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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**Cancels & replaces the same document of 21 November 2022**

**Director Disqualification and Bidder Exclusion – Note by Brazil**

29 November 2022

This document reproduces a written contribution from Brazil submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at  
[www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm](http://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm)

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## *Brazil<sup>1</sup>*

### 1. Introduction

1. This paper addresses the imposition of penalties of prohibition from participating in government procurements, more precisely the disqualification of bidders and company directors due to antitrust violations as per the Brazilian Competition Law and CADE's precedents. According to the OECD, these are the excluding sanctions that purchasing authorities, legal bodies, and antitrust authorities can impose on individuals engaged in anti-competitive conduct.

2. The basis for this analysis is Law 12529/2011, which structures the Brazilian Competition Defence System and establishes the work of CADE as an antitrust authority with powers to prevent and repress economic violations within the administrative field. Therefore, we stress the discussion we put forward covers CADE's jurisdiction, that is, the administrative field only. In Brazil, anti-competitive conduct—such as cartels and unilateral conduct—can affect the administrative, criminal, and civil spheres. CADE adjudicates the competitive aspect of the conduct in the administrative sphere, whilst the Judicial Branch is responsible for adjudging it in the criminal and civil spheres if necessary (that is, depending on the type of proceeding and the case at issue).

3. Brazilian law establishes several types of penalties for cartel practices, such as incarceration, fines, and obligations to do or not to do. Incarceration, for instance, only occurs within the criminal sphere; upon a criminal lawsuit filed by the Brazilian Prosecution Services: penalties provided in Law 8137/1990, which sets forth economic crimes, tax crimes, and crimes against consumers. The antitrust authority, however, cannot sentence an individual to incarceration. Similarly, CADE does not adjudicate private compensation claims for competition damages because they happen in the civil field, which is under the jurisdiction of the judicial branch. Thus, the judiciary can review cases adjudicated by CADE. However, in recent years it has only reviewed decisions on procedural grounds—rarely on the merits. Supreme Court Justice Luis Fux has supported this position in his decision on Extraordinary Appeal no. 1083955: “As a body with technical expertise on economic matters and great institutional capacity, judicial reviews should respect the merits of CADE's decisions. The review should be limited to analysing the lawfulness or misconduct of an administrative case, per this Supreme Court's strong case law.”<sup>2</sup>

4. In sum, CADE is a government agency with jurisdiction over competition matters (including final appeals) in the scope of the executive branch, acting in the administrative field of law. Therefore, the penalties it can impose on a party are those listed in Law 12529/2011.

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<sup>1</sup> This paper was prepared by Dario da Silva Oliveira Neto, Former Head of the Technical Advisory Unit to the Office of the President of CADE, and Isabella Santiago Accioly, Technical Advisor at the Office of the President of CADE. It was translated from Portuguese into English by Arianne Mesquita, Ariel Menezes and Bruna Assunção, in-house translators at CADE's International Unit.

<sup>2</sup> See the complete decision: < <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15340341922&ext=.pdf> >. Portuguese version only.

5. After clarifying the different spheres of law involved in adjudging anti-competitive practices, we can move on to analyse CADE's punishment for these practices. As mentioned in Brazil's contribution to the OECD roundtable *Purchasing Power and Buyer's Cartels*: "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 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; abuse a dominant position"<sup>3</sup>.

6. Contrary to the antitrust legislation of other jurisdictions, Article 36 of the Brazilian Competition Law does not distinguish between collusive behaviour (cartels) and unilateral conduct (price fixing, margin squeeze, market foreclosure, etc.). Thus, once the Tribunal of CADE convicts a firm or individual for anti-competitive conduct—meaning collusive or unilateral conduct (the latter not so common for individuals, except in cartel cases)—the convicted party is levied a fine, provided in Article 37 of the law. However, if the Tribunal requires so, it can add the other penalties provided for in Article 38. In general, as Law 12529/2011 does not distinguish the penalties for cartels and other anti-competitive practices, such as unilateral conduct, they can apply to any case. Hence, the Tribunal decides which one to impose according to its analysis of the case and considering their punitive, retributive and dissuasive effects.

7. Once the Tribunal of CADE convicts a party for an antitrust violation, the applicable penalties are those outlined in Articles 37 through 45 of said law.

8. CADE's most adopted type of punishment is fining companies and individuals (whether or not they are company administrators). In this regard, CADE has favoured financial contributions to punish players involved in anti-competitive conduct, as outlined in Article 37 of the Competition Law<sup>4</sup>. Hence, the central issue in imposing sanctions

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<sup>3</sup> Brazil's contribution to the Purchasing Power and Buyers' Cartels OECD Roundtable. <[https://one.oecd.org/document/DAF/COMP/WD\(2022\)17/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)17/en/pdf)>.

<sup>4</sup> Article 37. Committing an antitrust violation subjects the liable parties to the following penalties:

I. in the case of a company, a fine of 0.1% to 20% of the gross sales revenue the company, group, or conglomerate earned in Brazil in the field of activity affected by the conduct in the year before the proceedings were initiated, which should never be less than the accrued benefits, whenever possible to estimate them;

II. a fine amounting to between BRL 50,000 and BRL 2,000,000,000 is applied where impossible to use the gross sales revenue criterion in the case of individuals and legal persons governed by public and private law, or associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, which do not perform a business activity;

III. in case an administrator is directly or indirectly liable for a violation committed intentionally or negligently: a fine of 1% to 20% of the fine levied on the company, in the case of Item I of the head provision of this Article, or of the fine levied on the legal persons or entities, in the case of Item II of the head provision of this Article.

(1) Fines are doubled for repeat violations.

(2) In calculating the fine described in Item I of the head provision of this Article, CADE may consider the total revenues of the company or group of companies whenever information on the turnover linked to the field of economic activity in which the violation occurred, as defined by CADE, is unavailable or whenever the information presented is incomplete, not entirely clear or appropriate, or both.

(besides calculating fines, which we will not address in this paper) is whether to adopt the additional penalties mentioned in Article 38.

9. Additionally, despite the prevalence of financial sanctions, Article 38 describes a list of “alternative” penalties that can be imposed by themselves or alongside fines. Some of the penalties are **the prohibition to bid in government procurements** for a term no shorter than five years (Item II of the Article) and **the prohibition to carry out business on ones’ own behalf or via a legal person** for up to five years (Item VI). See below the non-financial penalties provided by the law:

*Article 38. The following penalties may be imposed, either individually or cumulatively, whenever the severity of the facts or the public interest require, without prejudice to the penalties set forth in Article 37:*

*I. the publication in the newspaper stated in the decision, in half a page and at the expense of the wrongdoer, of the summary of the judgement of conviction, for two consecutive days for one to three consecutive weeks;*

*II. the prohibition, for a term no shorter than five years, to be hired by official financial institutions and to bid for a contract to sell, lend, carry out works and services, and provide public services for the federal, state, and local governments, the government of the Federal District, and autonomous government bodies;*

*III. the inclusion of the wrongdoer in the Brazilian Consumer Protection Registry;*

*IV. the recommendation for competent public bodies of the following:*

*a) that a compulsory licence to exercise intellectual property rights held by the wrongdoer is granted whenever the infraction is connected to the exercise of this right;*

*b) that the wrongdoer in default on federal taxes should not be allowed to pay them in instalments and that all fiscal incentives or public subsidies are cancelled, partially or in its entirety.*

*V. the company's spin-off, transfer of controlling interest, sale of assets, or partial ceasing of operations;*

*VI. the prohibition from carrying out business on its own behalf or via a legal person for up to 5 years; and*

*VII. any other action or measure required to eliminate the anti-competitive effects.*

10. We should stress that Item II of Article 38 mentions the prohibition of partaking in government bidding and the prohibition of contracting with official financial institutions: two different penalties in the same item.

11. Furthermore, Item VII provides that CADE may impose a vast array of penalties other than those defined by law, provided they are deemed necessary to mitigate harmful economic and competition effects of a practice. Although this legal provision has not been employed so far, CADE can penalise competition wrongdoers so that they stop their harmful practices.

12. The penalties mentioned in the articles of the law and imposed by the Tribunal of CADE aim to have punitive, retributive, and dissuasive effects. Sanctions such as the prohibition to bid in government tenders, to carry out one’s own business or as a representative of a legal person, and other alternative penalties are efficient means to increase punitive, retributive and dissuasive effects. Moreover, they also work to protect the government from repeat offenders and losses to the Treasury. These measures are

significant to eliminate the negative effects of anti-competitive violations and discourage such violations by making them more costly and less advantageous to offenders.

## 2. The experience of CADE with debarment sanctions

13. CADE has imposed debarment sanctions on some occasions.

14. With the support of its Office of the Coordinator-General of Proceedings, we gathered information about the Tribunal of CADE's guilty decisions in anticompetitive conduct cases<sup>5</sup>. Since Law 12529/2011 has been in effect, out of the 103 cartel convictions, the Tribunal applied alternative sanctions (as provided in Article 38 of the law) in 45 cases—nearly 44% of the total cases. Of the 45 convictions with alternative sanctions, 17 included the prohibition to participate in procurement and contract with the government (Article 38, Item II)—that is about 37% of the cases.

15. In analysing the 17 cases of prohibition to contract with the government, we observed a majority of them occurred in procurement cartels. Thus, we can infer CADE imposes the bidding prohibition penalty for cartels that happen in the context of government procurement.

16. In sum, there is a relationship between the antitrust authority prohibiting companies that fixed prices, divided the market, or colluded in biddings from participating in new procurement processes for a minimum of five years. This prohibition applies to the whole Brazilian government (federal, state, and local levels); this means that, even if the procurement cartel happened in a local or state process, the convicted parties are forbidden from participating in government tenders held by any level of the Brazilian government.

17. From the experience of CADE, we note businesses are considerably afraid of this penalty since public procurement is a significant source of revenue for many of those hired by the government. Thus, CADE's Tribunal considers the possibility of a company going bankrupt because of this sanction since it affects the revenue of the convicted business directly. This risk of insolvency is a variable to consider in setting the penalty, as it must be proportional to the violation.

18. Next, there is the prohibition of carrying on trade for five years on one's own behalf or as a representative of a legal entity under Article 38(VI); according to our examination of the 103 cartel cases, the sanction only showed in four cases. Of which three were cartels in public procurement, and one was an international cartel. Moreover, in two of them, CADE also applied the penalty forbidding participation in government tenders under Article 38(II).

19. Hence, we can conclude the prohibition of carrying on a trade is much less frequent than the prohibition of participating in procurement. In addition, there is no direct relation between being convicted of cartel practice in procurement and the prohibition to trade since the latter was not imposed in numerous procurement cartels. The same is not true about the penalty prohibiting participation in procurement.

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<sup>5</sup> We gathered this data manually through the analysis of case documents and certificates of judgement. As the product of a manual analysis of thousands of pages, some mistakes may have occurred in this collection. However, the primary purpose of collecting this information was to reveal the most adopted alternative sanctions outlined in Article 38—a goal we have achieved.

20. All these considered, below we introduce some cases in which the authority used debarment sanction and describe their main features and effects according to the Brazilian experience.

### **2.1. Administrative proceeding: Cartel of office and school supplies in Pernambuco**

21. One of the cases in which the authority prohibited engaging in both tenders and trade was Case no. 08700.004455/2016-94, which the Tribunal of CADE heard on 18 August 2021 in its 182nd Ordinary Hearing. The investigation looked into cartels in the government procurement of school and office supplies in municipalities of the state of Pernambuco.

22. The probe started with an official communication from the Federal Police of the State of Pernambuco. Based on the evidence collected in the fact-finding procedure, the antitrust authority initiated its administrative proceeding. The enquiries revealed long-standing agreements and the exchange of sensitive information between the defendants, who aimed to get an advantage in procurement processes. The practice affected several of these procurements and even some federal government programmes. The Tribunal then found the individuals and legal persons guilty of cartel practices.

23. The commissioners of the Tribunal considered that, given the defendants' evident bad faith and the long duration and high severity of the conduct, imposing a mere financial penalty would not ensure the desired dissuasive (or educational) and repressive effects. Therefore, the Tribunal voted to prohibit the parties, for a five-year term, from contracting with official financial institutions and participating in bidding processes to purchase goods and works, transfer assets, provide services, and grant concessions at the federal, state, and local levels under Article 38(II) of Law 12529 (the Competition Law).

24. Moreover, the Tribunal also deemed it necessary to impose an additional sanction to forbid the defendants from carrying out trade activities on their behalf or as representatives of firms for a five-year term as from the decision under article 38(VI) of Law 12529/2011. According to the rapporteur of the case, this supplementary punishment would ensure the prohibition from contracting with the government was effective. The concern was that the defendants could circumvent the prohibition as the modus operandi of their cartel was to create shell companies and change their firms' business purpose or trade name to carry out the anti-competitive practice.

### **2.2. Administrative Proceeding: Cartel of Security Revolving Doors**

25. Another significant case involving exclusion sanctions was Case no. 08012.009611/2008-51, heard in the 190th Ordinary Hearing of the Tribunal on 9 February 2022. The proceeding started with CADE probing into cartels in public procurement processes conducted by Banco do Brasil, which intended to purchase revolving doors with metal detection.

26. The authority found the company Mineoro Indústria Eletrônica guilty of cartel practice and levied financial punishments. CADE decided to apply alternative sanctions, such as the prohibition from participating in government bidding for five years, which extended to companies in which the convicted individuals had an ownership interest.

27. However, the text of the law cited in the decision—Article 38(VI) of Law 12529/2011—gave rise to controversy since it forbade participation in bidding processes

but did not explicitly mention direct contracting<sup>6</sup>. Finally, by a majority of its commissioners, the Tribunal confirmed the text interpretation should be more strictly and allow companies to have no-bid contracts with the government. The authority's opinion was that the sanction to prohibit participation in bidding processes alone fulfilled its primary functions of dissuading and educating the defendants, who were guilty of a procurement cartel.

28. The authority also considered the possibility that the company banned from procurement processes could still partake in it through its relationship with members of competing companies or by supplying bidding companies<sup>7</sup>. However, this hypothesis has not been proven in the end. Moreover, CADE applied a principle outlined in Article 5, Item XLV of the Constitution of Brazil, which establishes that a penalty for a violation cannot be imposed on others who are only related to the person responsible for the offence.

29. Another relevant point for this case is that it mentioned SICAF, a federal government register with information on all government suppliers. In the previous case, CADE imposed the sanction prohibiting trading on one's own behalf or as a company's representative to prevent shell companies from participating in public procurement. In the case at issue, however, the prohibition from bidding in public tenders was accompanied by an order requesting that the defendants be included in SICAF. SICAF lists individuals' CPFs (the Brazilian personal taxpayer number) in the system and mentions that the person is not allowed to bid in public procurement processes for the time set in the judgement. The register also includes the relationships between the members of listed companies with other firms and all the relationships a listed company has with firms registered under the same CNPJ (the Brazilian corporate identification number).

30. The SICAF system gives a warning every time a listed company with a prohibition to contract with the government tries to take advantage of its relationship with other companies to participate in a bidding process and share the awarded contract. This system is a relevant tool for CADE's enforcement activities as all government auctioneers are obliged to consult SICAF in a procurement process. It is worth noting that SICAF only gives auctioneers information on listed prohibited parties, functioning as a type of warning; however, it does not prevent the government from contracting with a company.

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<sup>6</sup> According to Brazilian administrative legislation, although contracting with the government requires a bidding process, there are some exceptions. An example is Law 8666/1993, which covers procurement and contracts for works, services (including marketing services), purchases, transfers of assets, and rentals within the scope of the Federal, State, Federal District, and Municipality levels of government. Its Articles 24 and 25 list some cases of procurement exemption and waivers, and direct contracting is one of these exceptions. Hence, the core discussion was whether the sanction prohibiting participation in public procurement (Article 38(II) of Law 12529/2011) also forbade companies from contracting directly with the government (falling under the exceptions of waiver or procurement exemption).

<sup>7</sup> For instance, CADE convicted Company A, whose managing partner is Member X, from participating in procurement processes for five years. Thus, it is true that Company A is forbidden to be in public tenders for five years. Nonetheless, Member X can theoretically open a firm (Company B), and Company B would not be under the same prohibition. As seen below, this is no longer possible in Brazil thanks to SICAF, a system that lists the companies and members forbidden to contract with the government. In our case, it would detect Company A, Member X, and Company B.

### 2.3. Administrative Proceeding: Coffee Shop Cartel

31. In Case no. 08700.007278/2015-17, heard on 3 August 2022 in the 200th Ordinary Hearing, the authority investigated a cartel in the public procurement of coffee shop concessions in several Brazilian airports. In this proceeding, CADE imposed an interesting sanction that forbade bidding in public procurement.

32. The evidence revealed strong indications of collusion in the bidding processes, and, as a result, the Tribunal found against the defendants. Their practices included bid suppression, cover bidding, and bidder collusion in in-person reverse auctions. Therefore, the authority levied financial sanctions and, considering the severity of the facts, ordered the publishing of the judgement in a widely read regional newspaper and forbade the company from bidding in procurement processes of the federal, state, and local governments for a set period.

33. However, Infraero, a federal government company affected by the conduct, had already imposed a sanction preventing the defendant from being in procurement and contracts of the federal government for two years. Infraero gave those sanctions through its administrative procedures and decisions a few years before the adjudication by CADE<sup>8</sup>.

34. For this reason, the rapporteur of the case at CADE did not impose a penalty prohibiting the defendant from bidding in public procurement. That is because the sanction imposed by Infraero had already accomplished that. Nevertheless, the other commissioners of the Tribunal outvoted the case's rapporteur with the view that another body's sanction cannot substitute CADE in competition law enforcement.

35. Hence, the Tribunal decided CADE should independently impose non-financial sanctions provided by law for further dissuading collusive practices, especially considering that, in this specific case, a fine would not suffice in achieving the desired dissuasive effect. To have a proportional sanction, including concerning time, the Tribunal deducted the years the defendant had already served under Infraero's decision from CADE's five-year penalty.

### 3. Conclusion

36. The goal of this paper was to address the Brazilian experience in adopting the debarment sanctions provided in Article 38, Items II and VI of Law 12529/2011.

37. As mentioned before, CADE has repeatedly favoured imposing financial sanctions to penalise antitrust violations. Nevertheless, our case law shows the authority prefers to adopt the so-called "alternative sanctions" outlined in Article 38 of law 12529/2011 to increase its dissuasive power, especially for more severe violations.

38. The antitrust sanctions can target companies and individuals engaged in the practices equally, whether or not these individuals are administrators of a company. Although the primary target of CADE's sanctions is legal persons, these sanctions become even more dissuasive when imposed on individuals—as it exposes those effectively responsible for the anticompetitive conduct.

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<sup>8</sup> As stated at the begging of this paper, in Brazil, an anti-competitive practice can be heard and punished in several fields of law. Thus, CADE considered the conduct a cartel (an antitrust violation under Law 12529/2011), and Infraero deemed it a fraud in government procurement (under Law 8666/1993).

39. In its discussions, the Tribunal of the CADE usually focuses on achieving a dissuasive sanction, which includes pondering the social costs and, concurrently, avoiding excesses that could threaten the company's survival and payment of fines.

40. Against this backdrop, although CADE has imposed the so-called "debarment sanctions" on several occasions, fewer than half of the judgements included these sanctions since the enactment of Law 12529/2011.

41. Lastly, we observed there seems to be a connection between the Tribunal prohibiting participation in procurement processes and cartel practices in public procurement. The same does not hold for the trade prohibition, which the Tribunal adopted only a few times in these cases.