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## **Global Forum on Competition**

### **SERIAL OFFENDERS: INDUSTRIES PRONE TO ENDEMIC COLLUSION**

#### **Contribution from Brazil**

-- SESSION IV --

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## **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

### **-- Brazil --**

1. As the Brazilian authority responsible for enforcing the Brazilian competition law, Law 12.529, CADE has invested greatly in combatting collusion in Brazil. Recently, CADE has reinforced its efforts in the detection, investigation and sanctioning of cartel behavior, as well as in the promotion of more transparent, clearer guidance for businesses in complying with competition law. Taking a general perspective, there are rare cases of recidivism in CADE's jurisprudence and few sectors which have shown themselves prone to collusion.

2. Before tackling the sectors which have shown repeated collusion, it is worth outlining aspects of the Brazilian competition law and CADE's enforcement policy which address the issue of recidivism and endemic collusion.

#### **1. Brazilian Competition Policy and Enforcement**

3. Firstly, as a specific mechanism of deterrence of recidivism, the Brazilian Competition Law, Law 12.529 of 2011, has a specific provision in its Article 37 § 1 which specifies that in case of a repeat offense, the applicable fines will be double. That is to say that, instead of the maximum fine of 20% of the previous year's turnover, a repeat offender may be subject to fines of up to 40% of the previous year's turnover.

4. In terms of its enforcement action, CADE has made important efforts not only in terms of its enforcement activity, but also in terms of its normative guidance to business as a means to combatting collusion in the Brazilian economy, and as a consequence recidivism and endemic collusion. This is reflected in the more general application of competition law as regards cartels, but also in a more specific way in terms of promoting transparency, legal certainty, robust jurisprudence and creating avenues by which undertakings may seek to understand how CADE interprets particularly practices and points of law so as to avoid infringing the law.

5. In terms of enforcement policy, and more specifically cartel detection, for instance, the General Superintendence created, in 2013, an Intelligence Unit, which is charged with ex officio cartel detection, particularly in public procurement. This is based on a dual track approach of, on the one hand, creating partnerships with public institutions that can provide the data on public procurements in Brazil and, on the other hand, developing the procedures, based on international best practice, and the technological means, to apply screens to the data and identify potential collusive behavior in public bids.

6. Despite important advances in that area, CADE's Leniency Program continues to be a fundamental part of cartel detection in Brazil. It has evolved throughout these years, and is today a more mature instrument, in which CADE has become increasingly aware of the importance of effectively evaluating which leniency applications to accept, and which are simply insufficient. In 2014, the number of

leniency applications continues on an increasing trend, and reflects CADE's sound resolve in maintaining the integrity of the program.

7. As regards anti-competitive conducts, the developments and achievements have also been substantial, benefited in large part by the gain in efficiency from the elimination of the merger backlog and the filtering of cases that reach the Tribunal. Whereas in 2011, only 16 anticompetitive practice cases were tried by the Tribunal, 38 administrative proceedings in antitrust were tried in 2014, and 57 cases in 2015.

8. The organizational set up in the new CADE strongly contributed to these results. The creation of the General Superintendence as the investigatory body as regards antitrust investigations, with a significant degree of independence from the Tribunal regarding the opening of proceedings, how they are conducted thereafter and the recommendation to the Tribunal to file or to sanction a particular investigated conduct. The Tribunal, which was previously overloaded with older long-running investigations, was able, in the past years, to move beyond this and focus on cases that bring more impact to the institution and to the economy and create relevant precedent. In the past, for instance, a large majority of proceedings tried in the Tribunal were filed (up to 85%), whereas in 2013 and 2014, 64% of the administrative proceedings decided by the Tribunal led to convictions. This does not indicate a more aggressive competition enforcement trend, but rather that the Tribunal's efforts are being focused on cases that are more likely to be harmful to the Brazilian economy and to Brazilian consumers.

9. The internal organization of the General Superintendence, and in particular the implementation of a triage unit for receiving and screening complaints and leniency applications, as well as identifying and prioritizing harmful, stronger cases contributed to this. The prioritization and screening policies seeks to avoid cases with little chance of success, that is, which have apparently little evidence, and the subsequent squander of scarce resources.

10. CADE also contributed significantly to providing legal certainty for companies when assessing their liability in competition law infringements with resolutions. For example, in 2012, the resolution which set out branches of economic activity, cited in the Brazilian competition law as the basis for setting fines, ensured a much higher level of predictability and certainty in considering eventual fines for competition enforcement.

11. In the other dimension, that of promoting compliance with competition law, CADE was also very active. At CADE we are aware of the importance of being transparent and clear on the terms by which the competition law will be interpreted and enforced by the agency.

12. With experience in applying the new Brazilian Competition Law, CADE took the opportunity to provide clarification and further legal certainty and guidance on issues of competition policy and enforcement. These have included various clarifications to both the Brazilian Competition Law, as well as to CADE's Internal Regulation (*Regimento Interno do CADE – RICADE*).

13. For instance, a recently enacted CADE resolution sets out the rules on the consultation procedure, provided by Law 12.529/2011, whereby parties can consult CADE's Tribunal on the interpretation of the competition law. It is an extremely useful tool to encourage companies to engage with CADE to clarify issues related to the scope of the provisions of Brazilian competition legislation.

14. In 2014, CADE invested in the next step in this normative agenda in fulfilling its commitment to promoting compliance with competition law. As a consequence of the enactment of the Clean Companies Act in Brazil, which gave particular emphasis to compliance programs, and the high-profile corruption and cartel cases in the media, companies were also eager and willing to engage in a debate with CADE as to how best to structure initiatives within companies that promote compliance.

15. In August of 2014 then, CADE organized a seminar to launch this debate, which led, during 2015, to the development of CADE's draft Guidelines on Compliance Programs. It considers why compliance is important, and emphasizes the benefits that complying with competition law has for consumers, the economy and companies themselves. It also tackles risk evaluation – how companies can use a compliance agenda to improve how to evaluate the risk of a competition infringement, and how they can mitigate this risk (e.g. by signing a leniency or settlement agreement, or consulting CADE on a point of the competition law). Additionally, it outlines how CADE understands compliance programs without a structured, normative guide for setting up large, sophisticated, costly programs, and setting out only foundational characteristics.

16. This enforcement and policy agenda has aimed to provide better, more robust guidance to businesses, especially those in sectors which may have a greater tendency or risk of collusive behavior.

## **2. Sectors prone to collusion**

### **2.1 *Cement***

17. While CADE has not identified recidivism in the sectors identified in the background paper, CADE has identified that it has sanctioned collusion in these sectors. While some of these sectors have been investigated and heavily fined across the globe, these have not necessarily been cases with an international dimension.

18. In the **cement sector**, on 28 May 2015, CADE condemned the so-called cement cartel, (Administrative Proceeding no. 08012.011142/2006-79). The fines applied to six companies, six individuals, and three associations totaled BLR 3.1 billion. CADE also determined the divestment of plants, and prohibition of carrying out operations in the cement and concrete sector until 2019.

19. The cartel acted in the Brazilian cement and concrete market by fixing prices and sales quantity, and by regionally sharing the market and the allocation of customers between the cartel members. The companies, managers and class associations condemned also acted to prevent the entry of new competitors in these segments.

20. In the cement market, the collusion also controlled the inputs needed for manufacturing the product. Thus, it prevented other competitors to access the raw material and compete in the market with the cartel members.

21. The cartel started to act in the concrete market especially by the acquisition of concrete plants that was done according an offset logic, trading assets among themselves to maintain their previously agreed participation in the market by an illegal agreement.

22. To exclude the competitors of the market, the cartel worked to change the rules established by the Brazilian Association of Norms Techniques (ABNT). By the new rules, companies that were not part of the cartel did not abide to the norms. For example, the norm NBR 12655, which stipulates minimum volumes and specific characteristics of the cement used to prepare concrete and prohibited the use of additives in its preparation, among other demands.

### **2.2 *Construction***

23. In addition to these sectors, CADE has recently been very active in bid-rigging in public procurement, with particularly visible cases in the media. It has followed from a public agenda in

combatting corruption. There are two particularly important cases that have involved a cartel in the construction of power plants related to *Petrobrás* and *Eletrobrás*, which are both ongoing within CADE.

### **2.3 Liberal Professions - Doctors' pricing lists**

24. In Brazil, one of the practices and sectors that has seen consistent sanctioning over the past twenty years has been that of price fixing through recommended pricing lists by associations of doctors. CADE has consistently opted to sanction these medical associations, giving a clear sign to the market that this practice represented an anti-competitive behavior that infringed the Brazilian Competition Law as a mechanism of price-fixing among entities. However, throughout CADE's jurisprudence, there have been important nuances which must be highlighted and which may also help to explain why this practice has continued to be repeated along these two decades.

25. The application of competition law to the liberal professions is often a delicate balancing act of whether these professions should be subjected to the full force of the discipline of the competitive process or whether there are economic arguments that may justify practices that would otherwise be considered infringements of competition law.

26. The argument in CADE jurisprudence has been that the agreement via pricing tables suppresses market forces, the free interaction between demand and supply and consequently the competitive fixing of prices. The resulting price is therefore artificial and above what it would be if the market agents freely and independently set their prices. The consequence of this type of practice is higher prices for consumers.

27. Initial CADE jurisprudence did not consider other eventual efficiencies or benefits of the practice, nor whether there was any coercion in the practice. However, this tendency was interrupted by a decision in 1992, in which CADE filed a pricing table case due to the fact that coercion was not proved, gaining some distance from the strict per se logic that was applied in earlier cases. This was also the first case to mention the issue of countervailing<sup>1</sup> power –that is, the argument that the doctors' associations put forward that these pricing tables are necessary to rebalance the market forces between doctors and health plans.

28. Countervailing power, in this case, consists in the coordination between competitors to adopt uniform commercial practices with the objective to amplify their bargaining power to achieve better negotiation results, reducing the imbalance of power in relation to the other side of the production chain. This issue of countervailing power is particularly contentious within CADE. In fact, in 2006, CADE's decision took into consideration, for the first time, whether there might be efficiencies and benefits for the market with this behavior, as a compensation for market asymmetries.

29. The extent to which countervailing power should be considered by antitrust authorities as a potential beneficial practice has been explored in academic literature, and has not yet been incorporated by CADE as a sufficient argument to justify the fixing of prices among doctors within their associations. However, it has gained significant space within Brazilian law, particularly in terms of conduct investigations. On the other hand, this concept is widespread in the context of merger review.

30. In order to better understand this issue, it is useful to characterize the market, in a historical context and what it looks like currently, to examine what potential incentives might exist for this collusive behavior, particularly in terms of bargaining power – the most common argumentation by the medical associations. The presence of an intermediary in the health care sector, in this case health plans, associated

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<sup>1</sup> Galbraith, K. (1968) *American Capitalism*, Transaction Publishers, New Brunswick

with asymmetry of information, creates a context which may alter the incentives of consumers and health care providers.

31. In the market for health care and medical insurance, this asymmetry of information leads to issues of moral hazard, adverse selection and problems of agency. The moral hazard may occur associated to the behavior of the consumer or the health care provider. In the case of a health plan, consumers tend to make excessive recourse to services, as the marginal cost of the product is zero or close to zero. The health care providers, on the other hand, may induce demand for particular services, especially diagnostic exams, raising the cost of the service. This may be exacerbated if the payment is ensured by a third party (the insurer) as the patient does not hold the responsibility for payment and has no interest in controlling that demand. Adverse selection may occur in the insurance market when the insurer cannot adjust its premium to individual risk, because of lack of information or due to a regulatory obstacle. Ultimately, ferocious competition may have adverse effects in this case as firms will tend to compete for individuals with the lowest risk and this may lead to the exclusion of particularly high risk types from the market. (Andrade et al. 2015)

32. Given these characteristics of the health care sector generically, the Brazilian health sector, in particular, may be characterized as a mixed system, in which the public and private sectors act to provide health services. Health care plans offer private plans, including both individual and collective plans (hired by employers, for instance). The sector of private insurance plans covers approximately 25% of the population. The health insurance sector was regulated in 1998, by Laws 9656/98 and 9961/00 which created a regulatory National Agency for Health Insurance (ANS, from its Portuguese acronym). Essentially, the Brazilian regulatory framework creates criteria for entry into the market, the functioning and exit of health insurance operators, discriminates the patterns of coverage and assistance, defines the powers of the federal executive in regulating the economic activity and assistance provided by the operators, as well as the supervisory powers of the applicable norms in the sector. These, rather recent, transformations in the health sector led to strong incentives for concentration in the health insurance sector, which is clearly reflected in health insurance mergers notified to CADE.

33. In addition to the decrease in number of health insurance operators, there was also concentration in the sector among operators with a significant portion of beneficiaries. In the case of supplementary health sector, therefore, the legislative framework itself, created incentives to greater concentration in the sector, creating companies that were more solid and less susceptible to risk. However, this concentration may be accompanied by greater market power which, if abused, may also have potential negative consequences for competition – for instance, the creation of an imbalance in bargaining power.

34. Given this regulatory and conjectural context, incentives to collusion among doctors' associations perpetuate within the market, based on the argumentation of the need for countervailing power.

35. It is also worth mentioning that a large majority of these cases – over 90% - are unsuccessful following appeal to the judiciary. The judiciary has struck down CADE decisions based on the issue of countervailing power – that is, that there is an economic justification for the collusive behavior that brings efficiencies to the market. According to the judiciary, there is an imbalance between the health plan operators and the doctors, in which doctors do not have conditions to freely negotiate their prices as they are in a far worse bargaining position.

36. There has been a recurrent discussion within CADE as to whether this argument should be considered within competition decisions, but to date CADE has maintained its enforcement record of sanctioning this practice. Though these cases continue to emerge, this consistency in the jurisprudence has given a clear signal that, while CADE recognizes that there are other important arguments to be considered, they have not yet been sufficient to influence CADE's decision.

## REFERENCES

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