

ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE

PROVISIONAL INFORMATIVE NOTE
**ON THE COLLABORATION AMONG COMPANIES
TO FACE THE COVID-19 CRISIS**

JULY/2020

Summary

Introduction	3
1. Collaboration among Companies.....	4
1.1. General guidelines for collaboration	4
1.2. Implications of Law 14010/2020	6
2. Procedures.....	7
2.1. Communication Channel.....	7
2.2. Petition	7
2.3. Inquiry.....	9

Introduction

The COVID-19 pandemic (Coronavirus disease 2019), declared by the World Health Organization (WHO) on 11 March 2020, resulted in a serious global public health crisis and culminated in the recognition of State of Public Emergency, by the Brazilian National Congress, in the form of Executive Order no. 6 of 20 March 2020 (Executive Order 6/2020).

In addition to the health crisis, the COVID-19 pandemic has impacted several sectors of Brazilian society, notably the economic sector, which has been affected by the rupture of several production chain and by the destabilization of demand, resulting from the sudden decrease in the consumption of certain goods and services or from the abrupt need of essential goods and services to fight the health crisis.

In this context, considering the relevance for objective and timely instructions to ensure the competitive compliance of businesses strategies adopted to face the crisis, antitrust authorities worldwide are making efforts to provide swift review procedures and guidelines for market players.

The Administrative Council for Economic Defense (CADE), acknowledging the importance of this matter, elaborated the present **Provisional Informative Note on the Collaboration among Companies to Face the COVID-19 Crisis** (Informative Note), in order to provide guidance on the procedures to which economic agents may appeal to receive a decision from CADE concerning the adoption of strategies aimed at fighting the crisis, and ensure compliance with Law 12529/2011 of 30 November 2011 (Law 12529/2011). Furthermore, this Informative Note outlines general guidelines on the potential adoption of businesses strategies to face the crisis during the State of Public Emergency. Thus, the purpose is to indicate to the market what the recommended remedies would be to minimize possible competitive risks related to the collaboration among companies, in order to preserve the observance of Law 12529/2011.

It is noteworthy that agreements among competitors for price fixing, market division and supply restriction will continue to be strongly repressed by the antitrust authority, as well as the exchange of sensitive competitive information among companies, in accordance with the competition law and the consolidated precedent of this Council. Strategies involving collaboration among companies must observe all precautionary measures so that such types of anticompetitive practices do not occur, at the risk of being investigated and punished for the crimes committed.

Lastly, it should be noted that economic agents will continue to be fully responsible for measuring their own strategies to face the crisis and potential competitive risks arising from them. The present Informative Note aims to provide greater transparency and predictability to economic agents in assisting them with

guidelines on the collaboration among companies¹ and on available procedures to get a decision from the agency on this regard. However, it must be noted that this document is for educational purposes only and has no ruling nor binding nature.

1. Collaboration among Companies

1.1. General guidelines for collaboration

The current crisis caused by the COVID-19 pandemic may trigger the need for economic agents to develop cooperation strategies, which may result in significant benefits to mitigate the effects of the crisis.

From the antitrust point of view and in accordance with the precedent of this Council, it is possible to outline certain remedies on the scope, duration and territorial extension of the collaboration strategies to fight the crisis, so that economic agents have a more precise guideline and do not violate the competition law. These guidelines are aligned with similar recommendations suggested by the Organisation for Economic Co-operation and Development (OECD).

In order to guide the elaboration of such strategies, based on cases recently decided by CADE² and by rulings in force³, it is recommended that market players observe the suggested general assumptions, which will be detailed below. These are general guidelines, so that the review of this Council, by means of available procedures, will take into account the particularities of the specific case.

The assumptions shall also determine whether the procedures made available by the antitrust authority shall be initiated and, based on them, CADE will issue a provisional approving decision, in case there is no evidence of economic crime at the moment. The nature, binding and legal range of the mentioned provisional decision will be different for each procedural type, as established in Section 2 of this Informative Note.

Therefore, the authority has the right to review their own provisional decision, if any evidence of anticompetitive practices is found in the implementation of the collaboration strategy or as a result of it, determining the opening of suitable procedures for investigation.

¹ The considerations of this Informative Note cover companies that operate in the same market, in the same production chain or in correlated markets.

² Proceedings 08700.002395/2020-51 (Petitioners: Ambev S.A., BRF S.A., Coca-Cola Indústrias Ltda., Mondelez Brasil Ltda., Nestlé Brasil Ltda. and Pepsico do Brasil Ltda). Judged on 28 May 2020; Proceedings 08700.003483/2018-56 (Petitioners: Raízen Combustíveis S.A., Petrobras Distribuidora S.A. and Ipiranga Produtos de Petróleo S.A). Judged on 4 July 2018.

³ Law 12529/2011; Law 14010/2020; CADE Ruling 17/2016, among others.

a) Scope

The collaboration strategy must be specific and aimed at addressing a certain matter that is caused by the pandemic or its effects. In general, the collaboration strategy shall not embrace measures and means that are broader than those strictly necessary to facilitate the intended results.

SOME EXAMPLES

Regarding the scope and objective of the collaboration, it is possible that agents develop joint actions to ensure the maintenance or resumption of production, supply or distribution of essential goods and services whose production or distribution have been affected by the pandemic. Similarly, companies will also be able to develop collaborative measures in order to maintain or resume production and supply chain of raw materials, as well as distribution chains to the final consumer that are being severely affected by the crisis.

It is also possible that companies operate collaboratively to develop new products, particularly those related to the treatment of patients affected by the virus, or to mitigate the abnormalities caused by it. In this sense, cooperative agreements for research and development (R&D) or joint ventures can become tools of high importance and relevance, as they are implemented in order to seek innovative responses to the crisis.

For instance, a particular strategy may include spaces for exchanging information about a specific parameter necessary to enable the result expected by the agreement; however, the secrecy of other parameters not necessarily for its implementation must be held. Furthermore, as it will be shown below, potential exchange of information must follow governance rules to ensure competition protection.

A significant aspect to be considered by companies to define the scope of the strategy is trying to anticipate, compare and evidence the effects of a scenario without cooperation in the face of a scenario with cooperation.

b) Duration

The time duration of collaboration should be limited to the strictly necessary period for fighting the detrimental effects of the COVID-19 crisis. It is understood that, depending on the objectives proposed, there may be different needs in relation to the agreement or contract duration. In any case, it is recommended that the companies plan means to review their collaborative strategies, in order to be able to adopt these strategies to the consequences of the pandemic.

c) Territorial extension

To the same extent of the parameters “scope” and “duration”, the collaboration territorial extension should be limited to the objective of fighting the effects of the COVID-19 pandemic. In addition, it is possible that the pandemic will develop unevenly within the Brazilian territory, due to regional characteristics, which may require different actions according to the location of the companies or the object of the strategy.

d) Governance, transparency and good faith

When implementing strategies to jointly face the crisis, agents must act with caution, precaution and diligence, choosing measures that assure competition prevention and counteract competitive risks deriving from a possible collaboration. In this sense, strategies that concern competitors' participation must be based on strict controls of governance and compliance⁴, as means to present good faith and commitment with competition defense. Another way to present good faith, when seeking the decision of the antitrust authority by any of the available means, is to provide transparency and present all documents and information that assist the authority's provisional decision and prove the emergency and need for the strategy.

CAUTION WITH SENSITIVE INFORMATION

As an example, in case the collaboration strategy involves competitors and provide for the need to share competitive sensitive information, it is expected that the involved agents provide means to restrict the access to this information. It is suggested the creation of a separate group of competing companies, that may access and process the information.

1.2. Implications of Law 14010/2020

As Law 14010, of 10 June 2020, (Law 14010/2020) came into force, which establishes the Emergency and Temporary Legal Framework due to the COVID-19 pandemic, the effectiveness of certain provisions set forth by Law 12529/2011 were temporarily dismissed.

Particularly in regard to the objectives of this Informative Note, which concerns the collaboration among companies, it is noteworthy the suspension of the effectiveness of Art. 90, Section 4 of Law 12529/2011, as established by Article 14 of Law 14010/2020, for mergers and acquisitions (M&As) transacted and in force between 20 March and 30 October of 2020, or during the State of Public Emergency recognized by Decree Order 6/2020.

Thus, if two or more companies sign an associative, consortia or joint venture agreement, it will not be mandatory to report it before CADE, under the terms of Art. 88 of Law 12529/2011, during the period mentioned above. However, must be enhanced the possibility of further review of the M&A or investigation of an economic crime, under the terms of Art. 36 of Law 12529/2011, for agreements that are not necessary to fight or mitigate consequences resulting from the pandemic, as provided for in Article 14, Paragraph 2 of Law 14010/2020.

⁴ For further information on how to elaborate a competitive compliance program, see: <http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf/view>

In spite of the temporary suspension of effectiveness of Art. 90, Section 4 of Law 12529/2011, it is likewise recommended that economic agents comply with the general guidelines detailed above, aiming at mitigating competitive risks and complying with the provisions of Law 12529/2011.

2. Procedures

2.1. Communication Channel

The communication channel with the General Superintendence of Cade (SG/CADE) was established with the specific intent to address doubts and queries of market players regarding their strategies to face the crisis.

Through this communication channel, economic agents will be able to get a provisional expression of the SG/CADE, that shall appoint whether or not there are evidences of economic crimes in the strategy planned and presented at that moment.

This mean of communication concerns solely the SG/CADE review and will be used to provide greater predictability and safety to the agents by means of a provisional and non-binding decision from the authority.

To activate this communication channel, the agents must send an electronic mail to superintendencia@cade.gov.br, where they can request the scheduling of a meeting or submit documents and information about the planned strategy of collaboration.

2.2. Petition

Agents may exercise their right to petition in order to get a written and non-binding declaration from the SG/CADE and the Tribunal of CADE on the existence of anticompetitive evidence within the strategies of collaboration among companies, in particular and concrete situations to face the crisis of the COVID-19 pandemic.

In this case, the agents must provide all documents, information and studies available regarding the planned or initiated collaboration, by means of a petition addressed to the General Superintendence of CADE, with a request for further submission to the Tribunal of CADE.

The declarations of the SG/CADE and the Tribunal of CADE are unrelated and will be limited to the expression of an opinion of each on the existence or not of evidence of economic crimes, based on the elements reported to them, deciding for:

- (i) dismissal of the case, if the conclusions of the SG/CADE and the Tribunal of CADE define there is no evidence of an economic crime; or

- (ii) initiating any of the regular procedures provided for in Part II, Title IV, Chapter I, Section II of CADE's Statute⁵; and
- (iii) the adoption of measures and request for information necessary for the proper monitoring of activities reported by the agents.

PRECEDENT

In 2018, CADE has manifested at first and without binding effects on the agreement named "*Protocolo de Crise de Abastecimento*" (Fuel Crisis Protocol), which was signed by liquid and aviation fuel distributors to optimize the storage, transportation and distribution of these products through mutual logistical cooperation during the supply crisis caused by the protests of truck drivers throughout Brazil. See below the excerpt of the Presidency Order 135/2018, Case File 08700.003483/2018-56:

"7. I observe that the presented agreement brings a series of safeguards in the sense that: commercially sensitive information are not allowed to be exchanged among distributors; transparent mechanisms for exchanging information are established; and, information about the actions taken must be submitted to CADE.

8. Furthermore, I emphasize that the exceptionality of this measure does not constitute antitrust immunity to this agreement, which means that no immunity is given to the petitioners, in a sense that this Council will not be prevented to review potential irregularities or practices that potentially harm competition within the scope of this agreement.

9. In this opportunity, I launch a convergent understanding to the review made by the General Superintendence and, in this terms, I present to the Plenary a proposal for:

- a. acknowledgment of the petition submitted by the interested parties;
- b. **communicating to the interested parties that the measures presented in the document "*Protocolo de Crise de Abastecimento*" does not present evidences of anticompetitive behavior;**
- c. instruct interested parties to submit to CADE, whenever requested, all information related to the "*Protocolo de Crise de Abastecimento*", as well as, at the end of its term, a detailed report with the measures adopted, information exchanged and the results obtained."

In 2020, in the COVID-19 context, the Tribunal of CADE approved the Presidency Order 99/2020 for the Case File 08700.002395/2020-51, concerning the cooperation among competitors in the beverage and food sectors to recover activities of small retailers, with similar provisions:

"26. Thus, considering all mentioned aspects, it is presented to the Plenary proposal of:

⁵ "Section II. Preparatory Proceedings; Administrative Inquiries for Assessment of Infringements of the Economic Order; Administrative Proceedings for Imposition of Administrative Penalties for Infringements of the Economic Order."

- a) approval of Opinion 529/2020 (0757563) of the General Superintendence of Cade;
- b) acknowledge that, at the moment, there is no evidence of any attempt of anticompetitive behavior by means of the measures presented in the Memorandum of Understanding (0756222 and 0756231);
- c) clarify that Cade's right to review its own decision at a later moment on the evidence of any behavior that motivate the investigation for economic crime is protected under the terms of Art. 36 of Law 12529/2011;
- d) instruct interested parties to submit to Cade, whenever requested, all information related to the cooperation referred to in the Memorandum of Understanding, as well as, at the end of its term, a detailed report with the measures adopted, information exchanged and the results obtained (...)."

The Petition procedure and the legal scope of CADE's decision are aligned with the practice established by the European Commission, substantiated by the issuance of the "comfort letter" in a response to written consultancy made by agents, foreseen in paragraph 18⁶ of its release titled "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak"⁷.

The scope and legal effects of CADE's decision, within the scope of this procedure, are limited by the Brazilian law to the assumptions of declarations listed above. However, the agent's petition will be considered as an attitude of good faith in the monitoring of the transaction by CADE.

2.3. Inquiry

The Inquiry procedure is the mean by which agents can get a binding decision from the Tribunal of CADE regarding the application of the competition law, ensuring a greater legal certainty in the implementation of initiatives that involve collaboration among companies to face the effects of the crisis caused by the COVID-19 pandemic.

As established by Ruling 12 of 11 March 2015 (Ruling 12/2015), the object of inquiry may incur in:

⁶ "With a view to increasing the degree of legal certainty as regards antitrust guidance within a timeframe that is compatible with the urgency of certain situations related to the current COVID-19 outbreak, the Commission, through its Directorate General for Competition, stands ready, exceptionally and at its own discretion, to provide such guidance by means of an ad hoc "comfort" letter." Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en). Accessed in 29 Jun. 2020.

⁷ Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en). Accessed in 29 Jun. 2020.

- a) legality of transactions, contracts, businesses strategies or conducts of any kind: (i) already intended and planned, but not yet initiated; or (ii) already initiated by the enquirer party/parties; and
- b) competition law interpretation regarding the control of M&As, related to transactions or state of facts properly defined.

When elaborating an inquiry to the Tribunal of CADE it is important that the enquirer party/parties comply with the requirements provided for by Cade's Ruling 12/2015. Mandatory elements for the request of inquiry are as follows:

- a) complete and comprehensive description of all facts considered significant for the review and, whenever possible, must be substantiated;
- b) present the maximum amount of documents and information available that allow the Tribunal of CADE's adequate response to the inquiry, without the need to proceed with additional instruction, except for information available from public reliable sources;
- c) submission of specific situations, forbidden merely hypothetical queries;
- d) proof of payment of procedural fee in the amount of fifteen thousand Brazilian real (Art. 23 of Law 12529/2011); and
- e) other mandatory requirements provided for by Arts. 3 and 4 of Ruling 12/2015.

ACCEPTANCE OR DISMISSAL OF INQUIRY CASES

"9. Arts. 3 and 4 of CADE's Ruling foresee, respectively, positive and negative requirements for Inquiry acceptance. Such requirements must be understood as if they were true conditions of the action, that is, minimum conditions for the operation of the administrative jurisdiction.

10. In the case at issue, all positive conditions foreseen by Art. 3 are considered, since: (i) the enquirer party is duly qualified; (ii) the Inquiry contains a precise indication of its object; (iii) all necessary documents were submitted; (iv) provisions of law and CADE's precedent were identified in the case; and (v) the Enquirer party has legal standing to request the inquiry.

11. At the same time, no negative condition foreseen by Art. 4 is observed, since it: (i) was not requested by a third party unrelated to the practice under review; (ii) is not related to practices under investigation within CADE; (iii) does not require, for its review, facts other than those described and evidenced in the inquiry; (iv) does not concern merely hypothetical matters; (v) allows a minimal instructed response from CADE; (vi) does not involve a subject unrelated to CADE's power; and (vii) does not concern any hypothesis already ruled by CADE's Regulation or Summary.

12. For all those matters, the present inquiry is accepted (...)."

(Inquiry 08700.004594/2018-80. Enquirer: Continental do Brasil Produtos Automotivos Ltda. Voting of the Rapporteur Commissioner Paulo Burnier da Silveira)

“18. In every Inquiry the object must be completely clear and limited, under penalty of submitting to the antitrust authority the obligation to issue a provisional and binding decision on the practices not sufficiently delimited, whose effects on the market are not reasonably predicted.

19. In addition, it is necessary to have caution in the review of matters submitted that require, for its proper classification, a detailed investigation of other factual circumstances related to it. That is, when the extension of possible effects of the practice in the market require more data and detailed review by the Council for an objective and clear response, we will be facing the boundaries for further instructions, case expressly forbidden for Inquiry, under the terms of Art. 4, Sections 3 and 5 of Ruling 12/2015.”

(Inquiry 08700.007296/2018-41. Enquirers: Associação Paulista de Produtores de Sementes e Mudanças – APPS. Voting of the Rapporteur Commissioner Polyanna Vilanova)

Therefore, it is suggested that agents submit documents and information that evidence the “state of need” of the companies that are part of the collaboration and the statement of causal link between the structure of the proposed collaboration and its need to face the consequences resulting from the COVID-19 pandemic.

The legal term for response is of 120 (one hundred and twenty) days counted from the distribution of the procedure to a Rapporteur Commissioner. In 2019, four inquiries were responded, with an average term of 62 (sixty-two) consecutive days for review by the Tribunal of CADE.

Inquiries registered in 2020 and directly related to coping with the effects of the COVID-19 pandemic will be swiftly responded by the Tribunal of CADE, considering the emergency required by each case. Extraordinarily, the distribution must occur within 24 (twenty-four) hours after the requirement is registered, in an extraordinarily distribution session, if necessary.

The decision taken by the Tribunal of CADE in response to the Inquiry that fulfills the requirements mentioned above will have its binding effects modulated in view of the particularity of each case, as provided in Art. 8 of Ruling 12/2015, taking into account the period of public emergency recognized by Executive Order 6/2020, except for the hypothesis referred to in Art. 9 of Ruling 12/2015.

Conclusion

This Provisional Informative Note on the Collaboration among Companies to Face the COVID-19 Crisis join general guidelines about recommended parameters for elaborating strategies to fight the pandemic and available procedures for economic agents to get a decision from CADE.

The general guidelines for the collaboration among companies involve considerations related to the scope, duration, territorial extension and governance, transparency and good faith. In short, the strategies related to the collaboration among

companies might have a limited scope to deal with a particular issue derived from the crisis, with proof that the expected results could not be reached without the collaboration. The strategies must limit the duration and the territorial extension to the strict necessary to reach results.

CADE makes available, at the moment, three different means for agents to get a provisional decision regarding their strategies. Each one of the procedures implies differences in terms of the form, nature of the decision and its legal scope, agents involved and the swift review. These differences shall be considered by the agents when seeking the authority's review.

With this Informative Note, CADE seeks to provide a greater legal certainty to parties involved and, acknowledging the critical moment Brazil is going through, to establish mechanisms for swift and efficient reviews in order to support the economic agents' strategies to fight the COVID-19 pandemic and its effects.