

## Judgements issued in July, August, and September 2020

The bulletin presents summary case law information on judgements rendered by the Administrative Tribunal of Economic Defense during the period, after becoming final and unappealable.

The precedents describe the understandings adopted by the Tribunal after consideration and sum up its main positions on the matters at issue. This document seeks to facilitate the follow-up of the most important decisions of the agency.

For further information on the cases, CADE makes available links where readers can access the entire judgements.



### **Administrative Proceedings No. 08012.005009/2010-60 – PST Eletrônica S.A. (162th Ordinary Hearing)**

**Rapporteur Commissioner: Luiz Augusto Azevedo de Almeida Hoffmann**

ADMINISTRATIVE PROCEEDINGS. UNILATERAL CONDUCT. MANUFACTURE OF AUTO PARTS AND ACCESSORIES FOR MOTOR VEHICLES. MARKET OF ALARMS FOR MOTOR VEHICLES IN THE AFTERMARKET SECTOR. NATIONAL LEVEL. FOUND GUILTY BY THE GENERAL SUPERINTENDENCE. FOUND GUILTY BY THE SPECIALISED FEDERAL PROSECUTION SERVICES. FOUND GUILTY BY THE FEDERAL PROSECUTION SERVICES. GUILTY. FINE AND OTHER PENALTIES.

The practice of sham litigation must be assessed in a systematic way, looking into judicial or administrative actions, both individually and as a whole, to determine its anti-competitive character. To prove a conduct of sham litigation, the evidence must establish beyond a reasonable doubt that a given claim is absent of plausibility and legal basis or that it aims at hampering competitors and/or strategically increasing their costs.

Exclusivity agreements must be examined under the rule of reason so that if there is market foreclosure and no reasonable economic justification or positive effects arise from the conduct, it constitutes anti-competitive conduct.



### **Administrative Proceedings No. 08012.009581/2010-06 – Nippon Soda Company Ltd., Degussa AG., Aventis Animal Nutrition, and Aventis SA. (162th Ordinary Hearing)**

**Rapporteur Commissioner: Paula Azevedo**

ADMINISTRATIVE PROCEEDINGS. CARTEL. METHIONINE CARTEL. MANUFACTURING OF ORGANIC CHEMICAL PRODUCTS. METHIONINE MARKET. INTERNATIONAL LEVEL. FOUND GUILTY BY THE GENERAL SUPERINTENDENCE. SPECIALISED FEDERAL PROSECUTION SERVICES' OPINION FOR DISMISSAL. FEDERAL PROSECUTION SERVICES' OPINION FOR DISMISSAL. DISMISSED.

To find out whether the Government's investigation into the violation took place after the intervening statute of limitations expired (that is, after three years), it is not germane to analyse if the investigation had relevance or bore results. To this purpose, it is sufficient to know if it intended to examine the alleged anti-competitive conduct beyond a reasonable doubt; the outcome of the investigation is irrelevant. Therefore, the intervening statute of limitations is aimed at pursuing investigations or administrative prosecution but also at ensuring the Defendant has legal certainty that the state's intention to punish will sometime cease.

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**Administrative Proceedings No. 08012.003893/2009-64 – Cooperativa de Anestesiologistas da Região Nordeste do Rio Grande do Sul - Carene, Clínica de Anestesiologia S/C Ltda. - Can, Anestesiologistas Reunidos de Caxias do Sul – AR, Sane Nordeste Serviço de Anestesiologia Ltda. – SANE, and Federação Nacional de Saúde Suplementar – FENASAÚDE (163th Ordinary Hearing)**

**Rapporteur Commissioner: Lenisa Rodrigues Prado**

ADMINISTRATIVE PROCEEDINGS. CARTEL. ANAESTHESIOLOGISTS. HUMAN HEALTHCARE ACTIVITIES (INPATIENT AND OUTPATIENT CARE, URGENT CARE, MEDICAL DIAGNOSES, THERAPEUTICS, HEALTHCARE MANAGEMENT, AND SIMILAR SERVICES). MARKET OF MEDICAL ANAESTHESIA SERVICES IN THE MICROREGION OF CAXIAS DO SUL, STATE OF RIO GRANDE DO SUL. FOUND GUILTY BY THE GENERAL SUPERINTENDENCE. FOUND GUILTY BY THE SPECIALISED FEDERAL PROSECUTION SERVICES. FOUND GUILTY BY THE FEDERAL PROSECUTION SERVICES. CEASE AND DESIST AGREEMENT EXECUTED. GUILTY. FINE AND OTHER PENALTIES.

According to CADE's case law on fines applied to associations, cooperatives, unions, and similar entities, the legal basis for financial penalties is set forth in Article 37, Item 2 of Law 12529/2011 (or Article 23, Item 3 of Law 8884/1994), considering that, in a strict sense, they cannot have a turnover as no economic activity is conducted.



**Administrative Proceedings No. 08700.001486/2017-74 – Faurecia Emissions Technologies do Brasil S.A., Magneti Marelli Sistemas Automotivos Indústria e Comércio Ltda., Tenneco Brasil Ltda., Meritor do Brasil Sistemas Automotivos Ltda., Caetano Piragine Zafra, Carlos Eduardo Sambinelli, Fernando Petrolino, Guillermo Luis Minuzzi, Juliano Alves Lindo, Manoel Ribeiro da Silva, Rafael Rampazzo, Renata Luci Durante, and Roberto Carelli (163th Ordinary Hearing)**

**Rapporteur Commissioner: Sérgio Costa Ravagnani**

ADMINISTRATIVE PROCEEDINGS. EXCHANGE OF COMPETITIVELY SENSITIVE INFORMATION. EXHAUST SYSTEMS. MANUFACTURE OF AUTO PARTS AND ACCESSORIES FOR MOTOR VEHICLES. MARKET OF EXHAUST SYSTEMS AND THEIR AUTOMOTIVE PARTS PURCHASED BY ORIGINAL EQUIPMENT MANUFACTURERS. NATIONAL LEVEL. FOUND GUILTY BY THE GENERAL SUPERINTENDENCE. SPECIALISED FEDERAL PROSECUTION SERVICES' OPINION FOR DISMISSAL. FEDERAL PROSECUTION SERVICES' OPINION FOR DISMISSAL. CEASE AND DESIST AGREEMENT EXECUTED. LENIENCY AGREEMENT EXECUTED. DISMISSED.

For competition purposes, business succession is the full acquisition or dissolution of an entity through consolidation, merger, or spin-off.

The administrative violation of sharing or exchanging competitively sensitive information, considered individually, involves sharing information such as plans on prices and discounts, for instance. It differentiates from a cartel by the absence of evidence of price agreements, market manipulation, or market allocation. To determine whether this violation occurred, one should also ascertain there are no other plausible reasons to justify the sharing of information.

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The statute of limitations for punitive claims of sharing or exchanging competitively sensitive information, treated as an individual violation, has a deadline of five years under Law 9784/1999.



**Administrative Proceedings No. 08700.001422/2017-73 – BR Plásticos Indústria Ltda., Indústria e Comércio de Plásticos Majestic Ltda., Pilaplast Indústria e Comércio de Plásticos Ltda. (currently known as Pilaplast Negócios Imobiliários Ltda.), Bianchini Indústria de Plásticos Ltda., TWB Indústria e Comércio de Produtos Plásticos LTDA, Nasato Indústria de Plásticos Eireli, Tigre S.A. Tubos e Conexões (also known as Tigre S/A Participações), Aurélio de Paula, Gilberto Antonio Chies, Waldir Dezotti, Osmair Nasato, César Augusto Lima Nuñez, Igon Bernardelli, Lucilene Leschmann, and Paulo Roberto Cardozo (165th Ordinary Hearing)**

**Rapporteur Commissioner: Sérgio Costa Ravagnani**

ADMINISTRATIVE PROCEEDINGS. CARTEL. PVC (PROFILES AND CEILING TILES). MANUFACTURING OF PLASTIC PRODUCTS (LAMINATED TUBES AND SHEETS, PACKAGES, PLUMBING SUPPLIES, AND PRODUCTS FOR INDUSTRIAL, PERSONAL, AND DOMESTIC USE). MARKET OF SUPPLIERS OF CEILING TILES, PROFILES, AND OTHER PVC PRODUCTS. NATIONAL LEVEL. FOUND PARTIALLY GUILTY BY THE GENERAL SUPERINTENDENCE. FOUND PARTIALLY GUILTY BY THE SPECIALISED FEDERAL PROSECUTION SERVICES. FOUND PARTIALLY GUILTY BY THE FEDERAL PROSECUTION SERVICES. CEASE AND DESIST AGREEMENT EXECUTED. LENIENCY AGREEMENT EXECUTED. PARTIALLY GUILTY. FINE.

The difference between a hard core and a soft cartel (i.e. exchange of competitively sensitive information) concerns the level of institutionalisation of the agreement, not their negative effects. Thus, pragmatically, classifying the cartel as one or the other leads to different penalties according to the severity of the conduct. However, they are analysed in the same way, since both constitute violations by object and do not require an examination of their effects.

The administrative violation of sharing or exchanging competitively sensitive information, considered individually, involves sharing information such as plans on prices and discounts, for instance. It differentiates from a cartel by the absence of evidence of price agreements, market manipulation, or market allocation. To determine whether this violation occurred, one should also ascertain there are no other plausible reasons to justify the sharing of information.

The statute of limitations for punitive claims of sharing or exchanging competitively sensitive information, treated as an individual violation, has a deadline of five years under Law 9784/1999.



**Administrative Proceedings No. 08012.007011/2006-97 – Associação dos Hospitais do Estado do Ceará (AHECE), Clínica São Carlos Ltda, Otolínea S/C Ltda, Hospital São Mateus S/C Ltda, Wilka e Ponte Ltda (Hospital Gênese), Casa de Saúde e Maternidade São Raimundo S/A, Hospital Cura D’Ars Sociedade Beneficente São Camilo, Uniclínica – União das Clínicas do Ceará, Hospital e Maternidade Gastroclínica – Clínica de Endoscopia e Cirurgia Digestiva Dr. Edgard Nadra Ary Ltda., and Instituto do Câncer do Ceará – ICC (165th Ordinary Hearing)**

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### **Rapporteur Commissioner: Luis Henrique Bertolino Braido**

ADMINISTRATIVE PROCEEDINGS. HOSPITAL CARTEL. HUMAN HEALTHCARE ACTIVITIES (INPATIENT AND OUTPATIENT CARE, URGENT CARE, MEDICAL DIAGNOSES, THERAPEUTICS, HEALTHCARE MANAGEMENT, AND SIMILAR SERVICES). MARKET OF HEALTHCARE PROVIDERS. MUNICIPAL LEVEL. FOUND GUILTY BY THE GENERAL SUPERINTENDENCE. FOUND GUILTY BY THE SPECIALISED FEDERAL PROSECUTION SERVICES. FOUND GUILTY BY THE FEDERAL PROSECUTION SERVICES. GUILTY. FINE.

To support countervailing power as a defence argument, Defendants must prove efficiencies, such as lower transaction costs and improvements in customer service, which would offset the inefficiencies brought about by the artificial bargaining power. In addition, even if countervailing power is proved, the effects of the agreement must still be examined so as to avoid possible harm to the legal interests protected by Law 12529/2011. Thus, the absence of negative economic effects (due to countervailing power or a different reason) may be considered an extenuating circumstance in calculating a penalty, under the facts of the case, in accordance with Article 45, Item 6 of Law 12529/2011.

Besides, for the purpose of calculating it, and considering CADE's case law on fines imposed on associations, cooperatives, unions, and similar entities, the legal basis for financial penalties is set forth in Article 37, Item 2 of Law 12529/2011 (or Article 23, Item 3 of Law 8884/1994), considering that, in a strict sense, they cannot have a turnover as no economic activity is conducted.

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### **Administrative Procedures for Merger Assessment No. 08700.000422/2020-51 – Tintas Hidracor S.A. and Nacional Arco-Íris Indústria e Comércio de Tintas Ltda. (164th Ordinary Hearing)**

#### **Rapporteur Commissioner: Mauricio Oscar Bandeira Maia**

ADMINISTRATIVE PROCEDURES FOR MERGER ASSESSMENT (APAC). REVIEW OF TRANSACTION REPORTED AND CONSUMMATED BEFORE CADE'S APPROVAL. MERGER OR ACQUISITION OF MANDATORY REPORTING. VIOLATION OF ARTICLE 88, PARAGRAPH 3 OF LAW 12529/2011. EXECUTION OF AGREEMENT IN AN ADMINISTRATIVE PROCEDURES FOR MERGER ASSESSMENT.

The conduct violates Article 3, Paragraph 88 of Law 12529/2011 and Article 106, Paragraph 1 of the Statutes of CADE. Completing a merger or acquisition of mandatory reporting constitutes gun jumping, even if it is only a verbal agreement to transfer trademark or production rights, followed by the acquisition of assets.

CADE's Resolution No. 24/2019 regulates agreements in administrative procedures for merger assessment, and the Defendant has the right to settle the case by executing an agreement as long as its criteria is met.

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**President's Office Order No. 125/2020 (regarding the Merger or Acquisition No. 08700.002860/2020-54 – LSF10 Brazil U.S. Holdings, LLC, Natixis New York Branch, and Atvos Agroindustrial S.A.) (2nd Extraordinary Hearing)**

The request to intervene in a merger or acquisition case as an interested third party, under Article 50 of Law 12529/2011 in conjunction with Article 117 of the Statutes of CADE, must satisfy the requirements that guide CADE's assessment: i) ownership of rights and interests that may be affected by the decision (Article 117, head provision, of the Statutes of CADE); ii) present every document and opinion necessary to support the third party's claims (Article 117, Paragraph 1, of the Statutes of CADE); iii) relevance to the purpose of the merger review (Article 117, Paragraph 6 of the Statutes of CADE). Moreover, under Article 42 of the same Statutes, procedures conducted by interested third parties are limited to cases in which the competent authority deems them timely and suitable for the production of evidence.

Finally, in the admission of such requests, the agency analyses if they are in the public interest; their usefulness for the production of evidence; and which matters of a purely competitive nature may be affected.



**President's Office Order No. 167/2020 (regarding the Administrative Proceedings No. 08700.004631/2015-15 – PSA Automobile S.A., Autoliv do Brasil Ltda., and Takata Brasil S.A.) (165th Ordinary Hearing)**

Access to information and documents obtained by CADE in investigations into claims of anti-competitive practices, as provided in Resolution 21/2018 and later regulated by Directive No. 869/2019, is only granted in case of Leniency Agreements or Cease and Desist Agreements executed after the publication of the said resolution on 12 September 2018.



**President's Office Order No. 170/2020 (regarding Administrative Proceedings No. 08700.004353/2020-55 – Sementes Lotário Ltda., Rubem Semente De Cebola, Luís Sementes De Cebola Ltda., Semente Libório Ltda, Empresa Pública de Pesquisa Agropecuária de Santa Catarina, and Agritu Sementes Ltda.) (165th Ordinary Hearing)**

CADE's jurisdiction over cases that concern the need for compulsory licenses for protected plant varieties is unequivocal, as made explicit in the Brazilian Plant Variety Protection Act, Article 31, Paragraph 2 and Article 32, both of Law No. 9456/1997, as well as in Article 22 of Executive Order No. 2366/1997, which describes the information and documents that must be included in requests for such licenses, assessed by the Brazilian Plant Variety Protection System and the Brazilian Competition Defense System.

A compulsory license intends to ensure i) the availability of a variety in the market, at reasonable prices, whenever its supply is being unjustifiably obstructed by its owner; ii) the regular supply and quality assurance of a variety; and iii) that the owner is reasonably compensated. Compulsory licenses for plant varieties are used when there is an unjustified restriction on competition.

Thus, in requests of this nature, CADE has the jurisdiction to investigate abuses in the exercise of plant breeder's rights and whether there was unjustified restriction on competition and not on competitors.