

BRAZILIAN ANTITRUST POLICY TOWARDS BID RIGGING: HISTORY AND PERSPECTIVES

*Paulo L. Casagrande**

Key senior staff of the Brazilian antitrust authority, the Administrative Council for Economic Defense (“CADE”), have affirmed that fighting bid rigging will be one of the agency’s priorities in the coming years.¹ In view of that, the present article aims at providing a succinct analysis of the historical developments of this enforcement area in Brazil, as well as possible future developments.

Bid rigging was already deemed a modality of “abuse of economic power” since the creation of CADE by Law n. 4.137, enacted in 1962. It considered to be “unfair competition” the “previous price combination or the arrangement on advantages in public or administrative procurement proceedings” (art. 2, V, letter ‘b’). However, this Law had erratic outbreaks of enforcement while in the books for thirty years, and CADE has not systematically investigated cartels during that time.

Law n. 8.884, which entered into force in 1994, provided appropriate legal conditions for an effective antitrust policy. It stated that “violations against the economic order” should be investigated by a specialized body within the Ministry of Justice, the Secretariat for Economic Law (known as “SDE”), and then sanctioned by CADE. The Council, by its turn, obtained decision-making independence and the power to impose harsh penalties.² In particular, the law continued to outlaw the collusion among competitors in public procurement proceedings, in almost identical terms to those of the revoked Law from 1962 (art. 21, VIII).

This provision was employed by CADE in the first bid rigging conviction under Law n. 8.884, issued on 27.07.2001 (Administrative Proceeding n. 08012.009118/1998-26). In such decision, the majority of the Council agreed with SDE’s recommendation and decided to fine two companies that had executed a prior written contract regarding a Petrobras’ procurement proceeding, by which they agreed that the winner would compensate the loser. An interesting aspect of the judgement was the assurance by CADE of the autonomy of its antitrust analysis *vis a vis* the appreciation of the same conduct under other rules, considering that the competition agency applied a fine notwithstanding the fact that both Petrobras and the Federal Court of Accounts (TCU) did not deem the agreement between the bidders to be illegal under the Public Procurement Law (Law n. 8.666/93).³

* **Paulo L. Casagrande** is Bachelor of Law and PhD in Economic Law by the University of São Paulo; Master of Laws (LL.M.) in Law and Economics from the Universities of Hamburg and Manchester; and Head of the Antitrust, Compliance and Investigations practice at Stocche Forbes Advogados, São Paulo, Brazil.

¹ See, for example, interview with the President of CADE, Mr. Alexandre Barreto de Souza, available at the article ‘Cade passou com louvor pelo teste do caso JBS’. **O Estado de São Paulo**, July 11, 2017. (in Portuguese only).

² For more details about the Brazilian competition law system defined by Law 8,884/94, see the contemporaneous article from Caio Mario Pereira Neto and Paulo L. Casagrande, “Recent Developments in Brazilian Competition Law and Policy”, **Antitrust Chronicle**, Competition Policy International, vol. 7. 2010, available at <https://www.competitionpolicyinternational.com/recent-developments-in-brazilian-competition-law-and-policy/>.

³ Please refer to the vote of Commissioner Celso Campilongo in this matter (p.1999-2002 of the public file). In the final decision concerning the agreement between bidders a few months after the decision of CADE’s Plenary, the Federal Court of Auditors (TCU) decided to confirm the absence of violation to the bidding rules (Decision 807/2001 – Plenary, Reporting Minister Marcos Vinicius Vilaça, judged on October 3, 2001).

Since 2003, the fight against cartels became a priority, based on the use of two innovative mechanisms incorporated into the SDE's arsenal: *dawn raids* for collecting evidence; and *leniency agreements* providing administrative and criminal immunity for companies and individuals who collaborate with the investigations.⁴ Since then, cases involving collusion among bidders have been quite relevant, including the first leniency agreement executed by SDE in 2003. It benefited a company that reported a conspiracy between private security providers active in the state of Rio Grande do Sul to fix the terms and conditions of numerous public procurement proceedings in the State. The validity of such leniency agreement was confirmed by CADE in 2007, when it granted immunity to the applicant and punished several other companies and trade associations involved in the investigated scheme.

Also in 2007, the persecution of bid rigging became a priority. In May of that year, the Minister of Justice enacted an ordinance assigning to a special unit within SDE the power to investigate bid rigging cases, promote studies on the matter and establish cooperation agreements with other agencies such as the Office of the Comptroller General (the "CGU"), the Federal Police (the "PF"), the Public Prosecutors' Offices (the "MPs") and the TCU.⁵

Since then, SDE started to implement measures in order to fight this specific type of cartel. Several investigations were initiated, many of them in cooperation with the PF and the MPs and often with evidence borrowed from criminal proceedings. SDE's staff also organized training sessions and published a guidebook to educate civil servants in charge of procurement proceedings on how to identify signs of collusion among bidders. Moreover, SDE executed cooperation agreements with CGU and TCU to share information and coordinate investigations, always respecting their respective powers.⁶

Another measure worthy highlighting was the edition of SDE's ordinance n. 51, dated July 3th 2009, which approved the "Guidelines for the analysis of possible antitrust violations in public procurement proceedings".⁷ The Guidelines detailed important aspects of the application of antitrust law to suppliers of government agencies, and it was useful in several investigations carried out by CADE.⁸ SDE's ordinance also contained a "Model Certificate of Independent Bid Determination", which became widely employed in bidding proceedings by federal agencies due to an ordinance by the Ministry of Planning that adopted SDE's recommendation⁹.

⁴ CARVALHO, Vinícius Marques de; RAGAZZO, Carlos Emmanuel Jopert (eds.). **Defesa da Concorrência no Brasil: 50 anos**. Brasília: Conselho Administrativo de Defesa Econômica - CADE, 2013, p. 51 (in Portuguese).

⁵ Ordinance MJ n. 1.077, dated May 30, 2007, available at <http://www.agu.gov.br/page/atos/detalhe/idato/22522> (in Portuguese only). The author was the first head of the special bid rigging unit, from 2007 to 2009.

⁶ Many of those measures are described in a report presented in 2010 by the SDE to the Organization for Economic Co-operation and Development (OECD), available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2010\)13&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2010)13&docLanguage=En).

⁷ Available at <http://jacoby.pro.br/PortariaSDE51.pdf> (in Portuguese only). The author coordinated the drafting of these Guidelines.

⁸ For an example, please refer to the vote of the Reporting Commissioner Marcio de Oliveira Jr. in the Administrative Proceeding n. 08012.001273/2010-24, judged on August 17, 2015.

⁹ Normative Ruling SLTI/MPOG n. 02, dated September 16th, 2009, available at <http://www.comprasnet.gov.br/legislacao/legislacaoDetalhe.asp?ctdCod=265>.

The fight against bid rigging remained an important issue during the last years in which Law n. 8.884/94 was in force, as evidenced by the opening of several proceedings by SDE – often in cooperation with other agencies¹⁰.

The New Antitrust Law (Law n. 12.529) entered into force in May 2012 and brought about significant changes to the institutional framework applicable to bid rigging cases. The statutory wording of bid rigging is now more precise, being now illegal to “agree, combine, manipulate or adjust with competitors, in any circumstance, prices, conditions, advantages or abstention in public procurement proceedings” (art. 36, §3º, I, letter ‘d’).

The SDE was incorporated by CADE, in the form of the current General Superintendence (known as “SG”).¹¹ A specialized unit for the investigation of bid rigging was maintained as the current Anti-Cartel Unit 8. Moreover, the SG has been strengthening its cooperation with the CGU in recent years, by exchanging information concerning public bids and developing specific data mining methods to identify suspicious conducts by bidders.¹²

However, the single most important change by the New Antitrust Law involved the leniency program. Under Law n. 8.884/94, there was a significant doubt about whether the leniency applicant could obtain immunity related to the crime of ‘fraud to competition in public procurement proceeding’ – provided for in art. 90 of the Public Procurement Law. This is because such crime was not mentioned in the leniency rules of the previous antitrust statute. The doubt was eliminated by art. 87 of Law n. 12.529/11, which grants immunity to the leniency applicant also from “other crimes directly related to the cartel conduct”, with an explicit reference to the Public Procurement Law.

This change implemented by the New Antitrust Law was likely a key factor that encouraged several companies and individuals to come forward the SG to admit participation in bid rigging schemes, in exchange of administrative *and* a more comprehensive criminal immunity. Among these cases, the ones related to the well-known “Operation Car Wash” can be highlighted; up to now, it is known that 14 leniency agreements were executed within the scope of such large scale investigation, what resulted in the opening of several administrative inquiries and formal proceedings by the SG.¹³

Therefore, the prosecution of bid rigging cases in Brazil has been structured over the years by several legal and organizational measures which determined the activities of authorities and economic agents. This brief description of the history of this area of antitrust policy may be useful at the current moment where possible new specific

¹⁰ Please refer to the report presented by CADE to the Organization for Economic Co-operation and Development (OECD) in 2014, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)48&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)48&docLanguage=En).

¹¹ A description of the main changes determined by Law 12,529/11 can be found at CASAGRANDE, Paulo Leonardo, The New Brazilian Competition Law: Two Years On, **Antitrust Chronicle**, Competition Policy International, v. 1, 2014, available at <https://www.competitionpolicyinternational.com/jul-14/>.

¹² Please refer to the report regarding this issue presented by CADE to the OECD in 2016, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)19&docLanguage=En).

¹³ “CADE investigates bid rigging in infrastructure and road transport bids in São Paulo”, available at <http://en.cade.gov.br/cade-investigates-bid-rigging-in-infrastructure-and-road-transport-bids-in-sao-paulo>. See also “Brazil antitrust agency settles with 10 Car Wash cartels”, available at <https://www.reuters.com/article/us-latam-summit-brazil-antitrust/brazil-antitrust-agency-settles-with-10-car-wash-cartels-idUSKBN1A01OZ>

enforcement initiatives are being evaluated, considering that such initiatives will inevitably be influenced by past choices and practices.¹⁴

In view of that, it is possible to identify at least three possible future trends for the Brazilian antitrust policy towards bid rigging.

First, there will likely be further developments in the cooperation efforts between CADE and other Brazilian enforcement agencies in charge of sanctioning illegal acts related to public procurement, especially with a view for a more integrated approach for leniency and settlement agreements with companies and individuals willing to cooperate with the investigations – an initiative that is reportedly moving forward.¹⁵ Indeed, bid rigging differ from other anti-competitive practices because it is often associated with several infringements that are investigated by other bodies in Brazil, such as: i) the CGU, which can apply penalties due to violation of the Anti-Corruption Law (Law n. 12.846/13) and the Public Procurement Law, including debarment from public procurement; ii) the TCU, which can also impose fines and debarment; and iii) the Public Prosecutors Office (both at the Federal and State level), which can promote criminal investigations against individuals as well as civil lawsuits against companies.

The “Guidelines for CADE’s Antitrust Leniency Program” state that the SG seeks to cooperate with the CGU and the MPs during leniency negotiations, but acknowledges that there is no applicable general rule for such kind of cooperation.¹⁶ In any event, the Guidelines highlight the Memorandum of Understandings executed in March 2016 between CADE and the Federal Prosecutor’s Office at São Paulo (MPF/SP),¹⁷ which is an example of interinstitutional cooperation that certainly can inspire future bilateral or multilateral agreements aiming at providing more legal certainty to parties interested in cooperating with the competent authorities.

Secondly, besides fostering new leniency agreements, increased cooperation with other enforcement agencies will probably continue help CADE opening new bid rigging investigations based on information obtained independently from immunity applicants. The competition authority has been cooperating with CGU, TCU, the MPs and other agencies for more than a decade, resulting in several instances where evidence collected within probes of other illicit conducts – such as corruption and public procurement frauds – was employed in antitrust cartel investigations. This sort of cooperation may likely be improved in the coming years with more coordinated investigations and the continuous sharing of expertise.

Indeed, an example of the latter is the bid rigging investigation recently opened by CADE based on the identification of allegedly suspicious behavior of bidders by the use of

¹⁴ PRADO, Mariana TREBILCOCK, Michael. Path dependence, development, and the dynamics of institutional reform. *University of Toronto Law Journal*, v. 59, n. 3, p. 341–380, 2009.

¹⁵ See article “TCU vai mudar regras para acordos de leniência”, *Valor Econômico*, March 3rd, 2018, available at <http://www.valor.com.br/politica/5359991/tcu-vai-mudar-regras-para-acordos-de-leniencia> (in Portuguese only).

¹⁶ CADE, “Guidelines: CADE’s Antitrust Leniency Program”, items 17, 24, 26, available at <http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf>.

¹⁷ Described at CADE’s “Annual Report on Competition Policy Developments in Brazil - 2016”, submitted to the OECD and available at [https://one.oecd.org/document/DAF/COMP/AR\(2017\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2017)19/en/pdf).

algorithms over public procurement data,¹⁸ with the expertise on data mining being developed in-house by the competition authority after inputs provided by TCU, GCU and other federal agencies.¹⁹

Third, the authority may foster settlements with multiple defendants of ongoing large scale bid rigging investigations, thus accelerating the pace of such proceedings. This aim of resolving cases with settlements have been exposed by the current head of the SG.²⁰ A possible alternative that the authority could consider is providing increased legal certainty with additional specific criteria for bid rigging cases at CADE's "Guidelines on Cease and Desist Agreement for Cartel Cases"²¹, especially in relation to the calculation of the required 'monetary contribution'.

In any event, the authority will need to calibrate such legitimate aim of expedited investigations with the rights and guarantees of those defendants which decide not to settle, preferring to defend themselves until the end of the proceeding. Cartel cases with a leniency applicant and several settlements pose important new challenges, such as dealing with possible inconsistencies between the several accounts of the same investigated facts as well as guaranteeing to the other defendants all applicable due process rights (including the presumption of innocence).

To sum up, and looking into the future, CADE is certainly able to benefit from several policy measures adopted in the last ten years or more, in order to further improve this important area of competition policy that continues to be high in its enforcement agenda.

¹⁸ CADE, "CADE's General Superintendence initiates administrative proceeding to investigate a cartel in the market of orthoses, prostheses and special medical supplies", available at <http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-initiates-administrative-proceeding-to-investigate-a-cartel-in-the-market-of-orthoses-prostheses-and-special-medical-supplies>

¹⁹ Please see the report referred to at footnote 12.

²⁰ See the interview with Mr. Alexandre Cordeiro at "Cade pode encerrar alguns processos da Lava Jato apenas com acordos, diz superintendente", **Reuters.com**, January 16, 2018, available at <https://br.reuters.com/article/businessNews/idBRKBN1F52NR-OBRBS> (in Portuguese only).

²¹ CADE, "Guidelines: Cease and Desist Agreement for cartel cases", available at http://en.cade.gov.br/topics/publications/guidelines/guidelines_tcc-ingles-final.pdf.