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Brazil

CARTELS

Contributor

Vilanova Advocacia

Polyanna Vilanova

Senior Partner/Founder | polyanna@vilanovaadvocacia.com

Edson Dias

Associate Lawyer | edson@vilanovaadvocacia.com

Victor Tafaro

Associate Lawyer | victor@vilanovaadvocacia.com

Ana Flávia Napoli

Associate Lawyer | anaflavia@vilanovaadvocacia.com

This country-specific Q&A provides an overview of cartels laws and regulations applicable in Brazil.

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BRAZIL
CARTELS

1. What is the relevant legislative framework?

The Brazilian legislation framework against cartel is based on two basic pillars: the Brazilian Economic Crimes Law – BECL (Law No. 8,137/1990), and the Brazilian Competition Law – BCL (Law No. 12,529/2011), which establishes the Brazilian Competition Policy System, and sets forth preventive measures and sanctions for violations against the economic order.

Cartel investigation under the BECL is hold in the criminal sphere, while under the BCL, cartels are investigated under the administrative sphere. It means that one cartel conduct can be investigated simultaneously by both jurisdictions, subject to both BECL and BCL fines.

All the industries are subject to the BECL and the BCL, even the regulated ones. There is no antitrust exemption under the Brazilian legislation.

2. To establish an infringement, does there need to have been an effect on the market?

According to the Article No. 36 of the BCL, cartels in Brazil are a *per object* illicit, which means that there is no need for an effects assessment, but just the proof of existence of the conduct for the configuration of the infraction.

3. Does the law apply to conduct that occurs outside the jurisdiction?

It does in case there are effects or potential effects in the Brazilian territory.

4. Which authorities can investigate cartels?

The Administrative Council for Economic Defense – CADE, whose jurisdiction is established by Law No. 12,529/2011. The investigation is initiated and held by the General Superintendence – SG/CADE and then judged by CADE's Tribunal. In the criminal sphere, cartels case are investigated by the Public Prosecutor's Office (MP) and judged by Judicial Courts.

5. What are the key steps in a cartel investigation?

The investigation is initiated by the SG/CADE *ex officio* or based on a complaint or leniency agreement related to cartel conduct. It may be initiated as a Preparatory Procedure in order to verify indeed if it is an antitrust matter, as an Administrative Inquiry if it is an antitrust matter, but there is a need to gather more proofs and elements of the existence of the conduct, or as an Administrative Procedure if there are sufficient elements and proofs of the existence of the cartel.

The Technical Note of the initiation of the Administrative Procedure constitutes in the initial pleading of the adversarial proceeding. Once all the defendants are served, there is a 30 day term (extendable for more 10 days) for the filing of the administrative defense.

After 30 business days, the SG/CADE issues a technical note deciding on preliminary issues and on production of evidence requested by defendants, which initiates the discovery stage. Once the discovery stage is over, the defendants are notified about the presentation of final arguments within 10 days. After 15 business days, the SG/CADE renders its opinion on dismissal or conviction and send the records to CADE's Tribunal. It is worth noting that it is not mandatory for CADE to respect the terms abovementioned (i.e., the terms may be extended at the discretion of the authority).

6. What are the key investigative powers that are available to the relevant authorities?

According to the Art. No. 13, VI of the BCL, in order to

investigate and obtain information, the SG/CADE can:

1. Request information and documents from any individual or legal entity, bodies, and authorities, whether public or private, maintaining confidentiality, as the case may be, as well as to determine the inquiries deemed necessary for the exercise of its functions;
2. Request oral explanations from any individual or legal entity, body, and authority, whether private or public, under this Law;
3. Conduct inspection of the head offices, establishment, office, branch or subsidiary of the investigated company, the inventories, objects, papers of any nature, as well as commercial books, computers and electronic files, being able to make or require copies of any documents or electronic data;
4. Being unable to bring the main action, request of the Judiciary, by means of the Attorney-General's Office associated to CADE, a Search and Seizure Warrant;
5. Request the examination and copying of documents and objects obtained in investigations and administrative proceedings opened by Federal agencies or entities;
6. Require the examination and copying of documents and objects from police inquiries, lawsuits of any kind, as well as administrative investigations and proceedings established by other federal entities, provided that the Council must observe the same confidentiality restrictions established in the original procedures.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

There are no provisions in the legislation that fix rules on privilege or publicity of CADE's requests on access to in-house counsel and compliance personnel material. Moreover, none of the several decisions issued by Courts in the lawsuits that follow the dawn raids ran in cartel cases include public rulings on the extent to which the general rule on privilege applies with respect to emails and other documents created by or directed to in-house counsel and compliance personnel or to communications with outside counsel.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The condition for the extinction of punitive capability by the public administration (i.e., total immunity) is the lack of prior knowledge by SG/CADE regarding the conduct, as stated in the Statutes of CADE (Art. 249, I and II). If the SG/CADE did not have prior knowledge of the violation, the company and/or individual will be granted with the declaration of compliance with the Leniency Agreement by the CADE Tribunal´s Plenary, the benefit of full extinction of punitive capability by the public administration.

The Art. 86 of Law No. 12,529/2011 establishes that the antitrust leniency agreement signed with the SG/CADE must result in the: (i) identification of the other parties involved in the violation and (ii) gathering of information and documents that prove the reported or under investigation violation.

To propose a leniency agreement, the proponent must contact the SG/CADE in order to communicate their interest in proposing such an agreement regarding a specific anticompetitive conduct.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

The first proponent of the Leniency Agreement (that indicates for the SG/CADE the existence of the infraction that the authority did not have prior knowledge) is granted with all the benefits of the agreement. In the event that SG/CADE is already aware of the existence violation indicated by the proponent, but still does not have enough evidences, the proponent will be granted with partial benefits, which may be reduced up to two-thirds.

If a proponent reaches CADE for a leniency agreement, but there is already an ongoing investigation, the proponent will be able to celebrate a Settlement Agreement, under which the antitrust authority agrees to halt investigations against TCC signatories as long as the signatories comply with the terms of the referred agreement and agree to the commitments expressly provided thereunder.

10. Are markers available and, if so, in what circumstances?

Yes, markers are available in leniency programs from

CADE, under certain circumstances. The marker is a preliminary expression of interest by a company to cooperate with the authorities in a leniency program. The marker allows the company to secure its place in line for leniency and to have a certain period of time to gather the necessary evidence and negotiate the terms of the leniency agreement. To apply for a marker, the company must submit a written request to CADE, which must include the following information:

1. A brief description of the conduct under investigation;
2. A summary of the evidence available to the company;
3. The identity of the potential co-conspirators, if known;
4. A statement of the company's willingness to cooperate fully with the investigation.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Immunity or leniency applicants are required to provide ongoing cooperation with the relevant authorities in order to receive the benefits of their cooperation, such as immunity from prosecution or a reduction in penalties. This cooperation typically involves:

1. Providing complete and truthful information about the alleged anticompetitive conduct, including the details of any meetings, communications, or agreements with competitors;
2. Providing access to relevant documents and electronic data, including emails, internal memoranda, and other materials that may be relevant to the investigation;
3. Testifying in court or before regulatory agencies as required, and providing any additional information or assistance that may be necessary to facilitate the investigation;
4. Maintaining confidentiality about the investigation, including not disclosing any information to third parties without the prior consent of the authorities.

The confidentiality obligations for a leniency applicant will extend beyond the conclusion of the investigation or prosecution. The applicant may be required to keep the terms of the leniency agreement confidential indefinitely, even if they are not charged or in case charges are ultimately dismissed.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The Art. 87 of the BCL provides that regarding crimes against economic order and other crimes directly related to the practice of cartel, the leniency agreement suspends the statute of limitations and prevents the prosecution from being brought against the leniency beneficiary. Thus, once the leniency agreement is fulfilled by the proponent, the criminal liability is automatically extinguished.

In the event that the proponent of the Leniency Agreement is a company, the benefits of the agreement may be extended to its directors, administrators, and employees (current or former), as well as to companies of the same economic group, de facto or de jure, involved in the infraction, provided they cooperate with the investigations and sign the instrument jointly with the proposing company (Art. 86, §6 of the BCL).

13. Is there an 'amnesty plus' programme?

Yes. A Leniency Plus consists of the reduction by one to two-thirds of the applicable penalty for a company and/or individual that does not qualify for a Leniency Agreement in connection with the conduct in which it has participated (Original Leniency Agreement), but provides information on another conduct which Cade's General Superintendence had no prior knowledge of.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The Settlement Agreement (TCC) consists in the negotiation between the CADE and individuals and/or legal entities investigated for violations of economic order who express their intention to enter into an agreement. After the negotiation process, which may take place with the SG/CADE or the CADE's Tribunal, if the minimum legal requirements are met, the TCC may be approved by the CADE's Tribunal .

The Art. 85 of the BCL establishes the following minimum requirements: (i) obligation for the party not to engage in the investigated conduct or to act in a way that generates its harmful effects; (ii) imposition of a fine in case of total or partial breach of the agreement; and (iii) Imposition of a pecuniary contribution, which is mandatory only for TCCs signed in cartel investigations.

If the TCC is approved, the continuation of the investigations will be suspended, during the agreement's fulfillment, related to the signatories of the TCC.

The TCC may be negotiated at any procedural moment; however, depending on the procedural moment in which the request is presented, there may be variation in the expected fine discounts (limited to up to 50%).

15. What are the key pros and cons for a party that is considering entering into settlement?

The Brazilian experience indicates TCCs tend to generate positive effects for both the parties and the authority, as they can end an investigation more quickly, either by closing the remaining passive party in the administrative proceedings pending suspension, or by presenting evidence and information, thus avoiding the expenditure of financial and human resources by the Public Administration. In addition, the execution of the TCC suspends the administrative process for the parties that signed the agreement and avoids the burdens of an administrative defense and its eventual conviction. At the same time, TCCs ensure the cessation of anticompetitive practices, thereby interrupting the negative effects of the practice on the market and consumers in a more timely and effective manner.

Despite the beneficial effects, the negotiation of TCC may take on an unfavorable character in some opportunities, considering the exposure of the undertaker due to the admission of the infringement, and also due to the nonexistence of single Brazilian authority that negotiates agreements at the administrative level and, especially, that the absence of convictions may jeopardize signaling by CADE to the market which conducts to be considered anticompetitive offenses.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

Cooperation between CADE and other jurisdictions is crucial for the Brazilian competition environment. In that regard, CADE has signed cooperation agreements with other antitrust authorities from various countries, such as the United States, the European Union, Argentina, Chile, Colombia, Mexico, among others. These agreements aim to exchange information and collaborate in investigations, processes, and decisions in cases of anticompetitive conduct with effects in more than one jurisdiction.

This cooperation allows CADE to access information that would be very difficult to obtain otherwise, such as data from companies that operate in other countries, as well as to broaden the scope of investigation and decision-making in cases with effects beyond national borders. On the other hand, cooperation also enables other jurisdictions to access relevant information about anticompetitive practices that affect their markets.

17. What are the potential civil and criminal sanctions if cartel activity is established?

In the criminal sphere, the Brazilian Economic Crimes Law fix the penalty of imprisonment from 2 to 5 years as well as a fine. In addition, in the civil sphere, there is a possibility of damage reparation, in which it is possible that any victims of anticompetitive practices may sue for compensation in court (art. 47 of the BCL).

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The fine may range from 0,1% to 20% of the defendants' gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred.

It is worth noting that in recent precedents, CADE's Tribunal has also fixed the fines according to the advantage obtained by the defendants in the investigated conduct. In these precedents, CADE's Tribunal submitted that, in some cases, in order to have an appropriate deterrent effect, fines needed to exceed the gains obtained from the conduct, even if it exceeds the 20% threshold abovementioned.

The factors that are taking into consideration as aggravating or mitigating punishments are in art. 45 of Law nº 12.529/2011:

1. The seriousness of the violation;
2. The good faith of the transgressor;
3. The advantage obtained or envisaged by the violator;
4. Whether the violation was consummated or not;
5. the degree of injury or threatened injury to

free competition, the national economy, consumers, or third parties;
6. the negative economic effects produced in the market;
7. the economic status of the transgressor; and
8. any recurrence.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Yes. According to the Art. 33 of the BCL, the companies and their entities, de facto or de jure, shall be jointly and severally liable when at least one of them engages in violations of the economic order.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Yes. The article 47 of the BCL provides the possibility of private and class actions for cartels damage. This possibility is regulated since 1996 by the previous BCL. Nevertheless, the private and class actions for damage are not popular. According to the Organisation for Economic Cooperation and Development (OECD), the strengthening of antitrust in Brazil depends on complementing the public enforcement exercised by the antitrust authority with the private enforcement of competition law.

21. What type of damages can be recovered by claimants and how are they quantified?

As is well settled, any individual, company or public authority that incur in damage from cartel (or other anticompetitive behaviour) are entitled to seek damages to compensate the losses suffered. This includes those that purchased directly from the infringing entity (i.e., a direct purchaser), customers of the direct purchaser that may have paid higher prices for goods or services as a result of an overcharge caused by the cartel being passed on to them (i.e., indirect purchasers), competitors of the infringing entity, and purchasers of competing products that may have paid higher prices because of the anticompetitive behaviour. So that, in Brazil, a claimant is entitled to be placed, so far as money can achieve that, in the position which it would have been in but for the tortious acts which have caused it loss and the defendant has to pay this amount in double.

However, in Brazilian private damages actions it is very difficult to estimate damage and determine the value of compensation: there is no legal guidance about the correct methodology for the quantification of damages.

22. On what grounds can a decision of the relevant authority be appealed?

In Brazil, it is emphasized the importance of judicial deference of CADE's decisions for the balance of the constituted powers. It is assumed that technical expertise provides condition to give the better meaning of antitrust law, privileging an approach of the law through its practice. The judicial review would therefore be justified only to correct evident illegalities or abuses, in general procedural, but not as a broad review in substitution for CADE's decisions as stablished on the analysis of precedents issued by Brazilian Supreme Court (i.e., RE n. 1.083.955-DF).

23. What is the process for filing an appeal?

Judicial review (called *"Ação Anulatória de Ato Administrativo"*) issued by the competent Brazilian judicial court as stablished on the analysis of precedents issued by Brazilian Supreme Court (i.e., RE n. 1.083.955-DF).

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

Cartel in the domestic silicate market (Procedure No. 08700.006681/2015-29), judged on November 9, 2022. This administrative procedure investigated an alleged cartel in the Brazilian silicate market, specifically the sodium silicate, potassium silicate and metasilicates segments, from 1999 to 2012, at least, with the participation of the companies DAV Química do Brasil Ltda., Diatom Mineração Ltda., Manchester Chemicals of Brazil S.A., Pernambuco Química S.A., PQ Sílicas Brazil Ltda. and UnaProsil Ind. and with. Chemical Products Ltd..

The conducts investigated consisted of fixing prices and commercial conditions; share sensitive business information; discriminate against customers; allocate requests for commercial quotes; divide markets between competitors and practice price increases. The companies involved in the cartel accounted for more than 90% of the silicate production and marketing sector in 2011, the

year before the investigations began.

The Collegial Body of CADE condemned the companies Manchester Química, Unaprosil and Perquímia for forming a cartel and thirteen individuals linked to the companies. The fines amounted up to more than BRL 60 million.

On May 2022, CADE's Tribunal condemned telecommunications companies Claro S.A, Oi Móvel S/A, and Telefônica Brasil Ltda. in an administrative proceeding that investigated cartel practices in public procurement for the provision of services to federal government agencies (Procedure No. 08700.011835/2015-02).

CADE submitted that the formation of the consortium by the companies resulted in the infringement of cartel, since it was a service that could have been provided by at least two of the members of the consortium (Claro and Oi). The fines amounted up to more than BRL 783 million.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

On September 2022 CADE signed agreements with companies investigated for allegedly exchanging sensitive information in the Brazilian labour market in the healthcare industry (Procedure No. 08700.004548/2019-61). It is the first time that the antitrust agency analyses anticompetitive behaviours in the labour market. Depending on the result of that investigation it is expected that the number of investigations in that sector grows as well as the international tendency.

Another CADE's trend is the investigation of exclusivity agreements. In the past 6 months, CADE has settled two cases involving the matter: the first one in November 2022, with Gympass, in the market of gym aggregators (Procedure No. 08700.004136/2020-65), and the other one in February 2023, with iFood, in the market of food delivery platform (Procedure No. 08700.004588/2020-47).

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

CADE's Tribunal will have a major renovation given that the mandates of 4 of the 6 current commissioners will end. The new commissioners of the agency will decide about controversial topics such as the analysis of the effects of unilateral conducts, the standard of proof applicable in cartel cases, the usage of the utility/gains that the offender derives from the offense (inalienability rule) to quantify fines for collusive conduct and the antitrust remedies for complex operations. CADE will have to take a position on the limits of interfaces between antitrust and issues such as personal data protection, the labour market and the environment.

Furthermore, it is also expected that CADE will publish the "Guide for Vertical Mergers" which will complement the "Guide for Horizontal Mergers" (Guide H).

It is also possible that the changes introduced in the antitrust law in 2022 increase the number of private damages actions due to the incentives created by the Law No. 14,470/2022 (i.e. double damage and definitions of the statute of limitations for the private damages claims).

Contributors

Polyanna Vilanova
Senior Partner/Founder
polyanna@vilanovaadvocacia.com

Edson Dias
Associate Lawyer
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Victor Tafaro
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