



# Beyond Detection: The Management of Cartel Cases

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Throughout the world, competition authorities are used to allocating much of their human resources to cartel detection and punishment. The main justification for this allotment is linked to the potential harm that these agreements pose for the economy and, foremost, to consumers. It is not a coincidence that many countries criminalize cartels, requiring action not just on behalf of competition authorities but also that of other investigative State authorities, such as, for example, public prosecutors.

Since the entry into force of Law 8.884/1994, and even more so after reforms to the statute were implemented over the years, the development of a policy grounded in a crackdown on cartels as one of its main pillars has been the focus in Brazil. For the last ten years our competition authorities have been allocating most of its scarce resources to cartel repression, acting proactively in both the use of mechanisms for investigation (such as dawn raids, partnerships with agencies for criminal investigation, investment in training, etc.), and in strengthening a leniency program.

Despite the importance of this movement as a whole for the repression of national and international cartels with effects in Brazil during previous years, the organic growth of the Conselho Administrativo de Defesa Econômica (“CADE”) was not necessarily accompanied by the growth of its reputation and accomplishments. Likewise, although it is possible to point out some cases as paradigmatic and recognize the evolution of CADE’s jurisprudence towards a stiffening repression of such unlawful conducts, a status capable of producing efficient and immediate results that are so required by the complexity of the national economy has not yet been reached. A major reason for this may be linked precisely to the difficulty of case management, which involves both scarce human and material resources as the difficulty in the application and allocation of resources in a more efficient manner, according to the priorities of the agency.

This necessary organic growth is now, with the entry into force of new antitrust legislation in Brazil by Law 12.529/11, able to happen in a more organized, centralized and strategically planned fashion with the creation of a new competition authority. The law brings together in one agency almost all of the assignments of the three State entities that previously formed the Brazilian Competition System (SDE, SEAE and CADE). According to the new statute, cartel investigation and merger review will be performed by the General

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Superintendence, which will forward to the Tribunal cases based on its complexity, almost as a second instance court. Both departments — the General Superintendence and the Tribunal — basically now form the new CADE, (together with the Department of Economic Studies and CADE's Attorneys' Office).

The period of institutional change that CADE currently occupies serves therefore not only to reorganize the agencies in the face of a new institutional framework, but also as a window of opportunity for reflection on accomplishments, achievements, and which directions must be adjusted. Regarding the repression of cartels, such reflection takes the form of a diagnosis of investigations that were inherited from the former SDE as by planning, based on new legal and regulatory parameters about what should be the focus of the activity the General-Superintendence undertakes in this important area of antitrust policy.

The focus given to the repression of cartels in recent years, although generating a positive response on behalf of society by publicizing CADE's work, also ignited a greater demand for performance. Given this new scenario and the still insufficient resources at CADE's disposal, it becomes necessary to manage the investigations in the context of building a new institutional framework, under penalty of an excess of cases being opened without considering prioritization or high probability of conviction. This threat may eventually generate a message of scarce repression, mainly due to the delay in deciding important cases and because of a sense of impunity that a lack of practical results of an investigation may cause.

This challenge—namely, the management of investigations to be carried out by the authority, especially when dealing with serious conduct like cartels—is perhaps the main challenge of most antitrust authorities around the world. However, to tackle this mission is, at this point, the necessary step for CADE to consolidate its repressive action and thus build a greater reputation for deterring cartels before the economic agents, giving in due time the right answer that will increasingly be required of it.

Despite the effort carried out in recent years, one of the greatest criticisms of the Brazilian competition bodies' performance was directly linked to a delay in case resolution. Such delay sends an ambiguous signal to society about the repressive activity of the authority. The message is that while the agencies seek to enhance their investigative capacity by receiving and opening new cases, they do not have sufficient management skills to complete them. Such delay also creates a non-linearity of the decisions (generated by changes (i) in the composition of CADE, (ii) in the judicial decisions, and/or (iii) even in the economy) and a relatively low rate of cartel prosecution, especially when compared to the analysis of mergers and acquisitions. This may lead to the false perception that the authority does not emphasize its repressive activity in court.

These sorts of signals may stall advances made in the leniency program, insofar as the parties may either prefer not to commit to working with the authority for a lengthy period, or simply bet on the impunity that an unreasonable duration of a proceeding suggests. In the same sense, the duration of the investigation and

the difficulty of obtaining evidence may dilute in time, resulting in a number of filings of processes that exceeds the number of convictions. This result reinforces the feeling of impunity and also a lack of selection criteria / priority of the authority to address the demands for the opening of new cases. The large number of cases opened requires the authority to deal with increasing problems that arise from external factors. An example of this is the constant and dilatory judicial litigation on procedural steps during a cartel investigation and the dependence on articulation and partnerships with other investigative bodies in an effort to obtain evidence in some joint administrative/criminal cases. In the end, the process time may no longer be a factor that depends exclusively on the competition authority.

Thus the need to address cases that were opened was the first step of a planning project whose main purpose was to make the management of cartel investigations in Brazil more organized and efficient. The number of such cases is daunting: there are over 300 cases involving anticompetitive practices (roughly 120 of which are cartel investigations in several markets, including bid-rigging cases). With the diagnosis made, the next step is to reorganize the management of existing procedures in accordance with an internal organization of the General-Superintendence in order to create a more rational and functional division of labor. The reorganization should also take into account how the new cases will be treated within the new structure and regulation, so there are no contradictions between the treatment of new and old cases.

The first move was to create an intelligence division to serve as an initial filter and gateway to the new cases (many of which come from leniency agreements also negotiated and processed by the division). As the gateway, the division will identify situations that call for action prior to the commencement of proceedings, such as dawn raids, inspections, intelligence reports and contacts with partner agencies such as the Public Prosecutor's Office, a partner in joint administrative/criminal investigations in cartel charges.

The other three divisions that deal with cartel investigations will receive those cases that become priorities for processing. Whatever does not pass the prioritization procedure in the intelligence division, whether for lack of sufficient evidence or any other reason, will never reach the three divisions. Currently, most of the backlog of old cases is being reassessed by a triage within the intelligence division in order to verify whether pursuing these cases is viable under the requirements of the new law and the prioritization criteria developed. (It must be stressed that these cases being reassessed do not involve leniency applications, being originated mostly by complaints.)

CADE's Attorney's Office will rapidly address any sort of judicial litigation that may have arisen during the processing of cartel cases, allowing the final three cartel divisions to create a steady stream of progress for a greater number of cases that point towards resolution. Thus, a structure in which each division has an inventory of cases with different status and contents is exchanged for a structure that promotes a steady flow of processes towards the conclusion of the priority cases, leaving the other parts of the organizational structure to the

superintendence involving screening, intelligence and problem-solving related to judicial questioning of investigation procedures.

With a more targeted focus, strategic planning may take place within the cartel divisions for the most important cases. Such planning reflects an objective criterion of priority and time/cost of each process divided among each competition agent in accordance with his or her experience and time in the authority. This division of labor provides each division manager with a more thorough discussion of the substantive issues, and a standardization of understandings about the various issues surrounding the cartel repression policy and procedures. The reflex pathway of this type of planning is the incorporation in the investigative activity of the policy and precedents formulated by the Administrative Tribunal and the Judicial Courts, making its processing faster, more cohesive, and less subject to judicial review.

Leniency cases will be the utmost priority in CADE's new agenda. Therefore, all of the management changes seek to guarantee that leniency cases will be processed in a timely fashion, thereby encouraging more applications in the near future. The main idea is that through this management shake-up, the answers regarding the repression of cartels that society demands, and will continue to demand, of the new Brazilian competition authority will be more effective both with respect to celerity and effectiveness.