Public Statements from an Antitrust Perspective

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In their day-to-day activities, companies may often participate in industry meetings, organize conferences to disclose financial results, and give interviews to the media. At these events, companies usually express their views on the future development of their market, business strategies, and sector challenges. In the case of publicly-traded companies, addressing these issues is even mandatory, given their duty to keep investors informed about the company business.

However, public statements and information disclosed to the market without due care may lead antitrust authorities to suspect illegal "signaling" to the market or an "invitation to collude."

These practices would not amount to a classic cartel – the most egregious antitrust violation that usually involves an agreement among competitors to restrict competition. Instead, an invitation to collude is a unilateral conduct that signals to competitors, even if indirectly, the expectation that they will adapt their commercial behavior, in an aligned manner.

Until now, this type of violation has not been an enforcement priority of Brazil's antitrust authority, CADE (Conselho Administrativo de Defesa Econômica). Recently, however, this trend has been reversed: since 2020, CADE has initiated at least four proceedings to investigate potentially anticompetitive signaling in statements made to the market[1].

In one case[2], CADE's Superintendence-General ("SG" – Superintendência Geral) investigated whether public announcements made by an airline company regarding future pricing policies and market share could lead to the adoption of uniform conduct among competitors. After examining the statements as a whole and the context in which they were made, however, the SG concluded that the company had merely provided general responses to journalists' questions, containing only superficial analyses of the market and the company's overall strategy, and closed the case without imposing sanctions.

In another case[3], the SG investigated two poultry and pork companies for indicating, at the same public event, that chicken prices would rise due to the increase in the cost of corn. In the end, the SG decided to close the case without imposing sanctions, as (i) there was no intentional disclosure of commercially sensitive information, but rather a general response to journalists' questions, and (ii) the market projections disclosed by the companies were not the same, demonstrating that their price increase forecasts were not coordinated but only based on the same assumptions.

In a third case[4], which is still underway, the SG is investigating whether statements made by a telecommunications company during the presentation of its quarterly results could be considered unlawful, since it indicated that the price of its services would increase and that there was an expectation that competitors' prices would also rise. This proceeding is still in the early stages of investigation.

Last, in the fourth case[5], CADE is investigating a bioenergy company for allegedly encouraging competitors to agree on "a way to strategically control the supply" of a certain product, in the context of a public workshop for the entire industry. In that case, the SG recommended that the investigated company be held liable, mentioning that the invitation to collude constitutes, in itself, an antitrust offense – i.e., it is illegal even if not followed or accepted by competitors. The case is now under review by CADE's Tribunal.

Although there is no final decision in two of the four cases, at least two of CADE's decisions suggest that generic statements about the market are unlikely to raise competition concerns. Nevertheless, the authority's guidance is clear: companies must adopt caution when making public statements to avoid they are interpreted as anti-competitive signaling to the market. In the words of the authority itself, "*statements, even if unilateral and public, that may influence uniform conduct among competitors should be a cause for concern*"; "*a fundamental part of compliance programs involves ensuring executives and legal entities are aware of antitrust authorities' actions.*"

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NOTES

[1] Research of CADE precedents conducted on September 28, 2023.

[2] Preparatory Investigation 08700.001819/2023-11.

[3] Preparatory Investigation 08700.000416/2020-02.

[4] Preparatory Investigation 08700.003498/2023-81.

[5] Administrative Proceeding 08700.005438/2021-31.

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