



Cartels in the Age of the Data-driven Economy: Outcomes from the 2019 ICN Cartel Workshop

By Noemy Melo Colin

(CADE)¹

From October 7-10, 2019, the Brazilian Competition Authority – CADE – hosted the 16th ICN Cartel Workshop. Themed “cartels in the age of data-driven economy,” the workshop took place in Foz do Iguaçu, Brazil, and gathered more than 200 competition officials, lawyers, economists, and academics from 46 different countries and all five continents. Among the jurisdictions presented in the workshop, 12 were from Latin America and the Caribbean, including Uruguay, which participated at an ICN event for the first time. The event was jointly organized by CADE, the co-chairs of the ICN Cartel Working Group, and its Subgroup 2: Enforcement Techniques (“SG2”), i.e. the French Competition Authority (*Autorité de la Concurrence*), the Russian Federal Antimonopoly Service (“FAS”), the Netherlands Authority for Consumers and Markets (“ACM”) and the *Fiscalia Nacional Economica* (“FNE”) of Chile.

In the opening remarks of the workshop, CADE president, Alexandre Barreto, welcomed the participants and called on them to discuss the challenges ahead for the cartel prosecution in the digital economy. Barreto compared the scenario with the task of looking for a needle in a haystack, since the amount of data that one has to sift through to uncover cartels is monumental. He explained that the date of the workshop was not chosen randomly. CADE wanted to start the event on the Brazilian National Day on Fighting Cartels, which is celebrated on October 8th because of the first leniency agreement signed by CADE on that same date sixteen years ago. The two-and-a-half-day workshop consisted of four plenary sessions, six mini-plenaries, 12 breakout sessions and two side sessions totaling 24 panels. The Plenary sessions addressed the broader themes of cartel prosecution in the digital era, while mini-plenaries and breakout sessions addressed narrower topics within that theme.

On the first plenary session, Margarida Matos Rosa, President of the Portuguese Competition Authority (“AdC”), Stanislas Martin, from the *Autorité de la Concurrence*, and Andrey Tenishev, from the FAS, discussed the delineation of cartel activities in a changing business environment. Under the moderation of Alexandre Cordeiro Macedo, from CADE, the panelists explored the limits of inter-firm cooperation in a scenario where innovation as a competitive parameter and the assurance of interoperability between different “digital systems” have increased in importance. Margarida Matos Rosa focused on an analytical framework for the digital economy, as set out in the AdC Issues Paper on Digital Ecosystems, Big Data and Algorithms, published in July 2019. She discussed how algorithms may facilitate collusion, with practical examples of pricing algorithms. Ms Matos Rosa also tackled the issue of responsibility in these cases as the AdC considers that firms are responsible for the algorithms they use. She also touched on the AdC’s extensive advocacy work on access to data and data portability in FinTech. Stanislas Martin talked about innovation as a competitive parameter and gave three examples of cartels aiming to hinder innovation. He also spoke about the collection and sharing of data and explained how the French Competition Authority has been forcing access to data detained by a dominant company. In the end, he explored the implications of the use of the same algorithm by several companies active in the same sector. Andrey Tenishev talked about general issues of cartels in the digital age emphasizing how digitalization is transforming the way cartels are formed and maintained. He gave an example from FAS practice (LG Electronic Rus) and pointed out that Competition Authorities must counter the technical progress of cartel members by using their own technical and analytical tools to identify and prove the existence of cartels.

The second plenary session was dedicated to debating “intelligence and screening tools.” Diogo Thomson de Andrade, from CADE, moderated the discussion among Reiko Aoki, from the Japanese Federal Trade Commission (“JFTC”), Hylke de Vriend, from ACM, and Calvin Shivers, from the U.S. Federal Bureau of Investigations (“FBI”). The session started with a brief presentation of the proactive methods of investigation developed by each agency. Then, Calvin Shivers further explained the FBI’s investigations techniques such as the use of undercover

investigations, how to work with foreign partners, and other informal methods of investigation. Reiko Aoki explained how the JFTC performs screening simulations and presented its results. She also explained how the JFTC works on screening and how they collect information on bid-rigging from public procurement agencies. Hylke de Vriend presented the screening tools used by ACM, explained how the agency gets data to develop these tools and presented the agency's next steps in this area. In the end, the three panelists explained the challenges they are facing when using proactive methods in antitrust investigations.

The third plenary was about "Due process." Under the moderation of Despina Pachnou, from the Organization for Economic Co-operation and Development ("OECD"), the panelists discussed the different approaches applied by various governmental bodies on relevant due process topics. Sergio López Rodríguez, from the *Comisión Federal de Competencia Económica* ("COFECE") of Mexico, spoke about the measures that COFECE took to be aligned with best international practices (i.e. the ICN framework for Competition Agency Procedures ("CAP") and the charter of Paris between Latin American antitrust agencies), and the measures taken to ensure the confidentiality of information during all stages of the investigation procedure. He also presented COFECE's experience concerning legal privilege, since the Commission recently issued regulatory provisions on the subject in response to a judicial precedent, recognizing the right to protect information resulting from legal advice provided. Eric Van Genderachter, from the European Union Commission's Directorate-General for Competition (DG Comp), stressed the existing link between due process and effective and efficient enforcement. After presenting the Commission's system of procedural guarantees, he exposed how its implementation benefited key enforcement policies, such as leniency and settlement. Juan Pablo Herrera Saavedra, from the *Superintendencia de Industria y Comercio* ("SIC"), of Colombia, stated that there is a global consensus among competition agencies about the value and importance of due process, the challenge being the practical approach chosen to ensure due process. In this sense, he explained the most common procedural concerns from different parties' point of view, the components of due process in Colombian legislation and their impact on antitrust enforcement and investigation tools. He also presented the relevant areas of concern within Colombia's due process framework in matters of competition law enforcement.

The fourth Plenary session was dedicated to International Cooperation Tools. Under the moderation of Frank Montag, a German non-governmental advisor ("NGA"), the panelists walked through the current state of international cooperation in cross-border cartel enforcement, the existing types of cooperation and their benefits, and the future of international cooperation to reply to the question of whether international cooperation is worth being pursued. On this path, the three panelists presented their agencies' view on international cooperation in cross border cartel enforcement. Noemy Melo Colin, from CADE, talked about the types of cooperation and their benefits. She has also briefly presented the current documents from ICN, OECD, and UNCTAD that facilitate international cooperation and explained how CADE applies them in practice. Beatriz de Guindos Talavera, from the Spanish National Commission on Markets and Competition ("CNMC"), presented the "new forms" of international cooperation regarding economic intelligence and data analysis, the pros and cons of formal and informal types of cooperation and its experience on the factors that facilitate international cooperation as well as their obstacles. Richard Powers, from the United States of America Department of Justice ("USDOJ"), explained how the costs of international cooperation affects leniency applications and how confidentiality considerations influence whether to engage in international cooperation. Discussing the future of international cooperation, Richard Powers suggested that more work should be done on the subject of handling multiple sanctions for the same cartel, while Noemy Melo Colin suggested that there may be work to be done on benchmarking of the screening and

data mining tools being created and implemented by different competition authorities. All the panelists agreed on the importance and value of international cooperation to cartel enforcement.

The mini-plenaries and breakout sessions followed up with more deep discussions about topics like “the antitrust liability for software-based infringements”; “reliable evidence gathering in the digital era and the role of civil society”; “potential, limits, and risks of surveillance, infiltration, and whistleblowers in cartel probes,” among others. Other “trendy” topics included discussions about “public procurement: cooperation between antitrust authorities and other public entities”; and “how to foster private enforcement.” The breakout session about “Open-source Intelligence (‘OSINT’): best tools for antitrust investigation” was presented in a practical exercise format and was followed by a thirty-minute presentation of the “Brain Project,” CADE’s data mining and screening tool. There was also a panel dedicated to the “ICN framework on Competition Agency Procedures (‘CAP’) and its relevance for international cartel investigations,” a session devoted to discussing the improvements of the work product of the ICN Cartel WG SG 1 “Enhancing coordination on leniency matters,” and a side session for Portuguese speakers in which representatives from Angola, Brasil, Cabo Verde and Portugal talked about the challenges of cartel prosecution in their countries.

In the last day of the event, representing the cartel working group co-chairs, Joost van Zwet, from ACM, and Juan Correa, from FNE, gave a brief explanation of the structure of the ICN Cartel Working Group and its two subgroups (SG1 on Legal Framework and SG 2 on Enforcement Techniques) and an overview of the CWG work plan. Special focus was done to the “Big Data and Cartels” project and to the implementation of the ICN framework for the promotion of the sharing of non-confidential information. They also mentioned the upcoming webinars organized by the SG1, in particular the webinar on damage claims that will take place on December 11th.

¹ Administrative Council for Economic Defense (CADE) Head of the International Unit.