A) What, if any, agreements on information exchanges about prices should be prohibited in vertical relationships?

BRAZIL

1. Legal Framework

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

Antitrust violations are prohibited in Brazil pursuant to article 20 of Law no. 8,884/1994 (the Competition Law). Even though there is much debate regarding various possible legal interpretations, the provisions of article 20 can be summarized, for the purposes of this questionnaire, as any practice that has as its object or effect the lessening of competition, which will be considered anti-competitive. Article 21 contains a list of some practices that are often understood as examples of usual anti-competitive behavior, and this list includes several examples of vertical restraints.

The broad language of the authorities' guidelines on anticompetitive practices, Resolution No. 20/1999, issued by the Administrative Council for Economic Defense (the CADE), indicate that the analysis of alleged anticompetitive conduct should depend on the evaluation of their possible benefits. Specifically with respect to vertical agreements, this Resolution states that

> competition infringements involving vertical restraints generally require the existence of market power in a certain market as well as an effect over a substantial portion of the market towards which the conduct is directed. Although vertical restraints may in principle correspond to lessening of competition, they may as well result in benefits (efficiencies) which must be compared *vis-à-vis* the potential anticompetitive effects, according the a reasonability principle. (Resolution CADE no. 20/1999, Exhibit I, Section B)

Thus, generally speaking, vertical agreements tend to be reviewed in Brazil on the basis of an analysis comparable to the rule of reason, by which the authorities assess possible negative effects deriving from vertical restraints to their corresponding economic benefits. There is no *per se* illegality for vertical agreements pursuant to the Brazilian Law, even though CADE's recent precedents cases may be pointing to that direction in hard core cartel cases.

There is no block exemption or a system for the review of vertical agreements in Brazil, although the authorities are unlikely to challenge or investigate agreements involving parties with market shares (either in downstream or upstream markets) lower than 20% (as Brazilian Law generally assumes that a company is dominant if its market share is above such threshold). This tendency, however, shall not be considered as a block exception of any kind.

Finally, it is worth mentioning that the broad language of the merger control provisions allows companies to submit complex vertical agreements for clearance by the competition authorities. This, however, is far from common practice and the authorities are yet to issue a conclusive, guiding opinion on this matter.

1.2 Do these principles vary depending on the type of vertical practice considered?

Competition Law and CADE's guidelines do not set out a different treatment to different types of vertical practices. CADE's recent precedents also do not indicate the authorities will use different standards to review each type of vertical agreement.

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

No, there is no specific prohibition on vertical pricing practices or agreements. Therefore, all ways of controlling downstream (or upstream) prices tend to be accepted in Brazil, so long as there are reasonable justifications from the perspective of competition policy.

1.4 What is the de minimis / appreciability threshold, if any, applicable to vertical arrangements and practices?

Even thought, there is not a threshold on appreciability of conducts related to vertical restraints, the authorities are unlikely to challenge or investigate agreements involving parties with market shares (either in downstream or upstream markets) lower than 20%, as Brazilian Law generally assumes that a company is dominant if its market share is above such threshold.

Although there is not a consistent set of precedents regarding vertical agreements from which a clear rule can be inferred, recent decision practice in Brazil indicates that a vertical practice will only be subject to more in-depth investigation if it involves a dominant company targeting a significant market share on vertically related markets.

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and/or vertical price agreements?

There is no specific guideline in Brazil regarding exchanges of information and vertical price agreements. Nonetheless, the authorities have issued guidelines for trade associations indicating that antitrust concerns are less likely to occur if the information is old (more than one year), and aggregated. These guidance may also apply to other situations involving Exchange of information.

2. Criteria applicable to price related vertical agreements

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

Competition Law requires the authorities to evaluate such practices on the basis of an assessment comparable to the rule of reason, even when they involve practices (such as retail price maintenance) which are deemed to be per se illegal in other jurisdictions.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

As there is no differentiation on the treatment given to pricing and non-pricing vertical agreements, such restraints will generally be considered illegal if all four of the following conditions are met:

(i) the agreement involves a dominant company,
(ii) the agreement involves a substantial portion (>30%) of a vertically related market;
(iii) the agreement may involve a potential negative effect over competition in one of the markets involved; and
(iv) no countervailing economic benefits are found to exist.

2.3 What about the situations which are in-between, such as recommendations / suggestions and exchange of information?

CADE has decided in the past that mere price suggestions would not involve a competition infringement (case no. 0148/1992), but no additional guidance can be found on the authorities' recent precedents with respect to this matter. There is no clear cut precedent on the exchange of information on vertical practices.

2.4 What is the assessment of vertical unilateral practices in relation to prices?

CADE's review of a specific fidelity program involved a complex assessment of dominance, of the dominant company's prices and costs, market structure and dynamics, and an adapted price-cost test (an "as efficient" test), coupled with a review of documents on the conduct intent (see case no. 08012.003805/2004-10). On the basis of this precedent, one can assume that the Brazilian authorities would tend to review unilateral pricing practices from dominant companies on the basis of international standards: normal competitive behavior compared on the basis of price-cost tests.

2.5 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

No, there is no such rule in Brazil.

3. Anti-competitive effects

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

There is no difference on the anticompetitive effects required for a conduct to be found an infringement. The same "lessening of competition" effect is required, regardless of the conduct being reviewed.

An assessment of the seriousness (severity, gravity) of the infringement usually takes into account the type of the conduct (cartel or otherwise), the markets involved, the turnover of the violators etc.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

The authorities' precedents tend to take into consideration only effects of the conduct on inter-brand competition. Intra-brand effects may be considered for an assessment of the conduct, but to a much lesser extent than inter-brand effects.

3.2 Is also the anti-competitive intent of the vertical agreement considered?

Yes, it is. The Brazilian Competition Law sets out that a competition infringement is to be found if anti-competitive intent (object) is proven in connection with any type of conduct.

Case no. 08012.003805/2004-10 involved the review of the intent of a certain fidelity program, and documents seized from the dominant firms' offices were used as evidence of the anti-competitive objective of such program, as some documents made clear, according to the authorities, that the businessmen objectives involved a naked lessening of competition.

3.3 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practise encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

There are no recent precedents on this, but CADE's decision on case no. 0148/1992 indicates that the authorities are likely to take into account the actual conduct being evaluated.

For instance, if a dominant defendant alleges that it is only suggesting a resale price but, instead, it is proven to be fixing prices through bonuses, the conduct assessed will actually involve price fixing.

4. Pro-competitive effects

4.1 Does the national competition act recognise justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account

practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

There are no relevant precedents on this, but the authorities should, generally speaking, take economic efficiencies or reasonable business justification into consideration in evaluating vertical pricing practices.

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

The authorities will usually recognize any acceptable types of pro-competitive effects deriving from vertical practices, such as the reduction in transaction costs or the protection of relation-specific investments, pursuant to Resolution CADE no. 20/1999.

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organisation**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

4.4 Does the national competition act and case law take into consideration other justifications?

There are no precedents or substantial legal doctrine on the matter, but there are no grounds for rejecting *ex ante* any of the listed pro-competitive justifications. All of them should be accepted under Brazilian Law, if the defendant is able to produce economic sensible evidence in support of the justification at hand

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

Authorities are required to proceed with an automatic review of pro-competitive effects, but in practice interested parties (defendants more specifically) advance economic evidence in support of their justifications of the practice. This derives most likely from the proceeding adopted for the investigation of competition infringements in Brazil than from a substantive provision of the Competition Law.

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law ?

Competition authorities tend not to accept justifications if they imply anti-competitive effects in the long term.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

Sufficiently proven justifications tend to be taken into consideration for deciding that an agreement should not be prohibited (*i.e.*, it is not a competition infringement). There are no exemptions from competition rules in Brazil.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

Competition authorities should adopt a more systematic review of pro-competitive justifications for vertical practices. Although authorities do take them into consideration during the decision making process, quantification and review of the justifications do not follow a thorough approach, which tends to render defendants in a worse position.

5. Sanctions:

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

5.2 Are the above practices subject to sanctions as well?

Generally speaking, in Brazil anticompetitive practices, including vertical agreements involving pricing practices, are treated as administrative and civil violations. Cartels, specifically, can also be ruled as criminal violations by a Criminal Court.

The administrative penalties for antitrust violations are set out under article 23 of the Competition Law. A company can be fined from 1 to 30 per cent of its pre-tax turnover (which shall not be lower than the advantage obtained from the violation, if that is assessable). For managers (*administradores*) of companies that are directly or indirectly involved in the conduct, fines range from 10 per cent to 50 per cent of that applied to the company, if the participation of the managers in the scheme is proved; trade associations which have fostered coordinated behavior, as well as other individuals may be required to pay fines of around US$3 thousand to US$3 million. Additional penalties may be imposed upon companies, such as limitations to participate in public bids, restrictions on tax benefits and partial discontinuance of activities (even though the last two have never been applied).

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

Yes.

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

In July 2009, CADE issued a decision on case no. 08012.003805/2004-10 sanctioning the defendant in approximately R$ 352 million (EUR 132 million[1]), representing 2% of the company's turnover in the year of 2008. For purposes of imposing fines, CADE considers the gross turnover excluding taxes. This is the highest fine ever imposed by CADE in absolute figures, and the highest percentage for vertical restraints.

Even though the fines may range for 1% to 30% of the company's turnover, CADE seems to be cautious about the absolute amount of the fines.

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

As mentioned above, the Competition Law does not take into consideration the specificity of vertical agreements when dealing with price-related practices.

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

Brazilian antitrust authorities tend to review vertical agreements according to the rule of reason. Basically, the assessment focuses on possible negative effects and economic benefits of vertical restraints.

Despite the fact that vertical restraints tend to lead to less severe fines and sanctions if compared to cartels, the authorities investigate and prosecute these cases with the same attention and drive.

[1] Considering the average exchange rate for July 2009.