IS PRODUCT-FIXING A FORGOTTEN FORM OF COLLUSION IN BRAZILIAN ANTITRUST LAW? A COMPARATIVE ANALYSIS OF ENFORCEMENT TRENDS AND LEGAL FRAMEWORKS IN BRAZIL AND ABROAD

O "product-fixing" é uma forma esquecida de conluio no direito antitruste brasileiro? Uma análise comparativa das tendências de enforcement e dos marcos legais no Brasil e no exterior.

Alessandro Pezzolo Giacaglia [1]

Abstract: This paper examines product-fixing under Brazilian antitrust law, focusing on Cade's enforcement practice and its alignment with international standards. Although not explicitly defined in Law No. 12,529/2011, product-fixing can be considered anticompetitive when it undermines innovation, product quality, or consumer choice. Based on a comparative analysis of key precedents from the European Union and the United States, the article argues for the recognition of product-fixing as a distinct form of horizontal collusion.

Keywords: antitrust law; Cade; product-fixing, horizontal collusion; innovation.

Resumo: O artigo analisa a prática de *product-fixing* sob a perspectiva do direito concorrencial brasileiro, com especial atenção à jurisprudência do Cade e sua compatibilidade com padrões internacionais. Embora não expressamente previsto na Lei nº 12.529/2011, o *product-fixing* pode ser interpretado como conduta anticoncorrencial à luz de seus efeitos sobre a inovação, a qualidade e a variedade de produtos. A partir de uma análise comparativa com precedentes da União Europeia e dos Estados Unidos, o

[1] Alessandro P. Giacaglia is a dual-qualified lawyer (Brazil and New York) at Pinheiro Neto Advogados. His professional background includes experience at a leading law firm in Washington, D.C., as well as at CADE and the São Paulo Prosecutor's Office. In academia, Giacaglia holds an LL.M. from the University of Chicago, an LL.M. in Corporate Law from Insper, a post-graduate degree in Internal Investigations, and a bachelor's degree in law.

trabalho propõe a sistematização dessa prática como uma forma autônoma de colusão entre concorrentes.

Palavras-chave: direito da concorrência; Cade; *product-fixing*, colusão horizontal; inovação.

1. Introduction

A global shift in antitrust thinking—often referred to as New Brandeisian Antitrust—has sparked an increasing debate in Brazil about the appropriate scope of competition enforcement. This movement advocates for a rethink of antitrust that goes beyond its traditional focus on economic efficiency and consumer welfare, incorporating broader democratic and social values. Issues such as labor rights, environmental sustainability, diversity and inclusion, political power, and economic inequality have become key topics in antitrust.

While this broader perspective enhances the field by addressing previously overlooked concerns, it also raises an important question: Are there still significant topics being disregarded within the traditional boundaries of competition law? This question is especially pertinent in Brazil, where antitrust legislation is relatively new compared to more established jurisdictions. Before—or alongside—embracing these expanded areas, it may be both timely and strategic to revisit underexplored aspects within the conventional framework of antitrust.

This paper focuses on one such area: product-fixing. Despite its roots in classic antitrust theory, it remains largely overlooked in Brazil. Yet it can be just as harmful as price-fixing—and even more insidious when it shapes how products are designed, restricted, or standardized. Though often associated with traditional sectors, product-fixing is a forward-looking issue with growing relevance in fast-moving, innovation-driven markets. This article examines how Brazilian law—particularly through Cade—addresses this conduct and compares it with international enforcement trends.

2. The theoretical definition of product-fixing

Product-fixing refers to agreements among competitors on the technical or functional features of their products. While it may resemble standard-setting—particularly in coordinating specifications—the two

differ in purpose. Standard-setting typically aims to promote interoperability and efficiency, whereas product-fixing seeks to restrict competition, often by limiting innovation or consumer choice.

Brazil, like many jurisdictions, recognizes that standardization can generate efficiencies, as Cade noted in a case involving intellectual property rights: "this kind of standardization [interoperability standards] can lead to greater efficiency and benefit consumers by expanding the range of alternative products available in a given market."[2]

As Massimo Motta notes, standard-setting can be procompetitive, particularly when network externalities or interoperability are involved. Still, he cautions that "co-operative standard-setting" should be allowed "with some caution," warning that side agreements, like royalty cross-payments, may "relax competition in the product market" and should be avoided.[3] Carlton and Perloff add a further layer of concern: "unfortunately, standards and certification may either help or hurt. They are harmful if their information is degraded or misleading, or if they are used for anticompetitive purposes," especially when they create artificial barriers to entry or restrict innovation.[4]

Therefore, while standardization is broadly accepted as procompetitive, product-fixing becomes problematic when it suppresses differentiation and limits consumer options. This raises a key question for antitrust law: Should product-fixing be subject to scrutiny? And if so, under what circumstances should it be penalized?

3. Foreign Precedents Addressing Product-Fixing Conduct

[2] BRAZIL. Cade. **Voluntary Appeal 08700.010219/2024-17**, Telefonaktiebolaget L.M. Ericsson. Vote Commissioner Gustavo Augusto. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddZ7BJaSj-iR1wMZDgIQel66QrOJDLDJGYRy-WsBSAfbjklLga9Ngwl0hnt79IxSPWw7M1P4PO-XIeQ-ORAZyGVg. Accessed on: 22 July 2025.

[3] MOTTA, Massimo. **Competition Policy**: Theory and Practice. Cambridge: Cambridge University Press, 2009. p. 208.

[4] CARLTON, Dennis W.; PERLOFF, Jeffrey M. **Modern Industrial Organization.** 4. ed. Boston: Pearson/Addison Wesley, 2005. p. 473.

To understand the treatment of product-fixing, it is crucial to examine how other jurisdictions have dealt with similar behavior. The experiences of the European Union and North America offer valuable insights into the legal frameworks and enforcement strategies surrounding agreements that affect product characteristics and innovation.

3.1. The European experience

In the European Union (EU), product-fixing falls under Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements that restrict competition by object or effect. The European Commission's Horizontal Guidelines acknowledge that while standardization can enhance efficiency, agreements that impede innovation, quality, or consumer choice pose significant antitrust concerns. Cases such as the Car Emissions and Optical Disk Drives show that efforts to limit technological progress are treated by the EU as restrictions by object, even without price-fixing, reflecting a firm stance against non-price collusion.

3.1.1. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

The European Commission's Guidelines on Horizontal Cooperation Agreements provide a foundation for standardization agreements, defining them: *"*436. Standardization agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply." [5]

Like product-fixing, standardization leads to the uniformization of product technical standards. However, they are different because *"*439. Standardization agreements generally produce significant positive economic effects."[6] Standards typically increase competition, lower costs,

[5] EUROPEAN COMMISSION. **Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.** (2023/C 259/01). 2023. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01). Accessed on: 22 July 2025.
[6] *Ibid*.

and benefit economies by maintaining product quality, ensuring safety, providing information, and ensuring interoperability, thereby increasing consumer value.

The European Commission emphasizes that standardization agreements may restrict competition under Article 101(1) TFEU, either by object or effect. Restrictions by object can arise from discriminatory participation or limited access for certain firms. Even agreements among small-market players may raise concerns if they involve actual or potential competitors. Caution is warranted in cases involving standard-essential patents (SEPs), which may be exploited through excessive royalties unless bound by fair, reasonable, and non-discriminatory (FRAND) commitments.

The Commission distinguishes between harmful and legitimate cooperation. Agreements with hard-core restrictions —such as price-fixing, output limits, or exclusion of rival technologies—are treated as *per se* anticompetitive. In contrast, open, transparent, and inclusive agreements that ensure FRAND-based access are assessed under a rule of reason. This analysis weighs efficiencies against restrictive effects, considering necessity, proportionality, and consumer benefit. The Guidelines emphasize that procedural safeguards—such as openness, balanced participation, and public oversight—are crucial to ensure that standardization enhances, rather than restricts competition.

3.1.2. Optical Disk Drives – Case AT.39639.

The European Commission imposed fines on manufacturers for engaging in anticompetitive conduct in the market for optical disk drives (ODDs) sold to original equipment manufacturers. The Commission found that these companies participated in bilateral agreements that involved the exchange of sensitive commercial information and technical coordination. Specifically, the decision stated that these undertakings "entered into bilateral contractual relationships involving close cooperation on the production, development, and sale of ODDs."[7]

[7] EUROPEAN COMMISSION. **Case AT.39639 – Optical Disk Drives**. Decision of 21 October 2015. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39639/39639_3631_8.pdf. Accessed on: 22 July 2025.

The coordination of bidding strategies and technical specifications restricted innovation and reduced product differentiation. Although not involving price-fixing, it was deemed a restriction by object under Article 101(1) of the TFEU.

3.1.3. Car Emissions – Case AT.40178.

The European Commission fined car manufacturers for allegedly colluding to restrict competition in emissions-cleaning technology for diesel vehicles. These manufacturers held repeated meetings to allegedly coordinate their approach to Selective Catalytic Reduction (SCR) systems in diesel cars sold in the European Economic Area (EEA).

Despite the absence of price-fixing or market allocation, the Commission classified the agreement as a restriction by object under Article 101(1)(b) TFEU, without requiring proof of actual market harm. This was based on two factors: (a) conduct showed a clear intent to limit technical development and innovation in emissions-cleaning systems, and (b) such coordination on product design can suppress competition on product performance and consumer benefit. According to the Commission: *"*Since this infringement is an infringement by object, the parties cannot claim successfully that they did not act intentionally. Their conduct served to reduce uncertainty as to their future market conduct and to limit competitive pressure as concerns product characteristics.*"* [8]

The Commission emphasized that restricting innovation is inherently anticompetitive when it limits product features available to consumers. The case concluded that automakers agreed on uniform tank sizes and consumption rates, effectively preventing them from exceeding cleaning standards under European regulations. The authority concluded that, although regulatory compliance was required, firms could have competed on performance, such as offering longer refill intervals. Instead, they collectively suppressed innovation, reducing consumer choice, and stalling technological progress.

[8] EUROPEAN COMMISSION. **Case AT.40178 – Car Emissions.** Decision of 7 August 2021. Paragraph 198, p. 41. Available at: https://ec.europa.eu/competition/antitrust/cases1/202330/AT_40178_8022289_3048_7.pdf. Accessed on: 22 July 2025.

Even in the absence of market share data, the structural harm caused by limiting innovation was sufficient to establish a violation of the law. The case set a key precedent by confirming that suppressing non-price competition—especially innovation—can constitute a *per se* infringement of Article 101(1)(b) TFEU, placing it on par with traditional forms of product-fixing.

3.2. The North American experience

The North American experience with product-fixing shows a nuanced approach, sometimes applying the *per se* rule and at other times the rule of reason, depending on the nature and effects of the agreement.[9]

3.2.1. National Macaroni Manufacturers Association v. FTC (1965)

The U.S. Court of Appeals for the Seventh Circuit upheld the Federal Trade Commission's rejection of a collective agreement among Macaroni Manufacturers to standardize a lower-cost semolina blend due to high-quality durum wheat shortages. The court found that this agreement suppressed competition on quality, effectively replacing market competition with group decision-making. As stated by the court, "(…) the action taken in fixing the composition of macaroni products was clearly the result of agreement. It found that the agreement was intended to ward off price competition for durum wheat in short supply by lowering total industry demand to the level of the available supply."[10]

Applying the *per se* rule, the Court viewed the conduct as inherently anticompetitive. Despite the absence of direct price-fixing, the agreement restricted the use of superior inputs, limiting competition. The

---

[9] CLEARY GOTTLIEB. **The topic was recently revived in the United States of America, with statements from the Department of Justice, regarding the product-fixing risk.** July 2, 2025. Available at: https://www.clearygottlieb.com/news-and-insights/publication-listing/doj-antitrust-division-warns-about-product-fixing-risk. Accessed on: 22 July 2025.

[10] U.S.A. United States Court of Appeals Seventh Circuit. **National Macaroni Manufacturers Association et al. v. Federal Trade Commission**. n. 14713. 1965. Available at: https://law.resource.org/pub/us/case/reporter/F2/345/345.F2d.421.14713_1.html. Accessed on: 22 July 2025.

Court rejected claims that the agreement was a response to market conditions, reinforcing that coordination to reduce product differentiation is illegal. This ruling established a significant precedent in U.S. antitrust law by encompassing agreements that impact non-price competition under the *per se* illegality doctrine.

3.2.2. Automotive Manufacturers Antitrust Litigation

The U.S. District Court for the Northern District of California chose not to apply the *per se* rule to allegations that car manufacturers coordinated through technical working groups to limit innovation in vehicle features. The plaintiffs claimed that these companies agreed to delay or restrict the implementation of cleaner emission systems, advanced fuel efficiency solutions, and other performance-enhancing technologies. The complaint argued that "Plaintiffs' initial consolidated complaints alleged that Defendants agreed to 'slow the 'pace of innovation', reducing the quality of their cars."[11]

The Court determined that the appropriate analytical framework was the rule of reason. The judge noted that coordination among competitors in technical development "*was not 'per* se' anticompetitive because AdBlue technical standards could plausibly reduce engine clogging and the risk of vehicle damage, create more room for other vehicle features, and generally benefit all consumers."[12] Notably, the Court recognized that while some aspects of the alleged conduct were concerning, they did not amount to a clear horizontal restraint. Therefore, the case did not merit a summary condemnation but required a detailed examination of market effects and justifications. This decision draws an essential distinction between harmful coordination over product features and collaborative technical standardization, emphasizing that not all agreements regarding product-related matters among competitors are automatically illegal.

[11] U.S.A. DISTRICT COURT — NORTHERN DISTRICT OF CALIFORNIA. **In Re: German Automotive Manufacturers Antitrust Litigation**. October 2020. Available at: https://case-law.vlex.com/vid/in-re-german-auto-888761728. Accessed on: 22 July 2025.
[12] *Ibid*.

4. **The Brazilian legal framework and precedents**

While the Competition Law does not explicitly define product-fixing as a standalone violation, Cade has addressed the conduct when linked to broader anticompetitive schemes or the misuse of technical standards to exclude rivals. In some cases—particularly those involving price-fixing—Cade applied the *per se* rule; in others, it adopted an effects-based approach focused on procedural integrity and market dynamics. These precedents suggest that product-fixing may be prosecuted when its object or effects harm consumer welfare. Still, a clearer analytical framework would enhance enforcement and offer more consistent guidance to market participants.

4.1. Product-Fixing in Brazil

The initial question is whether Law No. 12,529 of November 30, 2011 (Competition Law) permits the prosecution of product-fixing, *i.e.*, agreements among competitors to coordinate non-price aspects of a product, such as features or quality.

Although the law does not explicitly include product-fixing in its definition of cartels, it does not preclude such enforcement. Article 36, §3, I of the Competition Law defines cartels as agreements involving price, output, or market division. Product-fixing is not expressly listed, but this enumeration is illustrative, not exhaustive.[13] In fact, §1 of Article 36 introduces a general clause prohibiting any conduct that produces one of four anticompetitive effects listed in items I to IV of the article. Thus, even

[13] "Based on a comparison with foreign experiences, it appears that Article 36 of Law 12,529/2011 allows for greater openness to the repression of invitations to cartelization, insofar as the provision deals generically with "acts manifested in any form." The fact that Brazilian law contemplates an open type of offense, therefore, makes it unnecessary to subsume the conduct under any of the items of paragraph 3, whose list, as is well known, is merely illustrative." (BRAZIL. Cade. **Administrative Proceeding nº 08700.005636/2020-14**. Defendants: Augustinho Stang and others. Vote of Commissioner Victor Oliveira Fernandes. Para. 9. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YlnBX8Qjt099g7spbtEu5AyyymBnTLOB7_6HlmKQdUz55rfc1gFUdZ4VTQv4KK5ICgP%22. Accessed on: 22 July 2025).

if not explicitly categorized, product-fixing could fall within the law's scope if its object or effect is anticompetitive. However, relying solely on the general clause can be controversial and may increase judicial resistance.

Additional support for enforcement may lie in Article 36, §3, items II, III, IV, and VII, which prohibit practices that: promote or influence concerted conduct among competitors (II); limit or hinder market access (III); create obstacles to the operation or development of competitors (IV); or regulate markets by restricting R&D, production, or investment (VII).

Depending on the context, product-fixing may be seen as a coordinated market strategy, possibly with exclusionary or innovation-suppressing effects. Hence, Cade could lawfully pursue such conduct under existing legal provisions.

While legally possible, it is necessary to verify whether it aligns with the objectives of the Brazilian antitrust authority. Again, we set aside the expanded mandate for competition authorities and focus on the original essence of competition law. As Bork famously argued:

> The antitrust laws, as they now stand, have only one legitimate goal, and that goal can be derived as rigorously as any theorem in economics. (…) (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore, (2) 'Competition', for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.[14]

Following this approach, the key question is whether product-fixing harms consumer welfare. Under the classical Chicago School view, consumer welfare centers on outcomes that reduce efficiency or harm consumers through higher prices, lower output, diminished quality, or reduced innovation.

Product-fixing can reduce consumer utility by restricting product variety, forcing consumers to choose between artificially similar products

[14] BORK, Robert H. **The Antitrust Parado**x. A Policy at War with Itself. Basic Books, Inc. Harper Torchbooks. 1978. p. 50-51.

that may not align with their preferences. Prices may remain unchanged—or even increase—despite reduced fitness for purpose.

Even if prices remain stable—or rise—product usefulness can decline. In differentiated markets,[15] where non-price competition is critical, aligning product features diminishes innovation incentives, erodes quality-based rivalry, and discourages R&D, leading to artificial commoditization.[16]

Product-fixing can also raise barriers to entry by excluding firms that diverge from coordinated standards. Such firms may face challenges in meeting consumer expectations or experience inefficiencies due to incompatible supply chains. However, in some cases, fixed standards may encourage disruption, offering opportunities for innovative entrants to challenge incumbents, but this situation ultimately depends on market structure and innovation dynamics.

Product-fixing may also appear as part of broader cartel conduct, such as coordinated pricing, output restrictions, or market division, where it becomes one element of a traditional cartel already recognized and prosecuted by Cade. Conceptually, product-fixing is tied to consumer harm, particularly in terms of quality, innovation, and choice. While Cade has not adopted a single overarching goal for Brazilian competition law, its case law

[15] According to Cade's guidelines on horizontal mergers: "Differentiated product markets are those in which the products offered differ not only in price, but also in other specific characteristics (brand, weight, durability, design, versatility, among others) or in characteristics related to sales policies, distribution, or even pre- and post-sales services, i.e., factors other than the price of a given offer define the product's performance in the market. The association of products with brands and emphasis on advertising signals a differentiated product market." BRAZIL. Cade. **Guia - Análise de Atos de Concentração Horizontal**. Junho de 2016. p. 23, nota de rodapé n. 9. Disponível em: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf. Acesso em: 20 de julho de 2025.

[16] "In industries with differentiated products, the demand facing a particular firm depends on the total supply of all its rivals, whereas in an industry with undifferentiated products, the demand facing a firm depends only on the total supply." CARLTON, Dennis W.; PERLOFF, Jeffrey M. *Op. Cit.* p. 227.

reflects a plurality of objectives, with consumer welfare[17] and innovation emerging as concerns.

Within this framework, and based on both legal provisions and enforcement trends, product-fixing may be prosecuted as an anticompetitive practice—provided its harmful intent or effects on competition are clearly demonstrated.

4.2. The Brazilian Experience

A notable precedent in Brazil that directly addresses product-fixing is the concrete and cement case, where Cade convicted the conduct as part of a broader cartel scheme. Cade applied the *per se* rule, treating product-fixing as an inherent component of cartel behavior, without requiring a detailed analysis of competitive effects. In other cases, elements of quality standardization have emerged in the context of resale price maintenance, raising questions about the intersection between technical uniformity and vertical restrictions.[18]

Beyond these precedents, several investigations offer preliminary insights into how Cade may approach product-fixing more broadly. A central focus has been the role of *Associação Brasileira de Normas Técnicas* (ABNT), Brazil's primary standard-setting body. As a private, non-profit organization, ABNT issues Brazilian Technical Standards (NBRs) across a wide range of sectors, including the formatting rules applied to this article, through committees composed of industry representatives.[19]

Cade has analyzed ABNT's processes under competition law, particularly where technical standards may promote product

[17] JASPER, Eric Hadmann. Paradoxo tropical: a finalidade do direito da concorrência no Brasil. **Revista de Defesa da Concorrência**, Brasília, v. 7, n. 2, p. 187-188. 2019. Disponível em: https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/424. Acesso em: 21 jul. 2025.

[18] There are still ongoing cases that involve related issues, but they are not mentioned here because there is no final decision on the definition of practice and its legality.

[19] Cf: https://abnt.org.br/.

homogenization or operate as entry barriers.[20] These cases provide a crucial analytical foundation for understanding how technical coordination and voluntary standards may raise anticompetitive concerns in the Brazilian context.

4.2.1. ABNT and the Use of Voluntary Technical Standard

Although Preparatory Proceeding No. 08700.004189/2015-19 was ultimately closed, it highlights the competitive risks posed by voluntary technical standards in Brazil, especially when such standards are widely adopted and coordinated by a single entity with *de facto* authority, such as ABNT.

The case arose from concerns within Cade's Tribunal about whether the ABNT might facilitate anticompetitive conduct through its procedures for drafting and approving norms. Specifically, the fear was that dominant firms or industry groups could steer technical specifications to raise barriers to entry or exclude rivals. These concerns are particularly acute in sectors such as construction and manufacturing, where ABNT standards are frequently cited in public procurement and regulatory requirements. As summarized in the case file:

> Given the symbolic recognition ABNT has earned as the most respected reference in setting technical norms in Brazil—which often grants it de facto powers to establish exclusive standards—it is reasonable to consider that it could serve as a mechanism for market foreclosure in certain sectors."[21]

[20] BRAZIL. Cade. **Merger Filing 08700.003985/2023-44,** Applicants: Knauf do Brasil Ltda. and Trevo Industrial de Acartonados S.A., Vote Commissioner Victor Oliveira Fernandes. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLdda1MbZVBdvxREi6fq4b4uXdTwR7R2mRiLjFLScA_VxKMF4h_ddmDIGrbUMpUgGT-ZvLpN8R0y8S7KjsFnRajcK8. Accessed on: 22 July 2025.

[21] BRAZIL. Cade. **Technical Note 09/2018/CGAA3/SGA1/SG/CADE**. Proceeding 08700.004189/2015-19. p. 3. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.p

Despite this potential concern, Cade's inquiry found no evidence of collusion or abuse in the standard-setting procedures. ABNT explained that its norms are defined through a consensus-based process, rather than by vote, and that its committees comprise a range of stakeholders, including industry representatives, academia, and government institutions. Additionally, all proposed standards undergo public consultations, allowing any interested party to submit comments and objections.

However, the case reveals a broader structural issue: how private standard-setting bodies can accumulate such symbolic and practical authority that their norms effectively become mandatory, despite being nominally voluntary. It also highlights the importance of transparency, openness, and stakeholder balance in standard-setting, particularly where standards serve as informal gatekeepers to market access. Although no antitrust violation was found, the case contributes to the growing global concern over how technical standardization—particularly when embedded in hybrid public-private arrangements—can shape competition not just by ensuring quality or safety, but also by structuring who gets to compete and on what terms.

4.2.2. Wire Mesh and Barbed Wire Standards Case

In Administrative Inquiry No. 08700.007831/2012-79, Cade examined allegations that Brazilian technical standards, governing galvanized wire mesh, were used as a *de facto* market barrier to imports.

An association of steel importers claimed that the standards revision process led to restrictions on roll diameter and packaging, effectively rendering imported products non-compliant and increasing their transportation costs. Although the case was ultimately closed, it is notable for highlighting concerns over exclusionary conduct arising from technical standardization. In its decision, Cade explicitly acknowledged that:

> 63. Although a technical change can be economically advantageous, other legal assets (such as consumer safety)

hp?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yNDjyVIw_UBp7LG2YW0M2Cimc4j9WOnpeiIHZYwe_fIDmCA6rargBodn6CJZ6_HywrjKJphzAv5nIvikaqhygr-. Accessed on: 21 July 2025.

> can and should be weighed up before a technical standard is changed. In fact, every technical standard generates a restriction. The big question is whether the restriction is reasonable and based on technical arguments, or merely exclusionary.[22]

While the decision led to dismissal, Cade reviewed a complex factual record concerning whether industry incumbents manipulated the standard-setting process to protect domestic manufacturers. Notably, it was argued that the new technical specifications reduced the number of rolls that could be shipped per container, creating a significant cost differential for importers. Allegations also included that certain norms were adopted without the full participation of affected stakeholders, potentially violating principles of competitive neutrality.

Although Cade found that the disputed standards had existed since 2003 and were not binding, the case reveals the authority's growing sensitivity to how voluntary standards can exert exclusionary effects in practice. The investigation acknowledged that technical requirements may have anticompetitive implications, particularly when shaped by a narrow group of incumbents.

4.2.3. Cement and Concrete Case

In Administrative Proceeding No. 08012.011142/2006-79, Cade investigated an alleged cartel practice in the market of cement and concrete in Brazil. The defendants were found to have engaged in a series of anticompetitive behaviors, including price fixing, market division, client allocation, and coordinated control of production volumes. The cartel allegedly operated through formal and informal agreements, often facilitated by industry associations, to maintain dominance, suppress competition, and artificially inflate prices in the cement and concrete markets.

---

[22] BRAZIL. Cade. **Administrative Inquiry 08700.007831/2012-79**. Defendants: ABNT, and others. Technical Note 16/2015//CGAA3/SGA1/SG/CADE. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?xgSJHD3TI7Rh0CrGYtJb0A1Onc6JnUmZgGFW0zP7uM8Zd4kPxVn03sfqf6y3nP0LsG_hbKRQR8PoQ7LAkhMq8eqxzaWqdqRQOfKwqlFknaqkaZj2298THUZXm2LcqWu1. Accessed on: 21 July 2025.

One of the practices identified by Cade was the creation of barriers to entry for new competitors. Acting through its industry association, Cade identified that the defendants coordinated efforts to alter technical standards set by ABNT. These changes included the imposition of minimum cement volumes in concrete production and the prohibition of direct use of mineral additives in concrete, which had the effect of increasing production costs for independent concrete producers and making it more difficult for new entrants to compete. According to Cade, the evidence showed that these technical modifications were not aimed at improving product quality but rather at excluding smaller companies that added mineral components to cement to reduce costs—from the market, by rendering their products "out of standard" and, thus, unsellable. According to the authority, this manipulation of product standards constituted a form of product-fixing, as it artificially restricted the types of products that could be legally sold, directly impacting market structure and competition:[23]

> 594. (…) As a result, competitors are no longer confronted in the market, but by mechanisms to exclude them from the market, through a deliberate strategy of changing technical requirements that were previously not in force for any player. The technical standard has been elevated to the category of a commercial strategy for those who dominate its issuance. The technical standard has been undermined, becoming an artificial barrier to entry, a guarantee of easy profits, no longer serving to protect society.

The Cade investigation revealed a deeply entrenched and sophisticated cartel that not only fixed prices and divided markets but also systematically manipulated product standards and supply chains to exclude new entrants and maintain its dominance. The use of product-fixing through

[23] BRAZIL. Cade. **Administrative Proceeding 08012.011142/2006-79.** Defendants: Anor Pinto Filipi and others. Vote Commissioner Alessandro Octaviani, p. 278, para. 594. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?j4i2q-cDlHOXFW-U1U1ZGsi1sKt-bSyYoPuKfr1F_h9s4dDbYpk0TORtzPIiCWyVm9x0SZZoQ_z41ob4ePRi9RcMHzojblIfFhr0-G40UizzungPSKv9lxSVBaHEAoAo. Accessed on: 22 July 2025.

technical standards and control of essential inputs exemplifies the cartel's commitment to suppressing competition at every level.

4.2.4. Other related cases

Rebar Imports and Technical Standards Case. Although the central issue in Administrative Proceeding No. 08012.001594/2011-18 involved allegations of sham litigation, the case also raised significant concerns regarding the strategic use of technical quality standards and the role of Brazil's national institute of metrology (Inmetro) in enforcing product conformity.

The complaint alleged that an institute engaged in a systematic campaign to delay and hinder the release of imported rebar (steel rods) at Brazilian ports, using a coordinated wave of injunctions and invoking alleged non-compliance with Inmetro technical standards. While Cade ultimately framed the conduct under the legal theory of sham litigation, the case reveals a deeper competitive concern with the misuse of quality certification regimes.[24]

PVC Tubes and Fittings Case. In Administrative Proceeding No. 08700.003390/2016-60, Cade investigated a large-scale cartel involving manufacturers and distributors of PVC pipes and fittings used in public sanitation infrastructure and private construction projects. While primarily focused on price-fixing, bid rigging, and the exchange of commercially sensitive information, the decision reflects a broader concern with potential harm to product quality stemming from the collusive conduct.

Notably, the case involved allegations that companies not only coordinated prices but also aligned technical specifications, commercial conditions, and bidding strategies. Although the decision does not explicitly frame these practices as product-fixing, it signals Cade's regulatory sensitivity to collusion that results in market stagnation, including reduced

[24] BRAZIL. Cade. **Technical Note 29/2016/CGAA3/SGA1/SG.** Administrative Proceeding 08012.001594/2011-18. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOoHDEVcGPBanjeFHwBkLypvyZrn_ViOFWl7aN-8Vdzn4L6pIeatNXo1K9_cgF_8s4ObojmqbUtmQgh2VUCHXBF. Accessed on: 21 July 2025.

product differentiation and diminished investment in quality. Cade explicitly reaffirmed this broader interpretation of harm, stating that "[c]artel conduct seriously harms consumers by resulting in price increases and/or restrictions in supply, making goods and services more expensive or unavailable, and/or undermining quality and/or technological innovation."[25]

Sunglasses Case. This case examined how industry associations can utilize private quality certification mechanisms and public policy lobbying to influence market structure in potentially exclusionary ways. The investigation focused on a seal of origin and safety created by an optical industry association, which was required for participation in the sector's largest trade fair and applied only to products sold through optical retailers. While framed as a consumer protection measure, the seal functioned as a *de facto* barrier, disadvantaging competitors operating outside traditional retail channels.[26]

Cade ultimately did not find evidence of coercion, exclusivity, or formal barriers that would substantiate a violation of the Competition Law. The seal program was deemed voluntary, and there was no evidence that the legislative proposals had a restrictive legal effect.

Driving Schools Case. This case involved a regional association of driving schools that partnered with a consultancy to produce and circulate cost spreadsheets suggesting minimum service prices. Although presented as educational material from a training course, the tables were shared among

[25] BRAZIL. Cade. **Administrative Proceeding 08700.003390/2016-60**, Vote Commissioner Luiz Hoffmann. Para. 97. Defendant Amanco Brasil e outros, SEI 0927207. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yPEp9uWnELU3NOEcuqN5Med3_DQHQIcpJ7d3EKnylPHDWBTSlTArGrIz2_t7AmBCxUx-OWlGxW7qinWJlnEy1kw. Accessed on: 22 July 2025.

[26] BRAZIL. Cade. **Administrative Proceeding No. 08012.010648/2009-11**. Defendants Abióptica and others. Vote Commissioner Eduardo Pontual. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YlnBX8Qjt099g7spbtEu5Ayy33obLWYRXNsPalxG3FDl1jFFN6Znt0vzb6RK-7QoLSr%22. Accessed on: 22 July 2025.

members and likely served to align pricing behavior, raising concerns of indirect coordination and price signaling under Brazilian competition law.[27]

A notable aspect was the use of a certification seal, which was tied to compliance with the cost parameters. While framed as a quality initiative, the seal operated as a quasi-standard, incentivizing conformity with pricing guidelines to gain reputational benefits. This added a non-price dimension to the coordination, reinforcing uniform conduct under the guise of quality assurance. Cade ultimately convicted the association for promoting anticompetitive alignment but cleared the consultancy, which had played a limited technical role in the training without participating in the broader dissemination or enforcement of pricing standards.

Lime Case. This case involved a regional lime producers' association that circulated spreadsheets establishing minimum production costs as pricing references for quicklime. The initiative raised concerns about price signaling and soft coordination, as it could encourage uniform pricing and deter more efficient competitors. The association's efforts to institutionalize these benchmarks through public partnerships further amplified competitive risks.[28]

Additionally, the defendants created a quality seal, linked to compliance with technical input standards, and packaging aligned with Inmetro norms. While presented as a consumer protection measure, Cade found that the seal, combined with the cost tables, functioned as a de facto standard, restricting pricing flexibility and potentially hindering innovation. The authority concluded that even well-intentioned quality initiatives

[27] BRAZIL. Cade. **Administrative Proceeding 08012.003874/2009-38**. Defendants: Arcal and others. Vote Commissioner Ricardo Ruiz. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRKzMwwbd5g_PuAKStTlNgP-jtcH5MdmPeznqYAOxKmGO9r4mCfJlTXxQMN01pTgFwPLudA9fKzkMzkAGgG8K1NYH4Ny3XF-io3U1gqQ5A3P4-nyQo%22. Accessed on: 22 July 2025.

[28] BRAZIL. Cade. **Administrative Proceeding 08012.009834/2006-57.** Defendants: APPC. Vote Ricardo Ruiz. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRKzMwwbd5g_PuAKStTlNgP-jtcH5MdmPeznqYAOxKmGO9r4mCfJlTXxQMN01pTgFwPLudA0iPtI6rz_wKzbbJqfyD559Sh6rPg_1QPHvfgHJablMg%22. Accessed on: 22 July 2025.

cannot be used by associations to standardize market conduct or to indirectly limit competition.

5. Conclusion

Answering the paper's central question, product-fixing is not entirely forgotten in Brazil, but it remains underexplored. While Cade has addressed related conduct in several cases, it has yet to fully recognize product-fixing as a distinct form of collusion. Strengthening enforcement and advocacy efforts could prevent harm to innovation, product variety, and consumer choice.

As shown throughout this paper, agreements among competitors to align product characteristics—distinct from legitimate standard-setting—can harm consumer welfare by limiting variety, suppressing innovation, and creating artificial entry barriers.

Foreign precedents offer helpful guidance. The EU's Car Emissions and U.S. National Macaroni Manufacturers Association cases applied the *per se* rule to conduct that limited innovation or degraded quality. In contrast, German Automotive Manufacturers illustrates when rule of reason analysis may apply, especially where cooperation offers potential benefits.

In Brazil, several cases reflect growing recognition that horizontal coordination can harm quality and innovation, not just price or output. The blurred line between product-fixing and legitimate standardization demands case-by-case analysis.

To improve enforcement consistency, CADE could adopt a structured, case-by-case approach to product-fixing. The first step is to verify whether documents—such as emails or meeting notes—demonstrate a clear anticompetitive intent, especially when the conduct seeks to restrict competition, dominate the market, increase profits arbitrarily, or abuse dominance (Article 36, §1, Competition Law). In such cases, product-fixing should be treated as a *per se* violation, as recognized in both domestic and international case law.

Second, if product-fixing is tied to other antitrust infringements—like price-fixing or resale price maintenance—it may serve as an accessory to a broader collusive scheme, justifying *per se* treatment. Still, depending

on the context, particularly in vertical arrangements, a rule of reason may apply.

Absent a clear anticompetitive object or link to other violations, the focus should shift to the practice's effects. Key factors include the transparency and inclusiveness of the coordination process. When standard-setting is open, voluntary, and subject to public consultation, it is more likely to be lawful. Otherwise, if exclusionary concerns arise, Cade should assess the net competitive impact, especially on innovation and consumer choice.

Recognizing product-fixing as a standalone form of collusion would align Brazil with global enforcement trends and reinforce protection for dynamic competition. Cade should also use its advocacy powers to raise awareness among Brazilian businesses that product-fixing, though often overlooked, can amount to a serious antitrust violation.

Bibliography

BORK, Robert H. **The Antitrust Paradox**. A Policy at War with Itself. Basic Books, Inc. Harper Torchbooks. 1978.

BRAZIL. Cade. **Administrative Inquiry 08700.007831/2012-79**. Defendants: ABNT, and others. Technical Note 16/2015//CGAA3/SGA1/SG/CADE. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?xgSJHD3TI7Rh0CrGYtJb0A1Onc6JnUmZgGFW0zP7uM8Zd4kPxVn03sfqf6y3nP0LsG_hbKRQR8PoQ7LAkhMq8eqxzaWqdqRQOfKwqlFknaqkaZj2298THUZXm2LcqWu1. Accessed on: 21 July 2025.

BRAZIL. Cade. **Administrative Proceeding 08012.003874/2009-38**. Defendants: Arcal and others. Vote Commissioner Ricardo Ruiz. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRKzMwwbd5g_PuAKStTlNgP-jtcH5MdmPeznqYAOxKmGO9r4mCfJlTXxQMN01pTgFwPLudA9fK

zkMzkAGgG8K1NYH4Ny3XF-io3U1gqQ5A3P4-nyQo%22. Accessed on: 22 July 2025.

BRAZIL. Cade. **Administrative Proceeding 08012.009834/2006-57.** Defendants: APPC. Vote Ricardo Ruiz. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRKzMwwbd5g_PuAKStTlNgP-jtcH5MdmPeznqYAOxKmGO9r4mCfJlTXxQMN01pTgFwPLudA0iPtI6rz_wKzbbJqfyD559Sh6rPg_1QPHvfgHJablMg%22. Accessed on: 22 July 2025.

BRAZIL. Cade. **Administrative Proceeding 08012.011142/2006-79.** Defendants: Anor Pinto Filipi and others. Vote Commissioner Alessandro Octaviani. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?j4i2q-cDlHOXFW-U1U1ZGsi1sKt-bSyYoPuKfr1F_h9s4dDbYpk0TORtzPIiCWyVm9x0SZZoQ_z41ob4ePRi9RcMHzojblIfFhr0-G40UizzungPSKv9lxSVBaHEAoAo. Accessed on: 22 July 2025.

BRAZIL. Cade. **Administrative Proceeding 08700.003390/2016-60**, Vote Commissioner Luiz Hoffmann. Defendant Amanco Brasil e outros, SEI 0927207. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yPEp9uWnELU3NOEcuqN5Med3_DQHQIcpJ7d3EKnylPHDWBTSlTArGrIz2_t7AmBCxUx-OWlGxW7qinWJlnEy1kw. Accessed on: 22 July 2025.

BRAZIL. Cade. **Administrative Proceeding nº 08700.005636/2020-14**. Defendants: Augustinho Stang and others. Vote of Commissioner Victor Oliveira Fernandes. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YlnBX8Qjt099g7spbtEu5AyyymBnTLOB7_6HlmKQdUz55rfc1gFUdZ4VTQv4KK5ICgP%22. Accessed on: 22 July 2025.

BRAZIL. Cade. **Administrative Proceeding No. 08012.010648/2009-11**. Defendants Abióptica and others. Vote Commissioner Eduardo Pontual. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnqI5_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YlnBX8Qjt099g7spbtEu5Ayy33obLWYRXNsPalxG3FDl1jFFN6Znt0vzb6RK-7QoLSr%22. Accessed on: 22 July 2025.

BRAZIL. Cade. **Guia - Análise de Atos de Concentração Horizontal**. Junho de 2016. Disponível em: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf. Acesso em: 20 de julho de 2025.

BRAZIL. Cade. **Merger Filing 08700.003985/2023-44,** Applicants: Knauf do Brasil Ltda. and Trevo Industrial de Acartonados S.A., Vote Commissioner Victor Oliveira Fernandes. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLdda1MbZVBdvxREi6fq4b4uXdTwR7R2mRiLjFLScA_VxKMF4h_ddmDIGrbUMpUgGT-ZvLpN8R0y8S7KjsFnRajcK8. Accessed on: 22 July 2025.

BRAZIL. Cade. **Technical Note 09/2018/CGAA3/SGA1/SG/CADE**. Proceeding 08700.004189/2015-19. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yNDjyVIw_UBp7LG2YW0M2Cimc4j9WOnpeiIHZYwe_fIDmCA6rargBodn6CJZ6_HywrjKJphzAv5nIvikaqhygr-. Accessed on: 21 July 2025.

BRAZIL. Cade. **Technical Note 29/2016/CGAA3/SGA1/SG.** Administrative Proceeding 08012.001594/2011-18. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOoHDEVcGPBanjeFHwBkLypvyZrn_ViOFWl7aN-

8Vdzn4L6pIeatNXo1K9_cgF_8s4ObojmqbUtmQgh2VUCHXBF. Accessed on: 21 July 2025.

BRAZIL. Cade. **Voluntary Appeal 08700.010219/2024-17**, Telefonaktiebolaget L.M. Ericsson. Vote Commissioner Gustavo Augusto. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddZ7BJaSj-iR1wMZDgIQel66QrOJDLDJGYRy-WsBSAfbjklLga9Ngwl0hnt79IxSPWw7M1P4PO-XIeQ-ORAZyGVg. Accessed on: 22 July 2025.

CARLTON, Dennis W.; PERLOFF, Jeffrey M. **Modern Industrial Organization.** 4. ed. Boston: Pearson/Addison Wesley, 2005.

CLEARY GOTTLIEB. **The topic was recently revived in the United States of America, with statements from the Department of Justice, regarding the product-fixing risk.** July 2, 2025. Available at: https://www.clearygottlieb.com/news-and-insights/publication-listing/doj-antitrust-division-warns-about-product-fixing-risk. Accessed on: 22 July 2025.

EUROPEAN COMMISSION. **Case AT.39639 – Optical Disk Drives**. Decision of 21 October 2015. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39639/39639_3631_8.pdf. Accessed on: 22 July 2025.

EUROPEAN COMMISSION. **Case AT.40178 – Car Emissions.** Decision of 7 August 2021. Available at: https://ec.europa.eu/competition/antitrust/cases1/202330/AT_40178_8022289_3048_7.pdf. Accessed on: 22 July 2025.

EUROPEAN COMMISSION. **Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.** (2023/C 259/01). 2023. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01). Accessed on: 22 July 2025.

JASPER, Eric Hadmann. Paradoxo tropical: a finalidade do direito da concorrência no Brasil. **Revista de Defesa da Concorrência**, Brasília, v. 7, n. 2, 2019. Disponível em: https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/424. Acesso em: 21 jul. 2025.

MOTTA, Massimo. **Competition Policy**: Theory and Practice. Cambridge: Cambridge University Press, 2009.

U.S.A. District Court — Northern District of California. **In Re: German Automotive Manufacturers Antitrust Litigation**. October 2020. Available at: https://case-law.vlex.com/vid/in-re-german-auto-888761728. Accessed on: 22 July 2025.

U.S.A. United States Court of Appeals Seventh Circuit. **National Macaroni Manufacturers Association et al. v. Federal Trade Commission**. n. 14713. 1965. Available at: https://law.resource.org/pub/us/case/reporter/F2/345/345.F2d.421.14713_1.html. Accessed on: 22 July 2025.