

Antitrust and Litigation

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The role of corrective decisions in Cade's punitive administrative proceedings

To correct means to clean up, to purge, to organize, to correct, among other things. In procedural terms, to correct means to fix “eventual flaws and to better direct the course of an action.”¹

Corrective decisions play an extremely important role when it comes to administrative and judicial proceedings, as they tend to avoid time and wastefulness of resources, and most importantly, they grant all parties legal certainty. The corrective phase has been given little value in Cade's punitive administrative proceedings. It is described by article 72 of the Competition Law (Law 12.529/2011): “Within 30 (thirty) business days after the time period mentioned by art. 70, Cade's General Superintendence will determine how the production of evidence shall occur. Cade is allowed to exercise the powers of instruction provided for in this Law and shall maintain legal secrecy regarding the investigation.”

As seen before, the aforementioned article 72 has as its primary goal organizing the production of evidence. But what is being proved through this organization? It is essential that corrective decisions provide further detail when it comes to describing their goals, according to article 115 of the Competition Law, which provides for a subsidiary application of the Brazilian civil procedure code. Moreover, the great relevance of the application of article 357 of the civil procedure code shall be noted hereinafter:

“(...) When it comes to corrective decisions, the judge shall:

I – Solve any pending procedural issues;

¹ Eduardo Talamini, “Comentários ao Código de Processo Civil,” Volume 1, Saraiva, São Paulo, 2017, page 181.

II - Define the factual issues, which will lead the production of evidence, as well as specify which forms of proof shall be admitted;

III - Attribute the burden of proof to one of the parties (...);

IV - Define the relevant legal issues;

V - If necessary, designate instruction and trial hearings”.

After all, what is the advantage of applying article 357 in Cade's punitive administrative proceedings? Predominantly, the advantage consists of giving the proceeding rationality, as well as making it faster by putting irrelevant matters to rest, besides granting the parties legal certainty. It should be noted that article 115 of the Competition Law allows for the application of the civil procedure code.

For the purposes of applying the civil procedure code to Cade's punitive administrative proceedings, it should be understood that (i) the “Defendant”, as referred to in the civil procedure code, corresponds to the “Represented”, as referred to by Cade, (ii) the “Plaintiff”, as referred to in the civil procedure code, corresponds to Cade itself, and (iii) the “Judge”, as referred to in the civil procedure code, corresponds to both Cade’s Superintendent-General (when it comes to the cognizance phase), and Cade itself (when it is the reporting counselor or the whole court, after the case has been addressed to Cade's court). It should be highlighted that a complaint can be received by Cade as an administrative inquiry (inquisitorial procedure), which might later on become an administrative proceeding (adversary procedure) within Cade’s General Superintendence. For that matter, the General Superintendence shall issue a final Technical Note (after the cognizance phase is over), in which it expresses its opinion regarding the dismissal of the case or the conviction. After that, the case shall be sent to Cade's court, a full board that will issue a final decision, by accepting or not the General Superintendence’s opinion.

The following example is merely hypothetical. There was an accusation regarding a cartel that was developed in only one Brazilian state, and the defense, in addition to saying that there was no cartel (or that even if there was a cartel, its client had not participated in it), says that it will be able to prove that its client did not influence the prices charged throughout Brazil. Truly, price change is a matter almost totally unrelated to the focus of the process, as only what happened in one specific Brazilian state matters when it comes to this cartel. Therefore, the Superintendent-General should remove this topic from the case by using the corrective decision.

In another hypothetical example, if the prosecution blamed the Defendant for two supposed violations against the economic order, and the Defendant admitted to only having been part of only one of them though claiming that such conduct does not represent an infraction), there would not be any need to prove that the Defendant

was involved in that conduct. Situations like this must be recognized by the corrective decision.

Below, there is a list of possible applications of the civil procedure code's article 357 in Cade's punitive administrative proceedings, which must be utilized by both the prosecution and the defense:

- **Solving pending procedural matters:** this is about recognizing or denying the existence of procedural matters that can tarnish the proceeding. Example: error allegations in the prosecution.
- **Defining factual issues which will lead to the production of evidence, as well as specifying which forms of proof shall be admitted:** thus, questions such as the following might be answered:
 - If the Defendant has participated in the meeting considered to be proof of an economic infraction;
 - If the prices of a given product were jointly discharged from all its producers after a meeting, whose objective was dealing with an economic infraction;
 - If the Defendant was in another location on the day that he were to have participated in an incriminating meeting.
- **Attributing the burden of proof to one of the parties, observing art. 373:** at this point, the Superintendent-General shall determine who must prove each fact, remembering that:
 - The burden of proof lays over the plaintiff when it comes to proving the accusations;
 - The burden of proof lays over the Defendant when it comes to facts that might prevent, modify, or annul any of the plaintiff's rights;
 - Cade's Superintendent-General is allowed to attribute the burden of proof in a different manner, if it is understood that the other party will have an easier time acquitting the burden. For example: this usually happens in cases where a party holds the documents, which are relevant for the other party.
- **Defining legal issues relevant to the decision:** when issuing a corrective decision, Cade's Superintendent-General must clearly state what the Defendants are accused of - only these accusations will be the topic of discussion. Therefore, if the corrective decision defines that the Defendants are accused of fixing resale prices, they can no longer be convicted of refusing supplies.
- **Designating instruction and trial hearings:** this topic should be understood, regarding the 3rd item of the civil procedure code's article 357: "If the case is complex, the judge shall designate a hearing, so that the correction is done in cooperation with the parties. A hearing is also an opportunity for the judge to

invite the parties to clarify their allegations, if necessary.” In fact, this provision is also aligned with article 6 of the civil procedure code: “All parties must cooperate with each other.”

Besides article 357, the civil procedure code should convince Cade to issue broad corrective decisions through its 10th article: “The judge cannot decide, in any degree of jurisdiction, if the parties have not been given the opportunity to speak out, even when it comes to matters that can be solved by the court’s own motion.” This is an aspect of the principle of the adversary.

Regarding the principle of the adversary, Camilo Zufelato says that it “has as its primary goal to guarantee the effective participation of the parties and, consequently, to limit the state’s decision power.”² Hereinafter, Roberto Barroso’s quote should be remembered: “to a large extent, the history of humanity has been the imposition of limits on the punitive power of the state.”³

What this article advocates for is more than only the issuing of corrective decisions, which is already done by Cade’s General Superintendence. The point here is that corrective decisions are broad enough to cover all the issues foreseen in article 357 of the civil procedure code.

Furthermore, the article defends the possibility of scheduling hearings, in which Cade’s Superintendent-General discusses the issues along with the parties, as a complement to the provisions of the civil procedure code’s art. 357, § 3. One may ask themselves the meaning of such hearing. The answer is simple: hearings can clarify controversial topics and avoid problems by identifying them ahead of time, saving time when it comes to correcting the proceeding, since all effort will be directed towards the same point.

Additionally, there is no need for a legal or regulatory change. It is enough to apply the provisions foreseen in the civil procedure code to better correct Cade’s punitive administrative proceedings.

² “Contraditório e vedação às decisões-surpresa no processo civil brasileiro,” D’Plácido, BH, 2019, page 43.

³ “Sem Data Venia, Intrinsic, RJ, 2020, page 185.