for healthcare products, equipment, and services.

53. Another relevant case pending at the SG regards an alleged cartel that involved human resources departments of 36 firms and 108 of its employees and former employees (Case no. 08700.004548/2019-61).

54. The SG issued a public technical opinion mentioning the conduct, which involved companies based in the metro area of São Paulo that jeopardised the labour supply of

[12] Law 12529/2011, Article 2: "This Law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory or that produce or may produce effects thereon."

healthcare products, equipment, and services. Furthermore, as a consequence of the higher monopsony power, it also affected the market of healthcare products, equipment, and services itself. Hence, the practice had effects on the upstream market (labour supply) and downstream market (sale and provision of healthcare products and services).

55. The anticompetitive conduct concerned (i) regularly exchanging commercially and competitively sensitive information on salaries, pay raises, and benefits offered to employees and/or future employees; and (ii) sporadically fixing prices and business conditions in hiring labour and HR personnel and in paying their salaries, pay raises, and benefits. The SG estimates it occurred from at least late 2009 to early 2018.[13]

56. Although the probe is still in its initial stage, the case reveals several complexities about collusive or coordinated conduct in the labour market, in which companies that do not produce competing products nevertheless compete for labour. Buyer power in this market happens through several practices: from the sharing of sensitive information to the more serious practices of no-poach and non-compete agreements, which compare to hard-core cartels. In the light of Brazilian competition law, however, they are all under the umbrella of collusion and, thus, constitute per se violations. That does not mean there are no differences as to severity nor that, in the case of sharing sensitive information, the authority cannot assess the nature of the information and determine (based on the evidence and context of the case) whether it truly constitutes competitively sensitive information, which would be prohibited due to its very nature.

57. The case is under investigation at the Antitrust Analysis Unit 8 of the SG. Once it completes the investigation and issues a technical opinion, the case is submitted to the Tribunal of CADE for consideration.

[13] According to the Office of the Superintendent General's Technical Opinion no. 36/2021/CGAA8/SGA2/SG/CADE, "the case was conducted by an unincorporated cooperation group self-identified as "MedTech" or "Grupo MedTech". MedTech initially aimed to substitute consultancy hiring by providing market knowledge about healthcare professionals' hiring terms. To this end, MedTech sent e-mails to member requesting information on their current and future practices according to professionals' position and qualification (salary and benefit policies), calling these e-mails 'short consultations' … For the purpose of organisation, MedTech often attached a spreadsheet to the e-mail so the recipient would fill it out. MedTech comprised individuals and firms. Despite its unincorporated nature, the group sought to be a relatively institutionalised organization. It had an official logo, roll of members, working subgroups for specific topics, a website project, internal rules for entering or leaving the group, regular in-person meetings, exchange of information on salaries and benefit policies (mainly via e-mail and standardised lists/sheets), amongst others. The exchanged information was (i) shared with the members of MedTech directly, (ii) about participating companies' current or future plans; (iii) disaggregated and individualised; and (iv) restricted to MedTech members only … The exchange of information had trade purposes and was used to inform strategic decisions of the involved companies. Moreover, it influenced them to adopt a similar or uniform behaviour". (CADE. Case no. 08700.004548/2019-61, Doc. SEI 0877689, p. 4-5).