Brazil

Cristianne Saccab Zarzur, Marcos Pajolla Garrido and Carolina Destailleur Bueno,
Pinheiro Neto Advogados

LEGAL FRAMEWORK

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

Law No. 12,529 of 30 November 2011 (the Brazilian Competition Act) is the main legal source setting out the antitrust law applicable to antitrust conduct in Brazil, including vertical restraints. The Brazilian Competition Act came into effect on 28 May 2012, replacing Law No. 8,884/94, and introducing several important changes to the Brazilian antitrust system. The Administrative Council for Economic Defence (CADE), the Brazilian competition authority, has been empowered with both investigative and decision-making attributions, in addition to the necessary independence to comply with its legal obligations.

The Brazilian Competition Act does not provide for a definition of vertical restraints, and specific guidelines in this respect are yet to be issued by the authorities. In this context, CADE currently relies on former regulations issued during the previous legal regime, including CADE Resolution No. 20 of 9 June 1999 (Resolution CADE 20/99), which has been partially revoked, but sets out an important analysis of possible anticompetitive practices, including a definition of what characterises vertical restraints.

Past rulings issued by the authorities are also an important source of guidance when it comes to vertical restraints, although the commissioners at CADE are not bound to past decisions when evaluating new cases, meaning that they are completely independent to form their own conviction in ruling a case, based on the specificities applicable therein, within the boundaries provided by the legislation.

In addition to administrative liabilities that may arise from a CADE ruling, anticompetitive vertical restraints may give rise to private claims in Brazil. Article 47 of the Brazilian Competition Act establishes that injured parties can actively go to court to defend their individual or collective interests, to end anticompetitive practices and to seek redress of losses and damages regardless of the existence of an administrative proceeding.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Article 36 of the Brazilian Competition Act contains the basic presumptions for the assessment of vertical restraints. It describes all types of anticompetitive practices that could be deemed as violations of the economic order, even if their effects are not achieved and regardless of the willingness of the agent to harm the market. In this context, Law No. 12,529/11 prohibits any acts that have as their object, or may lead to, the following effects:

- limiting, restraining or in any way harming open competition or free enterprise;
- controlling a certain product or service's relevant market;
- increasing profits arbitrarily; or
- abusing a dominant position.

In an attempt to provide more clarity on specific conduct that could be interpreted together with the above-mentioned provisions, paragraph 3 of article 36 brings a non-exhaustive list of acts that may constitute anticompetitive practice. Vertical restraints may include:

- the imposition on distributors, retailers and representatives of goods or services, of specific retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins or any other marketing conditions related to their business with third parties;
- discriminating against purchasers or suppliers of goods or services by establishing price differentials or discriminatory operating conditions for the sale or performance of services;
- refusing to sell goods or services within the payment conditions usually applying to regular business practices and policies; and
- conditioning the sale of goods to acquisition of others or to use of services, or conditioning the provision of services to use of another or to acquisition of goods.

As mentioned above, the Brazilian Competition Act does not contain a formal definition of vertical restraints. Resolution CADE 20/99, on the other hand, establishes that vertical restrictive trade practices are restrictions imposed by manufactures or suppliers of products and services in a certain market (market of origin) on a vertically related market downstream or upstream along the production chain (the target market). It connects the practice to the existence of a dominant position and states that vertical restraints may raise antitrust issues when they imply the creation of mechanisms that exclude rivals, whether by increasing the barriers to entry or costs of competitors, or, further, when they increase the probability of concerted exercise of market power by manufactures or suppliers, through practices that enable them to overcome obstacles to the collusion that would otherwise exist.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

In addition to pursuing economic objectives, the Administrative Council for Economic Defence is also responsible for fostering and promoting the culture of competition in Brazil, as well as assisting in the oversight of certain constitutional principles (mainly provided in article 170 of the Brazilian Federal Constitution), including consumer protection, freedom of enterprise and the social role of private property.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

In the administrative sphere, the Administrative Council for Economic Defence (CADE) is the authority responsible for enforcing prohibitions on anticompetitive vertical restraints. CADE's structure is composed of the General Superintendence, which is responsible for the investigative phase of a preliminary investigation, consultation or administrative proceeding; and the Administrative Tribunal, with six commissioners and a chairperson, which is responsible for final rulings. Paragraph 2 of article 9 of Law No. 12,529/11 establishes that the Administrative Tribunal decisions are not subject to revision by the executive branch, and must be promptly enforced. Nevertheless, all decisions issued by CADE may be subject to judicial review, and the enforcement of CADE's decisions may also be made through the judiciary branch, by initiative of its General Attorney.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

Article 2 of Law No. 12,529/11 sets out the territoriality principle, by establishing that the Administrative Council for Economic Defence (CADE) will have jurisdiction over any acts, including vertical restraints, wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered there. In other words, the Brazilian Competition Act may be applied to practices taking place abroad, but capable of producing effects in Brazil. To date, there have been no cases analysed by CADE in which the law has been applied extraterritorially against alleged anticompetitive vertical restraints in a pure internet context. In Administrative Proceeding 08700.009082/2013-03, the General Superintendence briefly restated that, according to article 2 of Law No. 12,529/11, the effects theory should be taken into consideration in analysing CADE's jurisdiction to conduct an investigation. According to the authorities, however, such analysis would depend on the evaluation of the merits themselves, considering that it would depend on the occurrence of the practice and its effects.

The Brazilian Competition Act has adopted a mechanism based on subjective criteria, in which the determination on whether a given practice constitutes an economic violation must be made case by case. There is no specific substantive test for verification of an antitrust violation, but, rather, the Act sets forth broad and generic principles to aid the analysis of each case, essentially guided by the application of the rule of reason principle.

In other words, according to the definition provided above, vertical restraints of trade are not illegal per se, but may raise antitrust issues when implying the creation of exclusionary mechanisms. Additionally, as in the case of horizontal restrictions, vertical restrictive practices could only be deemed a violation if the agent holds market power in the relevant market of origin, and an effect on a substantial share of the market that is the target of such practices is demonstrated, typifying a risk of harming the competition.

Finally, as recognised by CADE, although vertical restraints may, in some cases, limit free competition, in other circumstances they may also bring benefits, which must be weighed against the potential anticompetitive consequences, in accordance with the rule of reason principle.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Article 36 of the Brazilian Competition Act establishes that the law applies to anticompetitive practices, including vertical restraints, and should encompass individuals, public or private companies, as well as any individual or corporate associations, established de facto or de jure – even on a provisional basis – irrespective of separate legal identity, and notwithstanding the exercise of activities regarded as a legal monopoly. Therefore, there are no exemptions to the application of the Brazilian Competition Act to public entities, and, to date, important public companies such as Petrobras, Banco do Brasil and Empresa Brasileira de Correios e Telégrafos have already been investigated by the Administrative Council for Economic Defence.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Early in 2018, the Administrative Council for Economic Defence and the Brazilian Central Bank (BACEN) signed a Joint Normative Act, which provides for cooperation between the entities, including in the investigation of anticompetitive conducts in the financial sector.

Law No. 6,729/79 regulates the relationship between manufacturers and distributors in the motor car industry and sets forth rules on territorial and customer restraints. In addition, regulated industries, such as telecommunication, energy and healthcare, have specific agencies providing for industry-specific laws (ANATEL, ANEEL and ANS or ANVISA, respectively).

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

No. The Brazilian Competition Act applies indistinctly to any conduct that may harm competition, including vertical restraints. However, vertical restrictive practices should only be deemed a violation if the undertaking holds a dominant market position, which is presumed when the company or its economic group has at least 20 per cent of a relevant market. Such threshold may be altered by the authorities depending on the characteristics of the market.

TYPES OF AGREEMENT

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Brazilian Competition Act does not provide for a specific definition of 'agreement'.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The wording of article 36 of the Brazilian Competition Act is sufficiently broad to determine that any arrangement, either formal or informal, may be subject to antitrust scrutiny in Brazil. In 2009, for instance, AmBev, a

leading brewery company with approximately 70 per cent market share at the time, was condemned by the Administrative Council for Economic Defence to the payment of a fine amounting to 352 million reais, owing to the adoption of a loyalty and bonus programme with distributors: the company started awarding its distributors with gifts and discounts for the purchase of AmBev's products. The authorities understood that the programme created incentives for exclusivity arrangements, ultimately giving rise to market foreclosure.

Parent and company-related agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

The Brazilian Competition Act does not provide for the concept of 'related company', but makes reference to an 'economic group' of companies. The Administrative Council for Economic Defence Resolution No. 2 of 29 May 2012 (Resolution CADE 02/12) defines the following as belonging to the same economic group: entities under the same control and all companies in which the entities subject to common control hold, directly or indirectly, at least 20 per cent of the total or voting corporate capital. Although this definition has been introduced in the context of merger control filing thresholds, it may also be adopted as a reference for anti-competitive practices. Vertical restraint rules may apply to agreements between companies belonging to the same economic group whenever they lead to anticompetitive effects, such as exclusionary purposes.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Vertical restraint rules provided by the Brazilian Competition Act apply indistinctly to agent–principal agreements whenever they result in anti-competitive effects, aiming at, for instance, exclusionary purposes or any other type of abuse of dominant position.

13 Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

The Brazilian Competition Act does not provide for the concept of 'related company', but makes reference to an 'economic group' of companies. Resolution CADE 02/12 defines the following as belonging to the same economic group: entities under the same control and all companies in which the entities subject to common control hold, directly or indirectly, at least 20 per cent of the total or voting corporate capital. This is provided by Resolution CADE No. 02/12.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Restraints involving IPRs are assessed by the Administrative Council for Economic Defence (CADE) under the same rules and provisions as any other vertical restraint. In this respect, paragraph 3 of article 36 of the Brazilian Competition Act expressly includes the abusive exercise or exploitation of industrial or intellectual property rights, technology or brands in its illustrative list of acts that may be deemed as anticompetitive practices. This may be the case, for instance, when there is discrimination against distributors or licensees of a certain product protected by IPR.

Therefore, the Brazilian Competition Act should apply indistinctly to purely antitrust restraints, as well as to agreements where there are provisions granting IPRs. In the latter case, the authorities will certainly weigh the pros and cons related to the presence of IPRs, which will also influence CADE's final decision.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Resolution CADE 20/99 provides for the following analytical framework of restrictive trade practices, including vertical restraints:

- characterisation of the practice:
  - identification of the nature of the practice and definition of its legal classification; and
  - verification of whether there is sufficient evidence of the practice in the case records;
- analysis of the dominant position:
  - definition of the relevant market or markets, both in its product and geographic scope, which is usually based on the hypothetical monopolist test;
  - estimation of the total market share of the companies in the relevant market or markets; and
  - analysis of the actual and potential competitive conditions (barriers to entry) on the relevant market or markets (including institutional conditions); and
- analysis of the specific practice:
  - assessment of the anticompetitive damage caused by the practice on the market or markets;
  - examination of possible economic efficiency gains and other benefits generated by the practice; and
  - final assessment (balance) of the anticompetitive effects and the economic efficiencies of the practice.

According to Resolution CADE 20/99, which is based on the rule of reason, practices whose anticompetitive effects cannot be sufficiently offset by possible compensatory benefits or efficiencies should be convicted and penalised by the Administrative Council for Economic Defence (CADE).

Market shares

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Holding a dominant position in an investigated market is determinant when assessing the legality of vertical restraints of trade. Article 36 of Law No. 12,529/11 sets forth that a dominant position is presumed when a company or group of companies hold at least 20 per cent of the relevant market, even though the Administrative Council for Economic Defence (CADE) may change said percentage on a case-by-case basis. In any case, the thresholds represent an important guidance to private parties, as it is unlikely that sanctions would be imposed in the absence of market power. In Consultation No. 08700.004594/2018-80 filed with CADE involving the legality of a minimum advertised price policy (MAPP) to be implemented by Continental do Brasil Produtos Automotivos Ltda

(Continental) in the aftermarket tyres segment, the authorities concluded that the market shares held by Continental were lower than the 20 per cent threshold established by the Brazilian Competition Act and therefore the company lacked market power. As a result, CADE concluded that the intended commercial policy was legal. In such ruling, CADE expressly stated that, even though its past rulings may indicate that price-based vertical restraints are presumed to be unlawful, such presumption may be disregarded if the defendant succeeds in demonstrating that in the absence of market power, whether unilateral or coordinated, it is not a credible possibility that the market could be harmed by a given commercial practice.

Further, in another administrative proceeding recently ruled by CADE, the authorities understood that Unilever Brasil Ltda (Unilever) restricted the access of competitors to distribution channels in the ice cream market, therefore violating article 36 of Law No. 12,529/11. During its investigation, CADE undertook a market analysis, ultimately concluding that the company would have a dominant position, with market shares exceeding 20 per cent, and decades of leadership in the Brazilian ice cream market (Administrative Proceeding No. 08012.007423/2006-27).

A widely used practice by suppliers should not be interpreted as a safe conduct. If the presumptions of market power are present and the practices may harm the market and consumers, the authorities are entitled to investigate and punish companies adopting anticompetitive vertical restraints.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

The buyer's market share is also taken into consideration by the Administrative Council for Economic Defence (CADE) in evaluating vertical restraints. In fact, the market share's analysis is oriented by the market in which the restriction is imposed (ie, where market foreclosure is more likely to occur). An important case settled by CADE in this respect a few years ago (Administrative Proceeding No. 08012.006504/1997-11) involved the football broadcasting rights market. Accordingly, an association composed of the most prominent football teams in Brazil to jointly negotiate broadcasting rights with TV channels used to grant privileges to the biggest local TV channel – a quasi-monopolist in broadcasting football matches – so it could have a preference and cover the bids made by competitors during private tenders. As a result, the tenders used to be awarded by such TV channel. After conclusion of the case, such preference right has been removed and other interested companies can now compete equally for broadcasting rights.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Brazilian Competition Act does not provide for any block exemption or safe harbour. Vertical restrictive practices should only be deemed a violation if the undertaking holds a dominant market position, which, according to paragraph 2 of article 36, is presumed when a company or its economic group is capable of altering, in a unilateral and concerted manner, the market conditions or when it controls 20 per cent or more of the relevant market. In this sense, even though parties could rely on the 20 per cent threshold as a reference for its market position, the law allows the Administrative Council for Economic Defence to change such criteria for specific industries.

TYPES OF RESTRAINT

Assessment of restrictions

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Restricting the buyers' ability to determine its resale prices is one of the practices expressly listed as anticompetitive under the Brazilian Competition Act. Article 36, paragraph 3(IX) defines the conduct considered illegal as 'to impose on the trade of goods or services to distributors, retailers and representatives, any resale prices, discounts, payment terms, minimum or maximum quantities, profit margin or any other market conditions related to their business with third parties'.

Resolution CADE 20/99, in turn, also includes a specific definition of resale price maintenance (RPM), meaning the manufacturer establishing, in an agreement, the price (minimum, maximum or fixed) to be adopted by distributors or dealers. The resolution consolidates the understanding that fixing minimum prices often results in anticompetitive effects, usually related to easier collusive price practices and increases the manufacturer market power, deterring the entry of more competitive distribution and reducing intra-brand competition.

Nonetheless, the possible efficiencies arisen by the practice are also taken into consideration in the assessment of the buyer's ability to determine its resale price.

This understanding is reflected in the precedents issued by the Administrative Council for Economic Defence (CADE) in past years. The first cases analysed by the Administrative Tribunal were dismissed, owing to the lack of evidence of the imposition of retail prices and market power held by the defendants.

In Administrative Proceeding No. 184/94, one of the first cases on this matter in Brazil, CADE analysed Kibon's (a leading ice cream manufacturer) relationship with its distributors; more specifically, the use of pricing tables listing the values to be charged by the distributors. At the time, CADE emphasised that the practice constituted suggesting and not imposing resale prices. The authority also signalled that aspects such as obstructing free initiative, refusing to negotiate in the future and the mandatory character of the resale prices would be important factors in characterising illegal practice. None of these were demonstrated in the specific case.

Further, Consultations Nos. 20/97 and 14/96 (involving companies Ferrero do Brasil Indústria Doceria e Alimentar Ltda and Warner Lambert Industria e Comercio Ltda) addressed questions on the legality of suggesting prices. In both cases, CADE understood that suggested prices would not result in competition concerns.

The same understanding was adopted in precedents involving diverse markets, such as sale and distribution of books (Administrative Proceeding No. 08000.018299/96-86) and cement (Administrative Proceeding No. 91/92).

In 2013, in the *SKF* case (Administrative Proceeding No. 08012.001271/2001-44), CADE, for the first time, decided to convict a company for RPM. The main arguments to ground said decision were the following:

- definition of minimum mark-ups for exclusive distributors; and
- provisions for monitoring and penalties for non-compliance with the mark-ups predefined (ie, formal notification and loss of the licence to distribute).

It is worth noting that the decision was not unanimous. The Reporting Commissioner initially voted for the case to be dismissed. The

Commissioner, followed by the majority of the Administrative Tribunal after a review request, voted for the conviction of the company for RPM, signalling that great caution should be exercised by the authority in cases involving this type of conduct, especially when there is no evidence of efficiencies that would neutralise the negative aspect of the conduct. Indeed, one of the votes for the conviction of the company suggested that, owing to the high concerns related to fixing retail prices, the practice should be presumed illegal and the burden of proof should be attributed to the defendant, who should prove the absence of market power and the existence of efficiencies that neutralise the anticompetitive effects of the conduct.

More recently, in 2014, in the analysis of Administrative Proceeding No. 08012.011042/2005-61, CADE also convicted Raízen Combustíveis SA for restricting fuel resellers' ability to set final prices. The policy adopted by the company included monitoring measures and penalties for non-compliance.

The precedents described above show that the practices considered legal by CADE are usually those related to suggestion of resale prices. On the other hand, minimum resale prices, especially when associated with monitoring and punishment measures, tend to raise relevant concerns from CADE's perspective.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

Resolution CADE 20/99 establishes that the possibility of benefits resulting from transactional cost savings must be considered and taken into account when assessing the net effects of RPM on the market. Therefore, resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign, or specifically to prevent a retailer using a brand as a 'loss leader', are likely to be seen as legitimate commercial strategies that would not be capable of harming the market or consumers – quite the contrary.

Relevant decisions

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Resolution CADE 20/99 establishes that fixing of a minimum price may result in anticompetitive effects related to:

- easier coordination of actions that seek to form cartels or other collusive price practices between manufacturers (the market of origin), when this makes it easier to police consumer sales prices or protects tacit agreements between manufacturers by blocking the entry of new distributors that are more innovative or aggressive, hindering the development of new and more effective distribution systems; and
- unilateral increases in the manufacturer's market power, insofar as it permits the same effect described above of deterring the entry of new and more competitive distributors. In the specific case of after-sales services, this type of restriction also permits, in principle, monopolistic exploitation of users after purchase of products when the alternatives offered to them are drastically reduced.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

The Administrative Council for Economic Defence (CADE) recognises that the practice may guarantee the maintenance of quality standards of differentiated products and avoid effects, such as free-riding from distributors that may offer aggressive rebates, taking advantage of the investment in quality of certain distributors.

Nonetheless, although efficiencies are usually presented by the defendants and discussed in the cases involving RPM, they tend to be considered insufficient by CADE in justifying the dismissal of a case involving this type of vertical restraint.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

The Brazilian Competition Act does not provide for any specific guidance in this respect. Nevertheless, taking into consideration that vertical restraints are analysed under the rule of reason in Brazil, CADE's assessment will likely be made case by case, balancing the anticompetitive effects and the economic efficiencies of the practice.

Suppliers

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

The first discussions of most-favoured nations (MFNs) in the Brazilian competition environment became public in March 2018, in an investigation carried out by the Administrative Council for Economic Defence (CADE), with online travel agencies Booking.com, Decolar.com and Expedia as defendants. Since 2016, CADE had been investigating possible abuses involving contracts between these companies and the hotels using their platforms for online sales, after a complaint by the Brazilian Hotel Operators Forum. The three defendants negotiated settlements (cease-and-desist agreements (TCCs)) with CADE and all of these were approved by the Administrative Tribunal.

In summary, the MFN clauses adopted by the three online travel agencies were very broad and, according to the defendants, designed to guarantee that they would offer better prices and conditions to final consumers when compared to the ones offered by the hotels themselves or by competing platforms.

According to the studies developed on the effects of said provisions and evidence collected by CADE, the imposition of such clauses would reduce competition between the travel agencies, thus facilitating uniform prices in the market, and creating an obstacle for new entrants.

In this sense, by signing the TCCs, the companies agreed to cease the use of these broad MFN clauses. More specifically, they agreed not to use these instruments to require parity in relation to other online travel agencies or to prohibit better offers in the hotels' offline sale channels (eg, regular travel agencies and phone bookings).

Nonetheless, when negotiating the agreements, the General Superintendence understood that the maintenance of the possibility of a parity obligation in relation to the hotels' websites would be acceptable to avoid free-riding in the online booking market.

The TCCs included only behavioural commitments. Owing to the nature of the conduct, the companies were not required to pay any fine or pecuniary contribution. These behavioural commitments are valid for three years.

It is worth noting that CADE emphasised that the understanding in the case, described above, was in line with the international practice on the subject.

In 2019, CADE installed a new administrative inquiry (Administrative Proceeding No. 08700.001323/2019-53), to investigate possible vertical restraints in contracts between broadcasting content companies and pay-TV companies, which include MFN clauses that establish that the pay-TV company should offer to a certain broadcasting company the same conditions agreed with its competitors.

25 | Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

One of the conditions imposed in the settlement agreements recently signed by Booking.com, Decolar.com and Expedia and CADE was to cease the use of clauses that determined that the same product should be sold at the same price in different competing platforms. Therefore, although CADE has not yet decided any case of this specific nature, the provision in these settlement agreements demonstrates that the authority tends to consider the anticompetitive potential of such clauses.

26 | Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The legality of a MAPP was discussed in a consultation (Consultation No. 08700.004594/2018-80) filed with CADE by Continental in 2018. Continental intended to implement a MAPP to its retail distributors in the aftermarket tyres segment, aiming to preserve its business model.

After recognising the ambiguous effects generated by the MAPP to consumer welfare, CADE concluded that the policy to be implemented by Continental was legal, considering:

- the absence of market power;
- the fact that the MAPP was unilaterally designed by Continental; and
- the absence of any type of discrimination between Continental's distributors affected by the policy.

The absence of market power

The market shares held by Continental and its distributors were lower than the 20 per cent threshold established by the Brazilian Competition Act and, therefore, the company was deemed as lacking market power. CADE also considered that the markets affected were not concentrated. The authority highlighted that the legality of the policy should be reviewed in the case of a market share increase.

The MAPP was unilaterally designed by Continental

That the policy was developed independently by Continental, without any influence or pressure from distributors, was understood by CADE as an important sign that the policy would not facilitate agreements or collusive behaviour between competitors. Therefore, this second aspect was also considered a condition for the legality of the conduct.

The absence of any type of discrimination between Continental's distributors affected by the policy

CADE also demonstrated a concern to ensure isonomic and non-discriminatory treatment to all distributors in Brazil.

The decision was contested by a dissenting opinion issued by Councillor Cristiane Alkmin, who understood that MAPP should be considered illegal per se, since it would inevitably result in a price standardisation. Ms Alkmin also emphasised that there are relevant specificities for online distributors (such as transportation costs and timing) and there would be no price negotiations, which would inevitably result in a final uniform price offered to the final consumer (equal to the advertised price).

27 | Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

The Brazilian Competition Act does not provide for any specific guidance in this respect.

Restrictions on territory

28 | How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Resolution CADE 20/99 has a specific provision on territory restrictions and customer base, by which the manufacturer determines geographic boundaries to the operation of the distributors or dealers. Accordingly, practices of this nature may restrict competition and competitors' entry in several regions, facilitating collusive practices and unilateral increases of manufacturers' market power. Nevertheless, considering that the practice shall be analysed under the rule of reason, Resolution CADE 20/99 also provides that the possible benefits in terms of transactional cost savings should be taken into consideration when reviewing these cases.

Territorial restrictions have been assessed by the Administrative Council for Economic Defence (CADE) in the analysis of cases involving 'radius clauses', by which shopping centres deter tenants from exercising their activities within a certain pre-established distance. It is worth noting that these clauses, as well as other exclusivity relations, are automatically understood as illegal by CADE. The authority has indeed considered possible efficiencies arising from these types of commercial restraints (such as avoiding free-riding effects and guaranteeing quality standards), determining that the assessment of the legality of the practice should balance the anticompetitive effects and the economic efficiencies resulting from the practice.

In the most recent case involving radius clauses decided by CADE (Administrative Proceeding No. 08012.012740/2007-46), several shopping centres located in Porto Alegre were convicted for imposing clauses that were deemed excessively broad on commercial establishments, thus potentially causing the increase in the risk of market foreclosure.

Territorial restrictions were also assessed by CADE in Administrative Proceeding No. 08012.008024/1998-49, which investigated the exclusivity granted by Microsoft to TBA Informática in distribution agreements to attend to the public administration of the federal district. CADE decided that the practice was illegal, especially owing to:

- Microsoft's market position, which, allied to the exclusivity, would inevitably cause a double monopoly and the exclusion of competitors in the affected markets (downstream and upstream); and
- the absence of clear, fair and transparent criteria to ground the territorial restriction.

29 | Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

The Brazilian Competition Act does not provide for any specific guidance in this respect. Moreover, CADE's general understanding of territorial restrictions would likely be similar in the analysis of a case involving internet sales, considering the specificities of such market.

Restrictions on customers

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

As other vertical restraints, restrictions on customers to whom a buyer may resell shall be analysed under the rule of reason in Brazil. In this sense, the Administrative Council for Economic Defence (CADE)'s assessment will likely be made case by case, balancing the anticompetitive effects (eg, facilitating collusion) with the economic efficiencies of the practice. Nevertheless, CADE would likely consider discrimination against customers without a reasonable economic justification to be a violation.

Restrictions on use

31 How is restricting the uses to which a buyer puts the contract products assessed?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

Restrictions on online sales

32 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The Brazilian Competition Act does not provide for any specific guidance in this respect. Nonetheless, in 2019, the Administrative Tribunal decided on three administrative proceedings involving Google, which were eventually closed owing to a lack of evidence, as detailed below.

Administrative Proceeding No. 08700.009082/2013-03 (illegal use of content)

This proceeding investigated Google for allegedly using its market power in the internet research market to use product reviews submitted by clients in Buscapé and Bondfaro's websites as content for their own price comparison service, Google Shopping. The investigation was triggered by a complaint by E-Commerce Media Group Informação e Tecnologia Ltda, which controls Buscapé and Bondfaro.

The General Superintendence issued its opinion in May 2018, suggesting the dismissal of the case considering that there was no evidence that the conduct harmed Brazilian consumers and that competing price comparators advised that they had not been affected by any similar conduct from Google. Further, in June 2019, the Administrative Tribunal followed the opinion issued by Reporting Commissioner Polyanna Vilanova, who concluded for the absence of proof against Google and determined the dismissal of the case.

The decision also included the suggestion that the General Superintendence installed a new investigation on potential abuse of dominance involving the use of third parties' content to leverage its own platforms, such as Google Shopping and Google News.

Administrative Proceeding No. 08700.005694/2013-19 (abusive clauses)

This proceeding investigated Google for allegedly reducing the incentives for companies to advertise on both Bing's research pages (through Bing Ads) and Google pages (through AdWords). The investigation was triggered by a complaint by Microsoft, which owns Bing. According to the complainant, Google planned to include abusive clauses in the terms and conditions for the creation of advertising software on the AdWords platform, which would reduce the portability of such campaigns to competitor platforms.

The General Superintendence issued its opinion in May 2018, also suggesting the dismissal of the case. After contacting diverse clients from Bing Ads and AdWords, as well as advertising firms, it was shown that it was possible to advertise on more than one platform and that Google's clauses on the creation of software did not limit this possibility in any manner. Therefore, the opinion was grounded on the understanding that the conduct did not create even potential negative effects.

The Administrative Tribunal accepted the General Superintendence's recommendation and dismissed the case in June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia sustained that the clauses were usually found in licensing or adhesion contracts and would not prevent multihoming and, therefore, should not be considered anticompetitive.

Administrative Proceeding No. 08012.010483/2011-94 (Google Shopping)

This proceeding concerns the claim that, when launching Google Shopping in 2011 in Brazil, Google would have placed its price comparison service in a privileged position within the results of its internet research engine tool, which would infringe the neutrality of Google's algorithm to favour its service when compared to its competitors. The proceeding also investigated the claim that Google's decision to position Google Shopping's results at the top of its research website through image ads in 2013, which would be more attractive to consumers and not available to competing price comparators, would constitute discriminatory treatment.

The investigation was also triggered by a complaint by E-Commerce Media Group that both conducts would harm competitors in price comparison websites, reducing their exposure in Google's results and, as a consequence, forcing them to invest in Google's paid links.

The General Superintendence issued its opinion in November 2018, suggesting the dismissal of the case. Accordingly, there was found to be no sufficient evidence. Indeed, the opinion indicates that, after market research and economic studies, the conclusion was that there was an improvement in the user experience, for which the innovations introduced by Google should not be considered anticompetitive. In this sense, the General Superintendence emphasised that, in markets with intense innovation, such as the one under investigation, great caution should be exercised before an intervention, otherwise the innovative effort, inherent to these markets, will be restricted.

Further, in 2019, the Administrative Tribunal decided to dismiss the case in June 2019, in accordance with the opinion issued by the Reporting Commissioner Mauricio Oscar Bandeira Maia. The authority understood that there was no evidence of Google's algorithms in Brazil being manipulated or of conduct such as blocking the access to an essential structure, tying or a lack of transparency. The Reporting Commissioner also emphasised that Google's search tools would have provided efficiencies for the Brazilian market and that Google had innovated to improve the consumer's research experience, which was pro-competitive.

The investigation on Google, opened in September 2016 (Administrative Inquiry No. 08700.003211/2016-94), is still under way at the General Superintendence's level. This investigation was triggered by a complaint submitted by the company Yelp and concerns the alleged use by Google of its dominant position to divert search traffic from its competitors to Google+.

In addition, in 2019, the General Superintendence opened two new investigations into practices involving Google: the alleged use by Google of the Android Operating System – Administrative Proceeding No. 08700.002940/2019-76; and a potential abuse of dominance involving the use of third parties' content to leverage its own platforms, such as Google Shopping and Google News – Administrative Proceeding No. 08700.003498/2019-03. These proceedings are at the preliminary investigation stage at the General Superintendence.

33 | Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

Selective distribution systems

34 | Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The Brazilian Competition Act does not provide for any specific guidance in this respect. Nevertheless, an assessment by the Administrative Council for Economic Defence (CADE) will likely be made under the rule of reason on a case-by-case basis, balancing the anticompetitive effects and the economic efficiencies of the practice.

In addition, the assessment would likely relate to some of the provisions established by Resolution CADE 20/99 for restrictions on territory and customer base or refusal to deal. Their potential anticompetitive effects, therefore, could be related to blockage to, and increase in, barriers to entry into the distribution or supply channels.

According to Resolution CADE 20/99, practices such as refusal to deal are usually associated with other anticompetitive vertical practices, such as exclusive dealing, which would probably be taken into consideration in the analysis.

Finally, the assessment of possible anticompetitive effects rising from agreements establishing 'selective' distribution systems may also take into consideration the criteria grounding the selection. In this sense, systems based on objective and transparent criteria are more likely to be considered legal by CADE.

35 | Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

36 | In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

37 | Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

38 | Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

39 | Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

Resolution CADE 20/99 has a specific provision on territory restrictions and customer base, by which the manufacturer determines geographic boundaries to the operation of the distributors or dealers. Accordingly, practices of this nature may restrict competition and competitors' entry in several regions, facilitating collusive practices and unilateral increases of manufacturers' market power. Nevertheless, considering that the practice shall be analysed under the rule of reason, Resolution CADE 20/99 also provides that the possible benefits in terms of transactional cost savings should be taken into consideration when reviewing these cases.

Territorial restrictions have been assessed by the Administrative Council for Economic Defence (CADE) in the analysis of cases involving 'radius clauses', by which shopping centres deter tenants from exercising their activities within a certain pre-established distance. These clauses, as well as other exclusivity relations, are automatically understood as illegal by CADE. The authority has indeed considered possible efficiencies arising from these types of commercial restraints (such as avoiding free-riding effects and guaranteeing quality standards), determining that the assessment of the legality of the practice should balance the anticompetitive effects and the economic efficiencies resulting from the practice.

In the most recent case involving radius clauses decided by CADE (Administrative Proceeding No. 08012.012740/2007-46), several shopping centres located in Porto Alegre were convicted for imposing clauses that were deemed excessively broad on commercial establishments, thus potentially causing the increase in the risk of market foreclosure.

Territorial restrictions were also assessed by CADE in Administrative Proceeding No. 08012.008024/1998-49, which investigated the exclusivity granted by Microsoft to TBA Informática in distribution agreements to attend to the public administration of the federal district. CADE decided that the practice was illegal, especially owing to:

- Microsoft's market position, which, allied to the exclusivity, would inevitably cause a double monopoly and the exclusion of competitors in the affected markets (downstream and upstream); and
- the absence of clear, fair and transparent criteria to ground the territorial restriction.

Other restrictions

40 | How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

41 | How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The Brazilian Competition Act does not provide for any specific guidance in this respect.

42 | Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

The Administrative Council for Economic Defence (CADE)'s leading case in this regard is Administrative Proceeding No. 08012.003921/2005-10, which resulted in the signature of cease-and-desist agreements (TCCs) with tobacco companies Souza Cruz and Phillip Morris, by which

the companies agreed to cease any practices that would restrain competitors' access to stores (including exclusivity in merchandising, exposition, stock or sale of products). CADE's main concerns in the case referred to market foreclosure, an increase in barriers to entry and a reduction in inter-brand competition. In this sense, the Reporting Commissioner emphasised that disputes on space availability (ability to stock products) may reach a level of aggressiveness that is not healthy for a competitive environment. Besides the obligations described above, Souza Cruz and Phillip Morris agreed to pay 2.9 million and 250 thousand reais, respectively.

Further, in 2015, CADE celebrated a TCC with Ambev, regarding the company's commercial policy of providing refrigerators to exclusive distributors, which were prevented from storing competitor's drinks inside them. The obligations accepted by Ambev in the agreement included:

- limiting exclusivity relationships to up to 8 per cent of the market per region;
- limiting exclusivity to 10 per cent of the sales volume of its exclusive distributors; altering its refrigeration policy, by ceasing the practice of determining exclusivity as a condition of offering refrigerators as points of sale; and
- ceasing any requirements that distributors sell a single brand of Ambev's beer per refrigerator, among others.

In 2018, when deciding Administrative Proceeding No. 08012.007423/2006-27, CADE decided to convict Unilever, the owner of Kibon (a leading ice cream brand in Brazil), for limiting competitors' access to distribution channels. As a result of the investigation, the authority concluded that the company would be a leader in the affected market and would have offered rebates and bonuses in exchange for exclusivity in sales, privileged merchandising and the use of refrigerators. According to the Reporting Commissioner, the practice of requesting exclusivity in the use of refrigerators has an economic rationale and should not be restrained. Nonetheless, he reaffirmed that with regards to other types of exclusivity (sales, merchandising and minimum volume), CADE has already indicated that, when the company holds a dominant position, the conduct will probably result in market foreclosure or in the increase of barriers to entry for new competitors.

43 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

In 2018, when deciding Administrative Proceeding No. 08012.007423/2006-27 concerning Unilever, CADE convicted and prohibited Unilever, the owner of Kibon, for imposing contracts on distributors with the obligation of selling a minimum amount of products in a certain period of time, subject to the penalty of a fine and the return of the bonus value already paid by Unilever to the distributor in the execution of the contract.

Nevertheless, taking into consideration that vertical restraints are analysed under the rule of reason in Brazil, the assessment of new conducts by CADE will likely be made on a case-by-case basis, balancing the anticompetitive effects and the economic efficiencies of the practice.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The Brazilian Competition Act does not provide for any specific guidance in this respect.

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The Brazilian Competition Act does not provide for any specific guidance in this respect.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

In recent years, there has been an increase in the number of investigations related to vertical restraints in the Brazilian Payments System and, in 2019, CADE has published a study about the competition dynamics and precedents in this sector. The investigations concern the relationship between banks, payment arrangement companies (brands), acquirers and sub-acquirers. Historically, CADE has celebrated several agreements in order to cease exclusivity and discriminatory relations. Currently, there are several investigations under way, including proceedings to investigate exclusionary practices by traditional banks against emerging companies (fintechs) and administrative inquiry to broadly investigate verticalisation in the financial sector.

In 2019, CADE has also celebrated two settlement agreements with a provision of structural remedies with Petrobras, in the context of several abuse of dominance investigations in the refining and natural gas sectors. The agreements include a provision for the divesture of several units controlled by Petrobras.

NOTIFICATION

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Vertical agreements may be subject to merger control if they qualify as a concentration act, more specifically as 'associative agreements'.

Accordingly, notification to the Administrative Council for Economic Defence (CADE) is mandatory for certain types of transactions (mergers, acquisitions and associative agreements, among others) when:

- at least one of the involved economic groups registered gross revenues or volume of businesses equal to or exceeding 750 million reais in the year preceding the transaction in Brazil; and
- at least one other involved economic group registered gross revenues or volume of businesses equal to or exceeding 75 million reais in the year preceding the transaction in Brazil.

In order to calculate the groups' revenues, the general definition of 'economic group' takes into consideration companies under common control or companies in which any member of the group holds at least 20 per cent interest, or both. Further considerations apply to specific cases (investment funds, for instance).

Vertical agreements that meet the filing thresholds may be defined as concentration under the 'associative agreements' category, if certain circumstances as observed, as defined by CADE Resolution No. 17 of 10 October 2016. Accordingly, an agreement cumulatively containing the following characteristics will be treated as an 'associative agreement':

- has a duration of two years or more;
- is a creation of a joint undertaking to pursue an economic activity;
- shares the risks and results of the underlying economic activity; and
- has been executed between parties (or economic groups) that are competitors in the relevant market involved.

The last characteristic demonstrates that CADE excluded vertical agreements as a type of associative agreement. Nonetheless, vertical restraints are in fact taken into consideration in CADE's analysis of merger cases.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Yes. Article 9, paragraph 4 of the Brazilian Competition Act, further regulated by the Administrative Council for Economic Defence Resolution 12, of 17 March 2015, provides for a consultation, under which any interested party may request CADE's assessment on the application of the antitrust law with regard to a specific factual hypothesis.

In Consultation No. 08700.004594/2018-80 filed with CADE, involving the legality of a minimum advertised price policy (MAPP) to be implemented by Continental do Brasil Produtos Automotivos Ltda (Continental) in the aftermarket tyres segment, the authorities concluded that the market shares held by Continental were lower than the 20 per cent threshold established by the Brazilian Competition Act and therefore the company lacked market power. As a result, CADE concluded that the intended commercial policy was legal. In that ruling, CADE expressly stated that, even though its past rulings may indicate that price-based vertical restraints are presumed to be unlawful, such presumption may be disregarded if the defendant succeeds in demonstrating that, in the absence of market power, whether unilateral or coordinated, it is not a credible possibility that the market could be harmed by a given commercial practice.

ENFORCEMENT

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Any private party, whether or not party to the agreement containing the restraint, may offer a complaint to the Administrative Council for Economic Defence (CADE), including anonymously. The General Superintendence will then analyse the complaint and decide whether to commence a formal investigation, which will essentially depend on how grounded the request is. The authorities have also discretion to initiate a formal investigation ex officio (without complaints from third parties).

In either case, the General Superintendence usually initiates a preliminary inquiry, whereby it gathers further information on the alleged conducts and on the involved parties and market, to decide whether to commence an administrative proceeding. If this is the case, the concerned parties will formally be summoned to present their respective defences. Once the General Superintendence concludes its investigation, it may decide to dismiss the case or recommend a conviction by the Administrative Tribunal. In either case, the case records are sent to the Administrative Tribunal for a final decision, which is taken by a majority of votes, concluding whether to dismiss the case if it finds no clear evidence of violations, or imposing penalties to the defendants.

The hearings held by the Administrative Tribunal are public, usually taking place twice a month in Brasília, and it is possible to follow the discussion live, through CADE's website.

Regulatory enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

According to the Administrative Council for Economic Defence (CADE)'s public records, in 2019, its Administrative Tribunal decided 27 administrative proceedings: 17 investigating cartels, six investigating cartels and four investigating unilateral conduct. As mentioned above, the main cases ruled by the Administrative Tribunal in 2019 involving vertical relations were the ones involving Google.

With regard to the activities developed by the General Superintendence, we highlight the statement in CADE's Annual Report from 2018, that 30 unilateral conduct investigations were commenced in 2018, the agreements with Petrobras and the increase in the investigations on possible anticompetitive effects in the vertical relations within the Brazilian Payments System.

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

CADE is empowered to declare a contract fully or partially invalid or unenforceable if it understands that such agreement violates the antitrust law. If the decision affects only certain provisions of the contract, the remaining clauses would remain valid. In any case, parties affected by such decision could bring the discussion to the judiciary branch, where an injunction could be obtained to suspend the effects of CADE's decision until a final ruling is reached.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

CADE may directly impose penalties when deciding an administrative proceeding. Nonetheless, as an administrative title, the decision may be contested in court. Penalties that may be imposed by CADE are established in articles 37 and 38 of the Brazilian Competition Act.

For companies, article 37 provides that fines may vary from 0.1 per cent to 20 per cent of the gross revenues of the company, group or conglomerate, in the fiscal year previous to the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, and the possible estimation thereof. In the case of recurrence, the fines shall be doubled. There are several discussions on the concepts of 'field of the business activity' and 'the advantage obtained'.

In cases involving vertical restraints, the fines imposed by CADE are usually up to 5 per cent of gross revenues of the company, group or conglomerate in the segment affected by the restraint.

The largest fine ever imposed by CADE in a conviction for vertical restraints was in Administrative Proceeding No. 08012.003805/2004-10, in 2009, in a case involving an award programme called 'Tô Contigo', developed by Ambev. CADE understood that the programme created incentives for exclusivity relations and increased barriers for the entry of new competitors in the market, and imposed a fine of 352 million reais (approximately 2 per cent of the company's revenues in 2003). Ambev contested CADE's decision in court and, further, in 2005, Ambev and CADE reached a judicial agreement, by which Ambev agreed to cease the programme and to pay 229.1 million reais.

For individuals or legal entities that do not perform a business activity and, therefore, do not register gross revenues, article 37

establishes that the fine will vary from 50,000 to 2 billion reais. There is also a specific provision when the administrator is directly or indirectly responsible for the violation, when negligence or wilful misconduct is proven. Under this circumstance, the administrator's fine will vary from 1 per cent to 20 per cent of the fine applied to the company. Investigations of individuals for vertical restraints are rare within CADE's precedents.

Article 38 establishes the following alternative penalties, besides fines, that may be applied according to the seriousness of the facts or public interest:

- the publication, in half a page and at the expense of the perpetrator, in a newspaper indicated by the judgment, of the extract from the conviction, for a period of two consecutive days for one to three consecutive weeks;
- ineligibility for official financing and for participation in biddings when the objective is acquisitions, divestitures, performance of works and services, provision of public services, in the federal, state, municipal and federal district public administration, as well as in indirect administration entities, for a term of not less than five years;
- the registration of the wrongdoer with the National Registry for Consumer Protection;
- recommendation to the respective public agencies so that:
  - a compulsory licence over the intellectual property rights held by the wrongdoer be granted, when the violation is related to the use of that right; and
  - the violator be denied instalment payment of federal taxes owed by him or her, or that tax incentives or public subsidies be cancelled, in full or in part;
- the company divestiture, transfer of corporate control, sale of assets or partial interruption of activity;
- the wrongdoer be prohibited from carrying on trade on its own behalf or as representative of a legal entity for a period of five years; and
- any other act or measure required to eliminate harmful effects to the economic order.

These provisions show that CADE has a wide range of sanctions that include structural remedies (such as the sale of assets) and any measures required to eliminate the anticompetitive effects arisen by the conduct.

Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Law No. 12,529/11 empowers the Administrative Council for Economic Defence (CADE) with extensive investigative power, which includes the possibility of:

- requesting information and documents from any individuals or legal entities, as well as from public or private bodies, authorities and entities;
- requesting oral clarifications from any individuals or legal entities, as well as from public or private bodies, authorities and entities (or their respective representatives);
- conducting inspections at the company's place of business or office;
- requesting search and seizure warrants from the judiciary branch; and
- requesting access and copies of documents supporting an inquiry or proceedings commenced by government bodies.

Dawn raids depend on judicial orders and have traditionally been used by CADE in the context of cartel investigations rather than in vertical restraints.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Article 47 of the Brazilian Competition Act generically establishes that those injured by an anticompetitive conduct may go to court to defend their individual or collective interests, to seek an injunction to cease the anticompetitive practice and to recover damages. In practice, plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings), as well as moral damages.

Private lawsuits can be brought regardless of the existence of an administrative decision on an anticompetitive practice, and even before an administrative proceeding itself is instated. In addition, the existence of a private claim does not stay the administrative proceeding, which develops independently.

Both individuals and corporations can be sued, either individually or collectively. Private antitrust lawsuits can also take the form of individual enforcement actions or collective actions.

Coupled with the provisions in the Competition Act, the Brazilian Civil Code and the Brazilian Civil Procedure Code also set out general rules governing private lawsuits. Moreover, collective actions are further governed by a specific legal system that brings together several laws and regulations, such as the Brazilian Consumer Protection Code and the Public Class Actions Law.

Finally, the parties to a lawsuit can challenge all evidence, even when it has been produced by the Administrative Council for Economic Defence (CADE) within an administrative proceeding (ie, all evidence of the administrative investigation may be re-examined by the judicial courts), which may lead to contradictory decisions, as well as increase the timing for a lawsuit conclusion, which usually takes at least five years.

OTHER ISSUES

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

UPDATE AND TRENDS

Recent developments

56 What were the most significant two or three decisions or developments in this area in the last 12 months?

Recent developments

In 2019, the most important cases related to vertical conducts ruled by the Administrative Tribunal related to investigations into Google. The three cases were dismissed by the Administrative Tribunal, owing to a lack of evidence of anticompetitive effects. These decisions demonstrate that the antitrust authority is dedicating special attention to digital players and, at the same time, observing the caution necessary to avoid an excessive intervention, which could reduce incentives for innovation.

There were also relevant developments in investigations related to vertical restraints in the Brazilian Payments System, which concern the relationship between banks, payment arrangement companies (brands), acquirers and sub-acquirers. Historically, the Administrative Council for Economic Defence (CADE) has celebrated several agreements to cease exclusivity and discriminatory relations. In 2019, CADE published a study about the competition dynamics and precedents in this sector, and there are currently several investigations under way, including proceedings to investigate exclusionary practices by traditional banks against emerging companies (fintechs) and administrative inquiry to broadly investigate verticalisation in the financial sector.

CADE has also celebrated two settlement agreements with a provision of structural remedies with Petrobras, in the context of several abuse of dominance investigations in the refining and natural gas sectors. The agreements include a provision for the divesture of several units controlled by Petrobras.

Anticipated developments

Unilateral conducts and vertical agreements have been on the top of the Administrative Council for Economic Defence (CADE)'s agenda in recent years. According to CADE's Annual Report, the authority commenced 30 unilateral conduct investigations in 2018 and judged important cases related to digital markets.

Nevertheless, there are still challenges ahead. In 2019, CADE was subject to the OECD Peer Reviews of Competition Law and Policy, which analysed some of these challenges related to unilateral conducts and vertical restraints, which may explain why there is still a limited number of investigations of this nature.

The main challenge concerns the lack of resources dedicated exclusively to unilateral conduct investigations. According to the OECD report, considering that, currently, the resources are divided between mergers and unilateral conduct, and, given the statutory deadlines, mergers are prioritised and unilateral conduct cases may be overlooked as a consequence. In response, CADE has dedicated one staff member in each unit for unilateral conduct cases. Nevertheless, the OECD recommendation for an effective improvement on abuse of dominance cases is that 'CADE should consider establishing separate units within the General Superintendence for investigating abuse of dominance cases'.

The OECD also recommended that 'CADE should publish more substantive guidelines to improve transparency, predictability and legal certainty for businesses and to improve consistency of approach internally', and expressly mentioned vertical restraints as a possible topic that would benefit from more guidance. The General Superintendent has already stated that elaborating guidelines for the analysis of cases involving vertical restraints is on the authority's agenda.

Moreover, in 2019, CADE issued the First Report by the Competition Authorities Working Group on Digital Economy 'BRICS in the digital economy competition policy in practice'. The study describes CADE's agenda related to digital markets in the past years, including vertical restraints. On the topic, the study makes reference to the investigations on Google's conducts, the adoption of most-favoured nation clauses by online travel agencies operating in Brazil, Booking, Expedia and Decolar and exclusionary practices by traditional banks against emerging technology companies, especially companies offering financial services, namely fintechs.

PINHEIRONETO
ADVOGADOS

Cristianne Saccab Zarzur
czarzur@pn.com.br

Marcos Pajolla Garrido
mgarrido@pn.com.br

Carolina Destailleur Bueno
cbueno@pn.com.br

Rua Hungria, 1100
São Paulo 01455-906
Brazil
Tel: +55 11 3247 8506
Fax: +55 11 3247 8600
www.pinheironeto.com.br