Effectiveness: the advantage obtained in the defense of competition*

Efetividade: a vantagem auferida na defesa da concorrência

*Gilvandro Vasconcelos Coelho de Araújo***
*Marcelo Cesar Guimarães****

ABSTRACT

Competition and its defense are instruments at the service of society and are embedded in a system with different actors, forms, values and institutions, so that the enforcement must be rational. The effectiveness of the defense of competition is related to a response in a short period of time, using

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** Université Panthéon Assas — Paris II, Paris, França. E-mail: gilvandrovcaraujo@gmail.com
Doctor of Law fromaw Université Panthéon Assas — Paris II. Diplôme d'Etudes Approfondies (DEA Droit Public Général) from the Faculté de Droit de L'Université de Montpellier I. Post-graduate degree in Competition Law from FGV. Degree in Legal Sciences from Universidade Católica de Pernambuco. Director of Soluções Jurídicas e Administrativas at Infraero.

*** Universidade de Brasília, Brasília, DF, Brasil. E-mail: marcelocgui@gmail.com.
Doctorate in Law from Universidade de Brasília and Consultant for Organização para a Cooperação e Desenvolvimento Econômico (OCDE). Graduate in Law from Faculdade de Direito do Recife/Universidade Federal de Pernambuco (FDR/UFPE) and Masters in Law at the same institution, with a research tenure at Université du Québec à Montréal (UQAM).

the tools available to deliver the best possible decision. Unlike merger control, the aimed effectiveness of the enforcement of anti-competitive practices has been slower. The greatest impact on the effectiveness of the policy are the theories of "ideal penalty/pecuniary contribution", which are mainly applicable to cartels. In this context, the present article aims to evaluate the sanctions applied by Cade arising from conviction and pecuniary contribution from cease-and-desist agreements in cartel cases. In conclusion, it is stated that seeking the true effectiveness of the penalties is more important than a theoretical view of the fine.

KEYWORDS

Defense of competition — enforcement of anti-competitive practices — cartel —sanctions — effectiveness

RESUMO

A concorrência e sua defesa são instrumento a serviço da sociedade e estão inseridas em um sistema com diversos atores, formas, valores e instituições, devendo haver racionalidade em sua aplicação. A efetividade da defesa da concorrência está atrelada a uma posição em tempo econômico, valendo-se do ferramental disponível para a tomada da melhor decisão possível. Diferentemente do que se passou com as concentrações, a efetividade almejada no controle de condutas tem sido mais lenta. O que tem impactado de forma mais destacada a efetividade da política são as teorias de "pena/contribuição pecuniária ideal", aplicáveis, sobretudo, às condutas de cartel. Nesse contexto, o presente artigo objetiva avaliar as sanções aplicadas pelo Cade nas condenações, bem como as contribuições pecuniárias em Termos de Compromisso de Cessação em casos de cartel. Conclui-se que mais importante do que uma percepção teórica da multa, há de se buscar a verdadeira efetividade das penas.

PALAVRAS-CHAVE

defesa da concorrência — controle de condutas — cartel — sanções — efetividade

1. Introduction

Competition is an instrument which should be at the service of society. Where it leads to inefficiencies, it should be ruled out or even corrected.[1] This contention, from Jean Tirole, demonstrates that there must be rationality in the application of the "instrument" of competition. It is vital to avoid solipsism and to know that competition and its defense are part of a system with various actors, forms, values and institutions.

From an institutional point of view, competition and its defense in Brazil are regulated by *Conselho Administrativo de Defesa Econômica* (Cade), pursuant to art. 4 of Law No. 12.529/2011. But there are also many other elements which need to be taken into account. There are, for example, constitutionally accepted precedents for decision-making (form), requirements of public policies established in regulated markets (values), and the judicial capacity of the union, pursuant to art. 5, item XXXV, of the Federal Constitution (institution). Thus, competition is regularly brought to the table, as a part of the system, not the system itself.

In this sense, the effectiveness of competition defense is linked to a position in the economic context, taking advantage of available tools to make the best decision possible. Such a stance does not necessarily address what is imagined by an ideal theory, but makes feasible an implementable, real-world competition policy. It internalizes the various aspects previously advanced by applying antitrust techniques and objectives, supporting the form and values legally indicated, and mitigating the need for the judicial phase, with a greater impact on the parameter. This applies at the moment when there is little success with the resources presented.

In relation to monopolies, the desired effectiveness was constructed gradually. From the regime of Law No. 8.884/1994 to Law 12.529/2011, a clear evolution of legislation and decisions can be identified. A posteriori analysis gave way to prior analysis. The constant judicialization, questioning the form and derivatives of Cade's unilateral decisions(Nestlé/Garoto and Vale do Rio Doce, v.g.)[2] gave way to a formal improvement, with agreed authorizations. This approach allowed disapproval of acts without giving rise to judicialization (Brasken/Sovay, Kroton/Estácio), or ensuring the interests

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1 TIROLE, Jean. *Économie du bien commun*. Paris: Presses Universitaires de France, 2016. p. 498.

2 The Vale case was less prolonged, but Nestlé lasted more than a decade, including a return to Cade for another agreed administrative solution.

of Cade and companies with a negotiating capacity (Tim/Telefônica, Sadia/Perdigão, Sanofi Aventis, Banco do Brasil/Nossa Caixa All/Rumo, Ball/Rexam, Bradesco/HSBC, BM&FBovespa/Cetip, Itaú/XP and Disney/Fox).[3]

Thus, it is clear Brazil is on the right track in terms of managing monopolies, including structural and decision-making aspects. The technical ballast and institutional framework intertwine, improving the legal certainty and predictability of their analyses. Deliberation is timely and done in a satisfactory manner, to prevent operations with a competitive impact. Negotiation is an important tool for resolving cases, and the previous analysis structure allowed that even cases of failure which were technically well-substantiated would not require judicial review.

When it comes to conduct analysis, another pillar of defense of competition, development is slower. The first issue is the litigation of form and evidence arising from the influences of the sanctioning administrative procedure in competition law. This can be illustrated in the cases of steel and gas cartels, under judicial scrutiny for more than a decade. The second issue, which has most prominently impacted the effectiveness of the policy, are the theories of "ideal penalty/contribution", applicable, above all, to anticompetition cartels. Whether for agreements concluded or even unilateral condemnations in cases of collusion, Cade has witnessed intense debate: must the penalty/pecuniary contribution be mandatorily linked to an advantage allegedly gained by the offender? Should Cade evaluate the sanctions more in line with judicial sanctions?

The matter has prompted divergent positions in the plenary of Cade.[4] Would there be a prevailing understanding?[5] Would there need to be a proportional rate included in the company's invoicing with regard to the products affected by the cartel during the period of its duration?[6]

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[3] This precedent is illustrative as it demonstrates that, even in case of compromised implementation of the agreement signed with Cade, there may be a new arrangement to solve the identified competition problem, in the operation review by the competition authority.

[4] The case, for example, of Processo Administrativo nº 08012.009732/2008-01 (cartel das ambulâncias), ruled on 9/12/2020

[5] PIMENTA, Guilherme. Indicados de Bolsonaro deixam Cade mais imprevisível. Jota, 11 dez. 2020. Available at: www.jota.info/tributos-e-empresas/concorrencia/indicados-debolsonaro-deixam-cade-mais-imprevisivel-11122020. Accessed on: 2 Feb. 2021

[6] RESENDE, João Paulo. A dosimetria de penas em infrações contra a ordem econômica. *Consultor Jurídico*, 11 jan. 2021. Available at: www.conjur.com.br/2021-jan-11/defesaconcorrencia-dosimetria-penas-infracoes-ordem-economica. Accessed on: 2 Feb. 2021.

In this light, the present text seeks to emphasize that, more important than a theoretical perception of the fine, one must seek true effectiveness, built into the control of monopolies.

2. Applying or calculating sanctions?

The debate on penalties in relation to anti-competitive conduct is addressed by arts. 37 and 38 of Law No. 12.529/2011. The sanctions will, in addition to fines, include the ban on contracting with financial institutions, recommendation for compulsory patent license, non-concession of tax installments, the possibility of divestiture of companies, transfer of share control, sale of assets and even partial cancellation of activities, which helps avoid recidivism and expresses social disapproval of the investigated infraction.

The logical assumption for setting sanctions is that they must be greater than the offender's earnings, to create disincentives to wrongdoing.[7] There is a host of possible sanctions, including fines, as pointed out in the previous paragraph. But the ability to calculate the "earned advantage" attracts more attention in many cases, which means it is important to establish a clear position on the topic.

The already revoked art. 23, item I, of Law No. 8.884/1994 - whose text was replicated in Law No. 12.529/2011 —, prescribes, among other things, that the penalty will never be less than the benefit obtained, where an estimation is possible.

The billing and benefit assumptions, therefore, are product guidelines, a proportionality that should dictate the evaluation; respecting, naturally, the specifics of each case. Not all the elements sufficient to assess the expected conviction are found in the case files, but even so, a maximum number of measures must be sought to ensure adhesion, matching the sanction to the conduct and its agent.

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[7] LANDES, William M. Optimal sanctions for antitrust violations. *University of Chicago Law Review*, v. 50, p. 652-678, 1983; COMBE, Emmanuel; MONNIER, Constance. Fines against *hard core cartels* in Europe: the myth of overenforcement. *Antitrust Bulletin*, v. 56, n. 2, p. 235-275. 2011; GINSBURG, Douglas H.; WRIGHT, Joshua D. Antitrust sanctions. *Competition Policy International*, v. 6, n. 2, p. 3-7. 2010.

In this context, the debate has at least two currents: (i) the establishment of a quantitative model for estimation and (ii) the application of a percentage rate on the sales volume of products affected by the alleged conduct during the investigated period.

Historically, Cade has used it as a parameter for calculating the fines in the invoicing of companies,[8] establishing a defined rate in compliance with the dosimetry criteria provided for in the legislation.[9]

In defining the rate,[10] the degree of institutionalization is considered in terms of the volume of production, the essentiality of the goods or service, and the duration of the offence. The good faith of the offender, in turn, justifies higher rates in relation to cartels and lower rates for unilateral conduct. Consideration should also be given to realization, or otherwise, of the infraction, the degree of damage, the negative economic effects produced, the economic situation of the offender, whether there is a recidivism, etc. Among these various considerations, is a calculation of the advantage gained. This is one of the eight criteria for dosimetry listed in the legislation.[11]

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8 Invoicing is linked to the "business activity". Because it is not a concept of the legal system, Cade issued Resolução No. 3, of May 29, 2021, which established a list of branches of business activity, based on the Classificação Nacional das Atividades Econômicas (CNAE) of the Federal Revenue. Even so, there are situations in which the forecasted activity is too broad in relation to the market affected by the illicit act. Where it is difficult to identify the affected branch, CADE can adapt the branch of activity to the specific instance when the expected dimensions are manifestly disproportionate, to give greater proportionality to the penalty, under the terms of Resolução No. 18, of 23 November 2016.

9 First, the rate is determined, between 0.1% and 20%, taking into account the mitigating and aggravating factors provided for in art. 45 of Law No. 12.529/2011, in order to allow a more precise individualization. In general, higher rates apply, generally between 12% and 18%, for collaborative proceedings, and low rates, between 0.1% and 5% for unilateral conduct. This stems from the seriousness of the infractions, a criterion of dosimetry provided for in item I of the aforementioned art. 45 (SILVEIRA, Paulo Burnier da. *Direito da concorrência*. Rio de Janeiro: Forense, 2021. p. 100).

10 In the case of company fines, pursuant to art. 37, item I, of Law No. 12.529/2011. For company administrators, the fine is calculated between 1 and 20% of that applied to the company, according to art. 37, item III, of the aforementioned law. On the other hand, in relation to legal entities who do not carry out business activities, such as associations and unions, and individuals who do not hold a decision-making position in companies, art. 37, item II, of the aforementioned law determines that the fine is between R$ 50.000 and R$ 2 billion. Paragraph 2 of art. 37 also provides that Cade may consider the total revenue of the company or group of companies, when it does not have the billing amount of the business activity in which the infringement occurred or when this is presented incompletely and/or not demonstrated unequivocally and appropriately.

11 Note, in this regard, the vote of Councilor Paulo Burnier da Silveira in Administrative judgment No. 08012.002568/2005-51 (LPG cartel od Pará). As will be detailed subsequently, calculation of the benefit received is sufficient per se, without consideration of the other criteria, by way of abatement or increase of the fixed value, that might violate the principles of proportionality and legality, so dear to the sanctioning administrative law.

In short, quantifiable and non-quantifiable parameters are used in the consideration of any agent participating in an illicit act, so that the rates in the same case may vary according to the function currently exercised (leader or assistant), the time of their participation, and possible bankruptcy or pre-bankruptcy.[12]

It should be noted that in some cases Cade does not have data on tbilling, as expression of this is ordinarily applied in corporate and tax law, which may make it difficult to calculate according to the letter the law.[13] In these situations, the position that has been adopted by the Administrative Court is in the sense of interpreting the scope of the legislation to track company revenue, in order to achieve a calculation basis proportional to the specific case.

This is common, for example, in international cartel cases, in which it is not possible to determine the value of the reliable billing of the representatives on the national market in the year prior to the start of the administrative process. Of course, international cartels are sanctioned vis-à-vis Brazilian legislation, while the concept of tax invoicing or equity does not necessarily have synergy with company revenues abroad. This also applies when the amount is not shown as proportional to the case, notably in those situations in which there is allocation of customers and there are no direct sales to Brazil. In these cases, Cade seeks so-called "virtual invoicing", obtained from the projection of the world market share of the company in the imports in Brazil. It is important to note that the year prior to the filing of the deed is not necessarily used as a parameter, but, rather, the last complete operational one, to maintain greater rationality in the conduct.[14]

This applies to cases in which, without applying the methodology of invoicing in its purest nature, elements are sought to verify the adequacy of the norm. Analysis of an "activity", a dynamic behavior, is key here, it

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12 Silveira, *Direito da concorrência*, op. cit., p. 101

13 It should be noted that such situations can be mitigated should Cade request the Internal Revenue Service to share tax information in order to identify and calculate the value of the annual gross revenue of the legal entity. In this sense, the Attorney General's Office has already pronounced in favor of the commissions of Processos Administrativos de Responsabilização (PAR) requesting shared tax information of legal entities processed, pursuant to art. 198, §1, item II, of the Código Tributário Nacional, to calculate the penalty established by Law No. 12.846/2013 (Anti-Corruption Law), pursuant to Opinion PGFN/CAT/No. 708/2017. It is understood that the same can be used by Cade in administrative proceedings to impose administrative sanctions for economic violations.

14 In this sense, see the case of the cartel internacional de vidros CRT (Administrative Proceedings [0]8012.005930/2009-79), according to the vote of the rapporteur-councilor Gilvandro Araújo and the vote of Márcio de Oliveira Júnior.

must be remembered. The independent legal concepts must be applied in the manner provided for in the legislation.

The methodology presented above appears to be legally safe, with objective parameters; thus, the application of fines and formulation of various agreements, to lend security and effectiveness to the competition defense policy.

3. Limitations to the sanction/contribution-centered approach

Why would a penalty or contribution focused on the advantage gained not constitute the best sanction? Is it not desirable to augment the policy of repression of collusive conduct?

Firstly, it should be noted that the benefit gained should not be confused with the harm, although this distinction is not always clear in the arguments for the application of the advantage gained criterion to fines.[15] Based on this assumption it should be noted that the models for calculating gained advantage present intense challenges, among which is the definition of data and assumptions and inferences from the results.[16] Not even the defenders of

[15] This issue was brought up for the first time within the scope of the CADE Tribunal in the judgment

[o]f Administrative Proceeding No. 08012.002568/2005-51 (Pará GLP cartel), on Dec. 7. 2016. Under the terms of the opinion of the councilor Márcio de Oliveira Júnior: the "[…] concept of 'earned advantage', which is made up of two elements: there must be an advantage and proof of gain. I will explain. Overpricing is not the only way a cartel may obtain a competitive advantage. […] The second element of the advantage gained is proof of the internalization of gains by the individual, despite some passing on defense allegation. […] Thus, to be a minimally secure concept, the basis of the estimates must demonstrate that this internalization took place, which requires a much more in-depth analysis in relation to the economic-financial condition of the company, in addition to the structural conditions of the analyzed market".

[16] OXERA. Quantifying antitrust damages: towards non-binding guidance for courts. *Study Prepared for the European Commission*. 2009.

[A]vailable at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf. Accessed on: 28 Jan. 2021.

such a paradigm agree on establishing an ideal model,[17] nor a firm criteria to establish a solid counterargument.[18]

Another point worth mentioning is the common lack of qualitative analysis of the data and the results of the estimations implied by advantage available, as a thorough knowledge of the sector is relevant for structuring a credible, traceable, repeatable and legally safe model.[19]

The advantage obtained also involves, in its limitations, explanation of the causal link between the facts and the practice considered illegal, an essential aspect of sanctioning administrative law. Without this demonstration, it is not even possible to open an investigation and, consequently, the materiality of the conduct is impaired. In the absence of a minimum materiality on which to base the estimates, no calculations can be performed, however much the judge has significant directions as to the injury to the competitive environment.

In cases where the cartel is not successful - which may have occurred through the intervention of a third party, such as an investigation — or has not been able to impute overpricing, the benefit obtained may be near zero or end up negative.[20]

However, if there is no benefit gained, there must be a penalty (including fine) - for two reasons. Firstly, the law is expressed by setting the level of disapproval of the conduct without producing effects. It should be noted that

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[17] BUEREN, Eckart et at. Time is money — but how much money is time? Interest and inflation in competition law actions for damages. *Antitrust Law Journal*, v. 81, p. 271-336. 2016; CONNOR, John M. *Price-fixing overcharges: revised 3rd edition*.

[A]vailable at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780. Accessed on: 28 Jan. 2021; Oxera, Quantifying antitrust damages, op. cit.; STIGLITZ, J. E. *Economics of the public sector*. Nova York: W. W. Norton & Company, 2000. p. 18.

[18] Oxera, Quantifying antitrust damages, op. cit.; EUROPEAN COMMISSION — COMPETITION. Commission Staff Working Document — Practical Guide — Quantification of damages in claims for damages based on infringements of Articles 101 and 102 of the Treaty on Functioning of the European Union accompanying the Commission Communication on quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the functioning of the European Union. SWD (2013) 205, of 11 Mar. 2013.

[A]vailable at: https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf. Accessed on: 28 Jan. 2021. p. 12.

[19] FRIEDERISZICK, Hans W.; RÖLLER, Lars-Hendrik. Quantification of harm in damages actions for antitrust infringements: insights from German cartel cases. *ESMT Working Paper*, n. 10-001. 2010. Available at: https://www.e-ca.com/publication/quantification-of-harm-indamages-actions-for-antitrust-infringements-insights-from-german-cartel-cases/. Accessed on: 11 Feb. 2021.

[20] In fact, it is worth noting that price is just one of many competitive variables that may be affected by a violation of the economic order, and, equally, the consequences of behavior on quality, variety, increase in offer and innovation must be considered. (FRAZÃO, Ana. *Direito da concorrência*: pressupostos e perspectivas. São Paulo: Saraiva, 2017. p. 302).

this type of illicit conduct offends the legal interest of free competition and should be subject to a penalty that reflects the lack of social acceptability. Secondly, the magnitude of the advantage may impact the dosimetry of the specific case; but there is no legal authorization to absolve cartelists who have not obtained economic benefit or whose benefit could not be calculated.

Where a cartel, for example, delays development or implementation there may not be an effect on the price of products and services, but it will be equally harmful to consumers. In this way, the benefit criterion encounters more limitations in such cases, as the calculation of the amount incurred by the perpetrators is even more complex.

Another relevant aspect, already addressed by Cade[21], concerns the lack of definition of surcharge limits in cases where there is more than one party under investigation by different authorities.

In cases of cartel corruption, for example, when was the sum paid to the cartel and how much did the consumer pay in bribes? Again, the quantitative model alone does not provide an answer, so that it necessary to resort to legal instruments (such as the agreements) to define the scope of each illicit act, to identify damage to the protected legal assets, adjusted to reality.

Legal certainty can be made unfeasible by the use of models with dubious premises and with weak or unreliable data, which challenges the setting of a fine in the parameters allowed by the Brazilian legal system. In fact, this is the message we extract from Cade decisions faced by parties before the Judiciary.

In this sense, although econometrics is an important tool, its use must be linked to real life situations. It is important to keep in mind that economic rules are not exactly universal, but unstable and subject to variables. It is, therefore, necessary to reflect on the assumptions, characteristics and fallibilities of the econometric models used; excessively abstract or idealized formulas should not be adopted, without correspondence to concrete situations.[22]

Another aspect of the debate on benefit gained is based on the internalization of the time variable in the calculations, in that behaviors with longer duration differ from more temporary conduct with respect to sanctions.

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[21] See the ruling on Processos Administrativos nºs 08012.010744/2008-71 (cartel do leite) and 08012.002568/2005-51 (cartel do GLP do Pará).

[22] FRAZÃO, Ana. A importância da análise de consequências para a regulação jurídica — perspectivas e riscos do consequencialismo e do 'consequenciachismo'. Jota, 29 maio 2019. Available at: www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/aimportancia-da-analise-de-consequencias-para-a-regulacao-juridica-29052019. Accessed on: 2 Feb. 2021.

For this purpose, a percentage between 20% and 30% is set on the volume of sales affected by the cartel, which is the presumption of average cartel gain according to studies by international authorities.[23]

In the European Union, this discussion is addressed in Regulation (EC) No 1/2003 and the "Guidelines" for calculating the fines imposed by the European Commission.[24] A percentage of up to 30% was established on the value of sales made by the company, directly or indirectly related to the infringement, in the relevant geographical area of the Union, in the last full year of its participation in the infringement. This amount is multiplied by the number of years of involvement in the infringement. The fine may also be increased to exceed the amount of the illicit profits made as a result of the infringement, whenever it is possible to calculate this amount. However, the amount of the fine cannot exceed 10% of the volume of total business during the last full year of the infringement.

Despite these guidelines, it should be noted that the European Union Commission itself has already made the reservation that the numbers must not be absolute and that estimates cannot be inflexible and perfunctory. The estimates of economic importance of the infraction only point to the order of magnitude of the fine.[25]

It should be noted that the ceiling is a parameter fixed after the evaluation of each investigation. Therefore, the Commission's own methodology brings with it the need to differentiate cases based on structural parameters (e.g., market; essentiality; impact on the consumer; and geographic scope of the conduct), *vis a vis* art. 45 of Law No. 12.529/2011.

In turn, when dealing with the quantification of damages, the European Commission issued a Practical Guide in June 2013,[26] supporting jurisdictions of the Member States and the parties involved in the indemnity actions. The limitations in calculating the data were also highlighted. Furthermore, the Guide highlights that, although the vast majority of cartels effectively entail

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[23] For example, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *Hard core cartels* — third report on the implementation of the 1998 Council Recommendation. 2005. Available at: www.oecd.org/daf/competition/cartels/35863307.pdf. Accessed on: 19 Feb. 2021.

[24] COMISSÃO EUROPEIA — DG CONCORRÊNCIA. *Orientações para o cálculo das coimas aplicadas por força do nº 2, alínea a), do artigo 23º do Regulamento (CE) nº 1/2003* (2006/C 210/02, 1º set. 2006). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:PT:PDF. Accessed on: 1 Feb. 2021.

[25] Ibid.

[26] Comissão Europeia — DG Concorrência, *Documento de trabalho dos serviços da Comissão*, op. cit.

an additional charge, there are large fluctuations in observed supplementary prices. As an example, about 70% of the cases examined in the document resulted in a price between 10% and 40%, with the average around 20%.

The US Guidelines Manual[27], in the section referring to cartels in bidding, for price fixing or for market allocation (§2R.1.1), adopts the amount of 20% of the affected trade volume, plus other criteria identified, specified and weighted on a case-by-case basis. The US authority notes that it employs this standard percentage to avoid time and costs that would be required to determine the gain and the actual loss generated by the infraction.[28]

The uniformity of rates is, without a doubt, a resource optimization measure, but encounters severe difficulties in terms of compatibility with the procedural guarantees that the law confers on the accused.

It should also be noted that the method that focuses on the advantage earned for the calculation of fines is not the one most used by law enforcement agencies in the defense of competition.[29] In fact, a study by the International Competition Network (ICN)[30] indicated that the most usual criterion has been precisely the one adopted by Cade, consisting of the percentage added in the invoicing of the branch of activity, considering aggravating factors and particularities for a better individualization of fines. The method focused on advantage gained is referred to in the study as an alternative used in some jurisdictions.

While comparative experience is a good source of best practices and continuous improvement of legal-economic institutions, it is necessary to consider the diverse concrete specificities of Brazil in relation to other countries with more years of antitrust tradition.

Innovative calculations are welcome, as long as they are accompanied by some empirical ballast that opens the door for this dosimetry disruption to be actually incorporated in setting penalties or negotiating agreements. When the estimates of quantification of benefit gained do are not, to some extent,

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27 UNITED STATES SENTENCING COMMISSION. *Guidelines manual*. 2018. Available at: www.ussc.gov/guidelines. Accessed on: 2 Feb. 2021.

28 It should be noted that the US Supreme Court defined, in the *Booker* case, that the Guidelines manual is not binding on the courts, with only advisory nature (case *United States v. Booker*, 543 U.S. 220 (2005).

29 A warning offered by counselor Paulo Burnier da Silveira in the trial of Processo Administrativo nº 08012.005882/2008-38 (cartel do sal).

30 INTERNATIONAL COMPETITION NETWORK (ICN). *Setting of fines for cartels in ICN jurisdictions*. Updated 2017. Available at: www.internationalcompetitionnetwork.org/portfolio/setting-fines/. Accessed on: 11 Feb. 2021.

compatible with the Brazilian legal order, they receive more criticism and do not contribute to the improvement of institutional defense of competition.

4. The objectives of administrative sanctions

The desired deterrence must consider the prospect of a fine, its application in reasonable time, the peculiarities of each market and detection and conviction by the investigating authority, as well as other possible penalties. These elements have to be considered by the judge assessing the amount chargeable, either as a fine or as a contribution - even if under the aegis of the estimation of earned advantage.[31] In fact, these are parameters included in the *Termos de Compromisso de Cessação* (TCC) guide used by Cade to guide contributions of a pecuniary nature.[32]

As already highlighted, although the fine is a commonpenalty, Law No. 12.529/2011 allows, in art. 38, for the application, when the gravity of the facts or the general public interest requires, of other penalties. In reality, such penalties have an instrumental and prospective character, with the purpose of imposing or prohibiting future conduct, to change the market structure or dynamics.[33]

The aforementioned additional sanctions also produce financially negative effects on convicted parties, often more severe than the fine. This is

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[31] BREIT, William; ELZINGA, Kenneth G. Antitrust penalties and attitudes towards risk: an economic analysis. *Harvard Law Review*, v. 86, n. 4, p. 153-230, 1973; POSNER, Richard A. Optimal sentences for white-collar criminals. *American Criminal Law Review*, v. 17, p. 409-418, 1980; BRAGA, Tereza Cristine Almeida. Multas são suficientes para evitar novos cartéis? Reflexões sobre remédios antitruste e penas no direito concorrencial. In: FRAZÃO, A. (Org.). *Constituição, empresa e mercado*. Brasília: Faculdade de Direito-UnB, 2017; Ginsburg et al., Antitrust sanctions, op. cit.; WERDEN, Gregory et al. Deterrence and detection of cartels: using all tools and sanctions. *Antitrust Bulletin*, v. 56, n. 2, p. 207-234, 2011; HAMDANI, Assef; KLEMENT, Alon. Corporate crime and deterrence. *Stanford Law Review*, v. 61, n. 2, p. 271-310, 2010

[32] CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (CADE). Guia — Termo de Compromisso de Cessação para casos de cartel. Maio 2016. Available at: www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes/guias-do-cade. Accessed on: 28 Jan. 2021.

[33] FARACO, Alexandre Ditzel et al. Sanções não pecuniárias por infrações contra a ordem econômica. *Revista de Direito Público da Economia — RDPE*, ano 12, n. 46, p. 13, 2014

the case, for example, with banning participation in public tenders[34] and even more burdensome structural remedies, such as divestment.[35]

Thus, the assessment of penalties must be holistic, considering all the deterrents in question. Calculation based only on the advantage gained is flawed, as it focuses on the fine alone and ignores its possible combination with other sanctions.

The evaluation of penalties must also be linked to payment, notably considering the Brazilian reality of judicialization of decisions vis-a-vis convicted entities. In fact, voluntary compliance with cade's sentencing decisions is not the rule. In view of the constitutional democratic logic that allows judicial authority of administrative decisions, the judicial process is significant in cases of the application of fines.

As is well known, legal proceedings are long and costly to the State, which, in addition to delaying the effective payment of the fines imposed, entail the risk of revision of the administrative decision by the Judiciary.

To illustrate, empirical research[36] that evaluated the decisions issued by Cade between 2004 and 2010, with the imposition of some restriction or penalty, concluded that about half of the cases were reviewed by the judiciary. On average, courts upheld 74% of Cade decisions, which rose to more than 80% as of 2008. Despite this, the average time of legal proceedings was four years six months, with some cases exceeding ten years. This is much longer than the international standard.[37]

Take, for example, the case of the flat steel cartel,[38] judged by Cade in October 1999, with the conviction of three companies to the total of around

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[34] As occurred, e.g., in the following cases: Security Cartel (Processo Administrativo nº 08012.001826/2003-10), cartel in bidding for vehicle fleet maintenance (Processo Administrativo nº 08700.006551/2015-96), cartel in bids for building maintenance (Processo Administrativo nº 08012.006130/2006-22) and subway cartel (Processo Administrativo nº 08700.004617/2013-41).

[35] Application recorded only in the case of the cement cartel (Administrative Process No. 08012.011142/2006-79). On this topic, see OLIVEIRA JÚNIOR, Márcio de; LUIS, Alessandro Serafim Octaviani. Remédios estruturais em casos de cartéis: análise funcional e fundamentos econômicos para sua aplicação. In: CARVALHO, Vinícius Marques de (Org.). *A Lei 12.529/2011 e a Nova política de defesa da concorrência*. São Paulo: Singular, 2015. p. 321-337.

[36] AZEVEDO, Paulo Furquim de. Revisão judicial de decisões antitruste: incentivos para acordos? In: PRADO, Mariana Mota (Org.). *O Judiciário e o Estado regulador brasileiro*. São Paulo: FGV Direito SP, 2016. p. 87-88

[37] INTERNATIONAL COMPETITION NETWORK (ICN). *Competition and the Judiciary — a report on a survey on the relationship between competition authorities and the Judiciary*. Abr. 2006. Available at: http://antigo.cade.gov.br/assuntos/internacional/internacional-anexos/cooperacaomultilateral/icn-cpi-subgroup3-competition-and-the-judiciary.pdf. Accessed on: 9 Feb. 2021.

[38] Processo Administrativo nº 08000.015337/1997-48, conselheiro-relator Ruy Santacruz.

R$ 58 million. In December 2020, more than 11 years after the judgment, several cases were still being processed in the Judiciary, with penalties under discussion.[39] Although judicial decisions have been favorable to Cade, the penalties decided were not effectively implemented. At the end of 2020, the Cade Court authorized the conclusion of an agreement that ended the matter, with the payment of the updated full amount of the fines imposed, as active debt, by installments in three years, with the cessation of ongoing action and the need for publication of condemnatory decisions in the press.

, The prominent case of the industrial gases cartel and hospital procedures also need highlighting. Cade judged the administrative proceeding[40] in September 2010, imposing fines totaling approximately R$2.9 billion, at the time the highest conviction imposed by the Brazilian antitrust authority. Subsequently, the decision was challenged in court, which, more than ten years later, has still not reached a final decision. In the first instance, Cade's decision was annulled, on the grounds that it had been based on illicit evidence. The sentences were upheld in the appeal court, with some confirmed by the Superior Court of Justice in 2020.[41]

These examples illustrate a particular Brazilian reality, in terms of the judicialization of Cade decisions and the prolonged duration of proceedings. In short, in Brazil the fine imposed by Cade does not by itself guarantee

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[39] According to Parecer nº 124/2020/UCD/PFE-Cade-Cade/PGF/AGU, within the scope of Processo Administrativo nº 08000.015337/1997-48: (i) Action for annulment by Usiminas against the decision of Cade, pending before the Federal Supreme Court (ARE1.264;627/DF); (ii) Action for annulment of Cosipa against Cade decision, pending before the Superior Court of Justice (AREsp 1.672.802/DF); (iii) Court Injunction by Usiminas and Cosipa to suspend the fine, without need to offer a guarantee, pending in the Superior Court of Justice (AREsp1.614.584/DF); (iv) Court Injunction by Usiminas and Cosipa to suspend the conviction with regard to publication of the Cade condemnatory decision, to the detriment of the company, in a newspaper in the state of Minas Gerais, pending in the Superior Court of Justice (AREsp1,370,866/DF); (v) Execution of an Extrajudicial Deed filed by Cade relating to the administrative penalty imposed on Usiminas (0041842- 28.2010.4.01.3400) and respective Embargoes on Opposite execution (0001006-66.2017.4.01.3400); (vi) Execution of Extrajudicial Deed filed by CADE concerning the administrative sentence imposed on Cosipa (0041841-43.2010.4.01.3400); and (vii) Execution of an Extrajudicial Deed filed by CADE relating to the conviction imposed on Cosipa (0027870- 49.2014.4.01.3400) and respective Embargoes on opposing executions (0002452-41.2016.4.01.3400).

[40] Processo Administrativo nº 08012.009888/2003-70, conselheiro-relator Fernando de Magalhães Furlan.

[41] In this sense, for example, see: AREsp nº 1.364.579/DF, rel. Minister Benedito Goncalves, First Panel, ruled on 11/24/2020, DJe 12/1/2020; AREsp No. 1.477.007/DF, rel. minister Benedito Gonçalves, First Panel, ruled on 11/24/2020, DJe 12/1/2020. The special appeal by the company White Martins, to which the highest fine was imposed, is still pending judgment by the STJ (REsp No. 1.674.320/SP, Justice Regina Helena Costa).

satisfaction, representing only an enforceable title. In such cases, even when there is judicial confirmation, it is worth questioning whether the eventual imposition of fines, more than ten years after conviction (years after the start of investigations) is an effective deterrent.

It should be noted that although art. 98 of Law No. 12.519/2011 requires guarantee by the court vis-a-vis the amount of the fine imposed to grant the suspension of execution, as the magistrate must set a suitable bond, many judges have been flexible, for example, in relation to the acceptance of material assets or the presentation of a letter of guarantee. Therefore, it is often guaranteed without any immediate cost to the convicted, as they are required to offer received assets which are already part of its patrimony.

In addition, the indexing used by the Judiciary can also provide an incentive to postpone discussions. Even in the case of deposit of values by the convicted, the update via Selic (Special System for Settlement and Custody) may not fully recover the amount to be paid the public administration.

Therefore, the application of large fines is not consistent with deterrence. On the contrary, it may represent more incentives to question judicial acts, namely when the criteria ordinarily used are not met, which is evident in jurisprudence since the revoking of Law No. 8;884/1994.

Neither will disproportionate fines fulfill the purposes of the antitrust policy. High fines that exceed financial capacity, will ultimately lead to the closure of economic activities, with the consequent reduction of tax revenue and jobs, in addition to the decrease in the number of players in the market.[42] This effect will be even more deleterious in the case of conduct involving a high number of competitors or in already monopolized markets.

If the question of timeliness is imposed with regard to the application of fines, all the more reason to consider this argument when defining pecuniary contribution in TCCs. The amount, currently, is calculated based on the amount of the expected fine, with incidence of a reduction percentage according to the scope and utility of adherence to procedural instruction and the moment of the proposal. Despite the discount, there is definition of immediate payment, with full satisfaction of the obligation, mitigating the risk of judicialization.[43]

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[42] WEST, Jeremy. Are we winning the fight against Cartels? CPI Antitrust Chronicle, v. 2, n. 2, p. 3-4, 2012. A supracitada pesquisa empírica atestou que o implemento da política de acordos pelo Cade contribuiu para a redução da judicialização, em conjunto com outras ações da Autarquia, como atividades relacionadas com o devido processo legal (Azevedo, Revisão judicial de decisões antitruste, op. cit., p. 95-98).

[43] The aforementioned empirical research attested that the implementation of the agreement

There is also a possible contribution vis-a-vis the instruction itself, which can help the authority in the enforcement activity, with subsidies for varied cases. So, the value no longer received (the incident discount) must be priced considering the derived positive externalities (immediate cessation of conduct and payment of financial contributions, sparing public resources protracted investigation, etc.).

Cade's discretion in entering into these agreements observes a range of dimensions to assess whether the public interest would be satisfied, under the terms of art. 85 of Law No. 12.529/2011, regulated by its Internal Regime. If the idea of the law was to address the TCC solely in terms of the advantage gained, it would have already been brought within the scope of the legal text and the legal provision of item I of § 1, to the effect that the proposal must contain "specification of the obligations of the represented, not to practice the investigated conduct or its harmful effects, as well as obligations that it deems appropriate" forsaking the monetary aspect of the contribution listed in item III.

However, as already mentioned, the law did not specify hierarchy, but cumulativeness , which explains why it is impossible to conclude that the calculation of the benefit obtained could overcome the requirement of any or another obligation necessary for cessation of the conduct.[44] Considering the quantification of fines as an automatic process, careful consideration must be given to human action.

In this sense, it is important to highlight three examples in which the set of obligations presented by Cade had a public interest impact which extrapolated the quantification of the benefit gained.

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policy by CADE contributed to the reduction of judicialization, together with other actions of the body, such as activities related to due process of law. (Azevedo, Revisão judicial de decisões antitruste, op. cit., p. 95-98).

[44] This issue is even clearer in relation to the TCCs signed in cases of unilateral conduct (e.g., TCCs: Petrobras, referring to pipelines in the refinery market (IA nº 08700.006955/2018 22) and in the natural gas market (PA nº 08700.002600/2014-30); Empresa Brasileira de Correios and Telégrafos (PA nº 08700.009588/2013-04), in the postal service market; Booking, Expedia and Decolar (IA nº 08700.005679/2016-13), in the hotel reservation online market). Although the legislation does not require the payment of a pecuniary contribution, such agreements address disputed competition issues, reaching a quick and effective result, with reduced risks of subsequent judicialization. See, in this sense, empirical research on cases of unilateral conduct examined by CADE between 2012 and 2019, with evaluation of cases with and without a consensus solution. (Apud ATHAYDE, Amanda; JACOBS, Patrícia. A terceira 'onda' do antitruste no Brasil: marolinha ou tsunami? *Consultor Jurídico*, 1º mar. 2021. Available at: www.conjur.com.br/2021-mar-01/athaydejacobs-terceira-onda-antitruste-brasil. Accessed on: 7 Apr. 2021).

According to the judgment of the Federal Audit Court, accounts of individuals linked to the Federal Superintendence of Agriculture, Livestock and Supply in the State of Rio Grande do Sul were approved without reservations, incorporating Cade's determination that it addressed a structural remedy on the ban on bidding. One of the caveats was the determination to grant express knowledge to the competent entity, about the impropriety of admitting a company that evaded CADE's administrative sanction as a participant in the bidding process.[45]

In the case of the alleged "DF fuel cartel",[46] Cade General Superintendence collaborated with other control bodies, beneficial to society, which are not restricted only to the payment of a pecuniary contribution. Of course, the monetary dimension reflected in the contribution is important; however, it does not exceed the dimensions of the "whole".

In the agreement signed with Cade, in addition to recognition of the participation in the investigated conduct and collaboration in subsequent investigations, the termination of practice by the investigated company is foreseen, the adoption of a policy of competitive integrity (compliance), corporate restructuring to professionalize the management of the company and a solid divestment entailing the sale of a relevant assets of the company. Note that if the focus was the return of values taken as an advantage, this increase in competition would likely not materialize.

Finally, as part of *Operation Lava Jato* at Cade, the "refinery cartel",[47] which was under investigation, had a proposal for an agreement that was already at the maximum allowed by Law 12.529/2011, of 20%, added to the potential collaboration with Cade and the Public Prosecutor to clarify and disclose their behavior. The defensive position of 10% on the sales volume was still considered insufficient, notwithstanding the legal ceiling and the cooperation which the company was willing to provide the authorities to clarify the illicit actions involved. Such a position did not take into account the damage compensation policy directed by the Public Prosecutor's Office, nor the proportionality of the calculation basis, in the terms of art. 2-A of Resolution 3/2012; not to mention the collaboration in unravelling other dubious actions.

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45 Acórdão de Relação nº 3123/2017 — Segunda Câmara, published in tthe *Diário Oficial da União* de 13/4/2017. Special Rendering of Accounts nº 024.433/2013-6, ministro-relator José Múcio Monteiro.

46 Requerimento nº 08700.004602/2016-26.

47 Requerimento nº 08700.011995/2015-43.

Such cases help to corroborate that the raison d'être of the defense of competition is not and never could be tax collection: the mission of Cade's institutional framework has always been to "watch over the maintenance of an environment of healthy competition in Brazil",[48] as consolidated in its strategic plan.

The social disapproval of such conduct is not linked to the compensation to the treasury or to the consumer, but to the legal interests protected by Cade, which do not necessarily permeate private interest or the enriching of public coffers. The competition defense policy is made up of many factors and instruments designed to curb abuses and preserve the economic order. Civil liability to recover damages from the cartel is not the institutional mission of Cade, and the potential argument as to the inefficiency of enforcement in the private sector does not lead to action in this sense. Indeed, in Brazil there are other institutions responsible for acting in the recovery of undue profits, as is the case of the Federal Audit Court and the Public Prosecutors Office.

It is important that the determination of sanctions takes into account the objective of the legislator in penalizing illicit conduct. At the same time, the main purpose of sanctioning anticompetitive conduct is not payment for the offense per se (the purpose of the so-called retributive theory). Indeed, effective deterrence is sought, both special (preventing the recidivism of illicit actors) and general (to serve as an example for potential offenders), along the lines of the utilitarian theory of punishment.[49]

It should be noted that the Organization for Cooperation and Development (OECD) highlights this objective in its recommendation on effective action against *hard core* cartels,[50] with an assumption of the need for states to establish enforcement procedures, including sanctions, which are effective, appropriate and deterrent.

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[48] Available at: http://antigo.cade.gov.br/acesso-a-informacao/institucional/planejamento_estrategico. Accessed on: 3 Feb. 2021

[49] INTERNATIONAL COMPETITION NETWORK (ICN) WORKING GROUP ON CARTELS. *Defining hard core cartel conduct: effective institutions, effective penalties*. Report to the ICN 4th Annual Conference, Bonn, Germany, 6-8 June 2005. p. 51-52.

[A]vailable at: http://old.internationalcompetitionnetwork.org/uploads/library/doc346.pdf. Accessed on: 28 Jan. 2021.

[50] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *Recommendation of the Council concerning effective action against hard core cartels*. 1º jul. 2019. Available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452. Accessed on: 19 Feb. 2021. Adopted on 2019, substituting the previous Recommendation of 1998.

Finally, it must be recognized that the agreed solutions have been legitimized by the Brazilian Judiciary. In a recent judgment,[51] the Supreme Court suspended acts of the Federal Audit Court, which had declared the unsuitability of companies contracting with public administration that had signed leniency agreements with the Federal Public Ministry, the Office of the Comptroller General, the Attorney General's Office and Cade. According to the STF, the sanction imposed by the TCU nullified the signed agreements, weakening legal certainty, legitimate expectations and good faith, and violating the guarantee of transparency and predictability of public authority conduct. Bu ways of such a decision, reliability was granted to the relationship between the public and the private in search of more effective models.

It should also be noted that Cade has full discretion in applying the sanctioning mix, provided that their acts are clearly motivated. In this sense, the Court of Auditors of the Union recently established that it does not have competence to inspect acts directly related to competitive infringements, the responsibility of the Court of Auditors appeal body, as to the regularity of Cade's acts.[52] Thus, it is up to the authority to define the penalties or consensual decisions that it deems appropriate in each case, always seeking the greatest efficiency, and respecting fundamental principles.

5. Conclusion

For the calculation of fines for infringements against the economic order, as well as pecuniary contributions as regards TCC, Cade has consistently adopted the methodology based on the revenue of companies in the year prior to establishment of the administrative process in the branch of business activity where the infraction occurred, in addition to a definition of the rate between 0.1% and 20%, taking into account the dosimetry criteria contained in art. 45 of Law 12.529/2011 (including the benefit received).

In particular cases, the prevailing methodology can be adapted when Cade does not have access to billing data or where the data available are not proportionate to the specificity of the particular situation. In such hypotheses, proxies are sought to reach a base of calculation proportional to the concrete

[51] MS 35.435; MS 36.173; MS 36.496; e MS 36.526, rel. min. Gilmar Mendes, j. 30 mar. 2021.
[52] Acórdão nº 2839/2020 — TCU — Plenário, rel. Bruno Dantas, j. 21 out. 2020.

situation, in line with the methodology commonly used and the elements of the case under examination.

In such circumstances, Cade does not make use of a technique that focuses essentially on the advantage gained. On the contrary, parameters are sought to reflect a percentage of the sales volume of affected products during the investigated period. Thus, in the light of the legal provisions, the use of an objective criteria lends greater security to the legal system, with a lower risk of legal challenges.

The central issue, as recognized by the OECD, must be the effectiveness of penalties for deterrent purposes. For that, it is necessary to take into account the peculiarities of each market, with a holistic view of the sanctioning mix (the fine, undeniably, central, but with the possibility of other sanctions, as provided for in art. 37 of Law No. 12.529/2011). It is also necessary to take into account the timeliness of the application, considering, above all, the Brazilian idiosyncrasy of intense judicialization, and exhaustive, time-consuming scenarios.

Obviously, there is room for improvement, as suggested by the OECD,[53]. For example, a guide with directions for calculating fines that consolidate Cade's jurisprudence will bring more legal certainty and predictability.[54] Critiques *de lege ferenda* are also valid and should be addressed through the appropriate channels, notably before the Legislative Power. However, as attractive as the arguments may seem, Cade must observe that the effectiveness of its policy depends on respecting the legislation and judicial perceptions of its application. After all, effectiveness is the advantage gained in the defense of competition.

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[53] ORGANIZAÇÃO PARA A COOPERAÇÃO E DESENVOLVIMENTO ECONÔMICO (OCDE). *Revisões por pares da OCDE sobre legislação e política de concorrência: Brasil*. 2019. Available at: www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm. Accessed on: 19 Feb. 2021.

[54] In this sense, in July 2020, Cade submitted a proposal for a "Guide to dosimetry of cartel fines", with the aim of presenting the methodology used by the Administrative Court, according to case law between January 2012 and July 2019. (CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (CADE). *Cade lança versão preliminar de Guia de dosimetria de multas de cartel*. 2 jul. 2020.

[A]vailable at: www.gov.br/cade/pt-br/assuntos/noticias/cade-lanca-versao-preliminar-de-guia-de-dosimetriade-multas-de-cartel. Accessed on: 8 Apr. 2021. To date, there is no confirmation as to the date of publication of the final document.

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