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Soft Law and competition policy: promoting competition through guidelines in Brazil [1]

Soft Law e política de concorrência: promovendo a concorrência no brasil por meio da publicação de guias

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Abstract
This paper examines the use of soft law in competition policy. The focus is on the guidelines issued by the Brazilian competition authority in order to foster a better understanding of the competition law and enforcement approaches. The economic agents and their legal advisors benefit from these measures, as they increase the predictability and transparency of competition enforcement, facilitate self-assessment, and improve legal certainty for business transactions that often involve high monetary sums. From previous experience, these guidelines are often well perceived by local competition community as there is an increasingly concern with the objective of gathering information from interested parties to facilitate the drafting of higher quality documents through public consultations.

Keywords: Competition. Enforcement. Guidelines. Soft Law.

Resumo
Este artigo tem como objetivo examinar o uso de soft law na política de concorrência. O foco, no entanto, recai sobre os guias emitidos pela autoridade de concorrência brasileira a fim de promover um melhor entendimento da lei de concorrência e sua aplicação. Agentes econômicos e sociedade civil se beneficiam dessas medidas, uma vez que elas aumentam a previsibilidade e transparência do enforcement concorrencial, facilitam a autoavaliação e melhoram a segurança jurídica para transações comerciais que envolvem, na maior parte das vezes, quantias monetárias elevadas. Com base nas experiências anteriores, verifica-se que esses guais são bem recebidos pela comunidade concorrencial local, pois há uma preocupação cada vez maior com o objetivo de coletar informações das partes interessadas para facilitar a elaboração de documentos de maior qualidade por meio de consultas públicas.

Palavras-chave: *Direito da Concorrência. Enforcement. Guias. Soft Law.*

[1] The views hereby expressed are personal and should not necessarily be understood as CADE's official position.
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Introduction

Soft law instruments have been used in Competition Law since the late 1950s in Europe. They are issued unilaterally by the European Commission and are know as on binding competition law instruments since they lack of binding force (ZLATINA, 2014). Acording to Shelton (2006), in International Law, soft law usually refers to instruments, apart from treaties, containing norms, standards, principles or other statements of expected behavior.

The Organization for Economic Cooperation and Development – OECD set out international rules, such as guidelines, roadmaps, peer review mechanisms which are examples of soft law. They are are not legally binding, that is to say that their binding force is weaker than traditional law. However, OECD members can chose to turn them into binding agreements since, many technically non-binding OECD standards or norms are adhered to as if they were binding. This is refer to as “the power of soft law”.

One should note that guidelines foster a better understanding of the competition law and the agency’s enforcement approaches. The economic agents and their legal advisors benefit from these measures, as they increase the predictability and transparency of competition enforcement, facilitate self-assessment, and improve legal certainty for business transactions that often involve high monetary sums.

In this sense, it is important to note that one of the main OECD recommendations to Brazil was to increase legal certainty and predictability through the publication of substantive guidelines. According to the Peer Reviews of Competition Law and Policy 2019, business community could derive significant added benefit from guidelines on substantive enforcement approaches, such as for vertical mergers, horizontal and vertical competition restraints, market definition, and approaches to abusive practices (OECD, 2019).

Therefore, due to its importance to competition enforcement, this paper examines the use of soft law in competition policy. The focus is on the guidelines issued by the Brazilian competition authority in order to foster a better understanding of the competition law and enforcement approaches.

Guidelines in Brazilian Competition Policy

Guidelines are not a novelty for the Administrative Council for Economic Defense – CADE. Since 2015, the Brazilian Competition Authority has already released and updated several guidelines as an effort to promote competition enforcement in Brazil through offering better previsibility about the parameters used in its analysis.

Examples of that are the Guidelines for the Analysis of Previous Consummation of Merger Transactions – Gun Jumping (2015); Guidelines for Competition Compliance Programs (2016); Guidelines on Cease and Desist Agreements (2016); Guidelines on the Antitrust Leniency Program (2016), Guidelines on Dawn Raids (2017), Guidelines on Remedies (2018).[3]

More recently, in 2021, CADE issued its Guidelines on Fighting Cartels in Public Procurement – Practical Guidelines for Procurement Officials. Prosecution of bid rigging in public procurement has always played an important role for CADE. The Car Wash operation shed light to more than 30 alleged cartels investigations in Public

[3] English version of CADE’s Guidelines are available at https://www.gov.br/cade/en/content-hubs/publications/guidelines.

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Procurement ranging first from oil and gas related markets, such as the construction of power plants and refineries, then to other construction projects, such as football stadiums ad railroads. Moreover, the Car Wash operation have transformed the way leniency agreements are perceived in Brazil.

The 'Car Wash Operation' consisted in a set of investigations in Brazil, covering a wide range of topics that include corruption, money laundering and competition issues. It started in 2013 with a preliminary investigation into a minor money laundering suspicion. The name Car Wash was given because the investigation began focusing at a small office of foreign currency exchange and money transfer services located at a gas station in Brasilia, which also provided car wash services for its customers. This operation was not originally related to competition issues, but investigations eventually suggested that construction companies were colluding to divide markets and fix prices in several public procurements (SILVEIRA & FERNANDES, 2019).

Also in 2021, CADE issued its Guidelines on Parameters for Submitting Evidence in Leniency Applications, which complements its 2016 Guidelines on the Antitrust Leniency Program and provides a pragmatic framework for presenting evidence in the application for leniency agreements.

It is vital that the efficiency of the Leniency Program should be strengthen by providing predictability in the application of the evidence available for competition authorities to prosecute the case in order to prevent the Administrative Tribunal rulings from being brought to court and, eventually, reversed.

It goes without saying that leniency is, statistically, one of the most useful instruments to identifying and fighting anticompetitive conduct. However, Leniency Agreements are only available for the first whistleblower who appears before the competition authority and benefits from legal immunity in the administrative and criminal legal spheres.

Thus, in order to improve its efficiency, CADE's Guidelines on the Antitrust Leniency Program presented ancillary instruments to the Leniency Agreement. Cease and Desist Agreements – TCCs, for their acronym in Portuguese – are agreements available for latecomers, which are not entitled to sign a Leniency Agreement. Although TCCs do not provide for full legal immunity to its signatories, in terms of administrative and criminal prosecution, they enable a reduction from one to two thirds of the applicable fines for cartel offenses depending on the stage of the procedures on which agreements are signed.

In this sense, in line with the best competition practices abroad, CADE has recently created two working groups to develop future Brazilian guidelines. The working groups will be responsible for studying and researching aspects of national and international jurisprudence, reflecting about the best practices internationally and responding to the challenging question on how to address the main competitive challenges in the Brazilian context.

Movements Towards New Guidelines on Competition Policy

One of CADE's duties is to assess the effect of all mergers on the market and society in order to promote a healthy, competitive environment in Brazil. The previous Brazilian Competition Law (Law n. 8884/1994) used to adopt an *ex-post* merger control, which was based on a reporting system with very broad criteria and under

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which mergers could be notified to CADE after its implementation. However, according to the Brazilian Competition Law (Law n. 12529/2011), which entry into force has just completed its 10th anniversary and incorporated the *ex ante* merger analysis framework, CADE is to review all mergers that fulfil the criteria established by Articles 88 and 90, Items 1 through 4. Thus, mergers must be notified before its implementation, preferably after the signing of a binding document that sets out the terms and conditions of the transaction.

The types of transactions subject to CADE's review are as follow: (i) merger of formerly independent companies; (ii) acquisition of control over or parts of a company by any means, including acquisition of assets or shares; (iii) absorption of one or more companies by other companies and (iv) associative agreements, joint ventures and consortium.

The notification thresholds are based on the gross revenues of the parties in Brazil in the year before that of the deal proposed. For a transactions to be mandatorily notified to CADE, at least one of the economic groups involved in the transaction must meet the following threshold: annual gross turnover or overall volume of business in Brazil equal to or above BRL 750 million and BRL 75 million in the fiscal year prior to the transaction.[4] However, CADE is also competent to analyze merger which do not fall within these mandatory notification criteria. This competence shall be exercised within one year from the date of the operation completion.[5]

In this sense, on one hand, a merger that can be fully cleared when there are no apparent harmful effects on the economy. On the other hand, article 88 of the Brazilian Competition Law provides it can be blocked if applying remedies to a merger or acquisition that harms competition is unfeasible.

However, a merger can also be cleared subject to remedies, according to Article 61 of Law nº 12529/2011, when antitrust remedies are to be applied in order to eliminate potentially harmful effects of a merger or acquisition. Remedies look to preventing mergers from (i) diminishing competition in a significant part of the relevant market, (ii) increasing the likelihood of coordination amongst competitors, (iii) creating or strengthening a dominant position, or even (iv) controlling a relevant market of goods or services.

Only in the year 2021, CADE set a record number in its history, with 627 mergers submitted for review. Out of these, 611 deals were effectively reviewed, with an average 33 days to assess a case. Considering fast-track cases only, when cases are considered less threatening from a competition perspective, this number falls to 20 days – one of the shortest worldwide (CADE, 2021).

[4] CADE's Resolution no 12/2012 provides a specific concept of economic group. According to it, CADE an economic group comprises the following entities: (i) entities subject to common control; (ii) all the entities in which any of the controllers or companies subject to common control holds, directly or indirectly, at least 20% of the shares or voting capital. Additionally, special rules apply when the transaction involves investment funds, in which case the economic group includes: (i) any economic group of investors holding, directly or indirectly, 50% or more of the quotas of the fund involved in the transaction (either individually or under a shareholder agreement); (ii) portfolio companies controlled by the investment fund involved in the transaction or in which the fund holds ds, directly or indirectly, at least 20% of the shares or voting capital. Available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf .

[5] Law n. 12.529/2011, § 7 Cade may, within one (1) year as of the respective date of fulfillment, require the submission of the concentration acts that do not fall within the provisions of this article.

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Aware of this context of a more concentrated market and in line with the best competition practices abroad, CADE has recently created two working groups to develop future Brazilian guidelines. The working groups will be responsible for studying and researching aspects of national and international jurisprudence, reflecting about the best practices internationally and responding to the challenging question on how to address the main competitive challenges in the Brazilian context.

One of the working groups will be responsible for developing a draft version of the Guide to Vertical Mergers (V-Guide) and is expected to be delivered by December 2022. The future V-Guide, as market already calls it, is intended to complement the existing Guide to Horizontal Mergers (H-Guide), which was first released in 2001, after being developed by CADE through a partnership with the former Secretariat of Economic Law of the Ministry Justice and the Secretariat for Economic Monitoring, of the Ministry of Finance.

The updated H-Guide has incorporated the new *ex ante* merger analysis framework established by the Brazilian Competition Law, which entered into force in 2012. In July 2016, after a draft version was made available for public consultation, the updated version of the H-Guide was finally released.

The document establishes as its main purposes (i) to provide greater transparency to regarding horizontal mergers reviews (ii) to guide CADE's staff to use best when evaluating mergers and acquisitions with horizontal effects; and (iii) to assist economic agents in better understanding procedures and criteria adopted by CADE on its reviews (CADE, 2016)

There were some important innovations in the updated version of the H-Guide. In the 2001 Guide, the definition of the relevant market was the first step of the antitrust analysis (and one of the most important ones in the process). The updated guide, however, has acknowledged methodologies that draw valid conclusions regardless of whether there is a strict relevant market definition or that may not depend on the definition of the relevant market, such as counterfactual analysis and some other simulations. In cases where the relevant market continues to be used, complementary methodologies were explained, such as critical loss analysis, among others.

Analysis of portfolio power, potential competition, elimination of maverick firms, vertical integration vs. horizontal overlap and partial acquisitions were also included in the Guide. These represent important innovations in merger reviews, in addition to the deepening of some other specific issues to the stages of barriers to entry and rivalry. Nevertheless, H-Guide focuses on transactions resulting in horizontal integration, briefly mentioning the vertical integration hypothesis.

In recent years, several countries have developed some kind of guidelines on vertical restraints, being it in general or certain specific vertical restraints in particular, for instance, Germany (2017), Switzerland (2017), The Netherlands (2019), Ireland (2021) and Slovak Republic (2021), just to name some.

Authorities from the US are also conducting careful reviews of the Horizontal Merger Guidelines and the Vertical Merger Guidelines. According to the Department of Justice – DoJ, these documents are designed to provide increased transparency and guidance to the public on how the department makes law enforcement decisions.

The Vertical Mergers Guideline, which addresses the main practices and techniques of applying competition policy in cases involving vertical restraints, had

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been jointly issued by the DoJ and the Federal Trade Commission – FTC in 2020. However, on the 15th of September, 2021, by a 3-2 vote, the FTC withdrew the Vertical Merger Guidelines in order to work on a robust public engagement process to seek comment on ways it could be improved. Both documents are expected to be released by the end of the year (US DOJ, 2021).

Also, the European Commission has just released the final version of the new Vertical Block Exemption Regulation –VBER and Vertical Guidelines, which entered into force on the 1st of June 2022. The documents followed a thorough evaluation and review of the 2010 rules (EUROPEAN COMISSION, 2022)

The revised rules have also been made simpler, clearer and up-to-date in order to provide businesses with more accessible rules and guidance, especially to those who use them in their day-to-day business. The revised VBER rules, in particular, have been clarified and simplified. It has been updated with regard to assessment of online restrictions, vertical agreements in the platform economy and agreements that pursue sustainability objectives, among others.

In August 2022, CADE has also created a working group in order to provide a draft version on guidelines on the use of arbitration clauses and trustees within the scope of TCCs and Merger Control Agreements ("ACC" for their acronym in Portuguese). The working group will contribute to the maturing of the use of theses tools not only in the scope of TCCs and ACCs, but also on its overall use in competition.

OECD had already shown the importance of alternative dispute resolution mechanisms to resolve commercial disputes with a competition component on its document on Arbitration and Competition:

> The use of alternative dispute resolution mechanisms, including arbitration and mediation, to resolve commercial disputes with a competition component has increased exponentially in recent years. This interplay between arbitration and competition law has stimulated a lively debate amongst academics and practitioners and has led to interesting jurisprudential developments (OECD, 2010).

Arbitration, which is by govern by the Law n. 9307/1996, has progressively gained momentum in the Brazilian and international legal scenario. According to a survey conducted by Queen Mary University of London (2018), 97% of respondent market players indicated that international arbitration is their preferred method of dispute resolution.

In this sense, the use of arbitration is not new to the Brazilian Competition Authority since the Administrative Tribunal has already provided mechanism for resolving disputes between competitors in ACCs. For instance, the ACC on the ILC Brasil/Vale Fertilizantes merger case granted limited powers to the arbitration court since the final decision on the Agreement would be up to the Administrative Tribunal, regardless of the outcome of the arbitration.[6]

In the Rumo/ALL Merger Case, the ACC granted that the user contractor of rail transport services could initiate arbitration proceedings when discriminated. It bounded

[6] Merger Control n. 08700.000344/2014-47 (ILC Brasil/Vale Fertilizantes).

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the parties to the acceptance of arbitration requests from users and conferred the role of deciding on the arbitral.[7]

The Brazilian Competition Authority justified the use of arbitration (i) in the reduction of monitoring costs as complex discussions regarding the reasons that led to the refusal to negotiate or the inadequacy of the negotiation criteria would be left to the arbitrator and (ii) in the flexibility assured to the ACC as for the impossibility of foreseeing all situations.

Nevertheless, it was on the Bovespa/Cetip Merger case that CADE granted broad powers for an arbitration decision for the first time by removing the need referendum by the council and making it definitive and unappealable. According to Commissioner Paulo Burnier, the BM&FBovespa/CETIP Merger case represented perhaps the leading case by CADE in the use of an arbitration mechanism close to its more traditional meaning in private.[8]

The use of arbitration clauses has gained even more significance to competition enforcement in Brazil after the approval of Bill 11.275/2018, which modifies the Brazilian Competition Law on private actions for competition damages and details important topics for its development, such as enabling the aggrieved parties to access arbitration as means of resolving its reparations claims.

In a similar manner, trustees have also played a vital role in competition enforcement in Brazil and have long been used by the Brazilian competition authority. Since CADE is unable to be directly and continuously monitor compliance of the commitments regarding ACCs and TCCs, a trustee works as a *longa manus* of the competition authority and is generally desirable to assist the agency in monitoring and ensuring the fulfilment of obligations.

Final Remarks

In order to promote a healthy, competitive environment in Brazil, CADE has devoted enormous efforts to issue competition guidelines to provide the enforcer's perspective and greater predictability in the application of the competition legislation. Guidelines send clear messages to market players on what to expect of CADE's competition enforcement and how to comply with it.

By making a conscious effort to issue these Guidelines, CADE promotes its enforcement policy and clarify the understanding of the Brazilian Competition Law. From previous experience, these guidelines are often well perceived by local competition community as there is an increasingly concern with the objective of gathering information from interested parties to facilitate the drafting of higher quality documents through public consultations.

According to the Brazilian Competition Authority, the development and updating of guidelines is a permanent task that benefits not only the business community but the agency as well. Guidelines provide more transparency and predictability by setting out the practice and the parameters in the application of the competition legislation and serve as an important part of the institutional memory, and an institutional storage for best practices and policies.

[7] Merger Control n. 08700.005719/2014-65 (Rumo/ALL).
[8] Merger Control n. 08700.004860/2016-11 (BM&FBovespa/CETIP).

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