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**Agenda Item 3c. Enhancing international cooperation in the
investigation of cross border competition cases: Tools and
procedures**

Contribution by
Administrative Council for Economic Defense (CADE)
Brazil

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Enhancing international cooperation in the investigation of cartel cases: Brazil's experience¹

1) Introduction

During the past decade, international cooperation has been a priority on CADE's agenda with great results achieved. In this regard, CADE has strengthened its ties with strategic international partners, established relevant international cooperation agreements, increased its participation in international fora and implemented effective leniency and settlement programs. This growth in a positive international cooperation culture has facilitated the effective enforcement against international cartel activity.

Based on the above development process and the lessons learned through it, this paper sets out CADE's experience in using the relevant tools and powers at its disposal in the fight against international cartels. It also highlights current challenges and opportunities to improve international cooperation in this important area of work.

2) International cartel investigations in Brazil

The prosecution of international cartels has been one of CADE's major concerns, requiring increasingly closer collaboration with other antitrust agencies throughout the globe. During the period 2000 to April 2016, CADE opened 43 new proceedings to investigate international cartels. 81% of these cases were opened in the last seven years, reflecting an increase in the detection of international cartels having an effect in Brazil in recent years.² Thus far, international cartel activity affecting Brazilian consumers has been uncovered in the markets for electronics and electronics inputs, international freight and auto parts.

International cooperation has greatly contributed to CADE's enforcement measures against international cartels. In particular, during the period 2013 to 2016, CADE engaged in 36 cooperation activities for the assessment of 21 anticompetitive

¹ This document was prepared by Noemy Melo, Head of CADE's International Unit and Fábio de Sousa, Technical Assistant. For further contact: noemy.melo@cade.gov.br and fabio.lopes@cade.gov.br.

² ATHAYDE, Amanda; FERNANDES, Marcela. A Glimpse into Brazil's experience in international cartel investigation. Concurrence n° 3-2016.

conducts. These cooperation activities have largely involved the exchange of experiences and general views and sharing practical and procedural aspects of case analysis.

The cooperation activities have thus far mainly occurred with the Department of Justice (DOJ), USA, and the Directorate-General for Competition (DG-Comp), Europe, and the competition authorities of Australia, Canada, Chile, Colombia, Mexico, South Africa and South Korea.

3) Legal Framework for the prosecution of international cartel cases

In Brazil, cartels are treated as both administrative and criminal offences³. With regard to the prosecution of international cartels, Article 2 of the Brazilian Competition Law – Law 12.529/2011 – states: *“This law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon.”* Accordingly, the effects doctrine⁴ is adopted indicating that the law applies to anticompetitive practices that have an effect in the country even in cases where the actual conduct may have taken place outside the country.

CADE takes into account the following factors⁵, among others, when prosecuting and punishing international cartels:

- (a) the cartel produces countable, substantial and relevant indirect effects in Brazil;
- (b) Brazil is a relevant destination of imports of the final products cartelized;
- (c) the companies involved in the cartel are sources of highly demanded products or services in the Brazilian market;

³ The criminal prosecution of cartels is foreseen by Law 8.137/90, which provides confinement from two to five years and fines as a punishment for the individuals implicated in these anticompetitive conducts.

⁴ The effects doctrine provides that when it comes to the enforcement of competition law, the domestic legislation is applicable to foreign firms – or domestic firms located outside the state’s territory - when their practices or behavior produces effects within the domestic territory. In this case, more than one jurisdiction can claim the application of its competition laws on the same competition practices or business transactions, as it refers to a unilateral application of the country legislation.

⁵ These parameters were made public in the legal opinion n° 30/2016/LJP/CADE on the Administrative Proceeding n° [08012.005930/2009-79](#).

(d) the companies implicated in the cartel have a substantial presence or significant operation in Brazil; and/or

(e) there is no investigation or condemnation of the cartel in the jurisdiction directly affected, even though its detection is possible objectively.

In addition, the enactment of the new law and other recent legal changes contributed significantly to CADE's increased engagement in international cooperation activities. With the establishment of law 12.529/2011, all competition enforcement attributions were unified into one single authority, enabling CADE to exchange views and coordinate measures forthrightly with many competition agencies worldwide.

The competence to execute and obtain mutual assistance, establish cooperation agreements – with the approval of the Minister of Justice - and exchange information, all based on the principle of reciprocity, is provided by Article 60 of CADE's Internal Resolution⁶. Moreover, Article 21 of Decree n° 9.011/17 grant to the President of CADE's Tribunal the competence to act as a central authority for processing requests of international legal cooperation in antitrust matters.

In that sense, the authority is now able to directly engage in international cooperation with other agencies and request mutual assistance in competition matters. These requests are particularly relevant in order to notify defendants based abroad, ensuring the right for proper defense and due process⁷.

4) Tools, procedures and investigative power

The mutual understanding and interaction between competition authorities are considered important tools in the arsenal against international cartels. In the recent years, CADE has established agreements and protocols with many antitrust agencies, which allow for cooperation on the form of notifications with respect to enforcement activities affecting the other agency's interests, consultations, technical cooperation, exchange of

⁶ [Internal Regulation](#) of the Administrative Council for Economic Defense (RICADE), approved on 7 June 2017.

⁷ SILVEIRA, Paulo Burnier da; TOLLINI, P. T. International Cartels in Brazil: an Overview and a Look Forward. In: Vinicius Marques de Carvalho; Carlos Emmanuel Joppert Ragazzo; Paulo Burnier da Silveira. (Org.). International Cooperation and Competition Enforcement: Brazilian and European Experiences from the Enforcers' Perspective. 1ed. Kluwer Law International, 2014, v. 1, pp. 169-182.

information (subject to the laws of each jurisdiction protecting confidential information), regular meetings and the granting of specific comities.

CADE has signed international cooperation agreements of this kind with the antitrust agencies from the following jurisdictions: Argentina, Canada, Chile, China, Colombia, European Union, France, Japan, Mexico, Peru, Portugal, Russia, United States, South Africa and South Korea. The Brazilian Competition Authority is also a party to MOUs with BRICS, the Inter American Bank for Development, Mercosur and the World Bank⁸.

In addition to these agreements, CADE is empowered to request service of process abroad through rogatory letters, aiming at notifying a defendant or providing an *exequatur* for a foreign order. This instrument is particularly important, as the anticompetitive case can only be judged after the conclusion of the stage of presentation of defense. However, there are some challenges regarding these mechanisms, which is elaborated upon in item 5 below.

During the investigation phase, CADE usually relies on so-called ‘pick-up the phone’ cooperation. This kind of cooperation allow the competition agencies to hold informal discussions, by e-mail or telephone, about practical aspects of the investigation such as the difficulties with the service of process abroad and how to overcome bureaucratic hurdles. Another benefit is the maintenance of the agency’s work up-to-date and sharp to follow the international expertise on handling and classifying important cases. Most part of the cases described in the sixth topic of this paper benefited from this type of informal cooperation.

Regarding the exchange of confidential information, it is necessary to obtain a waiver from the relevant parties. These parties are usually leniency applicants. In this case, is possible to share confidential information, document, and more details of the conduct.

As for the investigative resources, the Brazilian Competition Law provides CADE with the power to require any documents or information, which would expedite the case

⁸ These international cooperation agreements are available at:
http://en.cade.gov.br/topics/topics/bilateral_cooperation/legislation/bilateral-cooperation

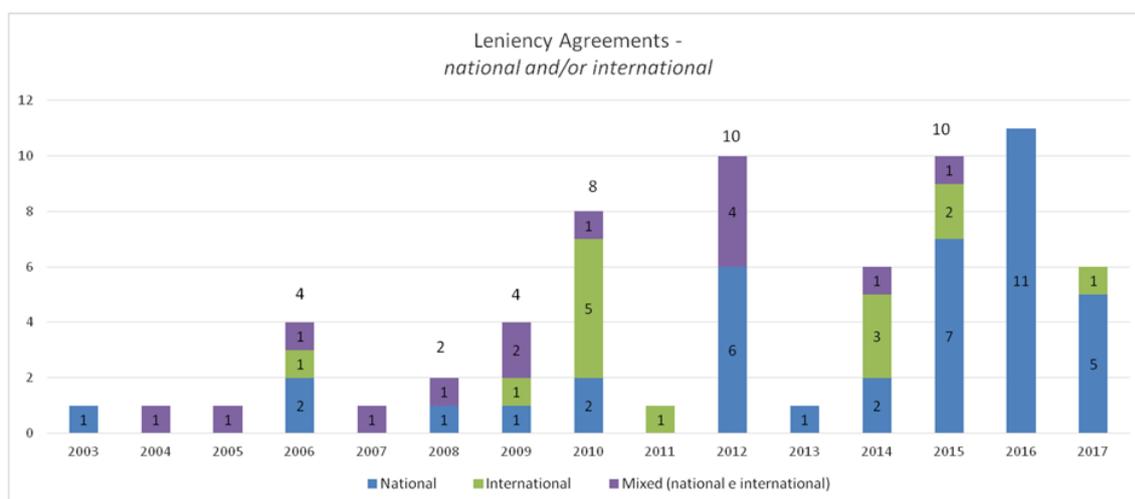
analysis, based on a reasoned decision and conduct unannounced search and seizure warrants, among others.

CADE's leniency and settlement programs have also proved to be effective investigative tools. This is elaborated upon further below.

5) The importance of Leniency Agreements and settlement programs to International cooperation

CADE's leniency agreement and settlement program can be considered as the main tools of CADE to detect cartels.

Brazil's Leniency Program, which became full-pledged in 2010, was responsible for detecting 67 cartels (domestic, international, mixed) from 2003 to May 2017. CADE's 2016 data indicates an increase of 510%, in comparison to 2015, in the request for markers⁹. In 2016, CADE also achieved two historical records: it was the year when it signed more leniency agreements and more leniency plus agreements (respectively 11 and 6) than ever before. It is also important to note that for each leniency agreement signed, one or more were rejected or not concluded, which demonstrates the increase in the proposals for agreement.



⁹ CADE. 2016 Activities Report. Available at http://en.cade.gov.br/servicos/cade_activities-report-2016.pdf

The success of the Leniency Program was accompanied by an increased in the numbers of the settlement agreements concluded. For example, in 2015, 90% of the leniency agreements were followed by at least one request of another settlement. That tendency was also observed in 2016¹⁰.

The Brazilian Settlement Agreement, also called TCC which is the Portuguese acronym for “Termo de Compromisso de Cessação” (Cease and Desist Agreement) are similar to the leniency agreement program¹¹, but do not confer automatic criminal benefits. Instead, it has the power to suspend and even close investigations against companies and individuals charged for collusive violations. The signature of the TCC is subject to a series of requirements, which can be more or less stringent depending on the violation investigated, including admitting the practice that is being investigated, committing to cease the practice and paying a pecuniary contribution¹².

It is important to note that the requirements and incentives to make a TCC are not the same where the process is under investigation at CADE’s General Superintendence or already under analysis at CADE’s Tribunal. In CADE’s General Superintendence the fine expected can be reduced by up to 50% while in Tribunal the fine expected can be reduced by up to a maximum of 15%¹³.

The increase observed in the numbers of Leniency agreements and TCCs, leading to the investigation of international cartels, were fundamental for the success of investigations and the international cooperation process. On the one, these instruments guarantee the payment of t pecuniary contributions and avoid the judicial review process, which results in less financial and material costs, shorter proceedings, better-documented cases which lend to better chances of convictions. On the other hand, they can be used by others authorities, if provided with a procedural or full waiver agreement, as an investigative source of evidence of antitrust violation.

Therefore in CADE’s experience international cooperation has proved to be an important tool to overcome the challenges related to international cartel investigations.

¹⁰ Idem.

¹¹ ATHAYDE, Amanda; FERNANDES, Marcela. A Glimpse into Brazil’s experience in international cartel investigation. Concurrence n° 3-2016.

¹² [Internal Regulation](#) of the Administrative Council for Economic Defense (RICADE), approved on 29 May 2012.

¹³ CADE. Guidelines on CADE’s Antitrust Leniency Program. Available at: <http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf>

These challenges include issues such as location and notification of foreign individuals and/or companies under investigation, coordination of dawn raids and investigative proceedings, access to evidence and enforcement of decisions – which are elaborated in item 7 below.

6) Summary of recent international anticompetitive cases

Below a summary of the most recent international cartel investigations conducted by CADE is set out reflecting the use of relevant tools and powers at its disposal.

Optical Disk Drives¹⁴

In December 2016, CADE's General Superintendence issued an opinion recommending the condemnation of five companies for involvement in an international cartel in the international market of Optical Disk Drives (ODD). The evidence showed that the cartel operated between 2003 and 2009 and affected the Brazilian companies that bought the product of the parties in a worldwide level and the final consumers of laptops, desktops and consoles that use OSD technology. The Cartel was also investigated and punished in other jurisdictions, such as the Europe, Taiwan and United States. In Europe and in Taiwan, companies were condemned and in the United States, the companies under investigation settled with the Department of Justice for the filing of the proceeding.

Dynamic Random Access Memory¹⁵

In November 2016, CADE's Tribunal condemned five companies and two individuals for the involvement in an international cartel in the market of Dynamic Random Access Memory (DRAM). Based on news of cartel condemnations in this market in the US and EU, the former Secretariat of Economic Law of the Ministry of Justice (SDE in its acronym in Portuguese) opened an investigation. NEC Corporation and individuals signed partial leniency agreement with SDE, in which they confessed their participation in the DRAM cartel and provided evidence. Other companies and individuals implicated in the anticompetitive conduct also signed TCCs and cooperated with CADE, which continued the investigations. The conduct affected companies that

¹⁴ Administrative Proceeding n° [08012.001395/2011-00](#)

¹⁵ Administrative Proceeding n° [08012.005255/2010-11](#)

bought DRAM chips from the parties involved in the cartel as well as final consumers of computers, laptops, GPSs and other devices that depended on DRAM chips.

Hermetic compressors¹⁶

In 16 March 2016, CADE's Tribunal condemned two companies and three individuals implicated in a cartel in the market of hermetic compressors. The investigation of this case started in July 2009, after *Grupo Tecumseh* and individuals provided under a Leniency Agreement evidences of cartel formation. The collusion harmed Brazilian and foreign consumers at least between 1996 and 2008. In order to collect evidence of the international cartel, coordinated dawn raids were conducted in companies' offices and executive's houses, located in Brazil, the United States and Europe. This was the first case judged by CADE, in which there was international cooperation for the conduction of dawn raids. Moreover, CADE has signed TCCs with two companies and other nine individuals implicated in the conduct, before the judgment of the case.

Marine hoses¹⁷

In March 2016, CADE condemned seven individuals for cartel formation in the marine hoses market. The collusion had worldwide scope and involved price fixing and allocation of markets, customers and volumes of marine hoses, including a formal coordination of a specialized consultancy. This anticompetitive conduct was also investigated by competition authorities of the United States, United Kingdom, Europe and Japan. In Brazil, the investigation started in 2007 after the signature of a leniency agreement with a company involved in the scheme. This case was split up from another proceeding in which CADE condemned two companies and an individual. Some of the individuals implicated in the conduct have also signed TCCs with CADE.

Sodium Perborate¹⁸

In February 2016, CADE condemned a company for involvement in an international cartel, with effects in Brazil, in the market of sodium perborate. The anticompetitive conduct harmed directly the Brazilian market, which imported a significant amount of the cartelized products. The investigation started in 2006, with the

¹⁶ Administrative Proceeding n° [08012.000820/2009-11](#).

¹⁷ Administrative Proceeding n° [08012.001127/2010-07](#).

¹⁸ Administrative Proceeding n° [08012.001029/2007-66](#).

signature of a leniency agreement. For the assessment of this case, CADE held cooperation activities with DOJ and DG-Comp, which investigated the same conduct in their jurisdictions.

7) Challenges and perspectives

While international cooperation has greatly increased in the last decade, it seems that its impact has been stabilized of late given the increased sophistication of cartel conduct. Some specialists advocate the creation of new legal frameworks to enhance international cooperation¹⁹. Although interesting, these ideas seem complex and time consuming to be implemented at this moment, given the different level of maturity, economic development, priorities and politics of competition authorities.

For this reason, more attention should be paid to those few improvements that have the greatest impact towards more efficient international cooperation. As indicated in previous studies, Brazil's statistics concerning international cartel investigations show that there are still some challenges that must be overcome.

“As the numbers indicate, only 14 of the 43 proceedings against international cartels resulted in a formal final decision by CADE's Tribunal by April 2016 (32%). 10 of them ended convicted (23%) and 4 closed (9%).⁹ In 14 cases, the authorities are still trying to locate all the companies and/or individuals involved and notify them of being subject to investigation in order to initiate”²⁰

In that sense, two main aspects that can be more easily addressed by the international community were identified that could result in more efficiency of the global enforcement system.

The first challenge is related to the notifying process of foreign companies and individuals that are subject to investigation. The mechanisms that are currently in place in many jurisdictions are time consuming and bureaucratic. In this sense, 50% of total

¹⁹ CAPOBIANCO, Antonio; NAGY, Aranka. Developments in International Enforcement Co-Operation in the Competition Field. Journal of European Competition Law and Practice. Oxford University Press, 2016.

²⁰ ATHAYDE, Amanda; FERNANDES, Marcela. A Glimpse into Brazil's experience in international cartel investigation. Concurrence n° 3-2016.

cartel investigations started after 2010 are still pending notification and the longer it takes to notify these companies and individuals the more difficult it is to achieve it.

In processes occurring simultaneously, the difficulty in obtaining this kind of information is mostly related to personal data protection laws. Over time, obtaining this kind of information is proving to be even more of a challenge, since the information they are reluctant to give may be no longer correct, as individuals can change addresses and companies can be sold, for example.

The second one concerns the disclosure of Competition Authorities' public information. Even when the information regarding a specific case is held public, it may not be evident to other authorities members were to find it. This can be explained by different reasons: barriers of language, difficult electronic platforms, etc. All of this can make a simple query of information timely, costly and ineffective.

A way to address this problem would be to create an international database where all competition authorities could send their public information. The database could be hosted and administered by an international forum - such as UNCTAD - and the documents could be translated into different official languages.