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NON-PECUNIARY SANCTIONS IN CARTEL CASES:
An empirical study based on Brazilian case law

SANÇÕES NÃO PECUNIÁRIAS EM CASOS DE CARTEL:
Estudo empírico com base na jurisprudência brasileira

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Dissertação apresentada ao Programa de Pós-Graduação em Direito da Faculdade de Direito, da Universidade de Brasília - UnB, como requisito parcial para a obtenção do grau de Mestre em Direito.

Orientador: Professor Paulo Burnier da Silveira

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“I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It’s when you know you’re licked before you begin but you begin anyway. and you see it through no matter what. You rarely win, but sometimes you do.”, To Kill a Mockingbird – Harper Lee.

ABSTRACT

This study aims to identify the state of play regarding non-pecuniary sanctions in cartel convictions by the Administrative Council for Economic Defense (“CADE”) in the period between 1999, when the first cartel conviction by CADE occurred, and 2022. The hypothesis to be tested is that although CADE has had legal powers to impose non-pecuniary sanctions for over 20 years, it has not yet defined clear and objective criteria for the imposition of each type of sanction, which can lead to legal uncertainty. Therefore, this study contributes to current discussions, both in Brazil and abroad, regarding the objectives of competition sanctions and ways in which to enhance enforcement against cartels. In order to identify the state of play and the criteria applied by CADE in the adoption of each type of non-pecuniary sanction, an analysis was conducted of each conviction from the perspective of to whom each sanction was applied to (companies, individuals, or associations). Based on the research results, recommendations and an analysis of prospects were made regarding non-pecuniary sanctions in Brazil, considering international experience as well.

Keywords: Cartel; Sanctions; Non-pecuniary; CADE.

RESUMO

Este trabalho tem como objetivo identificar o estado da arte de sanções não-pecuniárias em condenações de cartel pelo Conselho Administrativo de Defesa Econômica (“CADE”) no período entre 1999, quando houve a primeira condenação de cartel pelo CADE, e 2022. A hipótese a ser testada é a de que, muito embora o CADE possua poderes legais para aplicar sanções não-pecuniária há mais de 20 anos, o CADE ainda não definiu critérios claros e objetivos para aplicação de cada tipo de sanção, o que pode gerar insegurança jurídica. O trabalho, portanto, se insere em discussões atuais, no Brasil e no exterior, sobre objetivos de sanções concorrenciais e como aprimoram o *enforcement* contra cartéis. Para fins de identificação do estado da arte, bem como de critérios aplicados pelo CADE na adoção de cada tipo de sanção não-pecuniária, foi realizada a análise de cada uma das decisões de condenação sob a perspectiva de a quem cada uma das sanções foi aplicada (empresas, pessoas físicas ou associações). Com base nos resultados da pesquisa, foram feitas recomendações e análise de perspectivas futuras em relação a sanções não-pecuniárias no Brasil, também considerando a experiência internacional.

Palavras-chave: Cartel; Sanções; Não-Pecuniárias; CADE.

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LIST OF ACRONYMS

BA	Bahia
CADE	Administrative Council for Economic Defense
CE	Ceará
ECAD	<i>Escritório de Arrecadação e Distribuição</i>
GO	Goiás
IIVC	Communication Verifier Institute (<i>Instituto Verificador de Comunicação</i>)
LPG	Liquefied petroleum gas
MEA	Middle East and Africa
MG	Minas Gerais
OECD	Organisation for Economic Co-operation and Development
PB	Paraíba
PR	Paraná
RJ	Rio de Janeiro
RS	Rio Grande do Sul
SC	Santa Catarina
SDE	Secretary of Economic Law (<i>Secretaria de Direito Econômico</i>)
SP	São Paulo
UMS	Mixed health unit
MPF	Public Prosecutor's Office
UNDP	United Nations Development Programme

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1 INTRODUCTION

Scholars, competition authorities worldwide and the Organisation for Economic Co-operation and Development (“OECD”) have been searching for alternative or complementary sanctions to fines against anticompetitive practices or even ways to improve those alternative or complementary sanctions. In fact, in November 2022, the OECD organized a roundtable regarding two types of non-pecuniary sanctions (considered herein as those sanctions that do not involve direct payment in value by perpetrators of antitrust violations): director disqualification¹ and bidder exclusion². That roundtable was preceded by other events/official documents from the OECD discussing antitrust sanctions. For example, the OECD published a report in 2002 on fighting hard core cartels, including discussions on sanctions³; in 2016, there were discussions on sanctions in antitrust cases in the OECD Global Forum on Competition⁴; and in 2020, the OECD promoted a roundtable on the criminalisation of cartels and bid rigging conspiracies⁵.

Non-pecuniary sanctions have also been a hot topic for scholars in Brazil in the antitrust domain in the last years, even though discussions on non-pecuniary sanctions are, in general, lacking in CADE’s case law on how to define an optimal antitrust sanction in the judgement of anticompetitive practices. Amanda Athayde, for example, organized a book to study non-pecuniary sanctions applied by the Administrative Council for Economic Defense (“CADE”) after the enactment of the Brazilian Competition Act No. 12,529/2011⁶. Bárbara De’ Carli Cauhy also studied non-pecuniary sanctions applied by CADE since the enactment of the Brazilian Competition Act⁷. Alexandre Ditzel Faraco, Ana Paula Martinez and Eric Hadmann Jasper also dedicated their efforts to identifying case law from CADE related to non-pecuniary sanctions⁸.

¹ The OECD defined director disqualification as “*a sanction where an individual is not allowed to act as a director of a company for a period following a violation of competition law*” (OECD. Director Disqualification and Bidder Exclusion in Competition Enforcement, 2022).

² The OECD defined bidder exclusion as “*banning of the company from a bidding process or future public procurement tenders, typically in a specific market and for a specific amount of time*” (*Ibid.*).

³ *Id.*, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, 2002.

⁴ *Id.*, Competition and sanctions in antitrust cases, 2016. Available at: <https://www.oecd.org/daf/competition/competition-and-sanctions-in-antitrust-cases.htm>.

⁵ *Id.*, Criminalisation of cartels and bid rigging conspiracies, 2020. Available at: <https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>.

⁶ ATHAYDE, Amanda (Org.). *Sanções não pecuniárias no antitruste*. 1. ed. São Paulo: Editora Singular, 2022.

⁷ CAUHY, Bárbara De’ Carli. *Sanções não pecuniárias em infrações contra ordem econômica: uma análise da jurisprudência do CADE na vigência da Lei 12.529/11*. In: *Revista do IBRAC*, No. 1, 2021, p. 67-89.

⁸ FARACO, Alexandre Ditzel; JASPER, Eric Hadmann; MARTINEZ, Ana Paula. *Sanções não pecuniárias por infrações contra a ordem econômica*. *Revista de Direito Público da Economia*, n. 46, 2014, pages 9-40.

To try to contribute to the relevant discussions on the topic, this thesis mainly intends to identify the state of play of non-pecuniary sanctions specifically in cartels convicted by CADE in the period between 1999 and 2022, following the methodology detailed in Chapter 3. Before analysing detailed figures related to cartel practice, it is also worth defining what can be considered as a cartel in this thesis. According to some scholars in Brazil, a cartel practice refers to an agreement between competitors involving relevant competitive variables, such as prices. Paula A. Forgioni, for example, defines cartels as “*agreements between competitors, currently or potentially, aiming at enhancing or neutralizing competition between them and that have as their object or effect the provisions in items of Article 36 (...)*”⁹ (free translation from original). Ana Frazão states that it refers to a “*collusion between competitors with the sole goal of artificially increasing prices charged for consumers or dividing markets*”¹⁰ (free translation from original).

Institutionally, in CADE’s playbook from 2016, CADE itself defined cartel as “*any agreement or concerted practice between competitors to fix prices, divide markets (...)*”¹¹ (free translation from original). This also aligns with the OECD’s definition of what is known as hardcore cartels: “*anticompetitive agreements or practices between competitors that aim to fix and raise prices, restrict supply and divide or share markets (...)*”¹².

The analysis of non-pecuniary sanctions in cartel cases is relevant in Brazil, considering that this is the most common practice examined by CADE, at least in the period between 2015 to 2022, when roughly 65% of the administrative proceedings decided by CADE’s Tribunal were related to cartel practices, for example¹³. On global level, the OECD concluded in 2022 that “*Cartel activity is not showing signs of declining*” and that “[*h*]ard core cartel prosecution is a priority policy objective for the OECD, and an enforcement priority for Adherents’ competition authorities”¹⁴, therefore reinforcing the relevance of the fight against cartels. Non-pecuniary sanctions are part of this, as will be seen in this study.

On detailed figures related to cartel practices following the methodology described in Chapter 3 below, 120 cartel convictions by CADE were identified and will be examined in this study. The results show that at least one cartel was convicted in each year in the period between 1999 and 2022. Graphic 1 below provides detailed information on the quantity of cartel

⁹ FORGIONI, Paula A. Os fundamentos do antitruste. 9. ed. rev., atualiz. e ampl. São Paulo: Editora Revista dos Tribunais, 2016, p. 353.

¹⁰ FRAZÃO, Ana. Direito da concorrência: pressupostos e perspectivas. São Paulo: Saraiva, 2017, p. 440.

¹¹ CADE. Cartilha do CADE. 2016, p. 14.

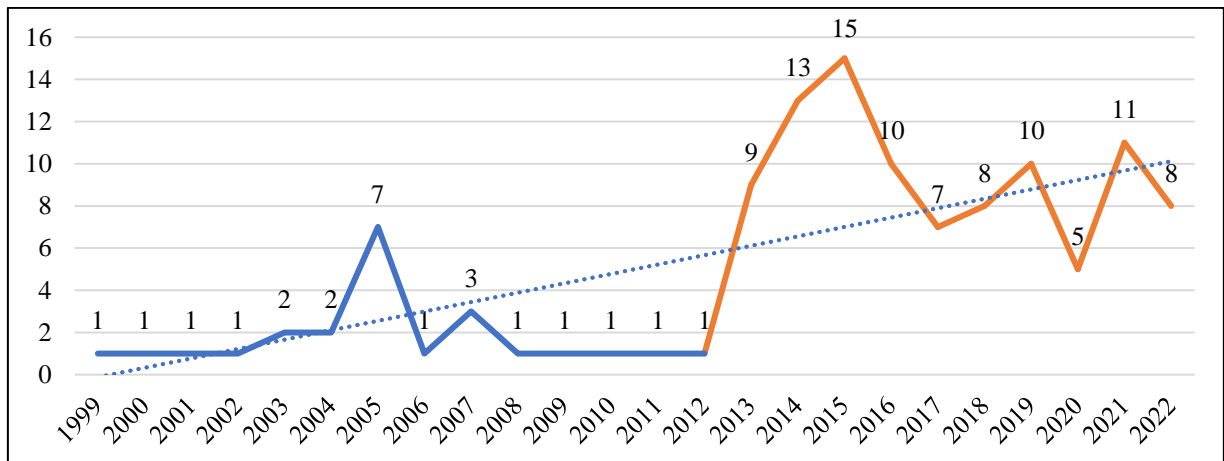
¹² OECD, *op. cit.*, p. 3.

¹³ CADE. CADE em Números. 2023.

¹⁴ OECD. Recommendation of the Council concerning effective action against hard core cartels. 2022, p. 3.

convictions per year, showing that after the enactment of Law No. 12,529/2011 the number of convictions per year increased in Brazil (as indicated in the line in orange below).

Graphic 1 – Cartel convictions by CADE per year



Source: author

As demonstrated above, there were two peaks in total in the periods prior and after the entry into force of Law No. 12,529/2011. The first was in 2005, with seven cartel convictions by CADE; and the other was in 2015, with 15 cartel convictions by CADE. After Law No. 12,529/2011 was published, the year with the lowest number of cartel convictions was 2020, which may be attributed to the COVID-19 pandemic.

To compare the figures above with international practices, the OECD Competition Trends 2023 report from February 2023 was examined¹⁵. The report contains an analysis of the average number of cartel decisions (and not necessarily convictions) from 2015 to 2021 per agency in the Asian-Pacific, Americas, OECD, Non-OECD, Middle East and African (“MEA”) countries, as well as Europe, and an analysis of all jurisdictions examined. In total, 79 jurisdictions were examined in the report. The report informed that from 2015 to 2021, less than 25 decisions were handed down per year in average in the jurisdictions analysed and concluded that there was an increase in the quantity of cartel decision per year, potentially in view of “recovery in the number of dawn raids, the increase in leniency applications in Europe and the rise in the use of settlements and commitments to close investigations”¹⁶. In all jurisdictions reviewed in the OECD report, the average number of cartel decisions was between 5 and 10 for all years examined; and for Americas, the range was also between 5 to 10 decisions per year. In Brazil, the number of cartel convictions per year varied from 5 to 15 in the period between

¹⁵ OECD. OECD Competition Trends 2023. 23 February 2023, pages 20-23.

¹⁶ OECD, 2023, page 22.

2015 to 2021. It is possible that other decisions were issued by CADE in that period deciding to close a case, but those decisions are not under analysis in this research.

Another parameter of analysis of the cartel cases related to timing was the year in which they were formally initiated by the former Secretary of Economic Law (“SDE” – *Secretaria de Direito Econômico*), when the former Competition Act (Law No. 8,884/1994) was in force; and by the current General Superintendence of CADE, under the provisions of the current Competition Act (Law No. 12,529/2011). The administrative proceedings with conviction for cartel cases in the period from 1999 to 2022 were formally initiated as administrative proceedings by SDE or CADE’s General Superintendence in the period from 1997 to 2019. The investigations were initiated in the period between 1997 and 2019 as well. For completeness, the average period between the formal initiation of the administrative proceedings and the final decision on the merits by CADE’s Tribunal was roughly 5 years and 8 months. The period between the initiation of the investigation and the final decision on the merits by CADE’s Tribunal was roughly 7 years and 6 months.

The year of 2010 had the highest number of cases formally initiated as administrative proceedings by the SDE (21 cases); afterwards the second largest number was in 2016 (11 cases) and the third was 2014 (9 cases). It was not possible to identify why a huge number of cases were formally initiated as administrative proceedings in 2010 compared to the other years, but it was noted that out of the 21 cases: 10 administrative proceedings (which correspond to roughly 48% of the cases initiated in 2010) were related to the health sector only and 3 administrative proceedings (roughly 15% of the cases initiated in 2010) were related to alleged cartel practice in the fuel retail sector. The OECD report does not contain information on cartel investigations launched in general, but only on ex-officio investigations.

Taking into account the scenario above of cartel convictions by CADE, this thesis focuses on non-pecuniary sanctions in the administrative sphere, that is, those specifically applied by CADE as part of a cartel conviction. Therefore, this thesis does not examine criminal sanctions or sanctions applied by the Judiciary Branch against cartel practices. It was possible to conduct this study because CADE makes available on its website the entire public case records of administrative proceedings launched to investigate cartel practices, which allows any third party to identify the initial claim, certain evidence and petitions filed by the defendants, and final decisions and opinions from CADE and its administrative bodies (for example, CADE’s General Superintendence and CADE’s Attorney’s Office).

As complementary goals of this research, it is expected to be able to answer these questions: which types of non-pecuniary sanctions does CADE apply in cartel convictions?

Who are the subjects of those non-pecuniary sanctions (companies, individuals, trade associations)? Is there a uniform methodology for CADE to apply each type of non-pecuniary sanction provided by law? Is there predictability for CADE to apply each type of non-pecuniary sanction provided by law depending on the type of practice (for example, how does CADE apply the prohibition to participate in tenders in all bid rigging cases convicted by CADE?).

Based on the goals and questions above, the hypothesis to be tested in this study is that, even though non-pecuniary sanctions were already provided for in the Brazilian Competition Law in force at the time of the first cartel conviction by CADE, almost 20 years have passed and CADE has not yet provided clear and objective criteria to apply non-pecuniary sanctions in cartel cases and, therefore, a potential scenario of legal uncertainty may exist.

In order to proceed with the goals of this study, this thesis will be structured as follows. Chapter 2 will be dedicated to the analysis of the goals of antitrust sanctions and to the identification of the complementarity of pecuniary and non-pecuniary sanctions in the antitrust domain. An exercise in identifying the international scenario on non-pecuniary sanctions against anticompetitive practices will be also conducted.

Chapter 3 will focus on the empirical analysis of non-pecuniary sanctions applied by CADE in cartel convictions in more than 20 years of activity of CADE. The Chapter will have as goals to identify the types of non-pecuniary sanctions applied by CADE against three groups of defendants identified in this research: companies, individuals, and trade associations. The non-pecuniary sanctions will be also analysed individually for each one of those groups.

Based on the findings of Chapter 3, Chapter 4 will contain recommendations and future perspectives related to non-pecuniary sanctions in Brazil. Finally, the last chapter will be the conclusion, which does not intend to cover every aspect of non-pecuniary sanctions in Brazil, but to give insights on next steps related to non-pecuniary sanctions in cartel cases.

2 OVERVIEW OF ANTITRUST SANCTIONS

In Brazil, antitrust sanctions in the administrative sphere are those mainly provided for in the Brazilian Competition Act (Law No. 12,529/2011, also referred to as “the current Competition Act” or “the Brazilian Competition Act”), which are very similar to those provided for in the former Brazilian Competition Act (Law No. 8,884/1994, also referred to as “the former Competition Act”). Considering that most of the administrative proceedings analysed in this study had as legal basis one of the two Competition Acts (the current and the former one), considerations will be made in relation to both statutes with respect to antitrust sanctions in this study.

There are also criminal sanctions related to antitrust matters provided for in the Criminal Code and the possibility of the Judiciary Branch applying non-pecuniary sanctions, but those possibilities will not be examined herein, considering that the scope of this thesis considers administrative sanctions applied by CADE itself.

The antitrust sanctions applied or that may be applied by CADE are those mainly provided for in Articles 37 and 38 of the Brazilian Competition Act¹⁷ (articles 23 and 24 of the former Competition Act), and they may be divided into pecuniary and non-pecuniary sanctions. The pecuniary sanctions are those put forth in Article 37 (former Article 23) and the non-pecuniary sanctions are those mentioned in Article 38 (former Article 24). Before analysing the non-pecuniary sanctions in detail, it is worth to first define what is being considered as non-pecuniary sanction in this study.

As mentioned above, non-pecuniary sanctions in the Brazilian Competition Act are those provided in Article 38 of Law No. 12,529/2011:

- I - the publication, in half a page and at the expenses of the perpetrator, in a newspaper indicated by the decision, of the extract from the conviction, for a period of two (2) consecutive days for one (1) to three (3) consecutive weeks;*
- II - ineligibility for official financing and for participation in biddings when the objective is acquisitions, divestitures, performance of works and services, provision of public services, in the federal, state, municipal and Federal District public administration, as well as in indirect administration entities, for a term of not less than 5 (five) years;*
- III - the registration of the wrongdoer with the National Register for Consumer Protection;*
- IV - recommendation to the public bodies with jurisdiction to:*

¹⁷ There are other sanctions provided in the Brazilian Competition Act, for example, those related to omitting information and others (Articles 39, 40 or 41 of the Brazilian Competition Act), but they are not object of the analysis performed in this research, as they are not directly linked to the anticompetitive practice directly, but to procedural issues, for example.

(a) grant compulsory license of intellectual property right owned by the perpetrator, when the violation is related to that right;
 (b) do not grant to the perpetrator the payment in instalment of federal taxes due by them or that tax incentives or public subsidies are cancelled, totally or partially;
 V - the company divestment, transfer of corporate control, sale of assets or partial interruption of activity;
 VI - the wrongdoer be prohibited from carrying on trade on its own behalf or as representative of a legal entity for a period of five (5) years; and
 VII - any other act or measure required to eliminate harmful effects to the economic order.” (free translation from original of the legal wording)

Item IV is related to the recommendations that can be made by CADE but might not in and of themselves be considered non-pecuniary sanctions, even though they are in the list of non-pecuniary sanctions. This considering that they do not result in a sanction to be applied against the defendants and do not necessarily change the *status quo* of the perpetrator after the conviction, except in case the competent public entities agree with CADE on applying the sanctions that were recommended by CADE. Therefore, the recommendations were not considered to identify figures of cases with non-pecuniary sanctions in Brazil. However, they will be addressed in detail in this study so that an overview of the quantity and how those recommendations were applied by CADE may be identified.

Law No. 12,529/2011 and the former Law No. 8,884/1994 (in its Article 24) provided for very similar non-pecuniary sanctions that can (or could) be applied by CADE’s Tribunal against defendants in administrative proceedings. The main difference between the provisions of the current Article 38 and the former Article 24 is that the current Competition Act added the possibility of CADE applying the sanction of director disqualification, that is, the prohibition of an individual from carrying on trade on his/her own behalf or as representative of a legal entity for a period of five years.

Based on those considerations, as will be detailed below, 61 administrative proceedings were identified with non-pecuniary sanctions applied by CADE, notably (a) publication of CADE’s decision (which also considers, for example, cases in which CADE determined that trade associations send CADE’s decisions to their affiliates or publish the decision in the website of the company and not necessarily in a newspaper); (b) prohibition to participate in tenders or execute contracts with official financial institutions (which will be addressed jointly as “*prohibition to contract with the public administration*”); (c) registration in the National Register for Consumer Protection; (d) company divestment; (e) director disqualification; and (f) other sanctions.

Before addressing specificities of non-pecuniary sanctions in Brazil applied by CADE, it is important to understand which conducts may lead to sanctions under Brazilian Law. Both

the current and the former Competition Act establish that the practices that breach the economic order, regardless of fault, and that have as an object or effect, even in case they are not achieved, are the following: to limit, restrain or in any form harm free competition or free enterprise; dominate relevant markets of goods or services; arbitrarily increase profits or abusively exercise a dominant position¹⁸. Both Competition Acts also provide a list of examples of practices that could represent any of the last four illicit acts established by law, such as agreeing prices with competitors. It is also relevant to note that the conducts or effects must have been performed/caused/potentially caused in Brazil¹⁹.

Once the conducts that breach the antitrust legal provisions are established, it is also relevant to understand who is subject to the Brazilian Competition Act. Those subject to the provisions of the Brazilian Competition Act are the same in the former and in the current Competition Act. That is, legal entities or individuals under public or private law, as well as associations or entities constituted by law or *de facto*, even if temporarily, with or without legal personality, even in case of legal monopoly²⁰. Paula A. Forgioni comments that, in relation to public entities, even though they are subject to the sanctions provided in the Brazilian Competition Act, the sanctions are not applicable to all public entities, for example, those responsible for the implementation of public policies, but only to those that participate in *stricto sensu* economic activities (that is, economic activities that inherently belong to the private sector)²¹.

Notwithstanding, CADE has already launched proceedings to investigate City Halls, for example. In 2018, CADE launched an administrative inquiry to investigate alleged anticompetitive practices in the City Halls of Rio de Janeiro, São Paulo and Manaus, for allegedly targeting public resources to create, promote and maintain taxi apps, for example. The administrative inquiry ended up being closed by CADE²². In 2000, CADE launched an administrative proceeding against a company and two city halls from Alpercata/MG and Governador Valadares/MG related to alleged anticompetitive practices in the market for collective transportation services of passengers. CADE also closed this administrative proceeding²³.

¹⁸ Article 36 of the current Competition Act and Article 20 of the former Competition Act.

¹⁹ Articles 1 of the current and the former Competition Act.

²⁰ Article 31 of the current Competition Act and Article 15 of the former Competition Act.

²¹ FORGIONI, *op. cit.*, pages 150-151.

²² CADE. Administrative Inquiry No. 08700.006067/2018-18, shelved on 4 July 2019.

²³ Id., Administrative Proceeding No. N° 08012.005610/2000-81. Reporting Commissioner Elvino de Carvalho Mendonça, shelved on 27 July 2011.

Even though this is under debate between scholars in Brazil, the Brazilian Competition Act (both the current and the former one) also provides for the joint liability of companies belonging to the same economic group²⁴. The difference is that the current Competition Act added the rule that joint liability will occur when at least one company of the economic group performs the anticompetitive practice, while the former Competition Act provided that joint liability would occur for the companies that engaged in the violation to the economic order.

Ana Frazão explained that the wording from the previous Competition Act could lead to the interpretation that joint liability would be applicable to the companies that participated in the practice belonging to the same economic group²⁵. In relation to the current wording, Ana Frazão also explains that the Brazilian Competition Act may not lead to the automatic interpretation that companies may be convicted/declared guilty by CADE due to the participation of another company from the same economic group in the practice, but it is possible to think about patrimonial effects for the joint liability²⁶. Renan Cruvinel de Oliveira, when analysing the provisions related to joint liability of companies belonging to the same economic group in the Brazilian Competition Act, concluded that joint liability in relation to the controller or any other company from the economic group for the payment of values established in the conviction decision should only occur if that company had the opportunity to defend itself in the case. The author also concluded that the current legal provision for joint liability should not be applied generically by CADE²⁷.

Another relevant aspect related to those that are subject to the provisions of the Brazilian Competition Act concerns individuals. Regardless of the job positions occupied by an individual at a company, it is possible that he/she may be convicted of an anticompetitive practice. The difference mostly relates to the percentages of fines that will be applicable to them. For managers, the current Competition Act provides that the fine will be calculated from 1% to 20% of the fine applied to the related company or other entity; for other individuals, the fine will vary from BRL 50,000.00 to BRL 2 billion²⁸.

In addition, another potential difference is currently being discussed in CADE's case law related to individuals. The debate arises from the difference in the legal wording for

²⁴ Article 33 of the current Competition Act and Article 17 of the former Competition Act.

²⁵ FRAZÃO, *op. cit.*, p. 310.

²⁶ *Ibid.*, p. 313.

²⁷ OLIVEIRA, Renan Cruvinel de. A Responsabilidade Solidária entre Sociedades Empresárias de um mesmo Grupo Econômico por Infrações ao Direito da Concorrência. *Revista de Defesa da Concorrência*, Brasília, v. 6, n. 2, p. 130-160, 2018, pages 148-149 and 157-158.

²⁸ The sanctions provided in Article 23 of the former Competition Act to individuals were: for managers, fines from 10% to 50% of the fine Applied to the company; and for non-managers, a fine ranging from 6,000 to 6 million UFIR (tax reference units), which was in force at that time.

managers and non-managers of companies. For sanctions for managers, the current Competition Act provides that fault or intent must be evaluated for fines against managers and the law is silent in relation to fault or intent regarding non-managers. This difference in wording did not exist in the former Competition Act.

Commissioner Sérgio Costa Ravagnani handed down a written decision in Administrative Proceeding No. 08700.000066/2016-90²⁹ (electronic components for the telecom sector) in 2020 on the difference related to the legal provisions for managers and non-managers. The Commissioner concluded that law does not allow the conviction of non-managers linked to companies under investigation. The conviction of non-managers could only occur if they were not linked to the companies under investigation, under strict liability. This understanding was because the legal wording suggests that sanctions applied to non-managers would be more severe than sanctions applied to managers and that for managers, it would be possible to assess fault and intent, while this would not be possible for non-managers. The acts performed by non-managers of legal entities being investigated lead to the strict liability of the company itself and not of the non-managers. This, however, is not the most accepted understanding by CADE until now.

Considering the analysis above of those that are subject to the Competition Act, it is also worth mentioning the sanctions that may be applied by CADE in response to a violation of the Competition Act. When speaking on pecuniary sanctions, the percentages of fines are different between the current and the former Competition Act and are different in relation to the groups of individuals or entities that may be subject to the Competition Act. In summary, the current wording is that, for companies, CADE may apply a fine ranging from 0.1% to 20% of the gross turnover of the company, group or conglomerate in the fiscal year preceding the launching of the administrative proceeding in the sector of activity in which the practice took place³⁰. For individuals, the fines are those established above. For other legal entities that are not companies, the fines may vary from BRL 50,000.00 to BRL 2 billion³¹.

The non-pecuniary sanctions examined in this study are those provided for in Article 38 of the current Competition Act and in Article 24 of the former Competition Act and they include, in summary, the following possibilities: (i) publication of an extract of the conviction

²⁹ CADE, Administrative Proceeding No. 08700.000066/2016-90, Reporting Commissioner Paula Farani de Azevedo, decided on 3 February 2021.

³⁰ In the former Competition Act, the fine varied from 1% to 30% of the gross turnover in the “last exercise”, excluding taxes (article 23 of the former Competition Act).

³¹ The sanctions provided in Article 23 of the former Competition Act to individuals were: a fine ranging from 6,000 to 6 million UFIR (tax reference units), which was in force at that time, to entities different from companies.

decision, in half a page and at the expenses of the violators, for two consecutive days within one to three consecutive weeks in a newspaper assigned in the decision; (ii) prohibition to contract with official financial institutions and participate in tenders related to acquisitions, sales, conduction of construction works and services, concession of public services, in the federal, state, municipal and the Federal District public administration, as well as in the indirect administration, for a period not under five years; (iii) registration of the violator in the National Registry of Consumer Defense; (iv) recommendations (as will be demonstrated below, they are not considered in and of themselves as non-pecuniary sanctions in this study, but they will be examined) related to the compulsory license of intellectual property law of the violator, when the anticompetitive practice is related to that right; (v) the corporate split, transfer of corporate control, sale of assets and partial ceasing of the activity; (vi) the prohibition to exercise commerce on his/her name or as representative of legal entity, for up to five years; and (vii) other sanctions that may be deemed necessary to eliminate the harmful effects to the economic order³². Each of those sanctions and recommendations will be further detailed in this study and it is important to remember that the antitrust policy in Brazil is related not only to companies, but also to individuals and other types of entities, such as trade associations and trade unions.

In order for CADE to assess the penalties it applies, CADE must meet the following parameters of analysis, which are the same in the current and in the former Competition Act: seriousness of the violation, good-faith of the violator, the advantage obtained or intended by the violation, whether the violation was consummated, the level of harm or the probability of harm to free competition, the national economy, consumers or third parties; the negative economic effects produced in the market; the economic situation of the violator and recidivism³³.

Given that an overview of legal aspects related to antitrust sanctions applied or that may be applied by CADE in Brazil was provided above, the following items will address the goals of antitrust sanctions, the complementarity between pecuniary and non-pecuniary sanctions and international practices related to antitrust sanctions.

³² As it will be also further detailed below, the main difference between the current Competition Act and the former one in relation to non-pecuniary sanctions is that the sanction of director disqualification, that is, of prohibition to exercise commerce on his/her own name or as representative of legal entity, was added by the current Competition Act.

³³ Article 45 of the current Competition Act and Article 27 of the former Competition Act.

2.1 GOALS OF ANTITRUST SANCTIONS

In pursuance of better understanding the sanctions themselves, it is important to identify the goals that the sanctions are designed to achieve in the antitrust domain, by bearing in mind that the goals may change depending on jurisdictions, may be or may not be cumulative and may even not be expressly established in a statute or case law. In this context, the main goals identified in national and international literature are the following: punishment of the anticompetitive practice, deterrence, the promotion of efficiency in resource allocation, compensation, and disgorgement. For completeness, Ioannis Lianos *et al.* classify the goals of antitrust sanctions into three main groups: curing, punishing and preventing. The authors conclude that “*the main purposes of fines/penalties are (i) to punish the competition law infringer and (ii) to ensure deterrence*”³⁴. Regardless of related classifications, the main aspects explored in literature and in documentation from international organizations will be detailed below.

Punishment appears to be the logical main goal for antitrust sanctions, including in Brazil. Ioannis Lianos *et al.* conclude, for example, that “*Punishment is certainly the main function of fines/penalties imposed in various jurisdictions for the infringement of competition law*”³⁵. In Brazil, Paulo Burnier da Silveira states that sanctions aim at restraining anticompetitive practices convicted by CADE³⁶.

Even though punishment is a relevant goal for antitrust sanctions, in general, much is dedicated in documents from international organizations and in literature on deterrence. The OECD classified the antitrust sanctions under a deterrence goal perspective, mentioning that the goal “*in some jurisdictions [is] also to force violators to disgorge their illegal gains and compensate victims*”³⁷. The OECD then concluded that fines in antitrust cases promote deterrence as it makes the antitrust conduct less profitable³⁸. Douglas H. Ginsburg and Joshua D. Wright mention that enforcers of antitrust law have adopted the strategy of increasing

³⁴ LIANOS, Ioannis.; JENNY, Frederic; PAPP, Florian Wagner Von; MOTCHENKOVA, Evgenia; DAVID, Eric. et al. An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis. CLES Research paper series 3/2014, UCL Faculty of Laws: London, 2014, p. 17-19. Available at: <https://www.fne.gob.cl/wp-content/uploads/2014/11/Estudio.pdf>.

³⁵ *Ibid.*, p. 16.

³⁶ SILVEIRA, Paulo Burnier da. Direito da Concorrência. Rio de Janeiro: Forense, 2021, p. 99.

³⁷ OECD. Remedies and Sanctions in Abuse of Dominance Cases. 2006, p. 7. Available at: <https://www.oecd.org/daf/competition/38623413.pdf>.

³⁸ *Id.*, Sanctions in Antitrust Cases: Background Paper by the Secretariat, 2016, p. 5. Available at: [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf).

corporate fines to increase deterrence³⁹. Daniel L. Rubinfeld also mentions that public sanctions seek deterrence⁴⁰.

Punishment and deterrence are relevant and are frequently mentioned as goals of antitrust sanctions. However, questions on how to quantify or how to establish the level of punishment and deterrence are also subject to discussions between scholars; and those discussions are related to efficiency. Kai Hüschelrath, Nina Leheyda and Patrick Beschorner stressed that “*although the importance and value of the deterrent effect of antitrust sanctions is undisputed among antitrust experts, it is equally undisputed that the scope of the effect is very hard to measure in practice*”⁴¹. On the exercise of identifying “*how many resources and how much punishment should be used to enforce different kinds of legislation*”, Gary S. Becker identified what is called “Optimal Deterrence Model” and concluded that an optimal decision is the one that incurs in reduction of social loss in income, that is, a sum of damages and three related costs (apprehension, conviction and enforcement of punishment)⁴².

Herbert Hovenkamp has criticized the Chicago School and Gary S. Becker’s “*Optimal Deterrence Model*”⁴³ and, consequently, Gary Becker’s view⁴⁴ on antitrust enforcement and penalties, in the sense that deterrence should be the main goal of antitrust sanctions and that “*antitrust policy should be the pursuit of economic efficiency*”⁴⁵. Herbert Hovenkamp mentions, for example, that “[i]f maximizing social wealth were antitrust’s only goal, its system of sanctions would make inefficient illegal conduct unprofitable but permit efficient illegal conduct to earn a profit”⁴⁶.

³⁹ GINSBURG, Douglas H. WRIGHT, Joshua D. Antitrust Sanctions. Competition Policy International, Vol. 6, No. 2, pages 3-39, Autumn 2010, pages 4-5.

⁴⁰ RUBINFELD, Daniel L. Improving Antitrust Sanctions. 2016, p. 97-102, p. 101. In: GINSBURG, Douglas H; WRIGHT, Joshua D. Global antitrust economics: current issues in antitrust and law & economics. 2016.

⁴¹ BESCHORNER, Patrick; HÜSCHERLARATH, Kain; LEHEYDA, Nina. The deterrent effect of antitrust sanctions: Evidence from Switzerland. The Antitrust Bulletin: Volume 56, No. 2, 2011, pages 427-460, p. 429.

⁴² BECKER, Gary Stanley. Crime and punishment: an economic approach. Journal of political economy, v. 76, n. 2, 1968, p. 169-217, p. 170 and 207.

⁴³ Herbert Hovenkamp states that “*The Optimal Deterrence Model is not concerned with compensation for victims, but rather with deterrence of violators. The proper measure of deterrence is the same whether the plaintiff is a consumer or a competitor: damages should equal the sum of the overcharge from any monopoly created by the antitrust violation and the traditional deadweight loss. This rule would permit efficient exclusionary practices to continue while stopping inefficient ones.*” (HOVENKAMP, Herbert. Antitrust’s Protected Classes, Volume 88, Issue 1, Michigan Law Review, 1989, p. 11-12).

⁴⁴ According to Herbert Hovenkamp, “*Becker argues that the social cost of illegal conduct includes three elements: (1) the costs imposed by the conduct itself; (2) the costs of detecting and apprehending suspected violators and of establishing their guilt; and (3) the costs of imposing sanctions. An ideal legal system would minimize the sum of these three costs. Unfortunately, these three costs of harmful conduct are mutually dependent. Catching more thieves costs more money. In order to reduce the number of violations (cost number one), society may have to spend more on enforcement (cost number two), or on long prison sentences (cost number three).*” (*Ibid.*, p. 1-2).

⁴⁵ Herbert Hovenkamp mentions that “*efficiency consists of two parts, allocative efficiency and productive efficiency*” (*Ibid.*, p. 12).

⁴⁶ *Ibid.*, p. 4.

On the other hand, Kenneth G. Elzinga, when exploring the goals of antitrust itself and concluding that efficiency⁴⁷ must be a goal, but not an absolute one, as it must also guarantee equity, stated that preventing cartelization in a market, for example, “*serves to help those at the low end of the income distribution range without decreasing efficiency*”⁴⁸; including efficiency within the goal of antitrust sanctions. This is also complemented by the conclusion that “*prices will be made lower in this market so that for any given income, however low, a larger market of goods and services can be purchased*”⁴⁹. Even though the author is not mentioning the goal of antitrust sanctions themselves, it may be interpreted as an analogy considering that antitrust sanctions may be responsible for preventing cartel practices, for example.

Even though compensation is listed as one of the goals of antitrust sanctions worldwide, in Brazil, Alexandre Cordeiro Macedo and Eduardo Frade Rodrigues concluded that compensation for damages is not a goal of the punitive State activity, but it is a goal for private law⁵⁰. Even though CADE is not directly responsible for compensation for anticompetitive practices damages, CADE has been active in promoting private enforcement in Brazil. In August 2016, for example, CADE issued a Technical Note on intersections between private and public enforcement⁵¹; and in September 2018, CADE issued Resolution No. 21, providing for a mitigating factor in the calculation of pecuniary contributions or fines for those who compensated competition harms⁵². Through Ordinance No. 869/2019, CADE also established related procedures for those who need access to documents from administrative proceedings to support claims for damages⁵³⁵⁴.

Although disgorgement was listed as one of the goals of antitrust sanctions by the OECD⁵⁵, for example, this was not a goal identified as explored or examined extensively by case law in Brazil or antitrust literature. Nevertheless, the Brazilian Competition Act (both the current and the former one) provides, as mentioned above, for a criterion related to the

⁴⁷ Efficiency was defined as: “*the concept of efficiency encompasses the maximization of economic welfare, not just the value of total output, and includes attaining an optimal distribution of income. Equity is central to the analysis*” (ELZINGA, Kenneth G. Goals of Antitrust: Other than Competition and Efficiency, What Else Counts. University of Pennsylvania Law Review, 1977, p. 1193).

⁴⁸ *Ibid.*, pages 1194 and 1213.

⁴⁹ *Ibid.*, p. 1194.

⁵⁰ MACEDO, Alexandre Cordeiro; RODRIGUES, Eduardo Frade. Dimensionamento de Sanções Antitruste a Cartéis. Instituto Internacional de Estudos de Direito do Estado, p. 22.

⁵¹ CADE. Nota Técnica nº 24/2016/CHEFIA GAB-SG/SG/CADE. November 2016.

⁵² *Id.*, Resolução nº 21, de 11 de setembro de 2018. 2018.

⁵³ *Id.*, Portaria CADE nº 869, de 1 de novembro de 2019.

⁵⁴ Those procedures were identified in six publicly available requests with the following numbers: 08700.007823/2022-02, 08700.005417/2021-16, 08700.004000/2021-36, 08700.004001/2021-81, 08700.001039/2021-00 and 08700.003997/2020-26.

⁵⁵ OECD, 2006, p. 7.

definition of fines in each case, which is the fact that the fine should not be lower than the advantage obtained by the perpetrators, whenever it is possible to quantify the advantage obtained, even though this concept and quantification may be discussed⁵⁶.

The discussions related to the goals of antitrust sanctions may also interact with discussions on effectiveness of sanctions in Brazil and worldwide. At least in Brazil and more specifically on pecuniary sanctions, even though there are explicit provisions for sanctions, the empirical experience identified by Roberto de Castro Pimenta is that for the period from 2009 to 2020, CADE collected only 5.01% of the fines applied by CADE in the period and most of the payments were made after judicial agreements (after the conviction)⁵⁷. Thinking about goals and effectiveness of the sanctions applied by competition authorities, the following chapter will be dedicated to the analysis of the complementarity between pecuniary and non-pecuniary sanctions to achieve antitrust sanctions goals.

2.2 COMPLEMENTARITY OF PECUNIARY AND NON-PECUNIARY SANCTIONS

For the antitrust sanctions goals to be implemented or improved, certain official institutions and part of the literature⁵⁸ mention the relevance of the complementarity of pecuniary and non-pecuniary sanctions in the antitrust domain of penalties. The OECD, for example, noted that competition authorities worldwide frequently consider non-pecuniary sanctions in public enforcement, such as criminal ones, “*disqualification orders on directors of undertakings, publication of findings of infringements and bans on bidding for public contracts.*”⁵⁹ As alternative to fines, therefore, the OECD also explored those non-pecuniary sanctions mentioning the alternatives of “*imposition of sanctions on individuals*”, “*criminal sanctions*”, “*director disqualification*”, “*publicise findings of infringement in order to use*

⁵⁶ On this regard, please refer to ARAÚJO, Gilvandro Vasconcelos Coelho de; GUIMARÃES, Marcelo Cesar. Efetividade: a vantagem auferida na defesa da concorrência. *Revista de Direito Administrativo*, 280(3), 2021, p. 67-92.

⁵⁷ PIMENTA, Roberto de Castro. *Limites Jurídicos e Econômicos da Multa Antitruste: A Capacidade de Pagamento como Elemento de Justiça e Efetividade das Condenações do CADE*. Dissertação de Mestrado. 2021. Universidade de Brasília, p. 131-132.

⁵⁸ Certain authors do not agree with the necessary complementarity of pecuniary and non-pecuniary sanctions. William Breit and Kenneth G. Elzinga, for example, stated that “*an analysis of the benefits and the costs of any alternate antitrust policies moves us to reject the antitrust literature which simply recommends doing more of everything - more fines, longer jail terms, bigger government budgets, enlarged rules of standing, generally easier access to the courts - with little discussion of the relative efficiencies and costs of these several approaches*” (BREIT, William; ELZINGA, Kenneth G. *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*. Harvard Law Review, volume 86, No. 4, 1973, p. 713).

⁵⁹ OECD. *Sanctions in Antitrust Cases: Background Paper by the Secretariat*, 2016, p. 2.

reputational effects as a deterrent”, “*debarment against bid rigging*”⁶⁰. The OECD also recommended, for example, that member countries ensure effective sanctions against cartels “*of a kind and at a level adequate to deter firms and individuals from participating in such cartels*”⁶¹.

On literature, Douglas H. Ginsburg and Joshua D. Wright explain that the “*standard economic approach to optimal sanctions*” is that pecuniary sanctions should be applied as a rule; and non-pecuniary sanctions should be an alternative. The authors identified, however, that, even though fines (pecuniary sanctions) are increased for deterrence purposes in antitrust, that deterrence goal is not necessarily achieved, considering that cartels still exist, and the rates related to recidivism. The source of antitrust sanctions would not only be law enforcement, but also the market itself in the scope of reputational issues related to anticompetitive practices. To enhance deterrence (focusing on price-fixing), the authors suggested that higher fines would not necessarily be the solution nor would focusing on the companies, but for authorities to debar individuals from employment positions that could allow them to breach antitrust laws again⁶². It was also suggested that the cartel sanctions were increased in relation to individuals engaged in price-fixing, and for those “*responsible for monitoring antitrust compliance*”, “*to the extent they are culpable*”, to promote deterrence⁶³.

Daniel L. Rubinfeld also noted that “*financial penalties alone generate only partial deterrence*”⁶⁴. To promote deterrence, the author mentions imprisonment of individual perpetrators, disbarment for members of the “*bar*”, the implementation of whistle-blower rewards and the private enforcement itself. Ioannis Lianos *et al.* also agree that the interaction of sanctions may increase deterrence. The authors analysed, for example, “*criminal sanctions, such as imprisonment or civil sanctions, such as disqualification orders on directors of undertakings*”⁶⁵.

In Brazil, Amanda Athayde and Renan Cruvinel concluded that “*even considering that fines are relevant deterrence mechanisms, in certain cases they do not appear to be the necessary incentive to inhibit anticompetitive conducts*”⁶⁶ (free translation from original). The authors then concluded that non-pecuniary sanctions are complementary to pecuniary sanctions,

⁶⁰ *Ibid.*, p. 31-37.

⁶¹ *Id.*, 2002, p. 106.

⁶² GINSBURG; WRIGHT, *op. cit.*, pages 4-6 and 9.

⁶³ *Ibid.*, pages 19-20.

⁶⁴ RUBINFELD, *op. cit.*, p. 98.

⁶⁵ LIANOS; JENNY; PAPP; MOTCHENKOVA; DAVID, *et al.*, *op. cit.*, p. 54-55.

⁶⁶ ATHAYDE, Amanda; CRUVINEL, Renan. A busca por sanções ótimas no direito brasileiro e as sanções não pecuniárias no antitruste. In: ATHAYDE, Amanda (Org.). Sanções não pecuniárias no antitruste. 1. ed. São Paulo: Editora Singular, 2022, p. 263-265, p. 19.

considering that the first may “*reach the purposes of the sanction, by generating less undesirable social and economic effects and complying with the proportional justice perspective*”⁶⁷.

The complementarity, therefore, explored by scholars and international organizations (notably the OECD) that was identified was mostly related to improving and implementing antitrust sanctions goals, through the application of sanctions not only to companies, but also to individuals. Brazil, for example, already has, as mentioned above, an intersection between pecuniary and non-pecuniary sanctions in the administrative sphere that may be applied not only against companies, but also in relation to individuals and other legal entities, such as trade associations. In fact, as will be detailed in the following chapters, CADE applies pecuniary and non-pecuniary sanctions not only against companies, but also against individuals and trade associations, and CADE has an express legal basis to act accordingly.

Considering the discussions above on goals and effectiveness of antitrust sanctions, of both pecuniary and non-pecuniary sanctions, the following chapter will provide an overview of non-pecuniary sanctions in the antitrust domain worldwide.

2.3 INTERNATIONAL PRACTICES IN THE USE OF NON-PECUNIARY SANCTIONS IN ANTITRUST

To identify international practices related to non-pecuniary sanctions in antitrust cases, this Chapter will be the basis for the analysis to be conducted herein: publicly available documents from the OECD forum discussing sanctions in antitrust cases in 2016⁶⁸ and publicly available documents from the OECD regarding the roundtable for director disqualification and bidder exclusion in competition enforcement held in 2022⁶⁹. In both circumstances, the OECD received contributions from several countries/jurisdictions on their experience with non-pecuniary sanctions in antitrust cases and, therefore, these discussions are relevant to the understanding of the current context of this subject.

Based on contributions from the countries/jurisdictions and on background notes for those events from the OECD, it was possible to identify that non-pecuniary sanctions worldwide are focused on whether individuals should be subject to penalties, such as director disqualification (“*sanction where an individual is not allowed to act as director, typically in*

⁶⁷ *Ibid.*, p. 24.

⁶⁸ OECD, 2016.

⁶⁹ *Ibid.*

any company, for a specific period following a violation of competition law”⁷⁰), a debarment sanction of prohibition to participate in tenders and the publication of an authority’s decision. As seen above, all those scenarios/sanctions are already provided for in the legal wording of the current Competition Act in Brazil. Director disqualification is the only sanction that was not provided for in the former Competition Act in Brazil.

In summary, for sanctions against individuals, in 2003, the OECD recommended “*introducing and imposing sanctions against natural persons*” in antitrust cases⁷¹. In 2016, the OECD analysed the practice of the countries/jurisdictions that adopted sanctions against individuals. Criminal sanctions were analysed, for example, but as they are not subject of this research, which focuses on administrative sanctions, the analysis will focus on other aspects of the sanctions imposed on individuals. These other aspects are mainly related to whether fines (pecuniary sanctions) may be applied against individuals and discussions on director disqualification, which will be summarized below. For fines against individuals, at least the following countries/jurisdictions stated that individuals can be fined by the competition authorities of their countries/jurisdictions, which does not necessarily mean that individuals were already fined by them or that it is a common practice⁷²: Argentina, Australia, Brazil, Bulgaria, Canada, Chile, Lithuania, Netherlands, Portugal, Turkey and Ukraine.

Director disqualification and debarment sanctions on prohibition to participate in tenders are sanctions that were detailed by the OECD in the Background Note of the roundtable held in 2022⁷³. The OECD identified that the director disqualification sanction for antitrust violations committed by individuals could be applied at least in the following countries/jurisdictions (outside of the criminal sphere, but that may be potentially applied not only by competition authorities but also by Courts): Australia, Brazil, Canada, Chile, Germany, Hong Kong, Ireland, Lithuania, Mexico, New Zealand, Sweden, United Kingdom and the United States of America.

On the debarment sanction, what the OECD also called “*Bidder Exclusion*”, several jurisdictions were also identified as having the power to apply this sanction to antitrust violations, mainly against firms and mainly involving bid rigging cases. The debarment sanction could be applied by competition authorities directly, other administrative bodies and/or by a court depending on the jurisdiction. For example, the OECD listed the following

⁷⁰ Id., 2022.

⁷¹ Id., Second Report by the Competition Committee on Effective Action Against Hard Core Cartels. 2003.

⁷² Id., Sanctions in Antitrust Cases – Summaries of contributions. 2016.

⁷³ Id., 2022, p. 3.

jurisdictions⁷⁴: Austria, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, European Union, Finland, Germany, Greece, Hungary, India, Italy, Israel, Japan, Korea, Lithuania, Luxembourg, Mexico, New Zealand, among other countries/jurisdictions.

Regarding publicizing the conviction for an antitrust violation, the OECD focused its analysis on this based on reputational issues derived from the conviction. The OECD stated, for example, that most authorities publish press releases of the decision and analysed practices in Brazil, France and Korea, including, not cumulatively, the publication of the decision by perpetrators and the publication of decision, for example, in the annual report of the companies.

Based on the overview above, it is possible to identify that Brazil has in its Competition Law references to pecuniary and non-pecuniary sanctions (in addition to director disqualification, bidder exclusion and publication) that can be applied directly by CADE and, therefore, appears to be in a prominent position in the non-pecuniary sanctions sphere for antitrust violations worldwide. To have a better view of this, the following chapter will be dedicated to the analysis of the Brazil's empirical experience on the subject.

⁷⁴ *Ibid.*, p. 3.

3 STATE OF PLAY OF NON-PECUNIARY SANCTIONS IN BRAZIL

Considering the scenarios above on the goals of antitrust sanctions and the relevance of the Brazilian scenario on this topic, this Chapter aims to provide an overview of the state of play of non-pecuniary sanctions applied by CADE in the conviction of cartel cases in administrative proceedings in the period from January 1999 to December 2022. The year of 1999 was chosen because this was the year in which CADE's Tribunal first convicted a cartel case⁷⁵. Therefore, the analysis in this study covers a period of more than 20 years of activities performed by CADE in the public enforcement against cartel practices.

Before diving into the non-pecuniary sanctions, it is important to first establish the methodology used to identify the cartel cases examined in this study. The initial step was to establish which cases would fall within the definition of a “*cartel case*”, considering that the Brazilian Competition Act (Law No. 12,529/2011 or the previous Law No. 8,884/1994 were both applied in the cases examined) does not contain the word “*cartel*” within the illicit practices described in its Article 36 (or the previous Articles 20 and 21 of the previous Law No. 8,884/1994). Therefore, it was assumed that the administrative proceedings referred to a cartel conviction in case any of the following requirements were met: (a) the Reporting Commissioner informed that the administrative proceeding was a cartel case in the summary (“*Ementa*”) and/or in the introduction in the beginning of his/her written vote and the defendants were convicted for that practice; and/or (b) administrative proceeding concerning an infringement of “*uniform commercial conduct*” was considered a cartel given the gravity of the practice and close similarity to cartels (e.g. reference price lists; and list price collusions)⁷⁶.

Once the criteria to define an administrative proceeding as a cartel case were established, the collection of the cases to be examined in this study followed the steps described hereinafter. The first step was to retrieve the table with cartel cases convicted by CADE in the period between 1999 and 2019 prepared by Paulo Burnier da Silveira in his book “*Direito da Concorrência*”⁷⁷. Those cases were then examined to check whether they complied with the “*cartel case*” definition established above, which was confirmed for all of them. Afterwards, the public minutes of the judgment sessions from CADE's Tribunal were searched for in CADE's website for the remaining period of December 2019 to December 2022 to identify

⁷⁵ CARVALHO, Vinícius Marques de; RAGAZZO, Carlos Emmanuel Joppert (coord.) *Defesa da Concorrência no Brasil: 50 anos*. Brasília, Conselho Administrativo de Defesa Econômica – CADE, 2013, p. 22.

⁷⁶ In summary, 8 out of 120 proceedings regarding this criterion were identified in the research.

⁷⁷ Please refer to table “8.2.2. *Processos administrativos com condenação por cartel no CADE (1999-2019)*” in pages 210-213 of SILVEIRA, *op. cit.*

cases in which CADE's Tribunal decided on the merits of the related administrative proceeding to convict at least one of the defendants for cartel practice.

For conservative purposes, CADE's platform "*CADE em Números*" (free translation from original: CADE in figures) was used as support to cross check the information on the quantity of administrative proceedings with cartel conviction since 2015, considering that this is the starting year for the information available in the platform⁷⁸. Based on the results generated by the platform for cartel convictions, the respective decision was searched in CADE's website to check if the case complied with the criteria set forth in this study for a case to be defined as a cartel case and was then added to the list of administrative proceedings analysed, whenever applicable.

As a result of the methodology above, 120 cases were identified and were considered as a subject of the analysis conducted in this study. Additional cases resulting from an original administrative proceeding were identified, for example, cases initiated from an administrative proceeding in view of difficulties from CADE to serve specific defendants, but they were neither counted nor specifically examined for the purposes of the analysis of this study⁷⁹. A specific analysis of the administrative proceedings derived from another administrative proceeding to serve individuals, for example, is a recommendation of a subject for future research.

The list of administrative proceedings does not include cases in which the judgment of the merits was initiated in December 2022, but was not finalized in 2022, due to a specific request for a commissioner to review the case further, for example. The criterion of "*not finalized in 2022*" is not applicable to appeals or motions regarding the decision from CADE's Tribunal on the merits of the case. Therefore, cases in which the judgment of the merits was finalized in 2022, but the decision of motions was still pending in 2022, were added to the list of administrative proceedings, considering that the judgment of appeals or motions were not seen as "*judgment of merits*" in the current analysis. Thus, this study examines the decisions on the merits of the case, which are not necessarily the final decision of the case, considering that sanctions may have been modified in the judgment of motions, for example, by CADE's Tribunal. A specific analysis of modifications to the decisions on the merits through appeals filed by the convicted defendants is also recommended for future research.

⁷⁸ CADE. *CADE em Números*. 2023.

⁷⁹ This was the case, for example, of Administrative Proceedings No. 08012.005069/2010-82, which resulted from Administrative Proceedings No. 08012.000820/2009-11, initiated to investigate an alleged cartel of hermetic refrigerator compressors. Therefore, the first was not included in the calculations in this research.

This study also does not contain an analysis of the judicial decisions that eventually decided to modify or annul the conviction by CADE in lawsuits decided by the Brazilian Judiciary Branch or even in claims for cartel damages filed in connection with a cartel case previously examined by CADE. This may also be a field worth exploring in future research.

As main difficulties to identify and examine the cartel cases, it is worth highlighting that most of the decisions and summaries of CADE's Tribunal decisions did not state expressly for which practice the defendants were being convicted and, therefore, it was an interpretation exercise to identify the cartel cases convicted by CADE. In addition, CADE's SEI (Electronic System of Information - in Portuguese, *Sistema Eletrônico de Informações*), which allows the visualization of the case files of the cartel cases, was implemented by CADE in Resolution No. 11, dated 24 November 2014. The Resolution provides that documents filed before 2 January 2015 should have been attached electronically to SEI. It was identified that after that date, the case files were made available on CADE's website with a specific link for each document from the case files, which made it easier to access and examine the documents from the case files. However, documents prior to such date were, in their majority, digitalized in volumes of documents rather than as an independent document (for example, a separate file with the written decision of a specific Commissioner), which resulted in significant efforts to identify the relevant documents for the current analysis.

As a third main difficulty, certain minutes of the judgment sessions did not include detailed information on CADE's final decision, for example, which sanctions were applied, but only a reference to the Commissioner's decision that was adopted by the majority. This also resulted in efforts to identify the prevailing decision in the case records and then in identifying the applicable sanctions adopted against the defendants in the respective case.

In addition, regarding the judgment minutes, divergences were identified in relation to the minutes of the judgement session and the written decisions. For example, in one specific case, the minutes included information on certain penalties, which were considered a material error by CADE's General Attorney afterwards. This happened in Administrative Proceeding No. 08012.005495/2002-14 (related to the market for fuel retail in Guaporé/RS)⁸⁰, decided by CADE's Tribunal on 14 September 2011. The minutes of the judgment session mentioned that the defendants that were convicted were also subject to the sanction of publishing the extract of the decision, "*under the terms and deadlines provided in the decision of the Reporting Commissioner*" (free translation from original). After checking the decision from the Reporting

⁸⁰ CADE, Administrative Proceeding No. 08012.005495/2002-14, Reporting Commissioner Carlos Emmanuel Joppet Ragazzo, decided on 14 September 2011.

Commissioner, it was possible to note that the decision did not reference the publication sanction at all, but only referenced the non-pecuniary sanction of registry before the National Register for Consumer Protection, in addition to recommendations, such as the recommendation for the defendants not to be granted with the possibility of paying federal taxes in instalments or that tax incentives or public subsidies should be cancelled. CADE's General Attorney recommended closing the case in May 2014, considering that all obligations were met and mentioned in its Technical Note No. 41/2014 – SCD/PGF/AGU, and that the publication sanction was a material error in the minutes of the judgment session.

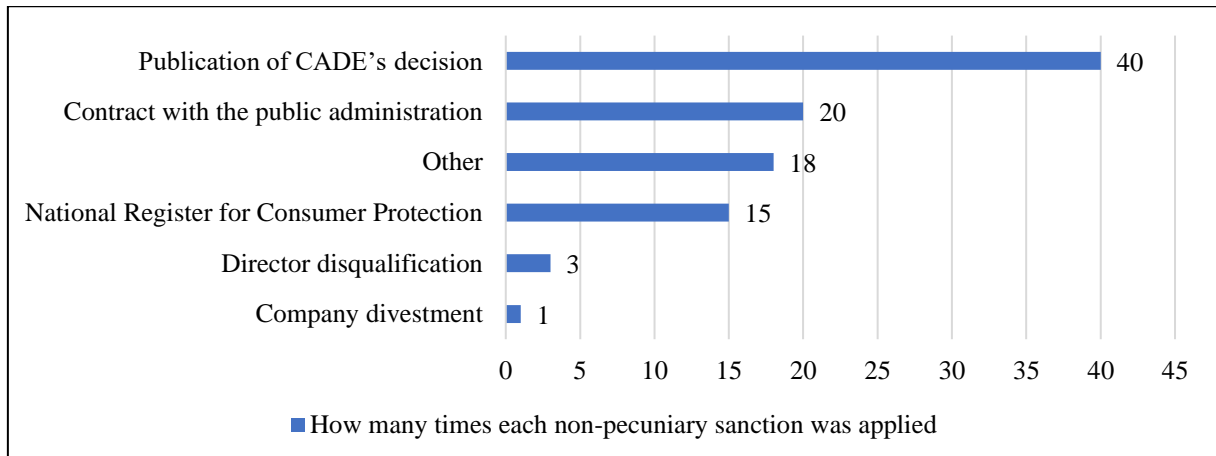
Another case also contained divergences. Administrative Proceeding No. 08012.009885/2009-21⁸¹ (related to the market for sanitation services) was initiated by CADE to investigate an alleged cartel in a tender to hire construction of a water production system in Água Mambu, in the State of São Paulo. Based on the minutes of the judgement session from CADE's Tribunal, certain defendants were sentenced to the publication sanction, according to the terms of the vote of the Reporting Commissioner. The written decision of the Reporting Commissioner, however, does not contain any reference to the publication sanction.

There were also challenges related to the identification of the non-pecuniary sanctions in CADE's decisions, considering that it is relatively common for CADE to apply non-pecuniary sanctions, without mentioning the legal basis for them. Therefore, an interpretation exercise was needed to classify the non-pecuniary sanctions within the legal non-pecuniary sanctions provided for in the Competition Act in Brazil.

Following the considerations above on the methodology applied to conduct the analysis in this study and its main difficulties, it was identified that in all 120 cases, CADE applied fines as sanction to the companies, individuals and/or trade associations that were convicted. As mentioned above, it was also identified that in 61 cases (roughly 51%), CADE also applied non-pecuniary sanctions.

Graphic 2 below provides information on how many times each non-pecuniary sanction was applied by CADE, considering the administrative proceedings with cartel convictions by CADE analysed herein. The sum of the numbers below is higher than 61 cases, considering that there were cases with more than one non-pecuniary sanction applied by CADE.

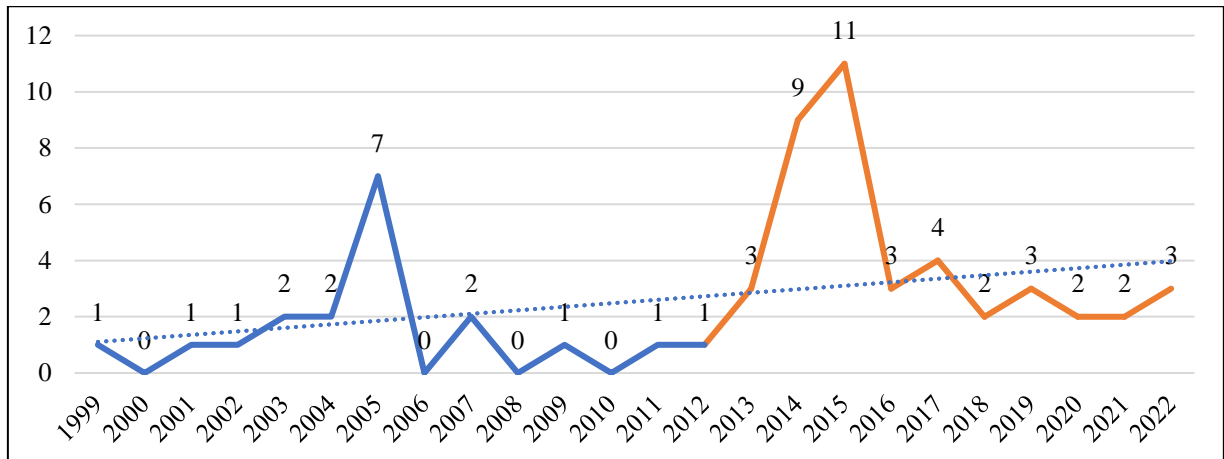
⁸¹ Id., Administrative Proceeding No. 08012.009885/2009-21, Reporting Commissioner Ana Frazão, decided on 8 April 2015.

Graphic 2 – Types of non-pecuniary sanctions applied by CADE

Source: author

Based on Graphic 2 above, the main non-pecuniary sanctions applied by CADE's Tribunal in descending order are: publication of CADE's decision in 40 cases (roughly 66% of the cases with non-pecuniary sanctions); prohibition to participate in tenders or execute contracts with official financial institutions, which was applied in 20 cases (roughly 33% cases); "other" sanctions were applied in 18 cases (roughly 30% cases); sanctions to register the name of the defendant in the National Register for Consumer Protection, which was applied in 15 cases (roughly 25% cases); director disqualification, which was applied in 3 cases convicted by CADE (roughly 5% cases) and company divestment, applied only in 1 case (roughly 2%).

Another interesting topic related to the non-pecuniary sanctions applied by CADE is when they were applied and if CADE is still applying them. Therefore, Graphic 3 below summarizes the main results on timing related to the application of non-pecuniary sanctions by CADE over time, that is, that non-pecuniary sanctions continued to be applied after the enactment of Law No. 12,846/2011 and have been applied more frequently by CADE over time.

Graphic 3 – Non-pecuniary sanctions per year

Source: author

Considering the analysis conducted above on general numbers related to the non-pecuniary sanctions applied by CADE in cartel cases, the following topics will address the non-pecuniary sanctions applied against each of the three categories of defendants identified in this study, that is, companies, individuals, and trade associations. The final topic of this chapter will be dedicated to the analysis of the so-called sanctions of recommendations related to taxes and compulsory license.

3.1 NON-PECUNIARY SANCTIONS AGAINST COMPANIES

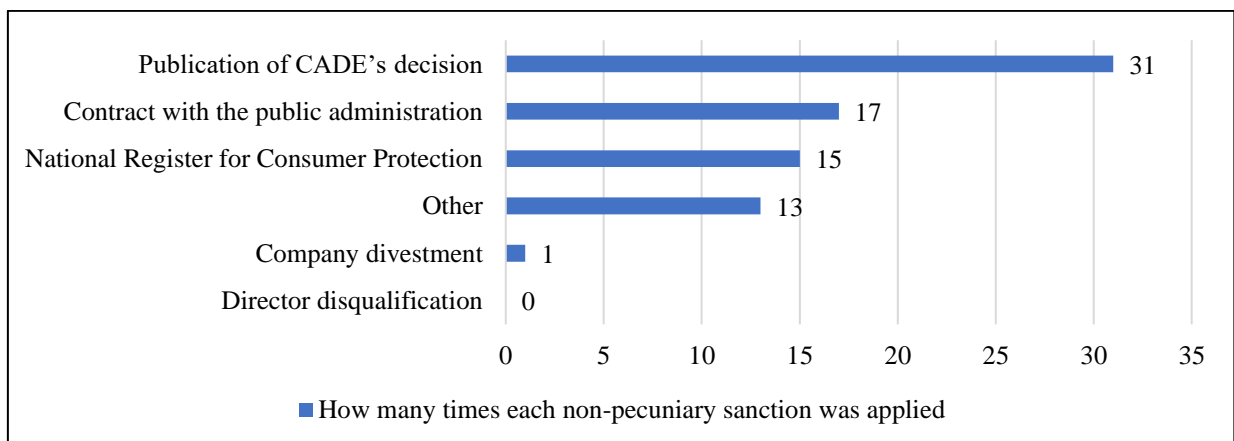
Non-pecuniary sanctions applied by CADE against companies are the most common when compared to sanctions applied to individuals and trade associations. As mentioned above, 61 cases (roughly 51% of the overall quantity of 120 cases examined) contained non-pecuniary sanctions applied by CADE in general. It was identified that 51 (roughly 84%) out of the 61 cases contained non-pecuniary sanctions applied to companies.

Graphic 4 below summarizes the non-pecuniary sanctions applied against companies in the period of analysis in this research, showing that the types of non-pecuniary sanctions applied against companies have a very similar incidence of the overall types of non-pecuniary sanctions applied by CADE. The main non-pecuniary sanctions applied by CADE's Tribunal in descending order against companies are: publication of CADE's decision (31 cases – roughly 51% of the cases with non-pecuniary sanctions); prohibition to participate in tenders or execute contracts with official financial institutions (17 cases – roughly 28%); sanction to register the name of the defendant in the National Register for Consumer Protection (15 cases – roughly

25%); “other” sanctions (13 cases – roughly 22%); and the company divestment sanction (1 case – roughly 2%).

The order above is different from the general order for the 61 cases in relation to the following non-pecuniary sanctions: the sanction to register the name of the defendants in the National Register for Consumer Protection, when compared to the “other” sanctions, that is, it was more common for CADE to apply the first than the latter for companies; and in relation to the director disqualification, which is a sanction directed against individuals, when compared to the company divestment sanction, which is a sanction directed against companies. The director disqualification sanction was, therefore, not applied against companies by CADE and the company divestment sanction was applied in only one case (roughly 2% of the cases with non-pecuniary sanctions).

Graphic 4 – Types of non-pecuniary sanctions applied against companies



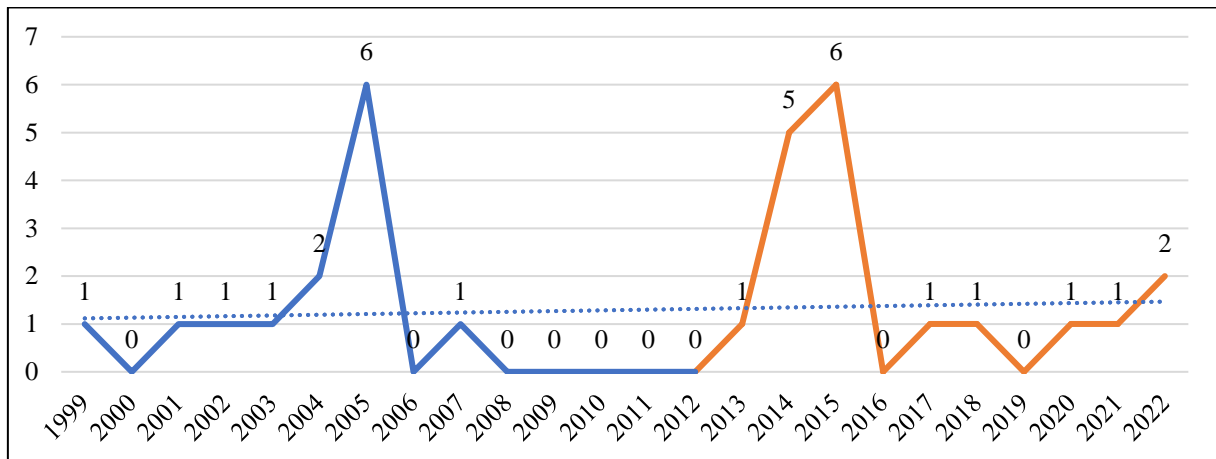
Source: author

Considering the results above, it will be conducted a detailed analysis of the non-pecuniary sanctions applied against companies by CADE in the cartel cases will be conducted herein.

3.1.1 Publication of CADE's decision: a structure under modification

As mentioned above, the sanction of publication of CADE's decision is the main non-pecuniary sanction applied against companies by CADE in cartel convictions. In terms of application of the publication sanction over time, Graphic 5 below shows that the publication sanction has been applied since the entry into force of the current Competition Act from a quantitative standpoint, but with differences on its merits that will be further detailed below.

Graphic 5 – Non-pecuniary sanction of publication applied over time against companies



Source: author

Both Competition Acts (the current and the former one) provided the following criteria for the adoption of this non-pecuniary sanction by CADE: (a) publication of an extract of CADE’s decision; (b) publication in a newspaper assigned in the decision; (c) size of the publication (half a page of a newspaper); (d) costs to be incurred by the defendants; and (e) the timing for the publication to take place (two consecutive days within one to three consecutive weeks). As will be detailed in the following topics, CADE also adopted in certain cases the definition of which page or section of the newspaper the extract of the decision should be published. In general, no standard was identified related to the non-pecuniary sanction of publication and when/how CADE would adopt a specific strategy in relation to the adoption of this sanction.

The following topics will examine CADE’s decisions in relation to the criteria described above provided for by both Competition Acts (the current and the former one).

3.1.1.1 Legal criterion related to what should be published as part of the sanction

The legal wording for this sanction provides that the extract of CADE’s decision should be published, and it is not clear what exactly “extract” means: a summary of the decision, the *ementa*, the *acórdão* or the decision itself. CADE provided consideration on the wording to be published by the defendants only in certain cases. In Administrative Proceeding No. 08012.011027/2006-02⁸² (related to air cargo services), CADE determined a specific

⁸² CADE, Administrative Proceeding No. 08012.011027/2006-02, Reporting Commissioner Ricardo Machado Ruiz, decided on 28 August 2013.

wording that should be published, which contained the information that the defendant was convicted due to a cartel practice, the name of the other companies allegedly involved, information on the name of the leniency applicant and information on the fines applied by CADE. In Administrative Proceeding No. 08012.007356/2010-27⁸³ (related to the market for measuring instruments in São José dos Campos/SP), CADE also established the wording to be published by the defendants, including the year of initiation of the investigation by CADE, the object of the investigation (including the information that it was a cartel investigation), information that the company was convicted, the practice that led to the conviction of the company and the fine to be disbursed by the company. In Administrative Proceeding No. 08012.007011/2006-97⁸⁴ (related to medical and hospital services in Fortaleza/CE), the wording suggested by CADE contained information on the conviction of the defendants, with their names, the object of the illicit act of which the company was convicted, information that the practice harmed direct clients, health plan operators and end customers, and a warning that any practices that have as an object or may result in harms to competition are subject to punishment by CADE.

Instead of the extract of the decision, CADE also ordered in at least in two cases that the companies publish the *acórdão* of the decision. This occurred in Administrative Proceedings Nos. 08012.004860/2000-01⁸⁵ (related to LPG retail in the Federal District) and 08012.006989/1997-43⁸⁶ (related to bus lines in Rio de Janeiro/RJ).

Still on the content to be published, CADE did not necessarily differentiate the content to be published by different defendants in administrative proceedings, which allows the interpretation that different defendants should publish the extract of CADE's decision in the same newspapers, which could lead to repeated or very similar contents published at the same time by different defendants. This happened, for example, in Administrative Proceeding No. 08012.009088/1999-48⁸⁷ (related to generic drugs) involving an alleged cartel of generic drugs. In that case, CADE determined that each defendant should publish a public note with an extract of the decision from CADE in the newspaper with the largest national circulation. In

⁸³ Id., Administrative Proceeding No. 08012.007356/2010-27, Reporting Commissioner Ana Frazão, decided on 25 March 2013.

⁸⁴ Id., Administrative Proceeding No. 08012.007356/2010-27, Reporting Commissioner Alexandre Cordeiro Macedo, decided on 19 April 2017.

⁸⁵ Id., Administrative Proceeding No. 08012.004860/2000-01, Reporting Commissioner Ricardo Villas Bôas Cueva, decided on 5 October 2004.

⁸⁶ Id., Administrative Proceeding No. 08012.006989/1997-43, Reporting Commissioner Luiz Alberto Esteves Scaloppe, decided on 15 June 2005.

⁸⁷ Id., Administrative Proceeding No. 08012.009088/1999-48, Reporting Commissioner Ricardo Villas Bôas Cueva, decided on 13 October 2005.

Administrative Proceeding No. 08012.011853/2008-13⁸⁸ (related to garbage management in Rio Grande do Sul), initiated to investigate alleged bid rigging related to garbage maintenance, CADE also stated emphatically that each company should publish the extract of the decision, but CADE allowed the publication to take place in one out of the three largest circulation printed newspapers in the State of Rio Grande do Sul, which would not necessarily lead to similar publications in the same newspaper.

3.1.1.2 Legal criterion related to the publication in a newspaper assigned in the decision

As mentioned above, the Brazilian Competition Act (both the current and the former one) provided for the publication in a newspaper assigned in the decision. The decisions examined in relation to the publication sanction demonstrated that CADE used to mention the name of a specific newspaper for the decision to be published by the defendants or mentioned requirements that the newspaper should meet to be chosen as the one in which the decision would be published.

It was mentioned that the newspaper should be the one with the largest circulation in a specific geographic region or gave options to the defendants (for example, mentioning that it should be published in one of the two or three largest circulation newspapers in the specific geographic region). For instance, in Administrative Proceeding No. 08012.009118/1998-26⁸⁹ (related to the renovation of a maritime platform), decided by CADE on 27 June 2001, CADE convicted companies Estaleiro Ilha S/A and Marítima Petróleo e Engenharia Ltda., determining the publication of CADE's decision in the newspaper of largest circulation in Rio de Janeiro. In Administrative Proceeding No. 08012.004860/2000-01 (related to LPG retail in the Federal District) regarding an alleged liquefied petroleum gas cartel in the city of São Sebastião in the Federal District in Brazil, CADE's Tribunal determined that the defendants should publish the decision in a newspaper of large circulation in the Federal District, without specifying that the newspaper should be the one with the largest circulation or the name of the newspaper. The case was decided in October 2004. CADE's Tribunal convicted certain airlines to a sentence that included publishing an extract of CADE's decision in one of the three largest printed

⁸⁸ Id., Administrative Proceeding No. 08012.011853/2008-13, Reporting Commissioner Eduardo Pontual Ribeiro, decided on 5 February 2014.

⁸⁹ Id., Administrative Proceeding No. 08012.009118/1998-26, Reporting Commissioner João Bosco Leopoldino da Fonseca, decided on 27 June 2001.

newspapers of national circulation in Brazil in Administrative Proceeding No. 08012.011027/2006-02 (related to air cargo services), decided on 2 September 2013.

Only in one decision was a criterion determined for the newspaper to be considered as a large circulation newspaper: in Administrative Proceeding No. 08012.011853/2008-13 (related to garbage management in Rio Grande do Sul) initiated to investigate alleged bid rigging related to garbage maintenance. CADE mentioned in the decision that the circulation of the newspapers should be certified by the Instituto Verificador de Comunicação – IVC (Communication Verifier Institute, in English) or by a similar entity. This reference was not identified in other decisions.

Another interesting case was Administrative Proceeding No. 08012.002097/1999-81⁹⁰ (related to newspaper sales in Rio de Janeiro), in which CADE decided to convict journalism companies in March 2005, determining the publication in the newspapers edited by those companies, without specifying a specific geographic dimension.

Modifications were identified in the adoption of this sanction in a case decided in 2014. The case was Administrative Proceeding No. 08012.001020/2003-21⁹¹ (related to the diagnostic medicine in Campina Grande/PB), in which certain hospitals and trade associations were convicted by CADE. CADE determined that the hospitals, for example, make available in the main page of their website the extract of the decision and determined that the hospitals disclose to the accredited health plan operators the content of the decision, by the means chosen by the defendants. Therefore, CADE allowed the publication on the website of the company and did not determine the publication in newspapers, as well as deciding that the companies release the decision to interested third parties in the decision, for example, the health plan operators in that case. No justification was identified in the decision for the sanction to be the publication on the website of the company instead of a newspaper.

After the case above, CADE continued to apply the sanction for publication in newspapers⁹², but also determined in other cases⁹³ the publication on the website of the companies⁹³, instead of newspapers.

⁹⁰ Id., Administrative Proceeding No. 08012.002097/1999-81, Reporting Commissioner Ricardo Villas Bôas Cueva, decided on 9 March 2005.

⁹¹ Id., Administrative Proceeding No. 08012.001020/2003-21, Reporting Commissioner Márcio de Oliveira Júnior, decided on 29 October 2014.

⁹² For example, Administrative Proceedings Nos. 08012.007356/2010-27, 08012.009885/2009-21, 08700.005326/2013-70 and 08012.007011/2006-97.

⁹³ For example, Administrative Proceedings Nos. 08012.010187/2004-64, 08012.012032/2007-13 and 08012.003893/2009-64.

In addition to the cases and criteria discussed above, it is also worth mentioning the decision handed down in Administrative Proceeding No. 08012.002812/2010-42⁹⁴ (related to recharges in prepaid mobile distribution), decided in 2018, in which CADE's Tribunal determined the wide disclosure of the decision by the defendants, including that the party forward the decision to potential interested parties, including clients. In this case, CADE did not specify how the defendants should disclose the decision and did not specify the name of the clients or interested parties that should be informed of the decision.

3.1.1.3 Legal criterion related to the size of the publication

Another criterion related to the publication sanction is the size of the publication. Both Competition Acts provided that the publication should occur in half a page, and this was determined by CADE in all cases with the publication sanction in newspapers examined against companies.

On the decisions related to the publication on websites, there was no indication in the decisions of minimum characters or criteria related to the size of the publication, except for the decisions that provided the exact content of the extract that should be published on the website.

3.1.1.4 Legal criterion providing that the publication costs should be incurred by the defendants

Both Competition Acts also provided that the costs of publishing the extract of the decision should be incurred by the defendants, without specifying how and if the costs should be divided between them. This was replicated in case law. For instance, CADE convicted certain companies in Administrative Proceeding No. 08012.009885/2009-21 (related to the market for sanitation services) in 2015 to publish the extract of the decision at their own expenses, without specifying if the sanction should be complied individually by each company and/or if the costs should be divided between the companies that were convicted.

However, two cases were identified with a provision from CADE on how the costs should be divided. The first case was Administrative Proceeding No. 08700.005326/2013-70⁹⁵ (related to port operations in Porto Alegre/RS) decided in 2015 by CADE's Tribunal. CADE

⁹⁴ CADE, Administrative Proceeding No. 08012.002812/2010-42, Reporting Commissioner Cristiane Alkmin Junqueira Schmidt, decided on 13 June 2018.

⁹⁵ Id., Administrative Proceeding No. 08700.005326/2013-70, Reporting Commissioner Alexandre Cordeiro Macedo, decided on 9 December 2015.

decided to apply the publication sanction to the defendants, mentioning that the costs of the publication should be proportional to the turnover of each defendant. It was not specified in the case if CADE would analyse the turnover of each company and then release the proportion that should be followed by the defendants and there was no reference to the year of the turnover information that would be considered for the purposes of the costs of publication. The second case was Administrative Proceeding No. 08012.007011/2006-97 (related to medical and hospital services in Fortaleza/CE) decided in 2017. In that case, CADE also applied the publication sanction to the defendants that were convicted and clarified that the costs of the publication should be divided equally between the defendants that were convicted.

3.1.1.5 Legal criterion related to the timing for the publication

Both Competition Acts (the current and the former one) also provided for the timing related to the publication sanction. The provision was that the publication should occur during two consecutive days within one to three consecutive weeks. In summary, the publication sanctions in printed newspapers identified were all within the timeframe of the three consecutive weeks established by law, except for the cases in which there was no reference to the timing of the sanction. For example, in Administrative Proceeding No. 08012.009118/1998-26 (related to the renovation of a maritime platform), CADE applied the publication sanction without mentioning any deadline in relation to the sanction: “*publish a news article on this decision, in half a page, in the newspaper of largest circulation in Rio de Janeiro*” (free translation from original). The sanction was applied in June 2001.

The timeframe for the publication sanction changed in relation to the determination from CADE for the defendants to publish the decision and/or an extract of the decision in their own websites. The cases referred to a term of 30 days and a term of 90 days; both are higher than the period of three consecutive weeks provided for by the Brazilian Competition Act. On the 30-day term, CADE determined in Administrative Proceeding No. 08012.010187/2004-64⁹⁶ (related to hospital services in Pouso Alegre/MG), decided in 2015, that certain hospitals should make the extract of the conviction decision available in their websites for 30 days. The same occurred in Administrative Proceeding No. 08012.012032/2007-13⁹⁷ (related to hemotherapy

⁹⁶ Id., Administrative Proceeding No. 08012.010187/2004-64, Reporting Commissioner Márcio de Oliveira Júnior, decided on 29 July 2015.

⁹⁷ Id., Administrative Proceeding No. 08012.012032/2007-13, Reporting Commissioner Márcio de Oliveira Júnior, decided on 16 September 2015.

services in Goiânia/GO), which was also decided in 2015. CADE also determined that the publication sanction stay on the website for 30 days. On the 90-day term, CADE applied the publication sanction in Administrative Proceeding No. 08012.003893/2009-64⁹⁸ (related to anaesthesiology services in the State of Rio Grande do Sul), decided in 2020. Based on the leading decision, the sanction applied was for the defendants to publish an extract of the decision on their websites for the minimum period of 90 days. There was no specific justification for this time period in the written decision.

3.1.1.6 Case law criterion: in which page/section of the newspaper the extract of the decision should be published

Another criterion for the application of the publication sanction was identified in case law, which was related to in which page or section of the newspaper the extract should be published. That criterion did not appear in all cases, but only in certain ones and will be addressed below.

CADE decided in Administrative Proceeding No. 08012.011853/2008-13 (related to garbage management in Rio Grande do Sul) in 2014 that the companies should publish an extract of the decision in the section of cities or economics or similar ones in one of the three largest newspapers in the State of Rio Grande do Sul. In Administrative Proceeding No. 53500.003888/2001⁹⁹ (related to cable TV in Blumenau/SC), CADE determined the publication in the first section of the newspaper with the largest circulation in the city of Blumenau/SC. In the first cartel conviction identified (Administrative Proceeding No. 08000.015337/1997-48¹⁰⁰ – related to flat steels), CADE also determined the publication in the first section of the newspaper with the largest circulation in the State of Brazil in which the defendants had their headquarters.

⁹⁸ Id., Administrative Proceeding No. 08012.003893/2009-64, Reporting Commissioner Lenisa Rodrigues Prado, decided on 26 August 2020.

⁹⁹ Id., Administrative Proceeding No. 53500.003888/2001, Reporting Commissioner Luís Fernando Rigato Vasconcellos, decided on 24 August 2005.

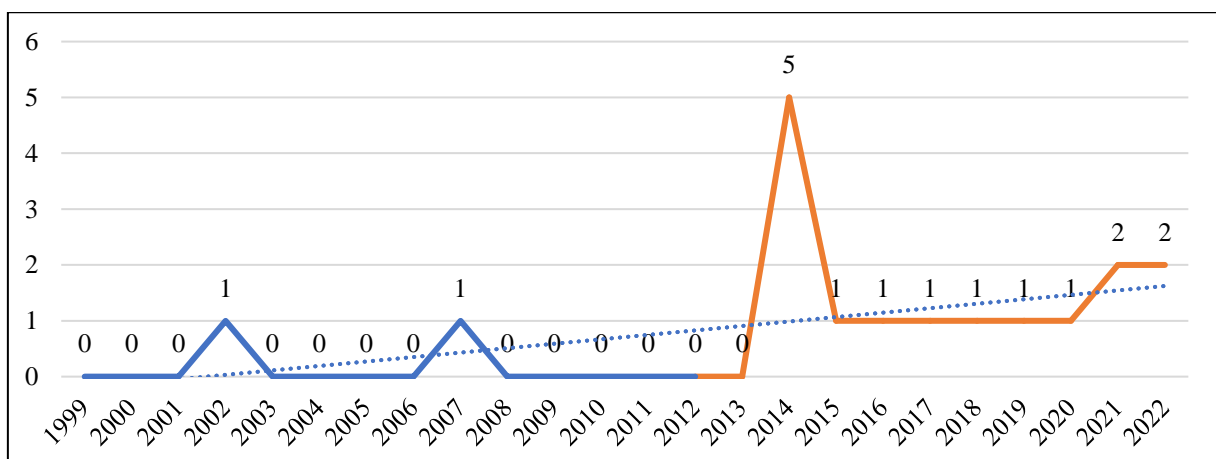
¹⁰⁰ Id., Administrative Proceeding No. 08000.015337/1997-48, Reporting Commissioner Ruy Santacruz, decided on 27 October 1999.

3.1.2 Prohibition to execute contracts with official financial institutions and prohibition to participate in tenders

The sanctions of prohibition to execute contracts with official financial institutions and to participate in tenders are provided for in item II, of Article 38, of the Brazilian Competition Act (item II, o Article 24, of the former Competition Act). The sanctions may be applied jointly or independently by CADE based on CADE's case law and on the legal wording itself, following the legal wording criteria: (a) prohibition to execute contracts with official financial institutions for the minimum term of 5 years; and (b) prohibition to participate in tenders that have as an object the acquisition, sale, provision of construction works and services, public services concession in relation to the federal, state, municipal and Federal District administration, and entities of the indirect administration also for the minimum term of 5 years. The sanctions will be referred to in this chapter as (a) prohibition to execute contracts with official financial institutions; and (b) prohibition to participate in tenders. Together, they will be referred to as sanctions related to prohibition to contract with the public administration.

These sanctions were the second ones with higher application by CADE in the cases examined. On the applicability of these sanctions in time, Graphic 6 below shows that, even though these sanctions already existed in the former Competition Act, they were more applied by CADE after the enactment of the current Competition Act.

Graphic 6 – Prohibition to execute contracts with official financial institutions and prohibition to participate in tenders applied over time against companies



Source: author

No huge change on how the sanction was applied over time was identified, when compared to the modifications to the publication sanction, but it possible to identify whether

CADE adopted certain criteria in relation to these sanctions and to conclude that they were not applied uniformly over time, as will be detailed below. The analysis below considers the following parameters of analysis for the scenarios in which the prohibition to execute contracts with official financial institutions and prohibition to participate in tenders sanctions were applied jointly or independently: if the object of the investigation was bid rigging; whether the sanction was applied to all defendants or only to certain defendants; the reasons for CADE to apply the sanction; the duration of the sanction and in relation to which public entities the sanction was applied.

3.1.2.1 Prohibition to execute agreements with official financial institutions

The sanction of prohibition to execute agreements with official financial institutions was applied by CADE's Tribunal without the prohibition to participate in tenders only in two cases, both decided in 2014.

The first case was Administrative Proceeding No. 08012.011853/2008-13 (related to garbage management in Rio Grande do Sul), which was initiated to investigate an alleged bid rigging regarding garbage maintenance in the State of Rio Grande do Sul. CADE determined that all companies that were convicted should be prohibited from executing agreements with official financial institutions for 5 years. No justification to apply this sanction was identified in the written decision from the case and the sanction was applied for 5 years. There was no reference to the names of the official financial institutions within the scope of the sanction or the geographic scope of the sanction.

The second case was Administrative Proceeding No. 08012.011142/2006-79¹⁰¹ (related to the cement and concrete markets), initiated by CADE to investigate an alleged cartel in the markets for cement and concrete in Brazil, and not related to bid rigging, based on the case files. In this case, CADE determined that only certain defendants convicted in the case were subject to the prohibition to execute agreements with official financial institutions. The leading Commissioner mentioned that the sanction was established with the goal to protect the Public Treasury from more damage and to prevent public resources from being used to sponsor anticompetitive practices. The sanction was applied starting from the date of the sale of the assets determined in the decision. The leading Commissioner also stated that the deadline was the sale date of the assets to ensure that the measure is effective and that the measure is not

¹⁰¹ Id., Administrative Proceeding No. 08012.011142/2006-79, Reporting Commissioner Alessandro Serafin Octaviani Luis, decided on 27 June 2014.

compensated for by public entity. No reason was identified for applying the sanction only to certain defendants convicted in the case.

3.1.2.2 Prohibition to execute agreements with official financial institutions and prohibition to participate in tenders

The prohibition to execute agreements with official financial institutions was applied with the sanction of prohibition to participate in tenders in four cases, decided in different years (2014, 2015, 2020 and 2021). All of them referred to bid rigging investigations. It is worth noting that four cases represent roughly 11% of the cases convicted due to bid rigging investigations (37 in total).

The first case was Administrative Proceeding No. 08012.006199/2009-07 (related to the market for construction materials in Lages/SC), initiated by CADE to investigate an alleged bid rigging related to construction materials in the city of Lages, in the State of Santa Catarina. CADE convicted three out of the five companies listed as defendants in the case and determined the sanction of prohibition to execute agreements with official financial institutions and prohibition to participate in tenders that had as an object the acquisition, sale and provision of construction works and services and public services concessions in all public entities (federal, state, municipal, and Federal District public administrations and the indirect administration). There was no specific justification or parameter mentioned in the leading written decision for CADE to apply both sanctions in the case. The sanctions were applied for a period of five years.

Another case was Administrative Proceeding No. 08012.010932/2007-18¹⁰² (related to marine hoses), initiated to investigate an alleged cartel related to marine hoses. The case did not have as a main object the investigation of fraud to tenders, but it was mentioned in the written decision that there was a geographic division for certain companies not to participate in tenders and, therefore, the case was considered in this study as a bid rigging investigation. In this case, CADE also applied sanctions against three companies that were convicted (out of eleven companies), without mentioning the justification or parameter for that. The sanction of prohibition to execute agreements with official financial institutions was applied with the prohibition “*to hire credit lines in which public resources are used, including the equalization*

¹⁰² Id., Administrative Proceeding No. 08012.010932/2007-18, Reporting Commissioner Márcio de Oliveira Júnior, decided on 25 February 2015.

of interest rates, made available by financial institutions”¹⁰³ for five years (free translation from original). The prohibition to participate in tender was also applied in relation to all public entities for five years.

The third case was Administrative Proceeding No. 08012.009732/2008-01¹⁰⁴ (related to the acquisition of mixed health units and dental health equipment), initiated by CADE to investigate an alleged bid rigging related to municipal tenders for the acquisition of mixed health unit (“UMS”) and dental health equipment. CADE applied the sanction of prohibition to execute agreements with official financial institutions for five years and the prohibition of the companies and individuals convicted to participate in tenders in relation to all public entities also for five years. The Reporting Commissioner mentioned in her written vote that CADE understands that it is appropriate to apply accessory measures in hardcore cartel cases involving public tenders but did not conduct any market research related to the relevance of the companies in tenders in Brazil and to the impacts of the sanctions applied in the decision.

The most recent case involving both sanctions of prohibition to execute agreements with official financial institutions and the prohibition to participate in tenders was Administrative Proceeding No. 08700.004455/2016-94¹⁰⁵ (related to the acquisition of school and office materials by city halls in the State of Pernambuco). CADE applied both the sanction of prohibition to execute agreements with official financial institutions and the sanction of prohibition to participate in tenders to all companies convicted by CADE in the case, for a period of five years. There was no reference to a methodology to justify applying those sanctions in the case and no information was provided on the impact of those sanctions in the case.

3.1.2.3 Prohibition to participate in tenders

In addition to the cases above, nine administrative proceedings were sanctioned with the application of the prohibition to participate in tenders by CADE. All of them referred to bid

¹⁰³ Original version: “*que sejam proibidas de contratar linhas de crédito em que haja o uso de recursos públicos, inclusive para a equalização da taxa de juros, disponibilizadas por instituições financeiras*”.

¹⁰⁴ Id., Administrative Proceeding No. 08012.009732/2008-01, Reporting Commissioner Paula Azevedo, decided on 9 December 2020.

¹⁰⁵ Id., Administrative Proceeding No. 08700.004455/2016-94, Reporting Commissioner Luiz Augusto Azevedo de Almeida Hoffmann, decided on 18 August 2021.

rigging cases. This number represents roughly 25% of the cases initiated by CADE to investigate bid rigging practices.

The sanction will be also examined considering the parameters above: if the object of the investigation was bid rigging; whether the sanction was applied to all defendants or only to certain defendants; the reasons for CADE to apply the sanction; the duration of the sanction and in relation to which public entities the sanction was applied.

As mentioned above, all cases referred to bid rigging investigations. On whether the sanction was applied to all defendants or only to certain defendants, cases were identified in which all companies convicted were subject to the prohibition to participate in tenders; in which the sanction was applied to third parties; in which the sanction was applied only in relation to certain companies convicted (not necessarily identified as leaders of the practices); and in which only the alleged leader of the practice was subject to the sanction.

In Administrative Proceeding No. 08012.008507/2004-16 (related to orthopedic prostheses), CADE applied the sanction in relation to all companies convicted. In Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors) mentioned above, in addition to applying the sanction to all companies convicted, CADE also applied the sanction to the companies in which any of the individuals convicted had any shares, even though those companies were not listed as defendants in the case. In Administrative Proceeding No. 08012.006130/2006-22 (related to building maintenance), related to an alleged cartel involving building maintenance, CADE convicted several companies, but only one company was subject to the sanction of prohibition to participate in tenders. The Reporting Commissioner, however, did not specify the reason for the sanction to be applied only in relation to that company or the methodology used to apply that sanction. CADE did not emphatically mention why the prohibition to participate in tenders was applied only to one company convicted in Administrative Proceeding No. 08700.004248/2019-82 (related to road equipment), nor did CADE mention the methodology adopted to justify that sanction.

On the application of the sanction to the alleged leaders of the practice, the following cases were identified. In Administrative Proceeding No. 08700.004617/2013-41 (related to the construction of meters) mentioned above related to the construction of meters, CADE applied the sanction only to the leader of the alleged cartel, mentioning that the company was also convicted by CADE in other alleged cartel cases involving tender procedures. In Administrative Proceeding No. 08012.008850/2008-94¹⁰⁶ (related to laundry in hospitals), also mentioned

¹⁰⁶ Id., Administrative Proceeding No. 08012.008850/2008-94, Reporting Commissioner Ana Frazão, decided on 3 February 2016.

above, CADE applied the sanction in relation to the alleged leader of the cartel, stating that its representatives and managers contacted the other participants to schedule meetings and proceed with agreements. In Administrative Proceeding No. 08012.006130/2006-22 (related to building maintenance) mentioned above, the Reporting Commissioner stated that the sanction should be applied against the leaders of the alleged cartel. The Reporting Commissioner identified that two out of the three leaders settled with CADE and then applied the sanction only in relation to the company that did not settle with CADE and was considered a co-leader of the practice.

On the reasons for CADE to apply the sanction, the following cases contained considerations on why the sanction of prohibition to participate in tenders was applied. In Administrative Proceeding No. 08012.009611/2008-51¹⁰⁷ (related to metal detector security doors), which was initiated to investigate an alleged bid rigging involving tenders from Banco do Brasil and Banrisul, CADE stated that the sanction was applied, considering that the alleged cartel affected several tenders, but there was no information on other criteria applied in relation to the sanction, for example, value of the tenders, relevance of the tenders or others. In Administrative Proceeding No. 08012.008507/2004-16 (related to orthopedic prostheses), the Reporting Commissioner stated that he was applying the sanction for deterrence purposes. This also happened in Administrative Proceeding No. 08012.006130/2006-22¹⁰⁸ (related to building maintenance), in which the Reporting Commissioner mentioned the deterrence purpose of the sanction and stated that the sanction prevented new tenders from being frauded. In Administrative Proceeding No. 08700.004617/2013-41 (related to the construction of meters) mentioned above, the Reporting Commissioner stressed that the sanction was applied due to the severity of the alleged cartel, the direct harms to the public administration and the indirect harms to the society. In addition, the sanction could not be applied against all or more companies considering the high concentration in the market, which could lead to the reduction of the number of companies able to participate in tenders.

In only one case, CADE provided detailed information on why the sanction was being applied and its potential effects on the market. In Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors), decided in 2015 by CADE's Tribunal, CADE applied the prohibition to participate in tenders sanction, mentioning that the sanction should be applied in relation to two criteria, the seriousness of the practice and

¹⁰⁷ Id., Administrative Proceeding No. 08012.009611/2008-51, Reporting Commissioner Gilvandro Vasconcelos Coelho de Araujo, decided on 15 December 2014.

¹⁰⁸ Id., Administrative Proceeding No. 08012.006130/2006-22, Reporting Commissioner Paulo Burnier da Silveira, decided on 16 August 2017.

the public interest. It was also mentioned that the sanction should be applied in a market with a high number of players that offer the product/service or in a market with low barriers to entry. Based on this, CADE conducted additional research to identify, for example, companies that entered and left the market in the period between 2006 and 2014; the geographic scope of the market; the analysis of barriers to entry; the structure of the market and the analysis of evidence to identify the leader of the alleged practice.

On timing related to the sanction of prohibition to participate in tenders, the law provides that the sanction may not be lower than five years. In fact, no sanction was identified with a deadline different from five years, but the reference to the period in the decisions was “five years” exactly (for example, Administrative Proceeding No. 08012.008507/2004-16¹⁰⁹ – related to orthopedic prostheses) or the reference to the fact that the sanction could not be lower than five years (for example, Administrative Proceeding No. 08700.004248/2019-82 - related to road equipment). In Administrative Proceeding No. 08700.007278/2015-17¹¹⁰ (related to coffee shop services in airports), initiated to investigate an alleged bid rigging involving tenders conducted by Infraero regarding the concession of areas for coffee shops in airports, CADE decided to apply the sanction of prohibition to participate in tenders to all companies convicted for five years. However, Infraero itself convicted the defendants and applied the prohibition to participate in tenders sanction for two years in the federal sphere. CADE, therefore, expressly mentioned that the five-year sanction could be reduced in relation to the period in which the Infraero sanction was in force.

Regarding the public entities included within the scope of the prohibition to participate in tenders sanction, that is, on whether the prohibition to participate in tenders sanction was applied in relation to tenders from all public entities provided in the Competition Act (both the current and the former one), that is, the federal, state, municipal and Federal District public administration and entities of the indirect public administration. All nine cases applied the prohibition to participate in tenders sanction in relation to all public entities provided in legal wording.

The scope of the sanction was also addressed in the cases. The legal wording provides that it refers to the prohibition to participate in tenders related to acquisition, sale, provision of construction works and services and public concession. In one case, Administrative Proceeding

¹⁰⁹ Id., Administrative Proceeding No. 08012.008507/2004-16, Reporting Commissioner Gilvandro Vasconcelos Coelho de Araújo, decided on 10 December 2014.

¹¹⁰ Id., Administrative Proceeding No. 08700.007278/2015-17, Reporting Commissioner Sérgio Costa Ravagnani, decided on 3 August 2022.

No. 08700.004617/2013-41¹¹¹ (related to the construction of meters), CADE specified that the prohibition was to participate either direct or indirectly in tenders. In Administrative Proceeding No. 08700.004248/2019-82¹¹² (related to road equipment), CADE specified that the sanction was related to the participation in tenders itself, but also related to the prohibition to execute agreements with the related public entities.

Also, on the scope of the sanction, CADE specified in certain cases (for example, Administrative Proceeding No. 08012.008850/2008-94 – related to laundry in hospitals) that the sanction was applied to tenders related to the object provided for in the legal wording, without specifying a specific restriction of product and/or service in connection with the tender. A similar situation occurred in Administrative Proceeding No. 08700.004248/2019-82 (related to road equipment), which was initiated to investigate an alleged cartel practice related to the leasing of contracts for road equipment that would have allegedly affected a tender procedure.

However, the object of the tender was limited in one case, in which the sanction was applied in relation to tenders regarding specific markets and/or products. The case was Administrative Proceeding No. 08700.004617/2013-41 (related to the construction of meters), initiated by CADE to investigate an alleged bid rigging related to the construction of meters. CADE applied the sanction of prohibition to participate in tenders but specified that the sanction be applied to tenders related to the supply or maintenance of undercarriages, auxiliary systems, and integrant parts, which was one of the markets related to the alleged practice.

3.1.3 National Register for Consumer Protection

Both Competition Acts (the current and the former one) provided for the possibility of CADE applying a sanction related to the registry of the defendant in the National Register for Consumer Protection. The case law identified in relation to this sanction only contained information on the application itself of the sanction, without mentioning the methodology, criteria, or effects of applying this sanction in relation to the defendants. The legal wording does not provide details on timing related to the sanction and no case was identified in which there was the inclusion of information by CADE related to the timing in which the sanction should be in force in relation to the defendants.

¹¹¹ Id., Administrative Proceeding No. 08700.004617/2013-41, Reporting Commissioner João Paulo de Resende, decided on 8 July 2019.

¹¹² Id., Administrative Proceeding No. 08700.004248/2019-82, Reporting Commissioner Lenisa Rodrigues Prado, decided on 5 October 2022.

3.1.4 Divestitures

Both Competition Acts (the current and the former one) provided for the possibility of CADE applying the company divestment sanction. The sanction provides for four possibilities in relation to the divestment of companies: the split of the company; the transfer of corporate control; the sale of assets; or the partial ceasing of corporate activity.

For the entire period under review, only one administrative proceeding with cartel conviction was decided by CADE with the company divestment sanction: Administrative Proceeding No. 08012.011142/2006-79 (related to the cement and concrete markets), decided by CADE's Tribunal in 2014.

This Administrative Proceeding was already mentioned above in relation to other non-pecuniary sanctions and was related to the investigation of an alleged cement and concrete cartel. In this case, CADE applied the sanction of sale of assets, which took place through the following means: (a) sanction to all companies convicted to sell 20% of the assets related to the provision of concrete services. Those assets should be sold in relevant markets in which there was more than one concrete company owned or under possession by the companies convicted; (b) the sale of all shares, whether or not minorities, in companies active in the market for cement or in the provision of concrete services; and (c) the uncrossing of any shares between the companies convicted in the markets for cement or provision of concrete services, directly or through minority shares in other companies that do not belong to the economic groups of the companies convicted.

The leading decision on these sanctions was handed down by the former Commissioner Márcio de Oliveira Júnior, who justified the structural sanctions as follows, in summary. The former Commissioner stated that the alleged practice was corroborated by corporate structures of the companies in the market. For example, it was supposedly demonstrated in the case files that the defendants were able to dominate the strategies of competitors through the ownership of minority shares in those competitors. The minority shares would have as one goal the sharing of sensitive information between the companies. The former Commissioner stated that the share crossing is like minority shares, in order to increase the transparency and reduce rivalry in the market. In addition, it was also stated that the conduct was related to inhibiting new entries and to controlling the distribution chain.

3.1.5 Other sanctions not defined by the competition law

Both the current and the former Competition Acts provided for the possibility of CADE applying sanctions not specifically mentioned in the legal provisions related to non-pecuniary sanctions in order to eliminate harmful effects to competition resulting from the practice convicted. Based on the methodology applied in this study, thirteen administrative proceedings identified in which there was the application of other non-pecuniary sanctions to companies. In practice, it was identified that the sanctions were complementary to the main sanctions applied in relation to the practice based on case law and that they can be divided in two main categories for companies: behavioural sanctions directly related to ceasing the practice; and structural sanctions related to the transactions of the companies involved¹¹³.

3.1.5.1 Behavioural sanction: ceasing the practice

The first category of other non-pecuniary sanctions is ceasing the practice, with the determination from CADE for the companies to refrain from conducting certain behaviours. This was the most common category of other non-pecuniary sanctions.

In Administrative Proceeding No. 08012.000677/1999-70¹¹⁴ (related to air passenger transportation), CADE ordered airlines that were convicted to no longer fix or disclose to competitors the parallel reduction of discounts and price readjustment. A similar sanction was applied in Administrative Proceeding No. 08012.004860/2000-01 (related to LPG retail in the Federal District), in which CADE ordered the companies to no longer agree on prices to resell LPG gas 13 kg. In Administrative Proceeding No. 08012.004086/2000-21¹¹⁵ (related to steel rebar), CADE determined that the companies refrain from dividing the market, through price fixing to distributors and direct buyers; from adopting retaliatory measures against distributors that have chosen an alternative supply of its storage in the international market; and that those abstentions take place before the publication of the extract of the decision.

¹¹³ The definition of behavioural or structural sanction follows the definitions of behavioural or structural remedies provided in CADE's Guidelines of Antitrust Remedies (in Portuguese, *Guia de Remédios Antitruste*), that is: "In general, they can be classified as structural or behavioural remedies. Structural remedies regard complete divestiture of assets, whereas behavioural remedies regard commercial activities without required divestiture of assets". Id., Guide to Antitrust Remedies. 2018.

¹¹⁴ Id., Administrative Proceeding No. 08012.000677/1999-70, Reporting Commissioner Thompson Andrade, decided on 15 September 2004.

¹¹⁵ Id., Administrative Proceeding No. 08012.004086/2000-21, Reporting Commissioner Luiz Alberto Esteves Scaloppe, decided on 23 September 2005.

In the health sector, in Administrative Proceedings Nos. 08012.001020/2003-21 (related to the diagnostic medicine in Campina Grande/PB), 08012.000377/2004-73 (related to the market for hospital services in Bahia), 08012.010187/2004-64 (related to hospital services in Pouso Alegre/MG), 08012.012032/2007-13 (related to hemotherapy services in Goiânia/GO) and 08012.003893/2009-64 (related to anaesthesiology services in the State of Rio Grande do Sul), CADE ordered the defendants to refrain from establishing price tables and/or promoting collective negotiations aiming to standardize prices and/or conditions or provision of medical services; refrain from promoting boycott, collective paralysation of attending beneficiaries of health plan or collective loss of accreditation. In Administrative Proceeding No. 08012.003893/2009-64 (related to anaesthesiology services in the State of Rio Grande do Sul), it was also determined that the legal entities refrain from creating obstacles to the direct and individual negotiation of fees between doctors/hospitals and health plan operators. Also related to the health sector, in Administrative Proceeding No. 08012.005004/2004-99¹¹⁶ (related to hemotherapy services in Vitória/ES), CADE also ordered the companies to refrain from collectively negotiating prices for hemotherapy services; as well from practicing any other conduct that leads to the control of free pricing or that results in the adoption of uniform commercial practices.

In Administrative Proceeding No. 08012.006764/2010-61¹¹⁷ (related to automotive license plates in Salvador/BA), CADE determined that the defendants cease the practice immediately and that they refrain from drafting, negotiating and/or disclosing any suggested price tables between associates or not, as well as any other means that could lead to the control of free pricing or that results in the standardization of commercial practices. It was also determined that the defendants refrain from dividing the market of manufacturing cards and signs in the way it was done inside an association convicted in the case.

In Administrative Proceeding No. 08012.011791/2010-56¹¹⁸ (related to driving school services in Santa Bárbara/SP), CADE also determined several measures related to ceasing the practice. The measures included deleting the system of control of enrolment that was created by one driving school; and that the driving schools cease any communication between

¹¹⁶ Id., Administrative Proceeding No. 08012.005004/2004-99, Reporting Commissioner Ana Frazão, decided on 10 December 2014.

¹¹⁷ Id., Administrative Proceeding No. 08012.006764/2010-61, Reporting Commissioner Ana Frazão, decided on 11 February 2015.

¹¹⁸ Id., Administrative Proceeding No. 08012.011791/2010-56, Reporting Commissioner Márcio de Oliveira Júnior, decided on 3 February 2016.

themselves related to commercially sensitive information, such as prices, discount policies, profit margins, and areas of activity and payment conditions.

3.3.5.2 Structural sanction: transactions

There were also structural sanctions. Specifically, they were applied to companies involving transactions and whether they should occur and/or should be notified before or after CADE's decision in the related administrative proceeding.

In Administrative Proceeding No. 53500.003888/2001 (related to cable TV in Blumenau/SC), CADE ordered the companies to notify a concentration act before CADE. In Administrative Proceeding No. 08012.011142/2006-79 (related to the cement and concrete markets), CADE determined the prohibition of conducting any structural transaction in the concrete market by any means for five years; the obligation to report to CADE any transaction conducted in the cement and concrete sectors for five years; prohibition to conduct any greenfield association by any means in the cement, concrete and slag sectors for five years.

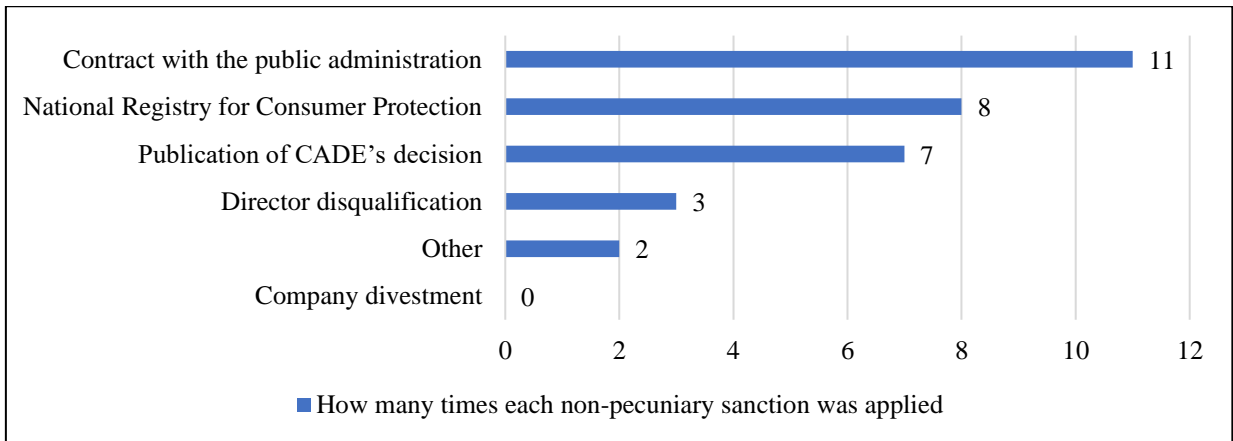
Following the analysis above on non-pecuniary sanctions applied against companies, the next chapter will be dedicated to the analysis of non-pecuniary sanctions applied against individuals.

3.2 NON-PECUNIARY SANCTIONS AGAINST INDIVIDUALS

As mentioned above, companies are the main subject of non-pecuniary sanctions applied by CADE over time. Convictions of individuals with the application of non-pecuniary sanctions were identified in 23 cases (roughly 38% of the cases with non-pecuniary sanctions applied), which represent roughly 28% of the alleged cartel cases convicted by CADE with individuals listed as defendants. Cases with individuals listed as defendants (85 cases) represent roughly 71% of the overall quantity of 120 cases examined in this study.

As will be detailed below, CADE applied non-pecuniary sanctions to individuals even before the enactment of Law No. 12,529/2011 and the results related to the analysis of this study are summarized in Graphic 7 below:

Graphic 7 – Types of non-pecuniary sanctions applied against individuals

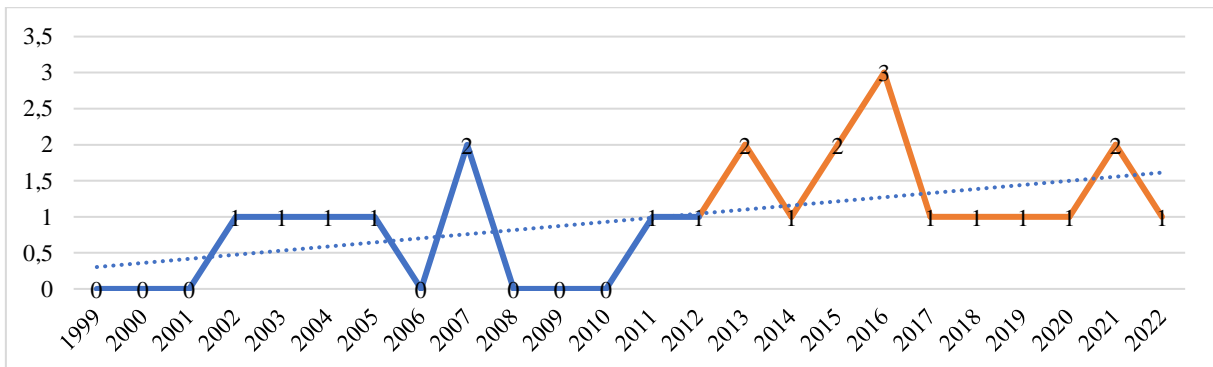


Source: author

As shown in Graphic 7 above, unlike the non-pecuniary sanctions applied against companies, the non-pecuniary sanctions applied against individuals by CADE were: prohibition to participate in tenders or execute contracts with official financial institutions (11 cases – roughly 19% of the cases with non-pecuniary sanctions); sanction to register the name of the defendant in the National Register for Consumer Protection (8 cases – roughly 14%); publication of CADE’s decision (7 cases – roughly 12%); director disqualification (3 cases – roughly 5%); and “other” sanctions (2 cases – roughly 4%).

For comparative purposes related to the application of non-pecuniary sanctions against individuals over time by CADE, Graphic 8 below provides information on the findings, that is, that non-pecuniary sanctions against individuals continue to be applied by CADE and has been more frequently applied after the enactment of Law No. 12,529/2011:

Graphic 8 – Non-pecuniary sanctions applied against individuals by CADE per year



Source: author

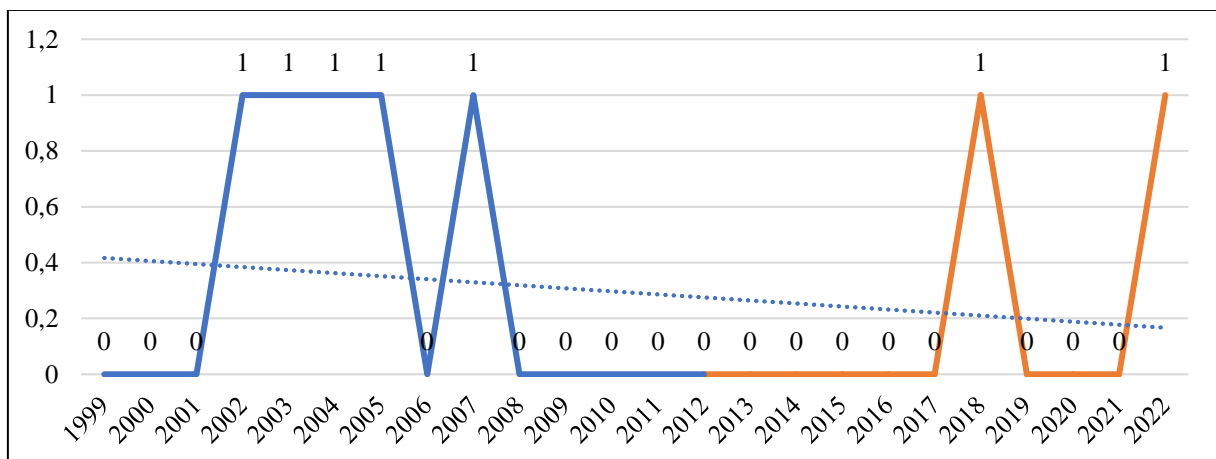
Considering the results above, it will be conducted a detailed analysis of the non-pecuniary sanctions applied against individuals by CADE in the cartel cases will be analysed in the following subchapters.

3.2.1 Publication of CADE’s decision: a sanction with lower incidence against individuals after the new Competition Act

Unlike the scenario for companies, the sanction of publication of CADE’s decision was not the main non-pecuniary sanction applied against individuals by CADE in cartel convictions, but rather the third most applied sanction. In terms of application of the publication sanction over time, Graphic 9 below shows that the publication sanction has been less applied after the entry into force of the current Competition Act from a quantitative standpoint.

It is worth noting that the publication sanction was not applied specifically against certain individuals in the cases examined, but rather in the package of sanctions applied against the defendants convicted, which, therefore, was extended to individuals.

Graphic 9 – Non-pecuniary sanction of publication applied over time against individuals



Source: author

As mentioned above in relation to companies, both Competition Acts (the current and the former one) provided the following criteria for the adoption of this non-pecuniary sanction by CADE: (a) publication of an extract of CADE’s decision; (b) publication in a newspaper assigned in the decision; (c) size of the publication (half a page of a newspaper); (d) costs would be incurred by the defendants; and (e) the timing for the publication to take place (two consecutive days within one to three consecutive weeks).

In the cases against companies, CADE also adopted in certain cases the definition of on which page or section of the newspaper the extract of the decision should be published. This, however, was not identified in the cases against individuals. For this reason, there will be no specific topic on this below. Unlike the sanction applied to companies, the publication sanction applied to individuals did not involve publication on websites and was solely related to publication in newspapers. Also, for this reason, publication on websites will not be addressed below.

Similarly to the sanctions applied to companies, in general, no standard was identified in relation to the non-pecuniary sanction of publication and when/how CADE would adopt a specific strategy in relation to the adoption of this sanction against individuals.

The following topics will examine CADE's decisions in relation to the criteria described above provided by both Competition Acts (the current and the former one).

3.2.1.1 Legal criterion related to what should be published as part of the sanction

Similarly to the decisions related to companies, the sanctions applied against individuals related to the publication of the extract of CADE's decision did not provide an universal definition for what "extract" means: if it was a summary of the decision, the *ementa*, the *acórdão*, or the decision itself. "Extract" had different definitions in the case law, as explained below.

In Administrative Proceedings Nos. 08012.004860/2000-01 (related to LPG retail in the Federal District) and 08012.009160/2002-67¹¹⁹ (related to LPG retail in Paranaíba/PR), CADE clarified that the extract of CADE's decision should be published (*acórdão*). A similar decision was handed down in Administrative Proceeding No. 08012.007602/2003-11¹²⁰ (related to changing taximeters in Porto Alegre/RS), in which CADE stated that the extract of the decision should reproduce the abstract of the decision (*ementa* and *acórdão*).

One case was identified in which CADE determined criteria to be adopted by the defendants in the drafting of the wording to be published. In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), CADE clarified that the extract of the decision to be published should not contain any allusion or opinion on the

¹¹⁹ CADE, Administrative Proceeding No. 08012.009160/2002-67, Reporting Commissioner Luiz Alberto Esteves Scaloppe, decided on 6 April 2005.

¹²⁰ CADE, Administrative Proceeding No. 08012.007602/2003-11, Reporting Commissioner Abraham Benzaquen Sicsú, decided on 17 January 2007.

decision, on the defendants or on CADE and should contain the names of the defendants. CADE also ordered that the text to be published should be previously presented for CADE approval.

3.2.1.2 Legal criterion related to the publication in a newspaper assigned in the decision

Regarding the publication in a newspaper assigned in the decision, the decisions examined in relation to the publication sanction also demonstrated that CADE used to mention the name of a specific newspaper for the decision to be published by the defendants or mentioned requirements that the newspaper should meet to be chosen as the one in which the decision would be published.

For example, it was mentioned that the newspaper should be the one with the largest circulation in a specific geographic region or gave options to the defendants. In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), CADE convicted certain individuals and determined that all of them publish CADE's decision in the daily newspaper of largest circulation in Florianópolis/SC. In Administrative Proceeding No. 08012.004036/2001-24 (related to fuel retail in Lages/SC), CADE determined that the decision should be published in the daily newspaper of largest circulation in Lages/SC. In Administrative Proceeding No. 08012.004860/2000-01 (related to LPG retail in the Federal District), CADE ordered that the publication should occur not in the largest circulation newspaper, but in a newspaper with large circulation in the Federal District. This also occurred in Administrative Proceeding No. 08012.009160/2002-67 (related to LPG retail in Paranaíba/PR), in which CADE determined that the publication should occur in a newspaper of large circulation in Paranaíba/PR. In Administrative Proceeding No. 08012.007602/2003-11 (related to changing taximeters in Porto Alegre/RS), CADE stated that the publication should occur in one out of the two daily newspapers with the largest circulation in the State of Rio Grande do Sul.

No decision was identified no decision with a criterion for the newspaper to be considered of large circulation or not.

In only one case, CADE determined that the publication should occur in a specific newspaper called "O Paraná" (Administrative Proceeding No. 08700.007278/2015-17 - related to coffee shop services in airports).

In addition to the cases above, it is also worth mentioning the decision handed down in Administrative Proceeding No. 08012.002812/2010-42 (related to recharges in prepaid mobile distribution), decided in 2018, in which CADE's Tribunal determined the wide disclosure of

the decision by the defendants, including the determination for the decision to be forwarded to potentially interested parties, including clients. In this case, CADE did not specify how the defendants should disclose the decision and did not specify the name of the clients or interested parties that should be informed of the decision.

3.2.1.3 Legal criterion related to the size of the publication

Another criterion related to the publication sanction is the size of the publication. Both Competition Acts stated that the publication should occur in half a page, and this was the determination from CADE in all cases with the publication sanction in newspapers examined against individuals.

3.2.1.4 Legal criterion providing that the publication costs would be incurred by the defendants

Both Competition Acts also provided that the costs of publishing the extract of the decision should be incurred by the defendants, without specifying how and if the costs should be divided between them. This was also replicated in the case law against individuals.

In one case, CADE determined that the publication should occur at the expense of each individual, which would suggest that each defendant convicted should publish the extract of the decision. This occurred in Administrative Proceeding No. 08012.004036/2001-24 (related to fuel retail in Lages/SC), in which CADE stated that the publication should occur at the expense of each defendant. Thus, such a decision would suggest that several news articles with the same or very similar information should be published by each defendant within the same timeframe.

In other cases, CADE did not mention how the costs should be disbursed (for example, equally or proportionally be each defendant). For instance, CADE convicted certain companies, individuals and trade associations in Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC) in 2002 to publish an extract of the decision at their own expenses, without specifying if the sanction should be complied individually by each defendant and/or if the costs should be divided between the defendants that were convicted in relation to only one joint publication by them. This was also suggested by the wording from Administrative Proceedings Nos. 08012.004860/2000-01 (related to LPG retail in the Federal District) and 08012.009160/2002-67 (related to LPG retail in Paranavaí/PR), in which CADE stated that the defendants should publish at their expenses and without prejudice of the fines applied by CADE. In Administrative Proceeding No. 08012.007602/2003-11 (related to

changing taximeters in Porto Alegre/RS), CADE only stated that the publication should occur at the expense of the defendants.

Therefore, no case against individuals specified how the publication costs should be divided between the defendants.

3.2.1.5 Legal criterion related to the timing for the publication

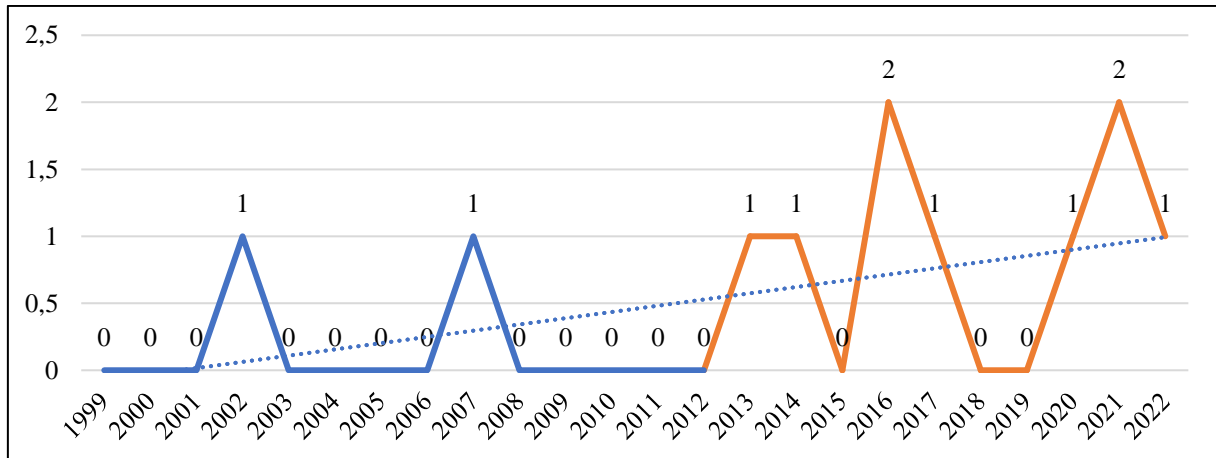
Both Competition Acts (the current and the former one) also provided for the timing related to the publication sanction. The provision was that the publication should occur during two consecutive days within one to three consecutive weeks. In summary, the publication sanctions in printed newspapers identified were all within the timeframe of three consecutive weeks established by law, except for Administrative Proceeding No. 08012.004036/2001-24 (related to fuel retail in Lages/SC), in which CADE determined that the publication should occur in two consecutive days within the deadline of 30 days counted from the publication of CADE's decision.

3.2.2 Prohibition to execute contracts with official financial institutions and prohibition to participate in tenders

As mentioned above, there were 11 cases applying the prohibition to contract with the public administration sanction against individuals, a number higher than the 9 cases identified against companies. Similarly to what happened to companies, the prohibition to contract with the public administration sanction was applied by the prohibition to execute agreements with official financial institutions and the prohibition to participate in tenders jointly or separately.

Also, similarly to the sanction applied to companies, the prohibition to contract with the public administration was applied against individuals even before the current Competition Act, but it is mostly applied since the entry into force of the current Competition Act, based on Graphic 10 below.

Graphic 10 – Prohibition to execute contracts with official financial institutions and prohibition to participate in tenders applied over time against individuals



Source: author

The sanction against individuals will be also examined in relation to the following parameters of analysis for the scenarios in which the prohibition to execute contracts with official financial institutions and the prohibition to participate in tenders sanctions were applied jointly or independently: if the object of the investigation was bid rigging; whether the sanction was applied to all defendants or only to certain defendants; the reasons for CADE to apply the sanction; duration of the sanction and in relation to which public entities the sanction was applied.

3.2.2.1 Prohibition to execute agreements with official financial institutions

The sanction of prohibition to execute agreements with official financial institutions was applied without the prohibition to participate in tenders only in one case against individuals, decided in 2017 by CADE's Tribunal. This case was Administrative Proceeding No. 08012.009382/2010-90¹²¹ (related to tenders for construction services in Curitiba/PR), in which CADE decided to apply the prohibition to execute agreements with official financial institutions in a case involving bid rigging and the sanction was applied to all individuals convicted in the case. There was no specific justification for this in the written decision of the Reporting Commissioner in that case. The period for the sanction was not expressly provided in the written decision of the case nor was the name of the official financial institutions listed.

¹²¹ CADE, Administrative Proceeding No. 08012.009382/2010-90, Reporting Commissioner Gilvandro Vasconcelos Coelho de Araújo, decided on 7 June 2017.

3.2.2.2 Prohibition to execute agreements with official financial institutions and prohibition to participate in tenders

The prohibition to execute agreements with official financial institutions was applied with the sanction of prohibition to participate in tenders in 5 cases, decided in different years (2002, 2007, 2013, 2020 and 2021).

Considering the parameters of analysis mentioned above, the first criterion of analysis is whether the cases referred to bid rigging investigations. Unlike the cases related to companies, in which all of them referred to bid rigging investigations for the sanctions to be applied together, 3 out of the 5 proceedings referred to bid rigging investigations in relation to individuals.

On the defendants that were subject to the sanction of prohibition to contract with the public administration, cases were identified in which all individuals convicted were subject to the sanction and other cases were identified in which the sanction was applied only in relation to key individuals. On the sanction applied to all individuals, this took place, for example, in Administrative Proceedings Nos. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC) and 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul). On the sanction applied to only certain individuals convicted, CADE decided to convict one individual only in Administrative Proceeding No. 08012.001003/2000-41 (related to fuel retail in Londrina/PR) with the sanction of executing agreements with official financial institutions and prohibition to participate in tenders, in view of his central role in the practice.

Regarding the reasons for CADE to apply the sanction, the following cases contained considerations on why the sanction of prohibition to participate in tenders was applied. In Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), CADE applied the sanctions in relation to all individuals convicted and clarified that it was due to the seriousness of the practices and based on the general public interest of qualified entities to execute agreements with official financial institutions and to participate in tenders. In Administrative Proceeding No. 08012.001003/2000-41 (related to fuel retail in Londrina/PR), CADE clarified that the sanctions were being applied due to a central role of the individual convicted with those sanctions. In Administrative Proceeding No. 08012.009732/2008-01 (related to the acquisition of mixed health units and dental health equipment), CADE stated that accessory penalties were being applied in hardcore cartels involving bid rigging, in view of deterrence. In Administrative

Proceeding No. 08700.004455/2016-94 (related to the acquisition of school and office materials by city halls in the State of Pernambuco), CADE mentioned that it would follow the recommendation from the MPF (Public Prosecutor's Office) to apply the sanctions. MPF's legal opinion does not clarify the reasons to recommend the sanctions.

The effects of the sanction in the market were also considered in Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), in which CADE clarified that the sanction would not affect the surveillance market in Rio Grande do Sul, considering that several other companies would be able to provide that service.

On timing related to the sanction of prohibition to contract with the public administration, the legal wording provides that the sanction may not be lower than five years. In fact, no sanction was identified with a deadline different from five years. In Administrative Proceedings Nos. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), 08012.009732/2008-01 (related to the acquisition of mixed health units and dental health equipment) and 08700.004455/2016-94 (related to the acquisition of school and office materials by city halls in the State of Pernambuco), CADE specified that the sanction would be applied for five years. In Administrative Proceeding No. 08012.001003/2000-41¹²² (related to fuel retail in Londrina/PR), CADE stated that the sanction would be applied for a period not lower than five years.

On the entities in relation to which the defendants should not execute agreements: in relation to the sanction of prohibition to execute agreements with official financial institutions, all cases referred to official financial institutions only in relation to the prohibition of defendants receiving credits or loans from them. CADE did not mention the name of the official financial institutions. For the sanction related to the prohibition to participate in tenders, the sanction was applied to tenders from the federal, state, municipal and Federal District public administration and entities of the indirect public administration, as provided for in the law.

For completeness, the scope of the prohibition to participate in tender sanction was also addressed in the cases. The legal wording refers to prohibition to participate in tenders involving acquisitions, sales, construction work, services and public services concession. In all cases, CADE specified that the sanction was applied in relation to that object provided by law. In Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private

¹²² CADE, Administrative Proceeding No. 08012.001003/2000-41, Reporting Commissioner Ana Frazão, decided on 6 March 2013.

surveillance in Rio Grande do Sul), CADE specified that, considering that the alleged practice involved several means to frustrate the tender, the sanction also involved the prohibition to participate in processes involving a waiver or a lack of requirements for a tender, including emergency contracts and the prohibition to extend public contracts counting from the publication of the decision. One case was also identified in which the sanction was applied in relation to tenders in specific markets and/or products. In Administrative Proceeding No. 08012.002299/2000-18¹²³ (related to fuel retail in Florianópolis/SC), CADE specified that the sanction of prohibition to participate in tender was applied in relation to tenders related to the market of retail commerce of oil derivatives and fuels.

Based on the above, the sanctions of prohibition to execute agreements with official financial institutions and prohibitions to participate in tenders were applied without a uniform methodology, pre-defined criteria or specific rationale in the cases above.

3.2.2.3 Prohibition to participate in tenders

The sanction prohibiting participation in tenders was applied only in five cases against individuals. The sanction will be also examined considering the five parameters mentioned above.

On the object of the administrative proceedings, similarly to the sanctions applied against companies, all those cases referred to bid rigging cases. Regarding the defendants that were subject to the sanction of prohibition to participate in tenders, cases were identified in which all individuals were sentenced to this sanction and in which the sanction was applied only in relation to certain individuals. On sanctions applied to all individuals, in Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors), CADE applied the sanction to any companies in which any of the individuals convicted had any type of shares, without specifying the names of the companies.

On sanctions applied only in relation to certain individuals convicted, in Administrative Proceeding No. 08012.008821/2008-22 (related to the manufacturing of antiretroviral drugs), CADE applied the sanction only in relation to two out of four of the individuals convicted, without specifying the reasons to apply the sanction only in relation to them and clarified that the sanction was applied to the individuals and to any companies in which they were partners or representatives in fact or by law. In Administrative Proceeding No. 08012.008850/2008-94

¹²³ Id., Administrative Proceeding No. 08012.002299/2000-18, Reporting Commissioner Afonso Arinos de Mello Franco Neto, decided on 27 March 2002.

(related to laundry in hospitals), CADE applied the sanction only to certain individuals related to the company that supposedly were the leaders of the alleged practice and specified that the sanction prohibited the individuals directly and was extended to any other individuals or legal entities under their influence.

On the reasons for CADE to apply the sanction, the following cases contained considerations on why the sanction of prohibition to participate in tenders was applied. As mentioned above, in Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors), which was initiated to investigate an alleged bid rigging involving tenders from Banco do Brasil and Banrisul, CADE stated that the sanction was applied, considering that the alleged cartel affected several tenders, but there was no information on other criteria applied in relation to the sanction. In Administrative Proceeding No. 008012.010022/2008-16 (related to outsourcing of school lunches in the State of São Paulo), it was stated that the pecuniary sanctions would not be sufficient for deterrence and, therefore, non-pecuniary sanctions would be applied, without specifying how the non-pecuniary sanctions would reach the deterrence purposes of their effects.

In two cases, CADE also mentioned certain considerations related to the effects of the application of the prohibition to participate in tenders sanction. In Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors) mentioned above, decided in 2015 by CADE's Tribunal, CADE applied the prohibition to participate in tenders sanction, mentioning that the sanction should be applied in relation to two criteria, the seriousness of the practice and the public interest. It was also mentioned that the sanction should be applied in a market with a high number of players that offer the product/service or in a market with low barriers to entry. Based on this, CADE conducted additional research to identify, for example, companies that entered and left the market in the period between 2006 and 2014; the geographic scope of the market; the analysis of barriers to entry; the structure of the market and analysis of evidence to identify the leader of the alleged practice. In Administrative Proceeding No. 08012.008850/2008-94 (related to laundry in hospitals), CADE stated that the sanction would allow the market to have new opportunities of sales, through a run of shares accommodation, which could result in dispute and rivalry.

On timing related to the sanction of prohibition to participate in tenders, the legal wording provides that the sanction may not be lower than five years. In fact, no sanction was identified with a deadline different from five years. In Administrative Proceedings Nos. 08012.009611/2008-51 (related to metal detector security doors), 08012.008850/2008-94

(related to laundry in hospitals), 08012.010022/2008-16¹²⁴ (related to outsourcing of school lunches in the State of São Paulo) and 08700.007278/2015-17 (related to coffee shop services in airports), CADE clarified that the sanction would be applied for five years. In Administrative Proceeding No. 08700.007278/2015-17 (related to coffee shop services in airports), initiated to investigate an alleged bid rigging involving tenders from Infraero regarding the concession of areas for coffee shops in airports, CADE decided to apply the sanction of prohibition to participate in tenders to all individuals convicted for five years. However, Infraero itself convicted the defendants and applied the prohibition to participate in tenders sanction for two years. CADE, therefore, expressly mentioned that the five-year sanction could be reduced in relation to the period in which the Infraero sanction was in force. In Administrative Proceeding No. 08012.008821/2008-22 (related to the manufacturing of antiretroviral drugs), CADE stated that the sanction should not be applied for a period lower than five years.

On the public entities that conducted the tenders in relation to which the defendants should not participate in, all five cases referred to the prohibition of participating in tenders in the federal, state, municipal and Federal District public administration and entities of the indirect public administration, as provided for in the law.

As previously mentioned, the legal wording also states that the tenders subject to the sanction were those involving acquisitions, sales, construction work, services and public services concession. Almost all cases reproduced the legal wording for the prohibition of participating in tenders. The exception was Administrative Proceeding No. 08012.008821/2008-22¹²⁵ (related to the manufacturing of antiretroviral drugs), in which CADE only stated that the prohibition was related to executing agreements with the public administration, without specifying that this was in the context of tenders involving acquisitions, sales, construction work, services and public services concession. Still regarding the object of the tender, CADE did not limit the scope of the tenders for specific markets and/or products in the cases related to individuals.

Based on the above, the sanction of prohibition to participate in tenders was applied without a uniform methodology, pre-defined criteria or specific rationale in the cases above against individuals.

¹²⁴ CADE, Administrative Proceeding No. 08012.010022/2008-16, Reporting Commissioner Paula Azevedo, decided on 14 April 2021.

¹²⁵ CADE, Administrative Proceeding No. 08012.008821/2008-22, Reporting Commissioner Gilvandro Vasconcelos Coelho de Araújo, decided on 20 January 2016.

3.2.3 National Register for Consumer Protection

Both Competition Acts (the current and the former one) provided for the possibility of CADE applying a sanction related to the registry of the defendant before the National Register for Consumer Protection. The law does not provide details on the timing related to the sanction, for example. The case law identified in relation to this sanction only contained information on the application itself of the sanction, without mentioning the methodology, criteria or effects of applying this sanction in relation to the defendants. No case that contained information related to the timing in which the sanction should be in force was identified.

Although there was no specific methodology or uniform reason to apply this sanction, in Administrative Proceeding No. 08012.010022/2008-16 (related to outsourcing of school lunches in the State of São Paulo), CADE stated that the pecuniary sanctions would not be sufficient for deterrence in the case and, therefore, non-pecuniary sanctions in general would be applied, without specifying how the non-pecuniary sanctions would reach their deterrence purposes.

3.2.4 Director disqualification

The current Competition Act provides for the director disqualification sanction, which inhibits individuals from exercising commerce on his/her own name or as representative of legal entity for a deadline of up to five years. The director disqualification sanction was applied in three cases, all of them referred to bid rigging investigations by CADE. The sanctions were applied in 2019, 2020 and 2021.

In Administrative Proceeding No. 08012.004280/2012-40¹²⁶ (related to tenders for IT services in the Federal District), CADE decided to apply the director disqualification only in relation to one individual in the case for five years. The justification to apply the sanction only in relation to her was that she participated actively and permanently in the alleged practice. It is worth noting that the individual convicted with this sanction was not listed as manager of the company and that other individuals were sentenced to pay a fine as managers of companies.

In Administrative Proceeding No. 08012.009732/2008-01 (related to the acquisition of mixed health units and dental health equipment), CADE applied the sanction of prohibition to exercise commerce on his/her own name or as a representative of a legal entity for five years to

¹²⁶ CADE, Administrative Proceeding No. 08012.004280/2012-40, Reporting Commissioner Mauricio Oscar Bandeira Maia, decided on 30 October 2019.

all individuals convicted. This was justified by the fact that CADE was applying accessory penalties in hardcore cartels involving bid rigging, in view of deterrence.

In Administrative Proceeding No. 08700.004455/2016-94 (related to the acquisition of school and office materials by city halls in the State of Pernambuco), CADE decided to apply the sanction of prohibition of all individuals convicted of exercising commerce on his/her name or as representative of a legal entity also for five years. The sanction was applied to ensure that the prohibition to execute agreements with the public administration was not breached by the individuals, considering that in the alleged cartel the individuals supposedly created sham companies and modified the corporate object and names of the legal entities in order to implement the practice.

3.2.5 Other sanctions not defined by the competition law

Only two sanctions classified as “other” non-pecuniary sanctions were identified in the cases examined against individuals. Both were related to determinations regarding ceasing the practice convicted. The first was Administrative Proceeding No. 08012.004860/2000-01 (related to LPG retail in the Federal District), in which CADE ordered the defendants, including individuals, to no longer agree on prices to resell LPG gas 13 kg. In Administrative Proceeding No. 08012.006764/2010-61 (related to automotive license plates in Salvador/BA), CADE determined that the defendants ceased the practice immediately and that they refrain from drafting, negotiating and/or disclosing any suggested price tables between associates or not, as well as any other mean that could lead to the control of free pricing or that results in the standardization of commercial practices; and refrain from dividing the market of manufactures of cards and signs in the way in which it was done inside an association.

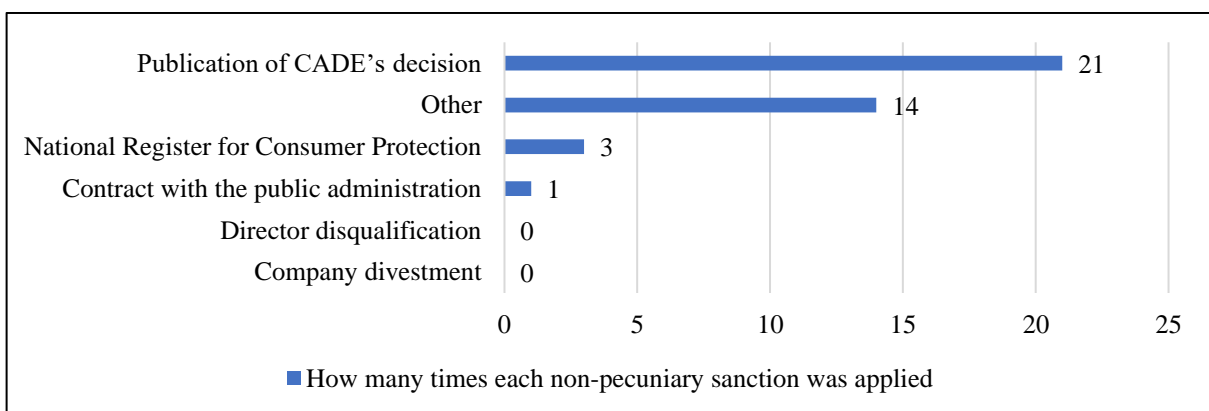
3.3 NON-PECUNIARY SANCTIONS AGAINST TRADE ASSOCIATIONS

Non-pecuniary sanctions were also applied by CADE against trade associations. The quantity of administrative proceedings with non-pecuniary sanctions against trade associations is the same number of administrative proceedings with non-pecuniary sanctions against individuals (23 cases - roughly 38% of the cases with non-pecuniary sanctions applied). The quantity of administrative proceedings convicted due to cartel practices with trade associations listed as defendants are lower than the cases with individuals listed as defendants, that is, 46 cases out of the 120 administrative proceedings analysed herein refer to cases with trade

associations listed as defendants. The cases with non-pecuniary sanctions represent 50% of those 46 cases, that is a number higher than the quantity of cases involving individuals *versus* cases with non-pecuniary sanctions applied against individuals. This could mean that it is more common for a collective entity to be convicted with non-pecuniary sanctions than for individuals to receive this type of conviction.

Graphic 11 below summarizes the information identified in relation to the types of non-pecuniary sanctions applied by CADE against trade associations in cartel cases:

Graphic 11 – Types of non-pecuniary sanctions applied against trade associations

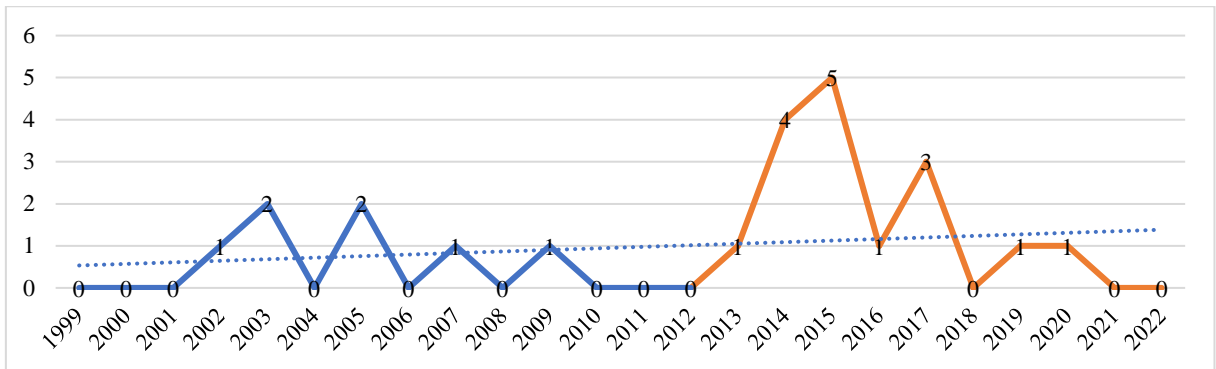


Source: author

Considering the information in Graphic 11 above, it is possible to identify that the main types of non-pecuniary sanctions are different from the non-pecuniary sanctions applied against companies and individuals. The non-pecuniary sanctions applied against trade associations by CADE were: publication of CADE's decision (21 cases – roughly 35% of the cases with non-pecuniary sanctions); “other” sanctions (14 cases – roughly 23%); sanction to register the name of the defendant in the National Register for Consumer Protection (3 cases – roughly 5%); and prohibition to participate in tenders or execute contracts with official financial institutions (1 case – roughly 2%).

The following graphic was also prepared in order to provide information on the application of non-pecuniary sanctions against trade associations over time by CADE, showing that, in general, non-pecuniary sanctions are mostly applied by CADE since the enactment of Law No. 12,529/2011:

Graphic 12 – Non-pecuniary sanctions applied against trade associations by CADE per year



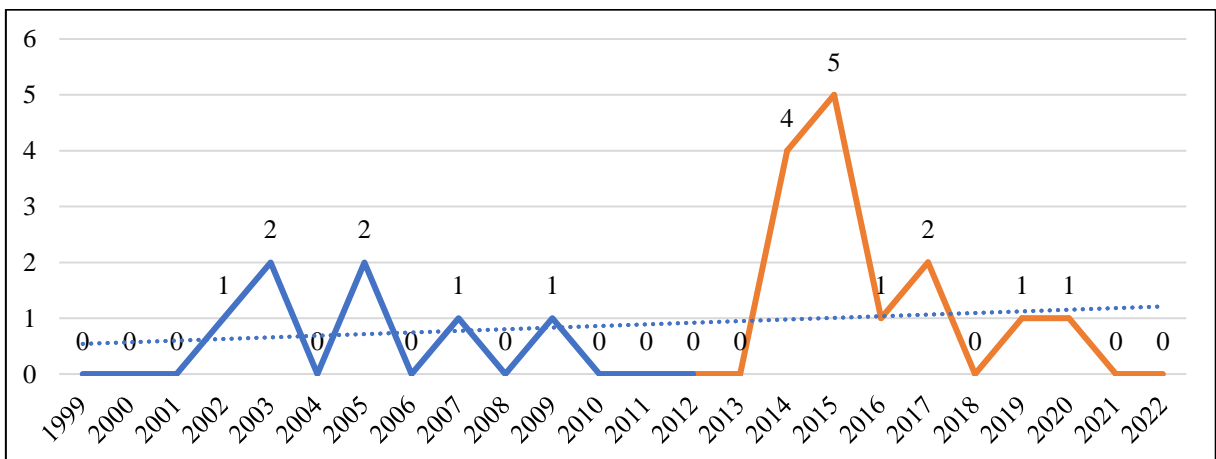
Source: author

Considering the results above, a detailed analysis of the non-pecuniary sanction applied against trade associations by CADE will be conducted in the cartel cases analysed herein.

3.3.1 Publication of CADE’s decision: much like to the application of this sanction against companies, a structure under modification

The sanction of publication of CADE’s decision is the main non-pecuniary sanction applied against companies by CADE in cartel convictions. The same applied to trade associations. In terms of application of the publication sanction over time, Graphic 13 below shows that the publication sanction has been still applied since the entry in force of the current Competition Act from a quantitative standpoint, but with differences on its merits that will be further detailed below, also in a similar way to the differences identified for the sanctions applied to companies.

Graphic 13 – Non-pecuniary sanction of publication applied over time against trade associations



Source: author

Both Competition Acts (the current and the former one) provided the following criteria for the adoption of this non-pecuniary sanction by CADE: (a) publication of an extract of CADE's decision; (b) publication in a newspaper assigned in the decision; (c) size of the publication (half a page of a newspaper); (d) costs would be incurred by the defendants; and (e) the timing for the publication to take place (two consecutive days within one to three consecutive weeks). As will be detailed in the following topics, even though it is not a legal criterion, CADE also adopted in certain cases the definition of on which page or section of the newspaper the extract of the decision should be published. In general, no standard was identified related to the non-pecuniary sanction of publication and when/how CADE would adopt a specific strategy in relation to the adoption of this sanction.

The following topics will examine CADE's decisions in relation to the criteria described above provided by both Competition Acts (the current and the former one).

3.3.1.1 Legal criterion related to what should be published as part of the sanction

Even though there were more decisions convicting trade associations with the publication sanction when compared to the quantity of decisions against companies and against individuals, it is possible to conclude that CADE did not apply a uniform definition for the extract to be published by the trade associations.

Several cases were identified with CADE providing comments and/or establishing the wording to be published as an extract by the trade associations. In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), CADE clarified that the extract of the decision to be published should not contain any allusion or opinion on the decision, on the defendants or on CADE and should contain the names of the defendants. CADE also ordered that the text to be published should be previously presented for CADE approval.

In Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), CADE provided the wording for the excerpt to be published by the trade associations, including information on the number of the administrative proceeding, on the existence of bid rigging and with information on the sanctions applied by CADE. In Administrative Proceeding No. 08012.006241/1997-03 (related to the market for the retail sale of medicines in the Federal District), CADE also provided the wording to be published by the collective entity, including the number of the administrative proceeding, the

date of the conviction, the reason why the collective entity was convicted and the penalties applied against the collective entity.

Likewise, in Administrative Proceeding No. 08012.006764/2010-61 (related to automotive license plates in Salvador/BA), CADE also ordered that the collective entity convicted publish a specific wording provided by CADE on the website of the collective entity, with information on the year of the initiation of the administrative proceeding, information on the practice that was under investigation and the penalties applied to the collective entity. In Administrative Proceeding No. 08700.005326/2013-70 (related to port operations in Porto Alegre/RS), CADE determined the wording that should be published, including information on fines applied, the practices under investigation and a warning from CADE that any actions in the market that may result in harms to competition may be punished by CADE. In Administrative Proceeding No. 08012.011791/2010-56 (related to driving school services in Santa Bárbara/SP), CADE ordered that the trade association convicted disclosed the content of the decision to its affiliates, mentioning that the trade association would refrain from drafting or disclosing price tables, in addition to avoiding any practice that aims at establishing uniform prices for the services provided by its associates. CADE also kept in force a preventive measure applied against the trade association ordering the publication of a note on its website related to the fact that the prices charged should be defined by each driving school, without price tables or instructions.

Also on the parameters included by CADE in the wording to be published by the defendants, in Administrative Proceeding No. 08012.002874/2004-14 (related to medical services in the State of Mato Grosso do Sul), CADE included the following information in the wording to be published by the trade associations: the practice under investigation, how the practice harmed competition; a warning from CADE that practices that may harm competition may be punished by CADE; and a statement that doctors are free to choose how much to charge for their services. In Administrative Proceeding No. 08012.007011/2006-97 (related to medical and hospital services in Fortaleza/CE), CADE included the following in the wording to be published by the defendants: the name of the entities convicted, the practice convicted, a warning that any practice that may harm competition may be punished by CADE and a statement that each service provider must negotiate prices with clients independently. In Administrative Proceeding No. 08700.010769/2014-64 (related to the market for fuel retail in Belo Horizonte/MG), CADE determined that a trade union included information in the extract to be published that the trade union settled with CADE.

3.3.1.2 Legal criterion related to the publication in a newspaper assigned in the decision

On the publication in a newspaper assigned in the decision, the decisions examined in relation to the publication sanction demonstrated that CADE used to mention the name of a specific newspaper for the decision to be published by the defendants or mentioned requirements that the newspaper should meet to be chosen as the one in which the decision would be published.

For example, it was mentioned that the newspaper should be the one with the largest circulation in a specific geographic region. In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), CADE convicted a collective entity and determined that it published CADE's decision in the daily newspaper of largest circulation in Florianópolis. In Administrative Proceeding No. 08012.004036/2001-24¹²⁷ (related to fuel retail in Lages/SC), CADE determined that the decision should be published in the daily newspaper of largest circulation in Lages/SC. In Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), CADE determined that the three trade associations convicted publish a specific text provided by CADE in the daily newspaper of largest circulation in the State of Rio Grande do Sul. In Administrative Proceeding No. 08012.007011/2006-97 (related to medical and hospital services in Fortaleza/CE), CADE determined that the publication should occur in the newspaper with the largest circulation in the State of Ceará. In Administrative Proceeding No. 08012.009987/1998-13¹²⁸ (related to medical services in the State of Sergipe), CADE ordered that the publication should occur in the two newspapers with the largest circulation in the State of Sergipe.

In other cases, CADE gave alternatives to the defendants convicted. In Administrative Proceeding No. 08012.002127/2002-14¹²⁹ (related to crushed stone), CADE ordered that the publication should be published in one out of the two newspapers with the largest circulation in the state of São Paulo. In Administrative Proceeding No. 08012.006241/1997-03 (related to the market for the retail sale of medicines in the Federal District), CADE determined that the decision should be published by the collective entity convicted in the largest newspaper of

¹²⁷ CADE, Administrative Proceeding No. 08012.004036/2001-24, Reporting Commissioner Thompson Andrade, decided on 23 July 2003.

¹²⁸ CADE, Administrative Proceeding No. 08012.009987/1998-13, Reporting Commissioner Thompson Andrade, decided on 18 February 2004.

¹²⁹ Id., Administrative Proceeding No. 08012.002127/2002-14, Reporting Commissioner Luiz Carlos Delorme Prado, decided on 13 July 2005.

national circulation that was interesting for the category or in the newspaper with the largest circulation in the Federal District. In Administrative Proceeding No. 08700.005326/2013-70 (related to port operations in Porto Alegre/RS), CADE determined that the defendants convicted publish the extract of the decision in one out of three newspapers with the largest circulation in Brazil or, alternatively, that the publication be made in the newspapers with the largest circulation in the port sector in printed and digital versions. A similar decision was handed down in Administrative Proceeding No. 08012.002874/2004-14¹³⁰ (related to medical services in the State of Mato Grosso do Sul), in which CADE determined that the publication should occur in the newspaper with the largest circulation in the State of Mato Grosso do Sul or alternatively, in the newspaper with the largest circulation in the health sector in the State of Rio Grande do Sul in printed and digital versions, in addition to the publication on the website of the defendants.

Unlike the other cases, one administrative proceeding was identified with CADE determining that trade associations publish in a specific newspaper. This occurred in Administrative Proceeding No. 08012.011142/2006-79 (related to the cement and concrete markets), in which CADE determined that each collective entity convicted should publish an extract of CADE's decision in the following newspapers: Folha de São Paulo, O Globo, O Estado de São Paulo, Zero Hora, Estado de Minas, Valor Econômico, Correio Braziliense, Jornal do Comércio e Diário do Pará.

In another case, CADE decided to convict journalism companies in March 2005, and determined the publication in the newspapers edited by those companies, without specifying a specific geographic dimension. However, the collective entity (*Sindicato das Empresas Proprietárias de Jornais e Revistas do Município do Rio de Janeiro*) was also convicted with the publication sanction under the same wording for the companies. Therefore, based on the decision, it was not clear in which newspaper the publication should occur for the collective entity (Administrative Proceeding No. 08012.002097/1999-81 - related to newspaper sales in Rio de Janeiro).

No uniform and/or specific reason was identified for CADE to adopt any of the strategies above related to where the extract of CADE's decision should be published.

Following the same path of the sanction applied against companies, a case decided in 2014 allowed the publication to occur on the website of the defendants only. The case was Administrative Proceeding No. 08012.001020/2003-21 (related to the diagnostic medicine in

¹³⁰ Id., Administrative Proceeding No. 08012.002874/2004-14, Reporting Commissioner Alexandre Cordeiro, decided on 1st February 2017.

Campina Grande/PB), in which certain hospitals and trade associations were convicted by CADE. CADE determined that trade associations, for example, make available in the main page of their website the extract of the decision and determined that the trade associations disclose to their affiliates the content of the decision, by the means chosen by the defendants. Therefore, CADE allowed the publication on the website of the trade associations and not only determined the publication in newspapers but also determined that the trade associations release the decision to third interested parties in the decision. No justification was identified in the decision for the sanction to be the publication on the website of the company instead of a newspaper. CADE also determined the publication on the website of the trade associations and the disclosure to their affiliates in Administrative Proceedings Nos. 08012.000377/2004-73 (related to the market for hospital services in Bahia), 08012.006764/2010-61 (related to automotive license plates in Salvador/BA), 08012.003893/2009-64 (related to anaesthesiology services in the State of Rio Grande do Sul), 08012.010187/2004-64 (related to hospital services in Pouso Alegre/MG) and 08012.012032/2007-13 (related to hemotherapy services in Goiânia/GO). For one trade association related to the health sector in Administrative Proceeding No. 08012.012032/2007-13 (related to hemotherapy services in Goiânia/GO), CADE also determined that the extract of the decision was also disclosed in each unit of attendance to the public for 30 days.

An interesting case related to the publication sanction was Administrative Proceeding No. 08700.010769/2014-64 (related to the market for fuel retail in Belo Horizonte/MG), in which CADE applied the publication sanction to a trade union that had settled with CADE. CADE determined that the trade union published in its website the result of the judgement of the administrative proceeding, including the information that the trade union settled with CADE, considering the relevance of the trade union in the region.

In addition to the publication on websites, the following was identified in relation to communication of the decision to associates or affiliates: CADE stated in Administrative Proceeding No. 08012.009987/1998-13 (related to medical services in the State of Sergipe) that the collective entity convicted should send a note to associates and affiliates with the entire content of CADE's decision, without specifying a specific period for the collective entity to comply with the order. In Administrative Proceeding No. 08012.001794/2004-33¹³¹ (related to the sale and maintenance of fire extinguishers in the Federal District), CADE did not determine the publication in a newspaper, but stated that the collective entity convicted should

¹³¹ CADE, Administrative Proceeding No. 08012.001794/2004-33, Reporting Commissioner Ricardo Machado Ruiz, decided on 5 February 2014.

communicate the decision to its associates, through any internal communication medium not specified by CADE. In Administrative Proceeding No. 08012.001020/2003-21 (related to the diagnostic medicine in Campina Grande/PB), CADE determined that trade associations disclose to their affiliates/associates the content of the decision, through a communication outlet chosen by the defendants, also not specified by CADE. The same occurred in Administrative Proceedings No. 08012.005004/2004-99 (related to hemotherapy services in Vitória/ES), 08012.000377/2004-73 (related to the market for hospital services in Bahia), 08012.006764/2010-61 (related to automotive license plates in Salvador/BA), 08012.010187/2004-64 (related to hospital services in Pouso Alegre/MG), 08012.012032/2007-13 (related to hemotherapy services in Goiânia/GO) and 08012.011791/2010-56 (related to driving school services in Santa Bárbara/SP).

3.3.1.3 Legal criterion related to the size of the publication

Another criterion related to the publication sanction is the size of the publication. Both Competition Acts stated that the publication should occur in half a page, and this was what CADE established in almost all cases with the publication sanction in newspapers examined against trade associations, except for in two cases. In Administrative Proceeding No. 08012.009987/1998-13 (related to medical services in the State of Sergipe), CADE did not specify the size of the publication, but stated that the collective entity should publish the entire content of CADE's decision. In Administrative Proceeding No. 08012.002097/1999-81 (related to newspaper sales in Rio de Janeiro), CADE stated that the publication should appear on a page of the respective newspapers of the defendants, without specifying the size of the publication.

The determination of the size of the publication was not identified in cases involving disclosing the decision on the website or in communications to be made by the trade associations.

3.3.1.4 Legal criterion providing that the publication costs would be incurred by the defendants

Both Competition Acts also provided that the costs of publishing the extract of the decision should be incurred by the defendants, without specifying how and if the costs should be divided between them. This was replicated in the case law for trade associations.

In certain cases, CADE stated that the publication should occur at the expense of each defendant, which suggested that each defendant should publish the extract independently. This could lead to several news articles with the same or very similar information being published by each defendant within the same timeframe. In Administrative Proceeding No. 08012.004036/2001-24 (related to fuel retail in Lages/SC), CADE stated that the publication should occur at the expense of each defendant. The same occurred in Administrative Proceeding No. 08012.011142/2006-79 (related to the cement and concrete markets), in which CADE determined that each collective entity convicted should publish the extract of CADE's decision in several newspapers within the same timeframe. CADE convicted certain companies, individuals and trade associations in Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC) in 2002 to publish the extract of the decision at their own expenses, without specifying if costs should be divided between the defendants that were convicted. The same occurred in Administrative Proceeding No. 08012.002097/1999-81 (related to newspaper sales in Rio de Janeiro).

Other decisions were identified with the determination that the costs should be divided. In Administrative Proceeding No. 08700.005326/2013-70 (related to port operations in Porto Alegre/RS), CADE stated that the publication costs should be proportional to the turnover of each defendant. In Administrative Proceeding No. 08012.002874/2004-14 (related to medical services in the State of Mato Grosso do Sul), CADE determined that the publication should occur at the expenses of the two trade associations convicted proportionally to the turnover of each one of them. In Administrative Proceeding No. 08012.007011/2006-97 (related to medical and hospital services in Fortaleza/CE), CADE determined that the publication costs should be disbursed equally by each defendant convicted. In Administrative Proceeding No. 08012.001826/2003-10 (related to the market for private surveillance in Rio Grande do Sul), CADE determined that the three trade associations should be jointly convicted with the publication sanction and stated that the costs with the publication should be incurred by the three entities. It was not clear from the decisions which year would be considered for the purposes of identification of turnover.

In one case, CADE stated that the publication should be paid by the collective entity convicted in the case (Administrative Proceeding No. 08012.002127/2002-14 - related to crushed stone).

3.3.1.5 Legal criterion related to the timing for the publication

Both Competition Acts (the current and the former one) also provided for the timing related to the publication sanction. The provision was that the publication should occur during two consecutive days within one to three consecutive weeks. In summary, the publication sanction in printed newspapers identified were almost all within the timeframe of three consecutive weeks established by law, except in the following cases. In Administrative Proceedings Nos. 08012.009987/1998-13 (related to medical services in the State of Sergipe), CADE did not establish the duration of the sanction. In Administrative Proceedings Nos. 08700.005326/2013-70 (related to port operations in Porto Alegre/RS) and 08012.002874/2004-14 (related to medical services in the State of Mato Grosso do Sul), even though the main option of publication given to the defendants was within the 3 consecutive weeks parameter, the alternative publication was determined to occur in three consecutive monthly editions.

On publication on websites, the sanction to publish the extract of the decision on the website of the trade associations was for a period of 90 days (for example, Administrative Proceeding No. 08012.003893/2009-64 (related to anaesthesiology services in the State of Rio Grande do Sul)). No specific timeline was identified for the sanction related to communication to the associates or affiliates of trade associations.

3.3.1.6 Case law criterion: which page/section of the newspaper the extract of the decision should be published

Another criterion was identified in case law for the application of the publication sanction, which was related to on which page or section of the newspaper the extract should be published. This criterion was identified only in one conviction that applied the publication sanction against trade associations, which was Administrative Proceeding No. 08012.006241/1997-03 (related to the market for the retail sale of medicines in the Federal District). In this case, CADE determined that the extract could be alternatively published in the

newspaper with the largest circulation in the Federal District, in half a page of the economy chapter.

3.3.2 Prohibition to execute contracts with official financial institutions and prohibition to participate in tenders

The sanctions of prohibition to execute contracts with official financial institutions and to participate in tenders are provided for in item II, of Article 38, of the Brazilian Competition Act (item II, o Article 24, of the former Competition Act). Only one case was identified against trade associations involving only the prohibition to execute contracts with official financial institutions, without the prohibition to participate in tenders. Specifically in Administrative Proceeding No. 08012.009382/2010-90 (related to tenders for construction services in Curitiba/PR), which was a case investigating an alleged bid rigging practice, CADE decided to apply the prohibition to execute agreements with official financial institutions to the only collective entity convicted in the case. There was no specific justification for this in the written decision of the Reporting Commissioner in that case nor did it include information on the names of the official financial institutions. There was no explicit definition of the deadline for the sanction to be in force in the written decision.

3.3.3 National Register for Consumer Protection

Both Competition Acts (the current and the former one) provided for the possibility of CADE applying a sanction related to the registry of the defendant before the National Register for Consumer Protection. The case law identified in relation to this sanction only contained information on the application itself of the sanction, without mentioning the methodology, criteria, or effects of applying this sanction in relation to the defendants. The legal wording does not provide details on timing related to the sanction, for example, and no case was identified in which there was the inclusion of information by CADE related to the timing in which the sanction should be in force in relation to the defendants.

3.3.4 Other sanctions not defined by the competition law

Both the current and the former Competition Acts provide(d) for the possibility of CADE applying sanctions not specifically provided for in the articles of non-pecuniary

sanctions in order to eliminate harmful effects to competition resulting from the practice convicted. Based on the methodology applied in this research, fourteen administrative proceedings were identified in which there was the application of other non-pecuniary sanctions to trade associations. In practice, it was identified that the sanctions were complementary to the main sanctions applied in relation to the practice based on case law and could be divided in two main categories for trade associations: behavioural sanctions directly related to ceasing the practice; and behavioural sanctions related to the adoption of a new behaviour by the trade associations. No structural sanction was identified against trade associations.

3.3.4.1 Ceasing the practice

The first category of other non-pecuniary sanction is ceasing the practice, with the determination from CADE ordering trade associations to refrain from certain behaviours. This was the most common category of other non-pecuniary sanctions, both for companies and trade associations.

In Administrative Proceeding No. 08012.003745/2010-83¹³² (related to copyright and related rights), CADE ordered that the defendants cease the practice of the joint and unified fixation of values for public execution of musical, literary-musical and phonogram works. CADE mentioned that those prices and decisions should occur in the associations, considering that negotiations of prices and product were made by each association. CADE also established that it is prohibited to discuss prices in general meetings and to promote price tables by the association ECAD (*Escritório de Arrecadação e Distribuição*), which is managed by other associations. In Administrative Proceeding No. 08012.001794/2004-33 (related to the sale and maintenance of fire extinguishers in the Federal District), CADE determined that the trade association convicted remove from its bylaws, and from any other instrument to be released by the association, any conditions related to price or that may lead to the standardization of the market with the exclusion of competitors.

In Administrative Proceeding No. 08012.011142/2006-79 (related to the cement and concrete markets), CADE determined that the trade associations could not gather information from the cement and concrete markets three months prior to the facts and release that data to the public in a deadline lower than three months after collecting the data. The data should necessarily be published in an aggregated way. Even though it was a recommendation and not

¹³² CADE, Administrative Proceeding No. 08012.003745/2010-83, Reporting Commissioner Elvino de Carvalho Mendonça, decided on 20 March 2013.

a sanction specifically, CADE also recommended that the trade associations should not include in their management boards any individual suggested by the legal entities convicted in the case nor should they include individuals with any relationship in the last five years with the legal entities convicted in the case files.

In Administrative Proceeding No. 08012.006764/2010-61 (related to automotive license plates in Salvador/BA), CADE determined that the defendants cease the practice immediately and that they refrain from drafting, negotiating and/or disclosing any suggested price tables between associates or third parties, as well as any other means that could lead to the control of free pricing or that could result in the standardization of commercial practices and refrain from dividing the market of card and sign manufacturing in the way in which it was done inside an association (APL). CADE also determined that the trade association should refrain from negotiating the acquisition of cards and signs in the name of its associates.

In Administrative Proceeding No. 08012.011791/2010-56 (related to driving school services in Santa Bárbara/SP), CADE also determined several measures related to ceasing of the practice. CADE determined that a trade association cease the utilization of a system of enrolment control, which could, exceptionally, be used to conduct the random quantitative division of health exams and psychological evaluations, so that the system was deleted or adapted; that a trade association cease drafting or editing price tables and remove from its website any price table; and that the trade association cease drafting or releasing of price tables of the services provided by driving schools and/or brokers; and to avoid any practices that aim at establishing uniform prices to the services provided by its associates.

In the health sector, which was the sector with the largest quantity of other non-pecuniary sanctions identified against trade associations, CADE determined several types of behavioural sanctions. In Administrative Proceeding No. 08012.009987/1998-13 (related to medical services in the State of Sergipe), CADE determined that a trade association should refrain from drafting or releasing price tables or any other information on the price of medical and hospital services between its associates or influence them in any way that could lead to the standardization of the practice between providers of those services that competed among them. In Administrative Proceeding No. 08012.006241/1997-03 (related to the market for the retail sale of medicines in the Federal District), a trade association related to the pharmacy sector was prohibited from drafting or distributing price lists that did not have a promotional purpose and those lists could not contain more than 50 products.

In Administrative Proceeding No. 08012.001020/2003-21 (related to the diagnostic medicine in Campina Grande/PB), CADE ordered the defendants to refrain from establishing

price tables and/or promoting collective negotiations aiming to standardize prices and/or conditions or provision of medical services; refrain from promoting boycott, collective paralysation of attending beneficiaries of health plan or collective loss of accreditation; and refrain from inhibiting or creating obstacles for the direct and individual negotiation of fees between hospitals and health plan operators or between hospitals and doctors. This was also applicable in Administrative Proceedings Nos. 08012.000377/2004-73 (related to the market for hospital services in Bahia), 08012.010187/2004-64 (related to hospital services in Pouso Alegre/MG), 08012.012032/2007-13 (related to hemotherapy services in Goiânia/GO) and 08012.003893/2009-64 (related to anaesthesiology services in the State of Rio Grande do Sul).

Also related to the health sector, in Administrative Proceeding No. 08012.005004/2004-99 (related to hemotherapy services in Vitória/ES), CADE ordered the trade associations to refrain from collectively negotiating prices of their affiliates and from drafting, releasing and/or negotiating any suggestive price tables between affiliates or not, as well from practicing any other conduct that could lead to the control of prices or result in the standardization of commercial conditions; refrain from inhibiting direct and individual negotiation of hemotherapy services to their affiliates; refrain from promoting boycott, collective paralysation of attending beneficiaries of health plan or collective loss of accreditation; and refrain from launching investigations, disciplinary administrative proceedings or using any other means to punish, threaten, compel or retaliate their associates to participate in boycotts, paralysations or loss of accreditation.

3.3.4.2 Adherence to a new behaviour

In certain cases, CADE also ordered a new behaviour to be adopted by the defendants. In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), CADE ordered that a trade union include in its bylaws the information that it did not aim or have as legitimate activity the promotion, conduction or participation on in agreements or decisions from its affiliates that modify, standardize or condition the commercialization mode of its affiliates, the profit margins or the prices charged by them.

Another case was identified in which CADE determined that the association adopt a new behaviour related to the practice. This occurred in Administrative Proceeding No. 08012.003745/2010-83 (related to copyright and related rights), in which CADE

determined that the defendants start to offer other licenses other than a blanket license¹³³. CADE also ordered ECAD and associations to reformulate within 6 months what was called in the decision as a collective management system; and ECAD should establish objective and reasonable criteria to adopt and maintain associations within ECAD. As mentioned above, ECAD is an association managed by other associations in the copyright field.

As mentioned above, no other non-pecuniary sanction was applied against trade associations in the cases examined. For completeness, the following chapter will provide information on the recommendations provided by law suggested by CADE in the cases examined herein.

3.4 NON-BINDING RECOMMENDATIONS AS A SPECIFIC TYPE OF SANCTIONS IN BRAZIL: TAXES AND COMPULSORY LICENSES

Both Competition Acts also provided for in the respective sections referring to non-pecuniary sanctions (Article 38 and the former Article 24) that two types of recommendations could be made by CADE to the public entities that have the legal responsibility to evaluate the recommendations. The first is the recommendation of obtaining a compulsory license and the second one is the prohibition of paying federal taxes in instalments (examples of federal taxes: income taxes, import and export taxes) and that tax incentives or public subsidies be cancelled totally or partially. The recommendation for a compulsory license was not identified in any of the 120 administrative proceedings examined in this study.

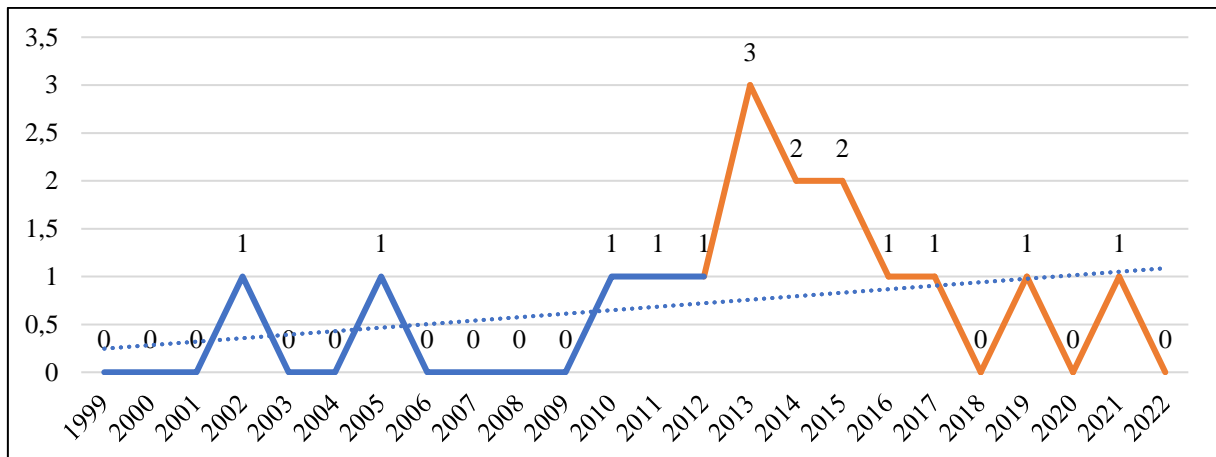
The recommendation related to taxes was identified in 16 cases¹³⁴ (roughly 14% of the 120 cases examined). In 3 out of the 16 cases, no other non-pecuniary sanction was applied by CADE. Six cases were related to bid rigging investigations, which represents roughly 38% of the cases with the recommendation related to taxes. On the incidence of the recommendations related to taxes over time, Graphic 14 below shows that the recommendations related to taxes

¹³³ According to the ECAD website, in the blanket license “*the copyright value is not charged “per music”, but due to the type of utilization and characteristics of the platform, app or website*” (free translation from original - available at: <https://www4.ecad.org.br/servicos-digitais-informacoes-gerais/>). Accessed on 29 April 2023.

¹³⁴ In Administrative Proceeding No. 08012.002299/2000-18 (related to fuel retail in Florianópolis/SC), the extract of CADE’s decision does not specifically mention the wording “recommend”, but “determined” both sanctions in addition to tax incentive or public subsidies not being allowed to be granted to the defendants, even though the possibility of CADE granting or not tax incentive or public subsidies was not provided by law. This was the only case in which the sanction was not referred to as a recommendation, but as a sanction in the extract of the decision. However, it was stated in the leading decision that the compliance with the decision should be made by the entity with jurisdiction.

have been applied mainly even after the entry into force of the current Competition Act from a quantitative standpoint.

Graphic 14 – Recommendations related to taxes applied over time



Source: author

In terms of defendants subject to those recommendations related to taxes, from the total amount of 16 cases, fifteen cases applied a recommendation to companies (almost 94%), nine cases applied recommendations to individuals (almost 57%) and 4 cases applied those recommendations to trade associations (25%).

In practice, the recommendation was mainly applied to establish simultaneously that the perpetrator not be granted the payment in instalments of federal taxes and that tax incentives or public subsidies be cancelled totally or partially. In a few cases, CADE only mentioned one provision related to the recommendation. In Administrative Proceeding No. 08012.004702/2004-77¹³⁵ (related to hydrogen peroxide), CADE determined that tax benefits or incentives and public subsidies should not only be cancelled, but that they should not even be granted to the defendants after the decision. In Administrative Proceeding No. 08012.010022/2008-16 (related to outsourcing of school lunches in the State of São Paulo), CADE only determined that the payment of taxes in instalments not be granted to the defendants, without mentioning the cancelation of tax incentives or public subsidies.

On the reasons to apply the sanction, in Administrative Proceeding No. 08012.002127/2002-14 (related to crushed stone), CADE justified that the recommendation was applied considering that the sector under investigation had adopted “*informal practices*”, without specifying expressly which practices and how they were related

¹³⁵ CADE, Administrative Proceeding No. 08012.004702/2004-77, Reporting Commissioner Carlos Emmanuel Joppert Ragazzo, decided on 9 May 2012.

to the recommendation itself. In Administrative Proceeding No. 08012.009888/2003-70¹³⁶ (related to hospital and industrial gas), CADE stated that the defendants were benefited by a relevant part of the national wealth by acting in collusion and that one of the economic groups involved in the case was granted roughly USD 7 million with a program from the Brazilian government. Therefore, the defendants could not benefit from tax advantages in the case. In Administrative Proceeding No. 08012.005495/2002-14 (related to the market for fuel retail in Guaporé/RS), CADE also recommended the sanction, mentioning that it is disproportional and unreasonable to benefit perpetrators of violations to the economic order with tax advantages.

On the deadline for the sanction recommended, in Administrative Proceeding No. 08700.004617/2013-41 (related to the construction of meters), CADE recommended that the sanction take place for five years and be applied only to the alleged leader of the cartel and to the companies that were part of the main core of the alleged practice. This was the only case with a suggested period for the sanction. The other cases did not provide a deadline for the recommended sanction.

In general, the effects of the recommendation were not examined by CADE to suggest that the sanction be applied by the authorities with jurisdiction.

In addition to recommendations related to taxes, CADE also made other recommendations unrelated to taxes in the written decisions. Even though they were not a specific object of this study, some of them were identified during the analysis of the administrative proceedings of this research. For example, in Administrative Proceeding No. 08012.009088/1999-48 (related to generic drugs), decided in 2005, CADE recommended that the defendants adopted an antitrust compliance program. In almost 67% (80 out of 120) of the administrative proceedings analysed, CADE also determined that the decision from CADE be forwarded to a State or the Federal Public Prosecutor's Office to evaluate whether to adopt criminal and/or civil measures (for example, filing a claim for damages) against the defendants convicted. Considering the scope and the methodology of this study, it was not possible to identify the effectiveness of CADE's recommendations in the administrative proceedings that were examined.

However, specifically in relation to the recommendation related to taxes, the Federal Revenue provided a public information to Amanda Athayde et al. that the recommendation provided for in article 38, item IV, letter b, that is, related to taxes, is not applicable itself to the

¹³⁶ Id., Administrative Proceeding No. 08012.009888/2003-70, Reporting Commissioner Fernando de Magalhães Furlan, decided on 1st September 2010.

concessions of tax nature. Based on the public response from the Federal Revenue, the recipients then concluded that:

“In last instance, this understanding by the RFB proves the suspicions above that the sanction, even though it appears, in theory, as an interesting non pecuniary sanction to avoid the transference of public resources to a perpetrator of the competition law rules, it is, in practice, an ineffective legal mechanism, considering that it is not, after all, applied by the public entity with jurisdiction to do so”. (free translation from original)¹³⁷

¹³⁷ ATHAYDE, Amanda; VIEIRA, Bruno Rodrigues; ROCHA, Camila Pires da. Da Pena Não Pecuniária de Não Concessão de Parcelamento de Tributos Federais ou de Cancelamento de Incentivos Fiscais ou Subsídios Públicos – Inciso IV b) Do Art. 38 da Lei N. 12.529/2011. *In*: ATHAYDE, Amanda (Org.). Sanções não pecuniárias no antitruste. 1. ed. São Paulo: Editora Singular, 2022, p. 263-265.

4 POSSIBLE AREAS FOR IMPROVEMENT AND FUTURE PERSPECTIVES

Given the state of play of non-pecuniary sanctions in Brazil mentioned above, the cases observed seem to indicate a lack of intensive or structured debates at CADE's Tribunal regarding the application of non-pecuniary sanctions in cartel cases. This was demonstrated by the lack of statements in the decisions on the reasons to apply the sanctions, their goals, their effects or even the lack of demonstration by CADE in the decisions of the link between the non-pecuniary sanctions applied and the concrete cases, in general.

This may result in a lack of legal certainty to the administrated defendants and to society and CADE itself. Defendants did not necessarily have a clear picture of why they were convicted or even why specific sanctions were applied against them or how they should comply with the non-pecuniary sanctions. For example, for which period should the defendants comply with the sanctions? What was the criterion for a newspaper to be considered a large circulation newspaper? What is the extract of the decision to be published? Why were there non-pecuniary sanctions in certain bid rigging cases and not in others? How to comply with a non-pecuniary sanction of registry before the National Register for Consumer Protection when this registry does not even exist?

Providing answers to those questions in case law is relevant as they result in an administrative entity thinking about the consequences of the decision that the decision has on legal entities or individuals. This is also required by law, specifically by Article 20, which was added in 2018, to Decree-Law No. 4,657/1942, which is the introductory law for the rules of the Brazilian Law. This article provides that in the administrative sphere (which is CADE's sphere of jurisdiction), decisions may not be handed down based on abstract juridical values without considering the practical consequences of the decision.

In view of these scenarios of uncertainties and of a legal provision that establishes the need for the Administrative Branch to consider the consequences of its decisions, this Chapter aims at providing a summary of how the non-pecuniary sanctions were applied; at identifying where Brazil stands in the global scenario regarding non-pecuniary sanctions, whenever this information is available; and of providing recommendations or exploring potential future perspectives for Brazil in relation to the non-pecuniary sanctions examined in this research. The disclaimer is that the recommendations and the state of play of non-pecuniary sanctions applied

by CADE will be detailed below in accordance with the assumption that CADE is a relevant competition authority worldwide and has a good reputation both nationwide and worldwide¹³⁸.

As indicated above, the non-pecuniary sanctions were applied by CADE in the following descending quantitative order, which will be followed for the analysis of each non-pecuniary sanction: publication of CADE's decision, prohibition to participate in tenders, other non-pecuniary sanctions, registry before the National Register for Consumer Protection, director disqualification, and company divestment. A topic on recommendations (as a type of sanction indicated in the Brazilian Competition Act) will be also addressed below.

4.1 SANCTION OF PUBLICATION OF CADE'S DECISION: AN ADVOCACY TOOL FOR DETERRENCE THAT MAY BE ADAPTED TO MODERN TIMES

As shown in Chapter 3, the publication of CADE's decision extract was the most common non-pecuniary sanction for companies and trade associations; and the third main non-pecuniary sanction applied to individuals. This sanction was initially provided for in Law No. 8,884/1994 and remained the legal wording of the current Law No. 12,529/2011. The sanction also continued to be applied by CADE since the enactment of Law No. 12,529/2011 for companies and trade associations and had a reduction in its incidence for individuals from there on.

The non-pecuniary sanction of publication of the competition authority decision was identified by third parties as having similar provisions in Argentina, Australia, Canada, Colombia and Portugal, among the analysis of the competition practices of roughly 22 jurisdictions worldwide¹³⁹.

In Brazil, the publication sanction was the most common non-pecuniary sanction identified. The purpose of the publication sanction appears to be justified by CADE's decision becoming available to the largest number of individuals and legal entities, including private and public ones. The goal is not only for the decision to be available, but also to allow third parties who have a relationship with the defendants to take a decision related to whether or not to continue with, create conditions for or even cease the relationship with the defendants; in

¹³⁸ For example, in 2022, CADE received four out of five stars from the Global Competition Review (GCR) in the Rating Enforcement, which evaluates the performance of competition authorities worldwide. CADE. Cade recebe quatro estrelas no Rating Enforcement 2022 pela GCR. 18 November 2022. Available at: <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-recebe-quatro-estrelas-no-rating-enforcement-2022-pela-gcr>.

¹³⁹ ATHAYDE; CRUVINEL, *op. cit.*, pages 40-45.

addition to having the potential to make third parties aware that certain practices are not allowed by the Brazilian Competition Act, enhancing *advocacy* nationwide. Daniel Silva Boson also understands that the publication sanction is related to “*publicity of the conviction by CADE*” (free translation from original)¹⁴⁰. Amanda Athayde, Débora Schwartz, and Sofia de Medeiros Vergara also state that the publication sanction results in public embarrassment of the perpetrators and in awareness of society to strengthen a competition law culture¹⁴¹.

Bearing the purposes of publicity of CADE’s decision in mind, the following paragraphs will provide a summary of how CADE applied the public sanction in Brazil in general in the cases examined in this research.

Regarding the content to be published as part of the publication sanction, it was noted that there was no uniform definition for an “extract” of CADE’s decision. This resulted in a wide range of decisions from CADE related to the content to be published, without uniform criteria, methodology, minimum requirements for the content to be published or even without a uniform reason to apply the non-pecuniary sanction itself. Therefore, in certain cases, CADE did not explain the meaning of the extract or what specifically should be published. In other cases, the sanction in the practice resulted in the determination from CADE for defendants to publish CADE’s decision itself, the abstract of the decision (*ementa* and *acórdão*), a specific wording prepared by CADE, a wording with certain criteria provided by CADE; a wording to be presented by the defendants for CADE’s approval and, in certain cases, the determination of communications by trade associations, with no content specified.

On wordings prepared by CADE to be published by the defendants, the following information was identified, which was not necessarily applied jointly in all cases: number of the administrative proceeding, date of conviction, the practice that resulted in the conviction, the name of other defendants in the administrative proceeding, name of the leniency applicant, fines applied by CADE, year of initiation of the investigation and/or of the administrative proceeding by CADE; practices that the collective entity would refrain from adopting (such as price tables) and statements (for example, that doctors are free to establish prices for their services). In certain cases, CADE also added warnings for third parties related to the prohibition of certain practices under the Brazilian Competition Act and that they could lead to penalties being applied by CADE.

¹⁴⁰ BOSON, Daniel Silva. *Sanções por formação de cartel no Brasil*. Dissertação de Mestrado. 2012. Universidade Católica de Brasília, p. 56.

¹⁴¹ ATHAYDE, Amanda; SCHWARTZ, Débora; VERGARA, Sofia de Medeiros. Da pena não pecuniária de publicação de extrato da decisão em jornais – inciso I do art. 38 da Lei n. 12.529/2011. In: ATHAYDE, Amanda (Org.). *Sanções não pecuniárias no antitruste*. 1. ed. São Paulo: Editora Singular, 2022, p. 79.

Another aspect related to the publication sanction is related to the publication in a newspaper assigned in the CADE decision. The great majority of the cases contained direct or indirect information on where the extract of CADE's decision should be published. In certain cases, CADE mentioned the specific name of the newspaper in which the decision should be published, in other cases, CADE adopted a threshold for the newspaper to be chosen. For example, by determining that the publication should occur in a newspaper of the largest circulation in certain geographic dimensions or that they were relevant for the public related to the market/product/service associated with the practice under investigation. However, only in one case did CADE specify the criterion to define what a largest circulation newspaper is, determining that it should be the criteria from the *Instituto Verificador de Comunicação – IVC* in Brazil, which was not explained in the decision.

There were two relevant changes in the case law on where the extract of CADE's decision should be published. The first change took place in 2014, when CADE authorized the defendants to publish the extract on their respective websites. CADE did not justify the modification from newspaper to website, but this could be related to the electronic means currently available and the number of users that electronic means may reach. Another change is related to CADE authorizing mainly trade associations to only or also communicate their affiliates/associates on CADE's decision. CADE, however, did not abandon the application of the publication sanction in newspapers, which continues to be applied by CADE.

On the size of the text to be published, the legal wording provides that the publication should occur in half a page, when it occurs in a newspaper. This was the determination for almost 100% of the cases involving publication in newspapers, except for those in which CADE did not define the size of the publication. For communications to affiliates/associates or for publications on a website, no case was identified in which there was a minimum limit of characters to be considered by the defendants in the publications.

On the publication costs and how they should be paid, the law provides that the costs should be incurred by the perpetrator of the violation. Cases were identified in which CADE only reproduced the legal wording, that is, that the costs should be incurred by the defendants convicted. This could lead to the interpretation that similar contents would be published by several defendants independently within the same period in the same newspaper. In other cases, CADE ordered that the costs should be divided between the defendants convicted in two manners: equally or proportionally to their turnover. Those cases suggested that only one publication would be made by all defendants convicted and they would divide the related costs. In certain cases, CADE also clarified that the publication costs would be incurred by the

defendants regardless of the fines imposed in the case, that is, the fine would not be reduced in view of the related publication costs.

Another aspect that was analysed in relation to the publication sanction was the timeframe in which the sanction should be in force. As previously addressed, the legal wording states that the publication should occur during two consecutive weeks from one to three consecutive weeks, that is, up to 21 days. Even though this timeframe of up to three consecutive weeks was the maximum period established by CADE in almost all cases related to the publication in newspapers, there were some cases in which CADE did not specify the timeframe or CADE determined publications within three monthly editions of the newspaper, without providing justifications for that. The timeframe for the publication on website or communications to third parties was also extrapolated by CADE, which determined the following: for publications on websites, the duration of the publication was from a minimum of 30 days to 90 days, without justifications in the written decisions for that. For communications to third parties, no uniform timeframe was identified, and CADE basically did not mention a specific period for the communication.

Even though it is not expressly provided for by law, a criterion was established in case law for companies and trade associations related to in which page or section of newspapers the extract of CADE's decision should be published. Only a few cases established a wording on this without, again, specific criteria or specific justification for CADE to choose a specific section of a newspaper. In certain cases, CADE determined that the publication should occur in the sections related to cities, economics, or similar ones or in the first section of the newspaper.

Therefore, in summary, it was possible to note that CADE sometimes only reproduced the legal wording, without deep reflections on the purposes, effects, consequences or even on the reasons to apply the non-pecuniary sanction of publication in the specific cases.

Therefore, the following was concluded based on case law from CADE: it is necessary that CADE clarify in its decisions what (not necessarily the specific wording) should be published by the defendants convicted and why CADE understood that the content (not necessarily the specific wording) adopted was relevant in the case.

On where to publish the extract of CADE's decision, it is recommended that CADE evaluates whether publication in printed newspapers is still effective, considering the electronic environment available nowadays. CADE has already been adopting other interpretations on whether the extract of CADE's decision should be published, for example on the internet or through means chosen by the defendant to inform relevant entities/individuals.

In case CADE decides to proceed with the publication in newspapers specifically, it is recommended that CADE makes explicit links in the decisions between the newspapers and/or the geographic dimensions chosen by CADE with the alleged practice (for example, that a certain region was chosen considering the geographic dimension of the practice). In case CADE adopts parameters such as those related to a newspaper with the largest circulation in a geographic dimension, it is important that CADE also defines what largest circulation means, so that the defendants may have legal certainty that they are complying with CADE's decision.

On other means to make the decision known by other parties, it is worth highlighting the following on CADE giving new interpretations or broadening the scope of the non-pecuniary sanction, also without necessarily justifying that behaviour: broadening the scope of the sanction may lead at least to three discussions regarding the enforcement of the sanction. The first is "*what is the purpose of this sanction?*", the second is "*can the sanction be modified to reach the purpose of the sanction?*" and the third is "*if the sanction cannot be modified to reach the purpose of the sanction, may those modifications fall within the item of Article 38 related to other non-pecuniary sanctions that are allowed to be applied by CADE?*". The following paragraphs do not intend to reply to these questions exhaustively, but to provide a few inputs regarding the answers.

As discussed above, the publicity of the decisions has been occurring through newspapers, defendant's website of the defendants and direct communications from the defendants to third parties assigned by CADE. Without the scope of a sanction, CADE also usually publishes news articles on its website with an extract of the case, CADE's Tribunal sessions are broadcasted and saved for posterior access on YouTube and CADE also notifies in certain cases the Federal or State Public Prosecutor's Offices in Brazil on the conviction decision for assessing criminal consequences or even whether to file claims for damages in relation to the practice under investigation.

Regarding whether the sanction may be modified to reach the purpose of the sanction, this will be addressed with the third question related to whether the sanction may be modified based on the Article 38 related to the other non-pecuniary sanctions allowed to be applied by CADE. The first aspect related to those two points is that, if there is a specific sanction provided for by law, this could not be modified by the public administrator in view of the legality principle, which is a constitutional one provided, at least, in Article 5, item II and Article 37 of the Federal Constitution. As acknowledged by Lucas Rocha Furtado, based on the traditional and scholars' views, "*the Public Administration may only act if and when law authorizes its*

activity”¹⁴² (free translation from original). This would mean, for example, that, due to the legality principle, in case the publication sanction in a newspaper specifically is established by CADE, the legal criterion for this sanction should be applied for what is expressly provided for by law, for example, the time period of the sanction, which is up to three weeks.

However, the Brazilian Competition Act also provides an item authorizing CADE to apply other sanctions needed to eliminate the harmful effects to the economic order. As will be further discussed below, one of the conclusions of this study is that the other sanctions may not be applied extensively, but only in a restrictive interpretation way; and it appears to be a restricted interpretation in case CADE applies a sanction such as the publication of the decision one considering the specificities of real life, reasonability, proportionality and effectiveness, such as the relevance of electronic ways to publicize CADE’s decision, to determine that the publication is made in the website of the defendants or that the communication is made by the defendants to third parties by other means, provided that they comply with legal principles restrictively. In fact, CADE has already adopted an interpretation different from the legal one for the publication sanction.

On the size of the publication, it is important that the reference to its size is made expressly in the decision when it refers to the publication in a newspaper. Even though the size is provided by law, the explicit reference in the decision to the size of the publication makes it more accessible to the defendants that were convicted with this sanction.

Regarding the publication costs, CADE’s case law may raise at least the following issues: the first is whether the publication decision is to be complied with by each defendant individually or by all of them. From the cases examined, it was interpreted that both strategies were adopted by CADE and this interpretation was made based on how CADE determined the publication costs to be incurred by the defendants. Since this interpretation was based on most cases, it is recommended that CADE makes it clear in the decisions if the defendants should publish the extract of CADE’s decision jointly or separately and why. This is relevant, as it could result in several publications occurring within the same timeframe by different companies in the same newspaper; and, therefore, it would be important that CADE defines in the decisions if this is the goal from CADE with the publication sanction.

A second issue related to the publication costs refers to the division of the costs by the defendants. Sometimes, the division was determined to be equal between the defendants. The first question related to this is if it would be reasonable, considering that the defendants could

¹⁴² FURTADO, Lucas Rocha. Curso de direito administrativo. 4. ed. rev. e atual. Belo Horizonte: Fórum, 2013, p. 80.

have participated in different time periods and phases of the alleged practice. However, another interpretation could be that, if the practice occurred, the defendants should be held liable for the obligations resulting from the punishment of the defendants due to the practice. After all, would it be possible to divide publication costs based on the actual participation of the defendants in the alleged practice?

In other cases, CADE determined that the costs were divided proportionally depending on the turnover of each defendant. CADE did not establish in the decisions which turnover should be considered (was it the turnover from the year preceding the CADE decision? Should the turnover in the sector of activity affected by the practice? Should the gross turnover be considered in this case?) and how the turnover would be assessed (should the defendants forward their turnover information to CADE so that CADE would make the proportional calculations?). In case CADE was not considered responsible for making the proportionality calculation exercise, would the defendants be responsible for that? If positive, this could lead to the sharing of sensitive information between them for the payment of publication costs.

The challenges related to the publication costs are not simple, but it is important that CADE makes it clear in the decision how the defendants should address the topics above to avoid lack of legal certainty related to the publication sanction.

Regarding timing, it was noted that CADE surpassed the timeframe of three consecutive weeks for the publication in newspaper and increased the timeframe from 30 to at least 90 days when the publication was determined to occur on the website of the defendants. No specific deadline was identified in relation to communications. In any case, CADE did not provide reasons in the decisions to adopt a period higher than three consecutive weeks in the publication sanction. This certainly results in a lack of legal certainty, and it is important that CADE provides legal reasons to adopt periods higher than three consecutive weeks in the written decisions and provides legal reasons for all other aspects related to the sanctions that CADE applies for each case.

In addition to the challenges, considerations and recommendations above, there is also another aspect that should be assessed, that is, whether to take the publication sanction as an opportunity to make the decision public to potential victims of the practice convicted. As mentioned above, for example, CADE forwarded the decision to the State or Federal Public Prosecutor's Office in 67% of the cases examined to assess criminal or civil claims related to the conviction by CADE.

The relevance of CADE increasing the knowledge of third parties of CADE's decision is also related to the recent Law No. 14,470/2022, which provides for considerations related to

claims for competition damages in Brazil. The Law modified certain provisions of the Brazilian Competition Act to add, for example, that the statute of limitations for claims will be initiated from the publication of the final judgement of the administrative proceeding by CADE. Therefore, increasing publicity of CADE's decision will be also aligned with a private enforcement agenda in Brazil, which has been promoted by CADE, for example, at least since August 2016, when CADE issued a Technical Note on intersections between private and public enforcement¹⁴³; and September 2018, when CADE issued Resolution No. 21 providing for a mitigating factor in the calculation of pecuniary contributions or fines for those who compensated competition harms¹⁴⁴.

4.2 PROHIBITION OF CONTRACTING WITH PUBLIC ADMINISTRATION: EXISTENCE OF INTERNATIONAL TREND, BUT NEED FOR CADE TO PROVIDE ADDITIONAL GUIDANCE

This section will be dedicated to the analysis of prohibitions on contracting with the Public Administration in Brazil, that is, the sanctions of prohibition to execute contracts with official financial institutions and the prohibition to participate in tenders.

Prohibition to contract with the public administration was the second non-pecuniary sanction most applied by CADE in general in the cases examined in this study. The sanction was the second most applied to companies; the first for individuals; and the fourth for trade associations, and has been applied by CADE more frequently since the enactment of the current Competition Act.

In general figures, the sanction was applied in roughly 33% of the cases with non-pecuniary sanctions and in roughly 17% of the 120 cases examined in this study. In addition, out of the 20 cases, 17 of them were bid rigging investigations, which represents roughly 85% of those cases. The 17 bid rigging cases represent, however, less than 50% of the bid rigging cases convicted by CADE (37 administrative proceedings in total). That is, it is not possible to conclude that bid rigging convictions by CADE resulted in prohibition to contract with the public administration in CADE's decisions. However, the sanction was usually applied in cases related to bid rigging.

In addition, in Brazil, the sanctions of prohibition to execute contracts with official financial institutions and the prohibition to participate in tenders were applied jointly or

¹⁴³ CADE, 2016.

¹⁴⁴ Id., Resolução nº 21, de 11 de setembro de 2018. 2018.

independently and were reviewed in Chapter 3 based on five parameters: the object of the investigation, whether all or only certain defendants were convicted with the sanction, the reasons for CADE to apply the sanction; the duration of the sanction; and aspects related to which public entities were within the scope of the sanctions. Those five parameters will be examined based on three categories of administrative proceedings: category 1 is related to conviction of the defendants only with the prohibition to execute agreements with official financial institutions; category 2 is related to the conviction with both sanctions of prohibition to execute agreements with official financial institutions and prohibition to participate in tenders; and category 3 is related to the conviction of defendants only with the sanction of prohibition to participate in tenders.

For the first category, the sanction of prohibition to execute agreements with official financial institutions was solely applied in three cases against companies, individuals and/or trade associations. This number represents 15% of the cases with prohibition to contract with the public administration.

Regarding the administrative proceedings related to those cases, two out of the three cases were related to bid rigging investigations. The sanction was applied mainly to certain defendants in the cases, without a specific reason for the sanction to be applied, for the sanction to be applied without the prohibition to participate in tender and for the sanction to be applied only to certain defendants and not to all of them. In the cement and concrete cartel case, CADE mentioned that the sanction was applied considering that the Public Treasury should be protected from more damage and to avoid that the defendants use public resources to sponsor anticompetitive practices. The duration of the sanction was usually five years, but in the cement and concrete cartel case, CADE determined that the sanction would be in force up to the sale of assets provided in the decision of the case. The names of the official financial institutions within the scope of the sanctions were not identified in any case.

Regarding the second category, related to the application by CADE of both sanctions on prohibition to execute agreements with official financial institutions and prohibition to participate in tenders, this scenario was only identified in decisions against companies and individuals, but not in relation to trade associations. Both sanctions were applied in 7 out of the 20 cases identified with prohibitions on contracting with public authorities, which represents 35% of the cases. Most of those cases referred to bid rigging investigations. On the defendants subject to those sanctions, CADE did not necessarily apply the sanctions to all defendants convicted, but only to a few of them in most cases, based on justifications mainly such as central role in the practice.

CADE provided justifications to apply both sanctions in less than half the cases, including the seriousness of the practices and based on public interest of qualified entities executing agreements with the public administration. Both sanctions were applied for the period of five years or with the wording that the period could not be lower than five years, without specifying if the period should be higher (or additional time).

On the public entities within the scope of both sanctions, for the sanction of prohibition to execute agreements with official financial institutions, CADE did not refer in the decisions to the name of those official financial institutions nor the geographic scope of the sanction. CADE also stated that this included hiring credit lines in which public resources are used.

For the sanction of prohibition to participate in tenders, the sanction was in general applied in relation to tenders provided for by the legal wording of the Brazilian Competition Act, that is, tenders related to acquisition, sale, provision of works and services and public concession in entities of the federal, state, municipal and Federal District public direct and indirect administration. At least in one case CADE mentioned that the sanction was not only related to participating in tender, but also in proceedings related to the waiver or lack of requirements for a tender, including emergency contracts; in addition to the prohibition for the defendants to extend existing agreements with the public administration. Also related to the object of the tenders in the prohibition to participate in tenders sanction, CADE decided to restrict the object of the tenders in one case to be related to the sector affected by the practice. The sanction of prohibition to participate in tenders was basically applied to all entities provided for in the law, regardless of whether the practice was national, local, or international, and regardless of geographic dimension of the relevant markets affected by the practices convicted.

It is worth noting that in no case from the second category did CADE conduct a market analysis of how the sanctions would affect the market following CADE's decision.

The third and last category of cases identified with the prohibition to contract with the public administration was the category in which only the sanction of prohibition to participate in tenders was applied (without the prohibition to execute agreements with official financial institutions). This sanction was solely applied to individuals and companies, not to trade associations. The sanction was solely applied in 10 out of the 20 cases, that is, in 50% of the cases involving the prohibition of contracting with public entities. All those 10 cases were bid rigging investigations.

In less than half of the cases, CADE applied the sanction only in relation to certain defendants, whether they were considered or not the leaders of the practices convicted. In other cases, CADE applied the sanction to all defendants. In general, CADE did not justify why the

application of the sanction was against all or only certain defendants. However, certain cases were identified in which the leading decisions stated that the leaders of the practice should be the ones subject to the sanction. It is worth noting that, for the sanction applied to individuals, it was identified that CADE did not apply the sanction to the individuals only but also to all companies in which they were shareholders and/or representatives.

Regarding the reasons for CADE to apply the sanction, a few arguments from CADE were identified, but they were not uniform and represented less than 50% of the bid rigging investigations. The reasons included the following: the fact that the practice affected several tenders; for deterrence purposes; to prevent other tenders from being frauded; the sanction was applied due to the severity of the cartel, the direct harms to the Public Administration and the indirect harms to the society. Since the bid rigging cases convicted with the prohibition to participate in tenders are under 50% of the total amount of bid rigging investigations with convictions, and considering that there is no uniform or objective reason to apply that sanction in those cases, it is possible to conclude that there are uniform or objective reasons for a case to receive the prohibition to participate in tenders sanctions.

In two cases, CADE specified the effects of the sanction of prohibition to participate in tenders towards the market. As indicated above, this occurred in Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors), in which it was stated that the prohibition to participate in tenders sanction should be applied depending on the seriousness of the practice and the general public interest, in markets with a high number of players or with low barriers to entry. In that case, CADE conducted additional research to assess the effects of the sanction to the market, including the players, the geographic scope, the analysis of barriers to entry, the structure of the market and the identification of the leader of the practice. Even though it was not that detailed, in another case, CADE mentioned that with the sanction, the market would have other sales opportunities, considering that the sales of the convicted defendants would be accommodated between other players.

Regarding timing, the decisions identified applied the 5-year period deadline provided by law, mentioning sometimes that the sanction should be applied for five years; and other times mentioning that the sanctions should not be applied for a period under five years, without specifying a specific period. CADE also considered a similar sanction applied by another authority in the calculation of the duration of the sanction, by reducing the deadline based on the period in which the sanction from another entity was in force.

On the public entities within the scope of the sanction, similarly to when the sanction was applied with the prohibition to execute agreements with official financial institutions, the

prohibition to participate in tenders applied solely was in general also applied in relation to tenders conducted by entities of the federal, state, municipal and Federal District administration. The sanction of prohibition to participate in tenders was basically applied to all entities provided for in the legal wording, regardless of the fact of whether the practice was national, local, or international and regardless of geographic dimension of the relevant markets affected by the practices convicted.

On the scope of the sanction, almost all cases emphatically mentioned that the sanction covered tenders provided by the legal wording of the Brazilian Competition Act, that is, tenders related to acquisition, sale, provision of works and services and public concession. It was also noted in the cases examined that the prohibition was related to both direct and indirect participation in tenders. CADE also specified in one case that the sanction be also related to the prohibition from executing agreements with the related public entities, for example in case of waivers of tender procedure. In one case, CADE restricted the scope of the tenders for those with objects affected by the practice convicted by CADE, but it was also identified that, in general, CADE applies the sanction with a broad scope, without defining the tenders per products and/or services.

Based on the above, the sanctions of prohibition to contract with the public administration applied by CADE in the cartel convictions examined herein was applied without a uniform reason or objective criteria. For example, CADE did not necessarily provide information on why the sanction was applied, why both sanctions of prohibition to execute agreements with official financial institutions and prohibition to participate in tenders were applied jointly or separately; and CADE did not analyse a basic quantity of evidence to establish that the sanction was applicable in the case.

In addition, the sanction was applied in less than 50% of the bid rigging convictions, which means that not necessarily a bid rigging will be convicted with the sanction, much less that a specific criteria or market study will be applied. In fact, there was no uniform methodology to apply the sanction and estimate its effects in the market or even on the companies. CADE did not assess in the decisions whether the companies convicted only or mainly participated in tenders as part of their economic activities and whether the sanction could lead to the closing of the companies and what this would represent in a competition dynamic. Even though those issues do not appear to be in CADE's radar, they are being discussed on an international level.

As mentioned in the introduction of this research, the OECD promoted discussions on director disqualification and bidder exclusion within the antitrust sphere at the end of 2022,

mainly related to the objective and scope of those sanctions in several jurisdictions¹⁴⁵. For this reason, the general prohibition to contract with the public administration sanction was considered an international trend in this chapter, considering that it is in the hot topics of a relevant international organization, such as the OECD. The sanction of prohibition to execute agreements with official financial institutions was not specifically identified in the public documents related to the OECD discussions, but it is understood in this research to have similar consequences and challenges when compared to the sanction of prohibition to participate in tenders.

Based on the background note of the OCED, the OECD identified that the specific sanction of bidder exclusion existed in 25 jurisdictions, including Brazil itself, Chile, the European Union, Germany, India, Japan, and New Zealand, for example. The OECD also concluded that the sanction was usually applied in bid rigging cases and that the duration of the sanction was in most cases 3 to 5 years. As mentioned above, the duration of the sanction in Brazil is 5 years. In addition, the OECD stated the sanction has as goals deterrence; public benefits, such as reputation; promoting integrity; sending a message to investors and consumers about the lack of irregular practices in the public sphere; and avoiding that public suppliers become involved in irregular practices¹⁴⁶.

On the challenges related to the application of the sanction, the OECD identified difficulties related to analysis of the market impacted to identify whether the sanction may reduce competition in tenders or increase concentration in the market¹⁴⁷. In view of this and other challenges, the OECD recommended a checklist to be followed by competition authorities and others related to the determination or not of the sanction of prohibition to participate in tenders. The checklist includes three main aspects: a. the analysis of whether there are alternative sanctions that may be equally or more effective, such as criminal sanctions, fines or director disqualification; b. in case there is no alternative sanction, it is important to understand if the market is oligopolistic and/or with the following characteristics: small number of players, with high barriers to entry or network effects, with homogeneous products, closeness of competition, parallel or interdependent behaviour of players, existence of economic, contractual and structural links that could lead to parallel behaviour and high transparency on prices; and c. in case the market is oligopolistic, it would be important to understand the viability of the following options:

¹⁴⁵ OECD, 2022.

¹⁴⁶ *Ibid.*, pages 28-29 and 37.

¹⁴⁷ OECD, 2022, pages 34-37.

“can only one of the participants (ringleader or instigator) to the bid rigging scheme be excluded? (...) is it possible and effective to limit the disqualification to a company subsidiary, a specific division or branch? (...) is it possible and effective to limit the disqualification to only a specific contract value, specific market or specific contracting authority? (...) is it possible and effective to shorten the duration of the disqualification? (...) what self-cleaning or other risk-management measures would make it possible to safely allow the relevant operator to access future bids? (...) is it possible and effective to use alternative tools to address the infringement (e.g. reward systems)?”¹⁴⁸

The goals, challenges and ways forward identified by the OECD for the sanction of prohibition to participate in tenders may be seen as parameters to be adopted, or at least evaluated, by CADE as it constructs its case law and as it studies impacts of the prohibition to execute agreements with official financial institutions.

Firstly, it is necessary that CADE makes the reasons to apply sanctions of prohibition of contracting with the public administration clear in the decisions, so that the defendants are able to know why they were convicted with those sanctions; and this will also give predictability to CADE and the society on what leads to the application of the sanction. This also leads to legal certainty. CADE making the reasons clear in the decisions will also allow that defendants, society and CADE itself are able to evaluate when the sanctions of prohibition to participate in tenders and execute agreements with official financial institutions are likely to be applied jointly or separately, which is not clear until now based on case law.

In addition to the reasons themselves, following OECD’s recommendations, it is extremely relevant that CADE assess the effects of the adoption of the sanction at least in two perspectives. The first is related to the effects on the defendants themselves, by questioning at least the percentage of public sales in the turnover of the defendants; which are the economic activities performed by the defendants; and how much they depend on public resources in their activities when applying the sanction of prohibition to execute agreements with official financial institutions. Considering the case law and that the legal wording provides for flexibility on the prohibition to contract with the public administration, CADE could also assess whether or not to apply the sanction only in relation to tenders and/or contracts related to the products and/or services affected by the practice that was convicted, in order to allow that companies continue to exist, whenever applicable; and that individuals and trade associations could have economic means to survive.

¹⁴⁸ *Ibid.*, page 37.

The second perspective is related to the effects of the sanction on the market. In addition to the considerations above from the OECD, CADE tried to make a detailed analysis of the effects of the sanction of prohibition to participate in tenders in one case, in which CADE conducted research to identify the effects of the sanction, including the analysis of the number of players, geographic scope and specificities of the market (for example, barriers to entry). This should not be an exception, but a rule for CADE to apply when deciding on the sanctions of prohibition to contract with the public administration.

Also, it is important that CADE provides objective information on the sanctions applied, that is, for example, that CADE specify in all cases what types of tenders are included in the prohibition to participate in tenders sanctions; give examples of which official financial institutions are within the prohibition to execute agreements with official financial institutions; that CADE includes emphatic information on the duration of the sanctions and whether the sanction is restricted to a geographic dimension or not. All this information will certainly make it clear for the defendants how to comply with the CADE's decisions.

4.3 OTHER SANCTIONS: A POWERFUL PROVISION THAT REQUIRES A RESTRICTIVE INTERPRETATION

The other non-pecuniary sanctions were also examined in this research. They referred to sanctions not expressly provided for in the items of Article 38 of the current Competition Act and the former Article 24 of the former Competition Act and were categorized by an exclusion criterion, considering that, as mentioned above, CADE did not necessarily provide the legal basis for the non-pecuniary sanctions applied in the CADE decisions.

Based on the methodology applied in this research, other non-pecuniary sanctions were identified in 18 administrative proceedings (roughly 30% of the administrative proceedings with non-pecuniary sanctions and 15% of the administrative proceedings with cartel convictions). The sanctions were applied in the following order, from most applied to least applied: fourth against companies; last against individuals; and the second most common non-pecuniary sanction applied against trade associations.

It is also possible to explore the figures related to other non-pecuniary sanctions. Thirteen administrative proceedings were identified against companies; two administrative proceedings were identified against individuals; and fourteen administrative proceedings were identified against trade associations. Considering that there was a lower number of administrative proceedings launched against trade associations, it was most common for an

“other” sanction to be applied against trade associations when compared to companies and individuals separately.

In practice in Brazil, it was identified in case law that there were behavioural sanctions, related to ceasing the practice or adopting a new behaviour after CADE’s decision. Ceasing the practice was the most common category of other non-pecuniary sanctions identified in the cases examined.

The practices to be ceased or avoided included the following in the cases examined: a. prohibition to fix or disclose to competitors the parallel reduction of discounts and price adjustment; b. prohibition to divide the market, through price fixing to distributors or direct buyers; c. prohibition of retaliation against distributors that have chosen an alternative supply; d. prohibition of establishing price tables (even if it was suggested); e. prohibition against promoting collective negotiations to standardize prices and/or condition or provision of medical services; f. prohibition against promoting boycotts, collective paralysation of attending beneficiaries of health plan or collective loss of accreditation; g. prohibition against creating obstacles to the direct and individual negotiation of fees between doctors/hospitals and health plan operators; h. prohibition of any other conduct that could lead to the control of free pricing or that results in the adoption of uniform commercial practices; i. refraining from using a system of control of enrolment in a specific case; j. that competitors cease any communication between them related to commercially sensitive information, such as prices, discount policies, profit margins, areas of activity and payment conditions; k. need to remove from trade associations bylaws any information related to price or that could lead to the standardization of the market with the exclusion of competitors; l. that trade associations are not allowed to collect information from the market three months prior to the facts and release that data to the public in a time period below three months after collecting the data (and the data should be published in an aggregated way); and m. also for trade associations, there was a prohibition for them to launch proceedings to punish, threat, compel or retaliate associates in order to encourage them to participate in boycotts, paralysations or loss of accreditation.

In two cases against trade associations, CADE also ordered the adoption of new behaviour by the trade associations, including the obligation for them to add to their bylaws the information that they did not aim at promoting, conducting or participating in agreements or decisions from their affiliates to modify, standardize or condition their commercialization rules, profit margins or prices. CADE also determined that new behaviours be adopted in relation to products offered and to strategies from a collective entity to select and maintain associations within the collective entity.

On structural sanctions, two cases were identified only against companies in which CADE applied sanctions related to transactions involving the companies. Structural sanctions, therefore, were not identified against individuals and trade associations. The first case was an administrative proceeding in which CADE determined that the companies notified a transaction before CADE. The other one was related to the prohibition for five years of structural transactions between the companies convicted in the markets object of the sanction, that is, the cement and concrete markets. The companies also were ordered to report to CADE any transaction conducted in the cement and concrete sectors for five years.

Other non-pecuniary sanctions were identified in case law and in legal provisions in 5 out of 22 jurisdictions mentioned above: Australia, Canada, the European Union, Japan and the United States of America. The sanction was not specifically analysed for the other 17 jurisdictions¹⁴⁹. Therefore, it is not possible to conclude that this is a common sanction worldwide, but the sanction was identified in relevant jurisdictions in the antitrust sphere, for example, the European Union and the United States of America.

In any case, it is a very tricky sanction for several reasons. This discussion is theoretical, considering that, as was demonstrated above, in practice, the sanction is applied by CADE in a complementary way to the pecuniary sanctions, with no big innovative sanctions within the other non-pecuniary sanctions. And they were complementary also because they were mostly related to the defendants ceasing the practice that was convicted by CADE. However, the theoretical discussions on this will be addressed below.

On one side, the sanction could be seen as a sanction with a strong deterrence purpose, considering that this could lead to companies, individuals and trade associations refraining from adopting anticompetitive practices in view of an open concept of sanction provided by law. That is, the administrated parties would refrain from engaging in anticompetitive practices because they would be afraid of what CADE could do with the provision related to the other non-pecuniary sanction. For example, the open concept could lead to CADE arguing an airline cartel that they should make available tickets for free for one year as part of the non-pecuniary sanction. As seen above, this could also occur without uniform methodology, reasons or analysis of effects by CADE, as occurred in several cases.

On another side, it could be argued that an open concept should not be allowed at all in the scope of the sanctioning power of the public administration, due to the breach of constitutional principles. This line of argumentation could say that the alternative for deterrence

¹⁴⁹ ATHAYDE; CRUVINEL, *op. cit.*, pages 40-45.

would be an attribution of the Legislative Branch, who could choose to add sanctions to the list of non-pecuniary sanctions that would lead to effective deterrence, but also to legal certainty and predictability for the administrated parties to avoid engaging in anticompetitive practices in Brazil or that could lead to effects in Brazil.

On discussions related to the breach of constitutional principles, a discussion could occur on whether the principle of legality provided for in Article 37 of the Federal Constitution and mentioned above would be compatible with an open concept of potential sanctions, considering that it concedes discretion to the public administration to decide a sanction not specifically provided for in law. The philosophical background of this should be explored. For example, what is the size of the State and why would the public administration be given an open concept to choose a sanction in administrative law.

Therefore, these discussions could be still explored from a rule of law perspective. Considering that the first article of the Brazilian Federal Constitution provides that the Federative Republic of Brazil is a State governed by the Rule of Law, and a State governed by the Rule of Law seeks to avoid authoritarianism and dominance from the State in certain aspects of life. Othon de Azevedo Lopes, when commenting aspects related to the rule of law, mentions that the rule of law was developed against domination and aims to treat individuals from a perspective of inherent dignity, with respect and consideration, in the sense that the related autonomy of the individual occurs within the society¹⁵⁰. An open concept for a sanction as it is provided by the Brazilian Competition Act could legitimately lead to this type of discussion between scholars, in case law and in other spheres.

A third perspective related to the existence of the other non-pecuniary sanctions in the legal wording of the Brazilian Competition Act is the one adopted in this study, which was developed only because of the State of play of the application of other non-pecuniary sanctions by CADE in the cases examined. The third perspective is that the legal provision for this type of sanction gives CADE flexibility to act in innovative cases, but that the sanction must continue to be applied by CADE in a restrictive way, that is in a complementary way to the other sanctions applied by CADE.

In fact, CADE applied the sanction mainly with the purpose of stopping the convicted defendants from engaging in the anticompetitive practices that led to the conviction. A minimum number of cases were related to CADE ordering the adoption of new behaviours, but it is concluded that those cases were also complementary to the other sanctions, as they were

¹⁵⁰ LOPES, Othon de Azevedo. *Fundamentos da regulação*. Rio de Janeiro: Processo, 2018, pages 101 and 108.

directly related to the practice under investigation. For the cases related to transactions to be notified, the Brazilian Competition Act provides for the thresholds to be met for a transaction to be considered as of mandatory notification before CADE. However, the legal wording also provides that CADE may request for entities to notify a transaction, even in case the thresholds are not met. Therefore, it is still concluded that the other non-pecuniary sanctions applied by CADE were applied in a restrictive way, as it was complementary to the other sanctions or legal provisions related to the conviction of the cases by CADE.

Therefore, the application of other non-pecuniary sanctions by CADE should be an exception and, in case it is applied, this should be applied with a restrictive interpretation of the legal wording, so that legal certainty, predictability, reasonability and legality be preserved.

4.4 NATIONAL REGISTER FOR CONSUMER PROTECTION: AN INEFFECTIVE SANCTION UNTIL THE REGISTRY IS CREATED

There is also a non-pecuniary sanction provided for by law related to registering the name of the defendant in the National Register for Consumer Protection. This sanction is within the top four non-pecuniary sanctions applied in general to the groups of defendants established in this study, that is, companies, individuals, or trade associations. Specifically, the sanction was applied in 15 administrative proceedings against companies (the third most common non-pecuniary sanction applied to companies); in 8 cases against individuals (the second most common non-pecuniary sanction applied to individuals); and in 3 administrative proceedings against trade associations (the third most common non-pecuniary sanction applied to trade associations).

No reason was identified for CADE to apply the sanction, nor was any timing decided in which the sanction would be in force, or any methodology to apply the sanction nor any analysis of effects or consequences related to the sanction in the cases examined, even though the sanction was frequent in CADE's case law in the last 20 years.

In addition, the conclusions above on how non-pecuniary sanctions are applied in Brazil without related justification make sense, considering that the National Register for Consumer Protection has not yet been created in Brazil. Nevertheless, this is a sanction that was being applied by CADE even before the enactment of the current Brazilian Competition Act.

From an international perspective, this sanction was not identified in any law in 22 jurisdictions, including Argentina, European Union, Germany, India, Mexico, South Korea and the United States of America¹⁵¹.

Even though CADE continued to apply the sanction over time, without the registry even existing, civil society noticed that this sanction is inadequate. An independent entity in Brazil related to the Information Access Law disclosed on its website, for example, that the entity presented a claim in 2020 to the Federal Court of Accounts (“TCU”) arguing that CADE and the Ministry of Justice have not created the National Register for Consumer Protection¹⁵². It was not identified in publicly available sources whether the TCU has launched any proceeding in relation to the claim.

In any case, CADE itself launched an application process in March 2023 to hire a consultant to develop the implementation of the Registry. In the Term of Reference of the application process, CADE stated that this is a sanction of reputational aspect and concluded that there are no clear aspects related to the sanction that better clarify its goals, reasons and effects¹⁵³. The consultant will have 180 days from execution of the contract to finalize his/her work related to the Registry. The products to be developed by the consultant includes benchmarking report regarding reputational sanctions from countries members of the OECD and others, report with legal basis needed for the Registry to work, proposals of methodology related to the creation, implementation and functioning of the Registry, among others. The process to hire a consultant was launched in partnership with the United Nations Development Programme (UNDP), based on the Term of Reference mentioned above.

Therefore, the sanction is currently totally ineffective, considering that the Registry does not even exist, and there is no definition of what being registered at such Registry means. However, CADE is currently looking for enhancing this sanction in Brazil and for creating the Registry so that the sanction may become effective. It is important, however, for CADE to bear in mind the need to establish objective and clear criteria to apply the sanction, including reasons in the decisions on why the sanction must be applied in the specific case, its goals and consequences, so that this may generate legal certainty and predictability in Brazil. In addition, it is important that CADE make it clear in its decisions the timeframe in which the names of

¹⁵¹ ATHAYDE; CRUVINEL, *op. cit.*, pages 40-45.

¹⁵² FIQUEM SABENDO. FS denuncia CADE e MJ ao TCU: Cadastro Nacional de Defesa do Consumidor (CNDC) ainda não foi criado. 17 December 2020. Available at: <https://fiquemsabendo.com.br/transparencia/fiquem-sabendo-denuncia-cade-mj-tcu-cndc/>

¹⁵³ CADE. Termo de Referência: Contrato por Produto – Contratação de consultoria técnica para elaboração de estudos sobre possível implantação do Cadastro Nacional de Defesa do Consumidor, de que trata o art. 38, inc. III, da Lei 12.529/11. 2023.

the convicted defendants will remain in the Registry, focusing on the need for legal certainty in CADE's decisions.

4.5 DIRECTOR DISQUALIFICATION: THE NEED TO BALANCE DETERRENCE AND REPUTATIONL RISKS IN CASE OF MISAPPLICATON

Another non-pecuniary sanction examined in this study was the director disqualification sanction, that is, a sanction that prohibits an individual from exercising commerce in his/her name or as representative of a legal entity for up to 5 years. This sanction was added to the list of non-pecuniary sanctions through the current Competition Act and its application occurred only in 3 out of the 120 cases examined in this study, which represents less than 3% of the administrative proceedings reviewed.

Specifically, the sanction was applied by CADE in 2019, 2020 and 2021. On the object of the cases, all three cases were bid rigging investigations. In two cases, CADE applied the sanction to all individuals convicted. In one case, CADE applied the sanction only in relation to one individual convicted, a woman that supposedly participated actively and permanently in the practice, according to CADE, and did not have a management position, based on the written decision. Regarding the duration of the sanction, even though the legal wording provides that the sanction could be applied for up to 5 years, CADE applied the sanction in all cases for the maximum period of 5 years.

On the reasons to apply the sanction, unlike most decisions applying non-pecuniary sanctions, CADE provided a reason to apply the director disqualification sanction in all three cases. The first justification was the one mentioned above that only the individual convicted participated actively and permanently in the practice. Another justification was that CADE was applying accessory penalties in hardcore cartels involving bid rigging, in view of deterrence. The third justification was that it was necessary to ensure that the prohibition to execute agreements with the public administration was not breached by the individuals, considering that in the alleged cartel, the individuals would have created sham companies and modified the corporate object and names of the legal entities in order to implement the practice. CADE did not provide a list in those cases of the names of the companies in which the individuals were active at the time of the conviction.

From a global perspective, as mentioned above, the OECD has promoted a recent debate on the director disqualification sanction and identified that, similarly to what happens in Brazil,

the director disqualification sanction “*has started to be applied relatively recently*”¹⁵⁴. The OECD identified that the sanction was applied in 23 jurisdictions and 10 out of them provide for the sanction specifically in competition laws. Unlike Brazil, that sanction is mostly applied by courts in other jurisdictions. As seen above, the Brazilian Competition Authority has jurisdiction to apply the director disqualification sanction directly.

The OECD concluded in that debate that the goals of the director disqualification sanction included deterrence (in view of the individualization of the sanction and easier application) and protection of “*the public from corporate misconduct and improve standards of corporate management*”¹⁵⁵. In addition to the goals, the OECD identified in its review that two factual elements should be proved, in general, for the disqualification sanction to be applied, including the violation of the competition act specifically, and the liability of the director convicted.

Even though the OECD started to provide comments on this sanction, the sanction started to be applied recently both in Brazil and worldwide, and, unlike the other non-pecuniary sanctions, CADE provided specific reasons to apply the sanction in Brazil. Mainly considering that it is a recent development in Brazil, but it is also important for CADE to provide a detailed analysis in its written decisions on the consequences or effects of the disqualification sanction to individuals as soon as possible.

Different from the director disqualification sanction analysed by the OECD, the Brazilian Competition Act does not specify that the sanction should be applied only to directors of companies or individuals in management position. In fact, the sanction may be applied by CADE against any individual convicted, and this already happened, as mentioned above, to an individual that did not have management position, but acted actively in the alleged practice. In addition, the prohibition that may be applied by CADE is not related to the prohibition of the individual convicted from having management positions at companies, but from exercising commerce or acting as legal representative of a company.

In fact, a conviction of an individual by CADE may result in serious reputational issues to individuals convicted, and they may face difficulties related to finding a job after the CADE decision. This reputational consequence may affect even more low-level employees, considering that the interpretation of the legal wording for this sanction appears to allow the individual only to become a low-level employee of a company or occupying a job position in the public sector. However, the prohibition of (also) low-level employees from exercising

¹⁵⁴ OECD, 2022, page 10.

¹⁵⁵ *Ibid.*, page 11.

commerce, plus the reputational risk, may lead to difficulties for those employees to gain financial resources to survive in the private sector in Brazil.

If, on one side, one could say that this is a consequence assumed by the individual that has chosen to engage in an anticompetitive practice; on another side, a disqualification sanction should be applied by CADE under the perspective of human dignity (which is a founding principle of the Federal Republic of Brazil provided in Article 1st, item III, of the Federal Constitution), especially regarding the perspective of financial survival of the individual that will be convicted.

The human dignity should be taken into account by CADE, considering the labour reputational issues to individuals convicted by CADE and that an individual convicted with this sanction may not be able to have any other type of salaries or jobs in the short term. In this context, it is recommended that CADE evaluates at least the following as methodology to apply the disqualification sanction in Brazil. The first recommendation is that CADE evaluates the role of the individual in the practice. Was he/she the leader of the practice? Was he/she involved in the decision-making process of the practice? Which were the job positions of those individuals at the respective companies at the time of the practices? The answers to those questions are relevant to understanding the role of the individuals in the practice and if the disqualification sanction should or not be applied against them.

The second recommendation is that, after CADE defines whether there was a violation to the economic order and the role of the individual in that practice, CADE should evaluate the size and the turnover of the company, but also related salaries of the individual as part of the decision-making process on whether to apply the sanction for the related individual and whether the sanction could affect labour issues that could make it impossible for the individual to have means to survive after the CADE conviction.

In addition, the legal wording for the sanction is not emphatic on whether the sanction could be related to the individual being prohibited from exercising commerce at all or only in a specific market or geographic dimension. CADE could also explore this in the decisions related to the application of the sanction to the specific relevant market affected by the practice or whether the sanction should be applied regardless of the relevant market affected. Those assessments are recommended to guarantee that the individual convicted will be allowed to work after CADE's decision and have financial means to survive afterwards.

4.6 DIVESTMENT: AN OLD PROVISION WITH AN INCIPIENT APPLICATION

As mentioned above, the divestment sanction is also provided in the Competition Act, under four possible categories: split, transfer of corporate control, sale of assets or the partial ceasing of the corporate activity. Even though the sanction was already provided for in the Competition Act enacted in 1994, only one case was identified in Brazil in which the divestment sanction was applied, which was the cement and concrete cartel convicted by CADE in 2014. The sanction was mostly related to the sale of assets, but also related to the sale of shares, which is not necessarily within the four possibilities provided by the legal wording. As previously mentioned, the divestment sanction was basically applied by CADE considering that the alleged practice would have occurred in view of corporate structures from the companies, which owned shares from competitors, and, therefore, allowed the practice to occur.

The divestment sanction was identified in case law and in the law of five jurisdictions: Australia, European Union, Mexico, United Kingdom and the United States of America¹⁵⁶. The OECD has also analysed the sanction of divestiture of assets in the competition sphere and identified the sanction as a structural remedy to competition infringement, providing information on the practice from the United States of America on this¹⁵⁷.

The OECD also stated that structural remedies (as the divestiture of assets was classified by the OECD) “*are usually detected following a market study*”¹⁵⁸. But the OECD also concluded that sanctions as structural remedies are not uniformly adopted / applied to all economic sectors. Even though they are not uniformly applied, the OECD examined real cases from different jurisdictions in the economic sectors of telecommunications, electricity, rail and gas applying divestiture of assets or the separation of legal personality, and highlighted certain best practices¹⁵⁹.

The best practices included effects on prices and technology developments; agreements related to effectiveness and implementation via dialogue; and even though dialogue was relevant, a top-down decision was also identified as important, when applied with “*clearly*

¹⁵⁶ ATHAYDE; CRUVINEL, *op. cit.*, pages 40-45.

¹⁵⁷ According to the OECD: “*The US Supreme Court, however, ordered a divestiture in order to create competition in a market in the 1972 Otter Tail case, where an electrical transmission company was required to sell power to public municipal electrical distribution companies. In the Alcoa case, a declared monopolist was also accused of Other competition violations. After long standing litigation, the US Congress stepped in and ordered the divestiture of some of Alcoa’s businesses, which was followed up later by Court and legally ordered divestitures (Waller, 2007[28]). The separation of AT&T in the United States further exemplifies the use of structural separation in the context of competition law enforcement.*” (OECD, The divestiture of assets as a competition remedy: Stocktaking of international experiences. 2019, p. 43).

¹⁵⁸ *Ibid.*, p. 43.

¹⁵⁹ *Ibid.*, pages 45-59.

*structured by legal instruments and under the supervision of a relevant authority*¹⁶⁰; the need to monitor the remedy for opportunities of improvement and also to identify compliance with the measures adopted¹⁶¹.

The OECD remarks that the adoption of divestment sanctions in the competition sphere may lead to thoughts on ways forward for the sanction in Brazil. If, on one side, one could say that the sanction restricts very important principles, such as the free enterprise; on the other side, the sanction should be exceptional and be applied with proportionality and reasonability. The fact that the sanction is “old” in Brazil, because it was provided for in the legal wording of the former Competition Act, does not mean that the sanction had to be applied by CADE in several cases. In fact, CADE only applied the sanction in one case, which is minimum when compared to the total quantity of convictions of cartel cases identified (less than 1% of the cases).

For this reason, the sanction is considered as incipient in Brazil. However, even though the sanction is incipient, it is important to look for what generated the sanction in the specific case in which the sanction was adopted: specificities of the practice, which was supported by the corporate structure of the companies that participated in the practice, based on CADE’s decision.

As a way forward, it is important for CADE to conduct market studies to identify specificities of the markets affected by the practice, such as products and geographic dimensions, quantity of players and others; so that the consequences of the sanction may be evaluated by CADE in its decisions. It is also important that CADE itself or a third party (such as a trustee) monitors the compliance of the sanction in order to ensure legal certainty, effectiveness and predictability in CADE’s decisions related to the practice.

4.7 NON-BINDING RECOMMENDATIONS AS SPECIFIC TYPE OF SANCTIONS

As also discussed above, the legal wording of the current and the former Competition Acts provide for recommendations that may be made by CADE in its decisions to be adopted by the authorities with jurisdiction. Even though CADE made no recommendations related to compulsory license in the cases examined, CADE recommended sanctions related to taxes in

¹⁶⁰ *Ibid.*, p. 51.

¹⁶¹ Specifically on this, the OECD stated that “*The integration of this expertise in one single authority in charge of monitoring the structural separation in the gas market can arguably increase the levels of efficiency, improving the uniformity of the authority’s actions and, therefore, increasing certainty and predictability for market operators and investors*” (OECD, *op. cit.*, p. 58).

roughly 14% of the cases examined. Those recommendations were made against companies, individuals, and trade associations.

It was also identified in the case law research that the recommendations related to taxes have been applied more frequently since the enactment of the current Competition Act. Even though the recommendations are made by CADE, the effectiveness of the recommendations are basically zero, considering that no adoption of the recommendation from CADE related to taxes were identified in relation to the Federal Revenue of Brazil, based on independent research previously mentioned.

It occurs that CADE has not made recommendations only in relation to the possibilities expressly provided by law, but also in relation to other behaviour, such as the adoption of compliance programs by the defendants (which was a recommendation).

On the recommendations expressly provided by law, it is important that CADE evaluates the effectiveness and the consequences of suggesting the adoption of those recommendations by the authorities with jurisdiction to apply those sanctions. Whenever applicable, CADE could also evaluate advocacy activities to be performed in relation to those entities.

For recommendations in relation to practices not expressly provided for by law, it is important that CADE evaluates what exactly those recommendations mean: are they messages to society on expected practices to be adopted by the companies, entities and trade associations? Why were those recommendations considered by CADE as recommendations and not as sanctions? What are the effects of the defendants not adopting the recommendations? Therefore, also aiming at ensuring legal certainty, reasonability and predictability, it is important that CADE clearly defines in its written decisions the narrative related to the recommendations, at least addressing answers to those questions.

5 CONCLUSIONS

This study mainly aimed at identifying the state of play of non-pecuniary sanctions applied in cartel convictions made by CADE. As was seen above, this study is within the scope of discussions related on how to promote or improve cartel enforcement in Brazil and worldwide, considering that cartels are frequently examined by competition authorities. Those discussions also include reflections on the goals of antitrust sanctions, which may include deterrence, punishment, efficiency, compensation or even disgorgement depending on the jurisdiction. Scholars in Brazil mainly comment on the deterrence and punishment goals.

Within the scope of how to improve/promote the fight against cartels worldwide and goals of antitrust sanctions, it was noted that the international scenario is focusing on identifying types of non-pecuniary sanctions that may contribute to enforcement, in a way complementary to pecuniary sanctions (i.e. fines). In addition to identifying the types of non-pecuniary sanctions, the discussions are also centered on the targets of antitrust sanctions: for example, sanctions should be applied not only against companies but also against individuals, whenever applicable. On this regard, it was identified that Brazil is in a relevant position on non-pecuniary sanctions, considering that for more than 20 years, the Brazilian Competition Law provides directly for several types of non-pecuniary sanctions and subjects to those sanctions, which are not only companies, but also individuals, trade associations and other entities.

In addition, and complementarily to what was stated above, research was conducted in this study to identify the state of play of non-pecuniary sanctions applied against cartel cases in Brazil by CADE specifically. Therefore, criminal sanctions and other judicial decisions were not examined as part of this study. The findings of the research showed that 120 cartel convictions by CADE were identified for the period between 1999 to 2022, in which 61 out of the 120 cases (roughly 51% of the cases) contained non-pecuniary sanctions adopted by CADE. In all 120 cases, pecuniary sanctions (that is, fines) were applied by CADE.

On types of non-pecuniary sanctions applied by CADE in cartel cases, it was identified that the following non-pecuniary sanctions were applied, in descending order: publication of CADE's decision (roughly 66% of the cases with non-pecuniary sanctions); prohibition to participate in tenders or execute contracts with official financial institutions (roughly 33% cases); "other" sanctions (roughly 30% cases); sanction to register the name of the defendant in the National Register for Consumer Protection (roughly 25% cases); director disqualification (roughly 5% cases) and company divestment, applied only in 1 case (roughly 2%). Regarding the timeline, it was identified that CADE applies non-pecuniary sanctions since 1999 in cartel

convictions and that more cases with non-pecuniary sanctions were identified after the enactment of the current Brazilian Competition Act.

The incidence and peculiarities of non-pecuniary sanctions were also examined in relation to three specific groups of defendants: companies, individuals and trade associations (referring in general to collective entities, such as trade associations, trade unions and others). In summary, companies are the group with more non-pecuniary sanctions applied against them, but companies are also the group with more cases in which they were listed as defendants. Specifically, more than 80% of the cases with non-pecuniary sanctions involved non-pecuniary sanctions against companies.

Table 1 below summarizes the main findings on the incidence of non-pecuniary sanctions against each one of the group of defendants examined in this study. In general, the publication of CADE's decision is the most common type of non-pecuniary sanction applied by CADE to companies and trade associations. Sanctions related to prohibitions on contracting with the public administration were the most common for individuals.

Table 1 – Summary of incidence of non-pecuniary sanctions, in descending order

Non-pecuniary sanctions against companies	Non-pecuniary sanctions against individuals	Non-pecuniary sanctions against trade associations
Publication of CADE's decision	Prohibition to participate in tenders or execute contracts with official financial institutions	Publication of CADE's decision
Prohibition to participate in tenders or execute contracts with official financial institutions	Register the name of the defendant in the National Register for Consumer Protection	Other sanctions
Register the name of the defendant in the National Register for Consumer Protection	Publication of CADE's decision	Register the name of the defendant in the National Register for Consumer Protection
Other sanctions	Director Disqualification	Prohibition to participate in tenders or execute contracts with official financial institutions
Company divestment	Other sanctions	-

Source: author.

Non-binding recommendations established by the Brazilian Competition Act were also examined separately in this study, considering that, as recommendations, they do not change the *status quo* of the defendants necessarily. The recommendations on compulsory license were not identified in any case. The recommendations were, therefore, mostly related to taxes. In summary, recommendations on taxes were identified in 16 out of the 120 cases examined in this study (roughly 14% of the cases). Recommendations on taxes have been made by CADE mainly after the enactment of the current Brazilian Competition Act.

Given the specificities of each non-pecuniary sanction identified for each group of defendants, it was possible to confirm, in general, the hypothesis tested in this research, that is, CADE, in general, does not have objective or clear criteria or even methodology to apply non-pecuniary sanctions in cartel cases convicted by CADE. Major evidence of this was that CADE has been applying the sanction of registering the name of the defendant in the National Register for Consumer Protection for years, while that Register does not even exist. However, as it was detailed in Chapter 3 above there were some attempts from CADE to establish methodologies and objective criteria to apply certain sanctions.

For example, in Administrative Proceeding No. 08012.009611/2008-51 (related to metal detector security doors), CADE applied the prohibition to participate in tenders sanction, mentioning that the sanction should be applied in relation to two criteria, the seriousness of the practice and the general public interest. It was also mentioned that the sanction should be applied in a market with a high number of players that offer the product/service or in a market with low barriers to entry. Based on this, CADE conducted additional research to identify, for example, companies that entered and left the market in the period between 2006 and 2014; the geographic scope of the market; the analysis of barriers to entry; the structure of the market and analysis of evidence to identify the leader of the alleged practice. Also regarding the prohibition to participate in tenders, in Administrative Proceeding No. 08012.008850/2008-94 (related to laundry in hospitals), CADE stated that the sanction would allow the market to have new opportunities of sales, through a run of shares accommodation, which could result in dispute and rivalry; and applied the sanction in relation to the alleged leader of the cartel, stating that its representatives and managers contacted the other participants to schedule meetings and proceed with agreements.

In view of the scenario of potential legal uncertainty, some recommendations and future perspectives were made/estimated in relation to non-pecuniary sanctions in Brazil. For example, on the publication sanction, it was identified that making the decision public may be an important tool for enhancing private enforcement in Brazil related to cartel practices.

Regarding prohibitions on contracting with the public administration, it is extremely relevant that CADE defines objective criteria and methodology to apply this sanction against defendants, also assessing whether to apply the sanction only in relation to tenders from certain public entities or in relation to specific products and/or services.

Considering that the Brazilian Competition Act also provides for an open concept of other non-pecuniary sanctions, it is important that CADE remains as it is, applying the sanction with a restrictive interpretation, in order to avoid that the public administration exceeds its powers in relation to the administrated ones. As mentioned above, on the National Register for Consumer Protection, it is important that CADE remains undertaking an effort to create the Register, as is provided by law, and that CADE defines the effects that will have in relation to previous related sanctions applied in cartel convictions.

Regarding director disqualification, even though it is an important non-pecuniary sanction against individuals and subject to international debates, constitutional principles should be considered by CADE in order to apply this sanction. This especially considering that the sanction may be applied not only to management individuals, but also to low-level employees in Brazil (which already happened in one out of three cases). In addition, the legal wording allows that the prohibition is related to not only having management positions, but also exercising commerce. And the legal wording neither specifies if the prohibition should be applied to all existing markets or only those affected by the alleged practice.

This scenario of uncertainties and possibilities, with reputational issues derived from a cartel conviction, specially for low-level employees, who may face relevant consequences to find a job and sometimes will need to exercise commerce to survive, led to the conclusion in this research of the need of CADE guaranteeing, for instance, that the human dignity principle (for example, means to survive after the decision) will be met in case a decision like that is handed down by CADE. A few suggestions on this were made in this research. For example, it is relevant that CADE identifies the job position of the individual convicted, the relevance of the involvement of the individual in the practice convicted by CADE, his/her salaries as part of the decision-making process on whether to apply the sanction for the related individual. Based on the findings, it is important that CADE evaluates whether the sanction should be that the individual is prohibited from exercising commerce at all or in a specific market or geographic dimension. In this context, it is key that CADE defines a methodology and objective criteria to apply this sanction.

The divestment sanction was already set forth in the legal wording in the first cartel conviction of 1999. This is not, however, a sanction commonly applied by CADE. This was

applied in only one case, in which CADE considered that structural issues corroborated for the practice to take place. In case CADE decides to apply the sanction in other cases, it is important that CADE conduct market studies to identify specificities of the markets affected by the practice, such as products and geographic dimensions, quantity of players and others; so that the consequences of the sanction may be evaluated by CADE in its decisions. It is also important that CADE itself or a third party (such as a trustee) monitor the compliance of the sanction in order to ensure legal certainty, effectiveness and predictability in CADE's decisions related to the practice.

Finally, on recommendations set forth by law, it is important that CADE evaluate the effectiveness of the recommendations and whether it would be the case for CADE to adopt them as sanctions and not as recommendations, whenever applicable and whenever CADE has jurisdiction to do so. Depending on the effectiveness of the recommendations, it is also suggested that CADE work on advocacy in relation to the authorities with jurisdiction to apply those recommendations to expand the competition culture in the public domain.

Considering the remarks above, it is possible to note that this study is not final on non-pecuniary sanctions applied in Brazil against cartel cases and additional studies are recommended in order to evaluate CADE's decisions on appeals filed by the defendants before CADE or the Judiciary Branch; and the case files related to the compliance with CADE's decision, so that certain specificities on the enforcement of non-pecuniary sanctions may eventually be identified. Research covering the decisions of the so-called "puppies" (*filhotes*, in Portuguese) proceedings derived from a main proceeding may also give more substance for future studies on this topic.

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RtUgqOwvr6Zlwydl0IhRNSr2Q221ByVKByYDYwsa13_JxmnHdrzUgUYhdBzjGjuuOSvVKOm_kehSnKu6elB4S59M.

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https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBce0CKxe72egxGLgapNfOggvxpycS0oc2HvXcKsmdF1WX.

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Annex I - Table of cartel cases convicted in Brazil (1999-2022)

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
1	08000.015337/1997-48	1999	Flat steels	3	0	0	3	Public	No	No	No	1y	No	No	58.510.205,00	Yes	Publication of CADE's decision: company
2	08012.005769/1998-92	2000	Passenger transport (DF)	0	0	1	1	Public	No	No	Yes	1y	No	No	58.620,00	No	No non-pecuniary sanction identified.
3	08012.009118/1998-26	2001	Tender for renovation of a maritime platform	2	0	0	2	Public	Yes	No	No	1m	No	No	-	Yes	Publication of CADE's decision: company
4	08012.002299/2000-18	2002	Fuel retail in Florianópolis (SC)	18	9	0	27	Public	No	No	No	1y	No	No	400.000,00	Yes	Publication of CADE's decision: individual, company, trade association Prohibition to contract with the public administration: individual, company National Register for Consumer Protection: individual, company, trade association Other: trade association Recommendation related to taxes: company, trade association
5	08012.004036/2001-24	2003	Fuel retail in Lages (SC)	10	9	1	20	Public	No	No	Yes	3m	No	No	55.000,00	Yes	Publication of CADE's decision: individual, company, trade association National Register for Consumer Protection: individual,

Administrative Proceeding	Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified	
																company, trade association	
6	08012.009987/1 998-13	2003	Medical services (SE)	25	0	1	26	Private	No	No	Yes	-	No	No	6.384,60	Yes	Publication of CADE's decision: trade association Other: trade association
7	08012.000677/1 999-70	2004	Air passenger transportation	3	4	0	7	Public	No	No	No	8m	No	No	-	Yes	Publication of CADE's decision: company Other: company
8	08012.004860/2 000-01	2004	LPG retail (DF)	4	5	0	9	Public	No	No	Yes	1m	No	No	-	Yes	Publication of CADE's decision: individual, company Other: individual, company
9	08012.006989/1 997-43	2005	Tender of bus lines in Rio de Janeiro (RJ)	7	9	0	16	Public	Yes	No	Yes	3m	No	No	-	Yes	Publication of CADE's decision: company
10	08012.002097/1 999-81	2005	Newspaper sales in Rio de Janeiro (RJ)	3	0	1	4	Public	No	No	Yes	1d	No	No	-	Yes	Publication of CADE's decision: company, trade association
11	08012.009160/2 002-67	2005	LPG resale in PR	6	6	0	12	Private	No	No	Yes	2m	No	No	-	Yes	Publication of CADE's decision: individual, company
12	08012.002127/2 002-14	2005	Crushed stone	21	0	1	22	Public	No	No	Yes	7y	No	No	-	Yes	Publication of CADE's decision: trade association Recommendation related to taxes: company, trade association
13	53500.003888/2 001	2005	Cable TV in Blumenau (SC)	2	0	0	2	Public	No	No	Yes	1y	No	No	-	Yes	Publication of CADE's decision: company Other: company
14	08012.004086/2 000-21	2005	Steel rebar	3	0	0	3	Private	No	No	No	-	No	No	-	Yes	Publication of CADE's decision: company Other: company
15	08012.009088/1 999-48	2005	Distribution of generic drugs	20	0	0	20	Public	No	No	No	4m	No	No	-	Yes	Publication of CADE's decision: company

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
16	08012.000099/2003-73	2006	Driving school services in Santos (SP)	13	0	0	13	Public	No	No	Yes	1y	No	No	-	No	No non-pecuniary sanction identified.
17	08012.007602/2003-11	2007	Changing taximeters in Porto Alegre (RS)	5	5	0	10	Private	No	No	Yes	2y	No	No	-	Yes	Publication of CADE's decision: individual, company
18	08012.004599/1999-18	2007	Vitamins	6	11	0	17	Public	No	Yes	No	9y	No	No	17.686.045,88	No	No non-pecuniary sanction identified.
19	08012.001826/2003-10	2007	Private surveillance (RS)	22	30	3	55	Public	Yes	No	Yes	12	Yes	No	40.590.140,26	Yes	Publication of CADE's decision: trade association Prohibition to contract with the public administration: individual, company
20	08012.006019/2002-11	2008	LPG distribution in Triângulo Mineiro (MG)	8	7	0	15	Private	No	No	Yes	1y	No	No	60.653,70	No	No non-pecuniary sanction identified.
21	08012.006241/1997-03	2009	Retail sale of medicines (DF)	83	17	1	101	Private	No	No	Yes	5y	No	No	-	Yes	Publication of CADE's decision: trade association Other: trade association
22	08012.009888/2003-70	2010	Hospital and industrial gas	8	8	0	16	Public	No	No	No	6y	No	No	2.947.055.509,42	No	No non-pecuniary sanction identified. Recommendations related to taxes: individual, company
23	08012.005495/2002-14	2011	Fuel retail in Guaporé (RS)	4	5	0	9	Public	No	No	Yes	-	No	No	8.462.340,02	Yes	National Register for Consumer Protection: individual, company Recommendation related to taxes: individual, company

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
24	08012.004702/2004-77	2012	Hydrogen peroxide	4	16	0	20	Public	No	No	No	9y	Yes	No	150.002.481,91	Yes	National Register for Consumer Protection: individual, company Recommendation related to taxes: individual, company
25	08012.010215/2007-96	2013	Fuel retail in Caxias do Sul (RS)	8	12	1	21	Public	No	No	Yes	2y	No	No	65.785.031,04	No	No non-pecuniary sanction identified. Recommendations related to taxes: individual, company, trade association
26	08012.004472/2000-12	2013	Fuel retail in Bauru (SP)	18	6	1	25	Public	No	No	Yes	1y	No	No	6.256.007,30	No	No non-pecuniary sanction identified. Recommendations related to taxes: individual, company
27	08012.001003/2000-41	2013	Fuel retail in Londrina (PR)	12	10	0	22	Public	No	No	Yes	1y	No	No	35.806.190,88	Yes	Prohibition to contract with the public administration: individual Recommendation related to taxes: individual, company
28	08012.003745/2010-83	2013	Copyright and related rights	1	0	6	7	Private	No	No	No	-	No	No	33.151.710,00	Yes	Other: company, trade association
29	08012.004039/2001-68	2013	Bakery in Sobradinho (DF)	18	19	0	37	Public	No	No	Yes	1d	No	No	650.165,10	No	No non-pecuniary sanction identified.
30	08012.004573/2004-17	2013	Fuel retail in Santa Maria (RS)	8	0	0	8	Public	No	No	Yes	9m	No	No	16.464.636,05	No	No non-pecuniary sanction identified.
31	08012.011027/2006-02	2013	Air cargo service	10	15	0	25	Public	No	No	No	2y3m	Yes	Yes	293.318.298,50	Yes	Publication of CADE's decision: company National Register for Consumer Protection: individual, company
32	08012.011668/2007-30	2013	Fuel retail in Londrina (PR)	17	13	0	30	Public	No	No	Yes	1y	No	No	10.964.962,20	No	No non-pecuniary sanction identified.

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
33	08012.012420/1999-61	2013	Resale of law books (DF)	12	10	3	25	Private	No	No	Yes	1d	No	No	35.115,30	No	No non-pecuniary sanction identified.
34	08012.004365/2010-66	2014	Pharmacies and drugstores in Curitiba (SC)	11	0	0	11	Public	No	No	Yes	-	No	No	1.500.619,09	No	No non-pecuniary sanction identified.
35	08012.001794/2004-33	2014	Sale and maintenance of fire extinguishers (DF)	20	2	1	23	Public	No	No	Yes	1d	No	No	1.922.771,70	Yes	Publication of CADE's decision: trade association Other: trade association
36	08012.011853/2008-13	2014	Tenders for garbage management (RS)	3	10	0	13	Public	Yes	No	Yes	1y	No	No	1.259.470,01	Yes	Publication of CADE's decision: company Prohibition to contract with the public administration: company
37	08012.010362/2007-66	2014	Tenders for postal air transportation services	2	2	0	4	Public	Yes	No	No	2y	No	No	83.427.226,55	Yes	Publication of CADE's decision: company
38	08012.011142/2006-79	2014	Cement and concrete	8	6	3	17	Public	No	No	No	-	No	Yes	3.113.453,058,64	Yes	Publication of CADE's decision: company, trade association Prohibition to contract with the public administration: company National Register for Consumer Protection: company Recommendation related to taxes: company Company divestment: company Other: company, trade association

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
39	08000.009354/1997-82	2014	LPG distribution of cylinders in Porto Alegre and Canoas (RS)	4	0	0	4	Public	No	No	Yes	-	No	No	10.483.270,45	No	No non-pecuniary sanction identified.
40	08012.001020/2003-21	2014	Support for diagnostic medicine in Campina Grande (PB)	11	0	2	13	Public	No	No	Yes	9y	No	No	2.609.722,81	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
41	08012.007033/2006-57	2014	Healthcare services in Londrina (PR)	3	0	1	4	Public	No	No	Yes	1y	No	No	2.192.046,00	No	No non-pecuniary sanction identified.
42	08700.008551/2013-69	2014	Healthcare services in Ibioporã and Londrina (PR)	2	0	0	2	Public	No	No	Yes	1y	No	No	1.064.100,00	No	No non-pecuniary sanction identified.
43	08012.005004/2004-99	2014	Hemotherapy services in Vitória (ES)	3	0	2	5	Private	No	No	Yes	-	No	No	2.857.149,25	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
44	08012.009611/2008-51	2014	Tender for metal detector security doors	7	10	0	17	Public	Yes	No	No	-	No	No	12.791.383,55	Yes	Prohibition to contract with the public administration: individual, company
45	08012.006199/2009-07	2014	Tender for construction materials in Lages (SC)	5	5	0	10	Anonymous	Yes	No	Yes	-	No	No	756.028,10	Yes	Prohibition to contract with the public administration: company National Register for Consumer Protection: company Recommendations related to taxes: company
46	08012.008507/2004-16	2014	Tender for purchase of	12	0	1	13	Public	Yes	No	Yes	-	No	No	2.244.437,63	Yes	Prohibition to contract with the public

Administrative Proceeding	Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified	
		orthopedic prostheses														administration: company	
47	08012.000030/2015-50	2015	Tender for maintenance of ambulances (RJ)	5	0	0	5	Public	Yes	No	Yes	1y	No	No	184.143,90	No	No non-pecuniary sanction identified.
48	08012.000377/2004-73	2015	Hospital services (BA)	8	0	2	10	Public/Private	No	No	Yes	8y	No	No	11.078.202,51	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
49	08012.001273/2010-24	2015	Tender for solar heaters	6	2	1	9	Public	Yes	No	Yes	-	Yes		18.515.990,88	Yes	National Register for Consumer Protection: company
50	08012.006764/2010-61	2015	Automotive license plates in Salvador (BA)	11	2	2	15	Public	No	No	Yes	-	No	No	349.386,69	Yes	Publication of CADE's decision: trade association Other: individual, company, trade association
51	08012.006969/2000-75	2015	Hospital services (DF)	13	0	4	17	Private	No	No	Yes	1y	No	Yes	20.391.797,82	No	No non-pecuniary sanction identified.
52	08012.007356/2010-27	2015	Measuring instruments in São José dos Campos (SP)	4	4	0	8	Public	No	No	Yes	-	No	No	650.533,00	Yes	Publication of CADE's decision: company
53	08012.008184/2011-90	2015	Tender for traffic inspection in Jahu (SP)	6	0	0	6	Public	Yes	No	Yes	1y	No	No	14.694.768,13	Yes	National Register for Consumer Protection: company
54	08012.006685/2004-11	2015	Car resale by dealerships (DF)**	31	2	1	34	Public	No	No	Yes	1y	No	No	1.117.305,00	No	No non-pecuniary sanction identified.
55	08012.008847/2006-17	2015	Fuel retail in Vitória (ES)	30	9	0	39	Public	No	No	Yes	1y	No	No	65.730.912,02	Yes	National Register for Consumer Protection: individual, company Recommendation related to taxes: individual, company
56	08012.009462/2006-69	2015	Toy manufacturing**	0	1	1	2	Private	No	No	No	1m	No	No	12.769,20	No	No non-pecuniary sanction identified.

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
57	08012.009885/2009-21	2015	Tender for sanitation services in Santos (SP)	2	6	0	8	Public	No	No	Yes	1y	No	No	19.647.636,58	Yes	Publication of CADE's decision: company
58	08012.010187/2004-64	2015	Hospital services in Pouso Alegre (MG)	2	0	2	4	Private	No	No	Yes	1y	No	No	944.804,06	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
59	08012.010932/2007-18	2015	Marine hoses	11	11	0	22	Public	Yes	Yes	No	22y	Yes	Yes	13.561.756,53	Yes	Prohibition to contract with the public administration: company National Register for Consumer Protection: company Recommendation related to taxes: company
60	08012.012032/2007-13	2015	Hemotherapy services in Goiânia (GO)	3	0	3	6	Public	No	No	Yes	2y	No	No	7.579.678,63	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
61	08700.005326/2013-70	2015	Port operation in Porto Alegre (RS)**	4	0	1	5	Public	No	No	Yes	1y	No	No	3.465.164,73	Yes	Publication of CADE's decision: company, trade association
62	08012.000820/2009-11	2016	Hermetic compressors for refrigeration	8	18	0	26	Public	No	Yes	No	12y	Yes	Yes	21.367.775,95	No	No non-pecuniary sanction identified.
63	08012.001029/2007-66	2016	Sodium perborate	2	3	0	5	Public	No	Yes	No	2y	Yes	No	17.428.573,35	No	No non-pecuniary sanction identified.
64	08012.002568/2005-51	2016	LPG retail (PA)	3	0	0	3	Public	No	No	Yes	2y	No	Yes	38.638.984,16	No	No non-pecuniary sanction identified.
65	08012.003321/2004-71	2016	Tender for purchase of homoderivatives	23	4	0	27	Public	Yes	No	No	7y	No	No	1.000.254,00	No	No non-pecuniary sanction identified.

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
66	08012.005255/2010-11	2016	DRAM semiconductor memory	11	27	0	38	Public	No	Yes	No	4y	No	Yes	7.095.868,60	No	No non-pecuniary sanction identified.
67	08012.005930/2009-79	2016	Cathode ray tube (CRT) glass supply	5	14	0	19	Public	No	Yes	No	8y	Yes	Yes	10.853.820,00	No	No non-pecuniary sanction identified.
68	08012.008821/2008-22	2016	Manufacturing of antiretroviral drugs	4	8	0	12	Public	Yes	No	Yes	6m	No	Yes	5.943.593,52	Yes	Prohibition to contract with the public administration: individual National Register for Consumer Protection: company
69	08012.008850/2008-94	2016	Tender for laundry in hospitals (RJ)	7	13	1	21	Public	Yes	No	Yes	6y	No	Yes	27.377.649,36	Yes	Prohibition to contract with the public administration: individual, company National Register for Consumer Protection: company Recommendation related to taxes: company
70	08012.009645/2008-46	2016	Tender for purchase of food for special purposes	5	0	0	5	Private	Yes	No	Yes	2y	No	No	8.084.616,19	No	No non-pecuniary sanction identified.
71	08012.011791/2010-56	2016	Driving School Services in Santa Barbara (SP)	18	6	1	25	Public	No	No	Yes	9y	No	No	889.177,50	Yes	Publication of CADE's decision: trade association National Register for Consumer Protection: individual, company, trade association Other: company, trade association
72	08012.000504/2005-15	2017	Road transport of	0	0	2	2	Public	No	No	Yes	6y	No	No	1.096.023,00	No	No non-pecuniary sanction identified.

Administrative Proceeding	Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified	
		solid bulk in Santos (SP)**															
73	08012.002874/2004-14	2017	Medical services (MS)**	0	1	3	4	Private	No	No	Yes	1y	No	No	1.177.426,65	Yes	Publication of CADE's decision: trade association
74	08012.006130/2006-22	2017	Tenders for building maintenance	9	4	0	13	Public	Yes	No	No	1y	Yes	Yes	11.945.811,61	Yes	Prohibition of contracting with public administration: company
75	08012.007011/2006-97	2017	Medical and hospital services in Fortaleza (CE)**	9	0	1	10	Private	No	No	Yes	7y	No	No	47.532.241,90	Yes	Publication of CADE's decision: company, trade association
76	08012.009382/2010-90	2017	Tenders for works in Curitiba (PR)	12	7	1	20	Public	Yes	No	Yes	1y	No	No	3.298.000,68	Yes	Prohibition to contract with the public administration: individual, trade association Recommendation related to taxes: individual, trade associations
77	08012.010744/2008-71	2017	Milk sales in Pelotas (RS)	3	13	3	19	Public	No	No	Yes	1y	No	No	2.749.929,14	No	No non-pecuniary sanction identified.
78	08700.002821/2014-09	2017	Fuel retail in São Luís (MA)	15	12	1	28	Public	No	No	Yes	1m	No	Yes	17.409.803,81	No	No non-pecuniary sanction identified.
79	08012.005882/2008-38	2018	Salt extraction and refining	19	43	3	65	Public	Yes	No	No	20y	No	Yes	289.506.209,18	Yes	Prohibition to contract with the public administration: company
80	08012.002414/2009-92	2018	Colour picture tubes (CPT) for television	16	22	0	38	Public	No	Yes	No	12y	Yes	Yes	4.968.267,11	No	No non-pecuniary sanction identified.
81	08700.001859/2010-31	2018	Distribution of taxi passenger transport services (PR)	0	6	7	13	Private	Yes	No	Yes	6y	No	No	1.053.459,00	No	No non-pecuniary sanction identified.

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
82	08012.002812/2010-42	2018	Recharges in prepaid mobile distribution	8	18	0	26	Public	No	No	No	2y	Yes	Yes	1.623.400,00	Yes	Publication of CADE's decision: individual, company
83	08012.004422/2012-79	2018	Private tenders for parking (SP)	6	17	0	23	Public	Yes	No	Yes	1y	No	Yes	489.460,69	No	No non-pecuniary sanction identified.
84	08012.004674/2006-50	2018	Flexible packaging	12	16	2	30	Private	No	No	No	5y	No	Yes	305.948.669,71	No	No non-pecuniary sanction identified.
85	08012.000758/2003-71	2018	Medical services (ES)	17	1	7	25	Private	No	No	Yes	3y	No	Yes	2.639.119,00	No	No non-pecuniary sanction identified.
86	08012.001376/2006-16	2018	Gas-insulated switchgear	14	12	0	26	Public	Yes	Yes	No	16y	Yes	Yes	4.956.435,25	No	No non-pecuniary sanction identified.
87	08012.001377/2006-52	2019	Electric power transmission products	19	47	0	66	Public	Yes	Yes	No	7y	Yes	Yes	56.171.260,73	No	No non-pecuniary sanction identified.
88	08012.003970/2010-10	2019	Submarine cables	11	6	0	17	Public	Yes	Yes	No	14y	Yes	Yes	20.964.914,93	No	No non-pecuniary sanction identified.
89	08012.001395/2011-00	2019	Optical discs (ODD)	9	14	0	23	Public	No	Yes	No	6y	Yes	Yes	24.519.660,39	No	No non-pecuniary sanction identified.
90	08012.008407/2011-19	2019	Cardiovascular services (PR and RJ)**	0	0	4	4	Public	No	No	No	4y	No	No	866.165,04	No	No non-pecuniary sanction identified.
91	08012.011980/2008-12	2019	Liquid crystal displays (LCD)	13	0	0	13	Public	No	Yes	No	5y	Yes	Yes	27.377.127,91	No	No non-pecuniary sanction identified.
92	08700.004073/2016-61	2019	Car shock absorbers	1	8	0	9	Public	No	No	No	14y	No	Yes	93.460.709,59	No	No non-pecuniary sanction identified.
93	08700.004617/2013-41	2019	Tenders for construction of meters (SP, DF, MG and RS)	17	68	0	85	Public	Yes	No	No	15y	Yes	Yes	535.123.969,51	Yes	Prohibition to contract with the public administration: company Recommendations related to taxes; company
94	08700.010769/2014-64	2019	Fuel cartel in Belo Horizonte (MG)	65	24	1	90	Public	No	No	Yes	1y	No	Yes	105.458.959,23	Yes	Publication of CADE's decision: trade association
95	08012.004280/2012-40	2019	Tenders for IT services (DF)	7	10	0	17	Public	Yes	No	Yes	3y	No	Yes	2.122.354,04	Yes	Director disqualification: individual

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96	08700.007938/2016-41	2019	Airbag, seat belts and steering wheels	0	2	0	2	Public	No	No	No	1y	Yes	Yes	1.632.495,29	No	No non-pecuniary sanction identified.
97	08700.011474/2014-05	2020	Bid rigging related to the construction of fenders in the Liquid Bulk Terminal (TGL) in the Maceió Port	2	5	0	7	Public	Yes	No	Yes	3m	No	No	2.847.252,94	No	No non-pecuniary sanction identified.
98	08012.003893/2009-64	2020	Anaesthesiology services market in the State of Rio Grande do Sul**	2	0	2	4	Public	No	No	Yes	18y	No	Yes	3.507.887,17	Yes	Publication of CADE's decision: company, trade association Other: company, trade association
99	08012.007011/2006-97	2020	Medical/Hospital services in Fortaleza (CE)**	14	0	1	15	Private	No	No	Yes	7y	No	No	47.532.241,90	No	No non-pecuniary sanction identified.
100	08700.001422/2017-73	2020	PVC products	6	8	0	14	Public	No	No	No	1y	Yes	Yes	19.255.551,32	No	No non-pecuniary sanction identified.
101	08012.009732/2008-01	2020	Bid rigging related to municipal tenders for the acquisition of mixed health unit ("UMS") and dental health equipment	8	4	0	12	Public	Yes	No	No	6y	No	No	55.446.871,48	Yes	Prohibition to contract with the public administration: individual, company Director disqualification: individual
102	08700.000066/2016-90	2021	Private tenders from Telemar and Telefônica regarding electronic components for the telecom sector	6	12	0	18	Public	No	No	No	5y	Yes	Yes	5.408.314,04	No	No non-pecuniary sanction identified.

Administrative Proceeding		Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified
103	08700.006065/2017-30	2021	IAM and/or OEM market	4	23	0	27	Public	No	No	No	8y	Yes	Yes	100.000,00	No	No non-pecuniary sanction identified.
104	08012.005324/2012-59	2021	Bearing supplied to the IAM and OEM markets	15	31	0	46	Public	No	Yes	No	7y	Yes	Yes	88.205.621,90	No	No non-pecuniary sanction identified.
105	08012.010022/2008-16	2021	Bid rigging related to outsourcing of school lunches in the State of São Paulo	12	15	0	27	Public	Yes	No	Yes	4y	No	No	340.798.741,17	Yes	Publication of CADE's decision: company Prohibition to contract with the public administration: individual, company National Register for Consumer Protection: individual, company Recommendation related to taxes: individual, company
106	08012.001183/2009-08	2021	International air and maritime freight agency	27	35	1	63	Public	Yes	Yes	No	6y	Yes	Yes	31.232.086,86	No	No non-pecuniary sanction identified.
107	08700.008897/2015-29	2021	Port services	23	19	1	43	Public	No	No	Yes	2y	No	No	1.339.992,31	No	No non-pecuniary sanction identified.
108	08700.009879/2015-64	2021	Fuel cartel in Joinville (SC)	46	31	1	78	Public	No	No	Yes	1y	No	Yes	38.732.011,84	No	No non-pecuniary sanction identified.
109	08700.008612/2012-15	2021	Bid rigging related to the acquisition of uniform, bags and school materials in several States of Brazil	10	21	0	31	Public	Yes	No	No	5y	Yes	No	91.409.637,15	No	No non-pecuniary sanction identified.
110	08700.003390/2016-60	2021	PVC pipes and fittings for sanitation infrastructure works (sewage and water) and	13	29	0	42	Public	Yes	No	No	7y	Yes	Yes	193.887.491,27	No	No non-pecuniary sanction identified.

Administrative Proceeding	Year of CADE's Tribunal decision	Market	N° Defendants (Firms / Individuals / Trade association/ Total)				Claimant (Public / Private)	Bid Rigging (Yes/No)	International (Yes/No)	Local (Yes/No)	Duration (years)	Leniency (Yes/No)	Settlement (Yes/No)	Fines in BRL (Total)	Non-pecuniary sanctions (Yes/No)	Comments on the non-pecuniary sanctions identified	
		buildings and civil construction works															
111	08700.003340/2 017-63	2021	Automotive filters	6	41	0	47	Public	No	No	No	10y	Yes	Yes	143.940.344,10	No	No non-pecuniary sanction identified.
112	08700.004455/2 016-94	2021	Bid rigging related to the acquisition of school and office materials by city halls in the State of Pernambuco	10	5	0	15	Public	Yes	No	Yes	8y	No	No	1.591.525,77	Yes	Publication on contracting with the public administration: individual, company Director disqualification: individual
113	08700.003718/2 015-67	2022	Resins of polyester and phenolic	13	51	0	64	Public	No	No	No	8y	Yes	Yes	46.804.508,18	No	No non-pecuniary sanction identified.
114	08700.001094/2 016-24	2022	International maritime car shipping	9	59	0	68	Public	No	Yes	No	36y	Yes	Yes	26.462.771,07	No	No non-pecuniary sanction identified.
115	08700.003396/2 016-37	2022	High-density polyethylene pipes (HDPE)	5	17	0	22	Public	Yes	No	No	11y	Yes	Yes	33.175.456,52	No	No non-pecuniary sanction identified.
116	08700.007278/2 015-17	2022	Coffee shop services in airports	5	8	0	13	Public	Yes	No	No	6m	No	No	4.775.170,93	Yes	Publication of CADE's decision: individual, company Prohibition to contract with the public administration: individual, company
117	08700.003067/2 009-67	2022	LPG retail (Northeast region)	14	29	1	44	Public	No	No	No	-	No	Yes	642.972.934,87	No	No non-pecuniary sanction identified.
118	08700.004248/2 019-82	2022	Lease contracts for road equipment	7	4	0	11	Public	Yes	No	No	3y	Yes	Yes	17.834.784,45	Yes	Prohibition to contract with the public administration: company
119	08700.006681/2 015-29	2022	Sodium silicate	6	28	0	34	Public	No	No	No	13y	Yes	Yes	61.178.820,91	Yes	Publication of CADE's decision: company

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120	08700.011835/2015-02	2022	Telecom services	3	0	0	3	Private	Yes	No	No	-	No	No	783.065.994,40	No	No non-pecuniary sanction identified.