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The interference of tax conduct in competition: the Brazilian case of concentrates for soft drinks produced in the Manaus Free Trade Zone

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ABSTRACT

The present work seeks to investigate whether tax conduct can lead to greater market concentration in Brazil. Thus, tax infractions adopted by soft drink industries that benefit from tax incentives from the Manaus Free Trade Zone and the possibility of harming not only the treasury, but also the free competition of the sector are considered. For this, the process tracking method is used which - through documentary research - examined manifestations of the Brazilian Administrative Council of Tax Appeals regarding tax infractions, in addition to seeking equivalence with anticompetitive practices through the principles of economic activity. The results indicate that there is sufficient evidence that tax practices can be classified as antitrust violations, deserving appreciation by the entities of the Brazilian System for the Defense of Competition. These findings contribute to the scientific literature that investigates anti-competitive conduct by bringing evidence to Brazil and formulators of tax and competition public policies.

Keywords: violations of the economic order; tax violations; Manaus Free Zone in Brazil; soft drink market.
JEL Classification: H23, H25, K21, K34.

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1. INTRODUCTION

In 1967, the Manaus Free Trade Zone was created, a public policy for regional development in Brazil to populate the Brazilian Amazon and promote local economic growth through special tax incentives to the manufacturing sector to replace imports (POSSEBOM, 2017). To be entitled to the incentives, industries must submit a Technical-Economic Project to the Superintendence of the Manaus Free Trade Zone, the authority that manages the Manaus Free Trade Zone, for approval.

The Economic Technical Project, indicates the production expectations for a given good, based on the technical specifications of the product to meet the Basic Production Process; in addition to adopting the Mercosur Common Nomenclature that will distinguish the tax rates of the industrialized good (SENA E MAGNO, 2022). The authors show that it is in the Basic Productive Process, established by Interministerial Decree, that the counterparts for the usufruct of the tax exemption/reduction are found.

Through the investment attraction policy, the largest soft drink industries change their tax planning and transfer their concentrate production plants, a basic input in the production of soft drinks, to the Amazon region to reduce their tax burden. Following the production chain of this sector, the bottlers acquire these concentrates with exemption from the tax on industrialized products and receive as a presumed credit the equivalent of the rate in force of this tax on the price paid in the acquisition. In this way, the Manaus Free Trade Zone has a unique nature, where the higher the tax rate on industrialized products, the greater the gains for the soft drink industries located there, in addition to the tax exemption.

The starting point of the investigation came from the observation of Federal Revenue reports indicating that concentrate manufacturers did not comply with two counterparts to enjoy the incentive. The first unfulfilled condition concerned the classification of concentrates for soft drinks that give rise to credit. The practice adopted by industries consisted of selling less complete inputs, most of which were exempt and did not contain the necessary characteristics to compose goods classified as concentrates, according to the Tax Incidence Table on Industrialized Products.

The second condition not fulfilled refers to the absence of regional plant extract during the process of elaboration of inputs that generate tax credits. In addition, the Federal Revenue identified as abusive tax planning the behavior of the same manufacturers when inflating the price of concentrates, to disguise components of the price of the product sold to bottlers.

Thus, the present work seeks to investigate the possibility of tax offenses practiced by the Brazilian soft drink industries leading to violations of the economic order. It is not intended to question the legitimate incentives granted in the Manaus Free Trade Zone or to judge the tax practices presented, the objective in question is limited to analyzing that, sometimes, tax conducts can interfere with competition, causing economic imbalances. The results indicate that there are sufficient indications that tax practices can be classified as antitrust violations, justifying inspection by the Brazilian antitrust system.

The interaction between taxation and competition is still little explored and, gradually, has been gaining ground not only in the antitrust field, but also in legal, legislative and academic discussions. In this sense, these findings contribute to the scientific literature that investigates anticompetitive conduct and to the design and evaluation of public policies by enabling a better understanding of the procedures to be adopted in cases of investigation of tax practices that may lead to anticompetitive conduct.

In addition to this introduction, the paper has four more sections. The second section is dedicated to the theoretical framework, which will contextualize the soft drink market, the Manaus Free Trade Zone model and the tax exemption scenario on industrialized products in the Manaus Free Trade Zone. The third section addresses the methodological framework used in the research. The results are exposed in the fourth section, where the structure of the relevant soft drink market is presented, the manifestations of the Administrative Council of Tax Appeals about the non-fulfillment of the legally foreseen requirements for the appropriation of tax credits on industrialized products when acquiring concentrates from of the Manaus Free Trade Zone and, finally, the fifth section concludes.

2. THEORETICAL REFERENCE

The Free Zone of Manaus encompasses three economic poles: commercial, agricultural and industrial (CARDOSO JÚNIOR and REY, 2019). The authors show that the Industrial Pole of Manaus offers federal and state incentives administered by three different entities. Suframa manages the tax exemption on industrialized products; granting a reduction of up to 88% of the import tax on inputs destined for industrialization; exemptions for federal contributions on internal operations in the Manaus Free Trade Zone; in addition to incentives for the Information Technology Law. In turn, the Superintendency for the Development of Amazon administers the concession of a 75% reduction in the Corporate Income Tax and, finally, the Government of

Amazonas grants a reduction of 55% to 100% on the tax on the circulation of goods and services for companies incorporated in the Industrial Pole of Manaus.

Understanding the tax incentives offered to companies installed in the Manaus Free Trade Zone, the large soft drink industries identified the possibility of industrializing in the region the production of their main raw material, the concentrate, thus changing their tax planning. In the teachings of Schoueri (2010), tax planning assumes that the taxpayer, when structuring his business, seeks tax savings, intending to avoid, minimize, or delay the incidence of taxes or enjoy tax benefits that reduce the tax burden. In summary, the exercise of tax planning is about tax avoidance, in other words, licit tax savings.

The tax on industrialized products is generally used in extra-fiscality policies, as it is a tax intended for the needs of industrial production and, consequently, operates as an agent of intervention in the economy and free competition (COÊLHO, 2016). As presented by Machado (2001), the tax rates on industrialized products must be geared to the needs of the final consumer, that is, the more superfluous a certain product is considered, the higher its rate will be. Another relevant feature presented by the author is the requirement that the tax be non-cumulative throughout its production chain, thus making it impossible for its multi-phase incidence to increase the final value of the industrialized good too much. Non-cumulative action is based on the use of credits related to the tax charged in the previous stage on inputs. It should be noted that the enjoyment of an exemption must be conditioned to consideration by the beneficiary, whether a burden or an actively demanded consideration, and it is up to the beneficiary to validate whether or not it is interesting to execute such assumptions to enjoy the benefit (CARVALHO, 2021).

Decree-Law No. 1,435/1975 establishes that products made with agricultural raw materials and regionally produced plant extracts, produced by industrial establishments whose projects have been approved by Suframa, are exempt from the tax on industrialized products. Products will generate tax credit on industrialized products, calculated as if it were due, whenever used as raw materials, intermediate products, or packaging materials in the industrialization, anywhere in the national territory, of products subject to the payment of said tax.

Equally, concentrates produced in the Manaus Free Trade Zone are exempt due to the territorial criterion of the incidence hypothesis and are entitled to the non-cumulative credit which is calculated by applying the rate corresponding to their tax classification (equivalent to 20% until April 2018), as if it were due.

Suframa recognizes as a regional raw material that is the result of extraction, collection, cultivation, or animal husbandry in the Western Amazon region and describes the criteria for

recognizing the predominance of raw material of regional origin that must meet at least one of the following attributes: volume; amount; Weight; or importance, to use in the final product. If the requirements that condition the exemption are not met, the tax will become chargeable, plus a fine and interest.

In its inspection plans, the Federal Revenue (2020, 2019, 2018, 2017) shows that manufacturers of concentrates in the Manaus Free Trade Zone sometimes do not comply with counterparts for the use of the incentive and, in this way, unduly take advantage of the presumed credits of the tax on industrialized products.

In the same reports, the Federal Revenue identifies as abusive tax planning the practice of artificially increasing beverage concentrates. Thus, the agency concludes that the behavior of these industries harms not only the public finances, but also the competitive environment.

Competition policy is essential for economic development, summarized as the combination of measures stipulated by the State to shield competitiveness between entities and discourage practices that may harm free competition and, with that, maintain and even increase productivity in the market (PONDÉ, FAGUNDES and POSSAS, 1997).

As a reference, the law for the defense of competition prescribes the Brazilian System for the Defense of Competition, systematizing the control bodies, namely the Administrative Council for Economic Defense and the Secretariat for Economic Monitoring. The Council is entrusted with the task of promoting free competition, and which, in addition to carrying out the repressive and preventive task of harmful conduct in the context of competition, translates the educational nature of the body into its decisions. The Secretariat for Economic Monitoring, in turn, is an advisory body that aims to promote competition in public bodies, especially by producing studies that indicate the competitive conditions in the country, in addition to suggesting the revision of laws, as well as regulations that may produce negative effects on competition in the country.

Within the scope of repressive control, antitrust practices are conventionally characterized according to their main manifestations: agreements; concentrations; and abuse of dominant position. According to antitrust legislation, it does not matter how the examined act is verified, since it is limited to determining the prohibition of acts, which are manifested in any form. For it to be conceived as contrary to the economic order, it is sufficient that it aims at or causes one of the following results typified in the antitrust law: i. limit, distort or in any way harm free competition or free enterprise; ii. dominate the relevant market for goods or services; iii. arbitrarily increase profits; and iv. abusively exercise a dominant position.

Forgioni (2020) summarizes that not every restriction on free enterprise or free competition is classified as market dominance or abuse of a dominant position, however, there is no market dominance or abuse of a dominant position without restriction of these principles or that gives rise to an increase of arbitrary profits.

To calculate economic power, it is necessary to estimate the market shares of the companies involved in the analysis. Then, some indicators of market concentration can be applied; the most commonly used indices are the "Ci" indices and the Herfindahl Hirschman Index (HHI) (PAVIC, GALETIC and PIPLICA, 2016). The concentration ratio "Ci" measures the percentage share of the "i" largest companies in the relevant market. In turn, the HHI is calculated by summing the squares of the market shares of each of the firms in the industry, taking into account the relative size and distribution of firms in the market. The index approaches zero when the market is fragmented and can reach up to 10,000 points, a value at which there is a monopoly (PAVIC, GALETIC and PIPLICA, 2016). The index demonstrates that markets are: i. not concentrated when the HHI is below 1500 points; ii. moderately concentrated when the index is between 1,500 and 2,500 points; and iii. highly concentrated when the HHI measures above 2,500 (CADE, 2016).

Concerning violations of the economic order themselves, Salop (2006) develops two categories of anticompetitive conduct, collusion and exclusion. Likewise, Baker (2010) infers that the so-called collusive conduct directly influences competition, implying systematic actions that propagate behaviors among competitors in the same market, causing them to repeat the same conduct of a monopolist. Regarding the exclusionary behavior, in this system the costs of rivals are high to make access to key inputs difficult or restrict access to distribution centers. The influence generated by the effect of exclusion can come from unilateral or multilateral acts, considering that the effects will be indirect regardless of the form. In harmony, Motta and de Streel (2003) externalize that both categories of anticompetitive conduct can reinforce market power to an economic agent or its group.

Strictly speaking, there is no need to talk about damage to competition if there is not enough evidence to show the risk, potential or direct, of causing violations of the economic order. When verifying the legality of the conduct, as well as the scope of its effects, the definition of the said market is examined, both from a geographic and material point of view, given the domain that that agent exercises in such market, being an essential factor to validate the legality of your acts. Thus, the present work seeks to contribute to the literature by bringing empirical evidence about how such tax practices can affect competition in the soft drink market.

3. METHODOLOGY

The methodological option for the research was the process mapping technique, also known as causal process tracing. This procedure emerged as an important causal inference approach in research that employs the case study in some way (KAY and BAKER, apud COLLIER, BRADY and SEAWRIGHT; GEORGE and BENNETT, 2015).

The use of causal process tracing is very useful in the study of public policies, and can be used to identify and describe them, in addition to elaborating single or multiple paths through which the policy succeeds, using available metrics and standards (KAY and BAKER, 2015). The evidence provides a complete view of the events, in this case, the tax conduct, described in the Federal Revenue reports (2017, 2018, 2019 and 2020) and 68 CARF judgments, in the period from 2019 to 2021.

The selection of Carf judgments was based on case law research on the website of this Fiscal Council, using the judgment search tool. The recent judgment sessions for the years 2019, 2020 and 2021 were selected, one at a time, and the following keywords were searched for: "ipi", "concentrates for soft drinks", "kits" and "Zona Franca de Manaus", with the keywords selected jointly. An exhaustive list was found containing 68 processes that dealt with the subject (CARF judgments used in the work can be seen in Annex I). From these decisions, we seek to identify the companies that improperly took advantage of the tax credits on industrialized products arising from acquisitions made in soft drink concentrate industries located in the ZFM.

In turn, the investigation of previous violations of the economic order by the Administrative Council for Economic Defense was consulted on its institutional website, operating the statistical panel Cade in Numbers in the period from 2015 to 2021. The filter used was systematized in a spreadsheet of Excel the following data: total administrative proceedings judged, conduct, year, month, case number, represented and representative. Concerning the concentration acts judged by the same Council, the Cade panel in Numbers was also used in the same period referred to above, however, the filter used had the following information: total number of merger cases judged, year, month, number of the process and applicant.

To fill the gap in the period before 2015, it was examined on the site Conselho Administrativo de Defesa Econômica, Pesquisa Procedural and in the Free Research field it was tracked by the names of the main competitors in the soft drink market: Ambev, Brasil Kirin, Coca-Cola, Heineken and Pepsi. Only those linked to the development of the work were used, such as processes that dealt with definitions of the structure of the soft drink market; and investigations

regarding possible anti-competitive practices.

Relying on the evidence, it will be observed which factors may contribute to the causality of the issue in question, that is, which tax behaviors would be capable of distorting the competitive environment. The variables presented are the basic criteria used by the Brazilian antitrust authorities in the analysis of unilateral conduct, namely: characterization of the restrictive conduct to competition; delimitation of the relevant market; dominance analysis; analysis of actual and potential competitive conditions; and assessment of potential anti-competitive damages from the conduct.

4. RESULTS

4.1. Analysis of the soft drink market structure

In a precedent on the beverage concentrates market, the Administrative Council for Economic Defense (2015a) identified that this input finds greater application in the soft drinks and juices segments. The preparation of the drink consists of diluting the concentrated extracts in water (CADE, 2015a).

The definition of the soft drink market can be noted in the merger involving Coca-Cola and Unilever (Cade, 2016b), in which the Administrative Council for Economic Defense delimited the market in the product dimension as a market for alcoholic and non-alcoholic beverages (carbonated or not). In some precedents, the market was segmented in a more restricted way, such as soft drinks, juices, energy drinks, among others.

Regarding the relevant geographic market, the Administrative Council for Economic Defense (2016b) has established the understanding that the transport of beverages would be economically viable only in an area comprised within a distance of 500 kilometers from the location of the plants productive. At times, the Council also delimited the geographic market for beverage production as national and regional, depending on the scope of the operation's distribution network (CADE, 2019).

Although there is no public supply data in the soft drink market, it is possible to superficially suggest the shares held by the largest economic agents between the years 1998 to 2015. In 1998, Santos and Azevedo (2003) showed that the market was divided as follows: Coca-Cola (47.7%); Brahma/Pepsi (13.1%); Antarctica (11.9%); and other companies (27.3%). In 2011, Gonçalves (2012) indicated the following holdings: Coca-Cola (56%); Ambev (17%); Schinca-

riol (3%); and other companies (24%). In 2015, Afrebras (2018) presented the following market division: Coca-Cola (61%); Ambev (19%); Heineken (7%); and regional companies (13%). It should be noted that there is no knowledge about the metrics adopted for the estimates described.

Based on this conjecture, the degree of market concentration can be measured using the Ci and HHI indices. Considering only the year 2015, the C3 would be 93%. In other words, C3 reflects that Coca-Cola, Ambev and Heineken have 93% of the market about the total. In turn, when calculating the HHI, also having the year 2015 as a reference, the market can be considered extremely concentrated, since the three largest competitors accounted for 4,131 points. Once again, it should be noted that there is no knowledge about the proxies used in the publications, which makes the data not very robust.

Hypothetically, the supply structure estimates, presented in the period from 1998 to 2015, indicate that the participation of the largest soft drink industries remained above the 20% threshold, the minimum percentage necessary for presuming the possibility of exercising a dominant position (CADE, 2022). Even so, this condition is not sufficient to prove absolute dominance.

Regarding the technology structure for soft drink manufacturing, Santos and Azevedo (2003) state that the process is accessible to small producers, enabling the manufacture of quality soft drinks at low cost. In the same way, the basic inputs are presented as low-cost raw materials, such as water, sugar, fruit juice, extracts, acidulants, citric acid, syrup, dyes, among others.

In short, accessibility and entry costs in the production process do not prove to be high, either in the acquisition of inputs or in the technology applied in the process. However, expenses for establishing the brand and distribution capacity (promotion, advertising and building a network of distributors) are high sunk costs. Next, empirical evidence of tax violations by the most representative agents in the soft drink market and their potential anticompetitive effects will be analyzed.

4.2. Analysis of potential conducts

Concerning the relationship between competition and taxation, these are included in a context of problems conceived in relevant product markets, subject to the wide incidence of tax evasion, falsification and adulteration of products and/or use of legal instruments in the form of ostensive litigation in bad faith, or even the practice of tax planning through simulation, fraud

of the law and abuse of rights (FERRAZ JÚNIOR, 2006).

Silveira (2011) maintains that, for tax planning to be valid, it is essential that there is no abuse of rights, abuse of form and fraud of the law. The author presents, in generic terms, parameters for proving or not acts or simulated businesses, among them: operational implementation and compatibility with the stated purposes; adoption of market business conditions, when the operation takes place between related or linked parties; and verification of the business purpose, that is, the existence of reasons other than merely tax savings.

The authors Carvalho and Mattiuzzo (2021) corroborate the understanding that there is an intrinsic link between tax and competition violations, indicating a pattern that, to relate one offense to the other, such conduct would require continuous unfair practice; high tax rate accompanied by negligible profit in a given market; relevant growth of the market share of such company; correspondence between cunning practice and increased market share; and, finally, when founded damage to competition is found. In this context, the study details tax conduct and possible correspondence with antitrust practices.

4.2.1. Non-payment of tax on industrialized products and use of undue tax credits

The potential violation of the economic order was observed in decision nº 3402-009.784 of the Administrative Council of Tax Appeals (2021a), in the judgment of the administrative proceeding arising from the notice of infraction issued due to the appropriation by Heineken BR Bebidas Ltda of undue credits from the tax on industrialized products from the acquisition of concentrates not derived from agricultural raw materials and vegetable extractives produced in the Western Amazon, namely: caramel coloring, neutral alcohol, hydrated ethyl alcohol, guarana seed and guarana extract; and guarana seed extract. The calculation period occurred between 02/2012 to 12/2014, for the constitution of tax credit in the total amount of R$ 30,958,804.06.

In the fiscal verification document drawn up by the Federal Revenue, it is stated that the caramel coloring, neutral alcohol and hydrated ethyl alcohol are produced from sugar and sucrose, agricultural raw materials extracted from plants. However, they are not inputs from regional production, as they came from the state of Mato Grosso, located outside the incentivized region.

At the time, the Tax Authority found that the caramel coloring was obtained from the DD Williamson industry, which, in turn, purchased almost all of the sugar from Usinas Itamarati, located in the state of Mato Grosso, since this plant purchased sugar cane from rural producers

and other companies also located in the same state. Regarding neutral alcohol, this chemical was purchased through the company Magama Industrial, which obtained hydrated alcohol from a distiller, whose main sugarcane suppliers were also located in Mato Grosso.

Heineken argued that the purchased inputs contain raw materials from the Western Amazon, therefore, it is entitled to the exemption and presumed credit of the tax on industrialized products. The industry also understood that, regardless of the fulfillment of any requirement, the right must be preserved, under penalty of violating the principle of non-cumulative tax.

Due to the need for a correct investigation of the facts, the Administrative Council of Tax Appeals converted the judgment of the appeal into diligence. As a result, the Inspection removed the glosses made on the tax credits on industrialized products from orange, lemon, grape, apple, citrus and Cola 1 concentrates (it was certified that the sugar to compose this product was purchased in Acre from May of 2013). Regarding the Cola 1 concentrates (purchased before May 2013), Cola 2 and grape dye, they were not even contested by the defense, thus, the Audit Committee decided to maintain the impediment of maintaining the presumed credit by the taxpayer. It turned out that the guarana concentrate, in which the fruit seed extract was used, met the requirement.

In the judgment of the administrative proceeding of the Administrative Council of Tax Appeals (2021a) nº 10880.734782/2019-98, as a result of the notice of infraction made against Ambev, the tax authorities denied the appropriation of incentivized or fictitious credits, calculated on the exempt concentrates purchased from Arosuco Aromas and Juices industry, indicating that the credit is only accepted if there is a positive tax rate on industrialized products for the purchased input. The assessment was not based on the lack of verification of the tax classification adopted by the appellant, nor was any regulatory fine applied for non-compliance with this requirement, but only the official fine for non-payment of the tax due. The calculation period elapsed between 05.2017 and 06.2017 and the amounts disputed by Ambev were not informed.

The tax authorities show that the concentrates purchased by the charged bottlers were in the form of kits consisting of two or more components, each individually packaged, the content of which can be liquid or solid, with no dilution capacity for any component for the manufacture of soft drinks, i.e., do not have the essential characteristics of the complete or finished syrup according to the Table of Incidence of the Tax on Industrialized Products. In this way, the raw materials and intermediate products only effectively become a compound preparation for the preparation of beverages after a new industrialization stage that takes place in the acquirer's establishment.

The Administrative Board of Tax Appeals interprets that the preparation of the kit differs from the production of the syrup. In turn, syrup differs from soda, the final product. Thus, it is necessary to distinguish the tax classification of each item in the kit, not adopting just one, since it is not a compound. The Supervisory Board maintains that this understanding is following the international method of classification of goods, the Harmonized System of Description and Coding of Goods. In addition, the agency also relies on the judgment of the World Customs Organization when analyzing the tax classification of goods with characteristics similar to those of kits in the world market for beverage production. On that occasion, the World Customs Organization decided that the individual components of beverage bases should be classified separately. With the components classified separately, there is no value to be used from the tax, since most of these components are taxed at a zero rate.

The Audit Committee points out that the competence to grant permission for projects by companies that seek to enjoy tax benefits is exclusive to Suframa. In turn, it is the responsibility of the Federal Revenue to check whether the products raised comply with the Mercosur Common Nomenclature used in the Table of Incidence of the Tax on Industrialized Products, as well as being responsible for verifying the conformity of the credits perceived by the taxpayer in his presentation Supervisor.

Due to the limitation of the work, it cannot be said that there is a systematization of the operations of the industries when marketing the less complete input instead of the concentrate or the lack of verification when not observing the tax classification in the entry invoice by the assessed bottlers. However, a potential competitive imbalance resulting from tax evasion may be suggested.

In his work, Silveira (2011) relates possible tax causes to violations of the economic order. The author interprets that when determining the practice of an act contrary to tax legislation (tax evasion) or exposing third parties to risk for tax liability as a result of non-payment of the tax, even when supported by a suspensive cause of enforceability, it may be related to conduct described in the Competition Defense Law, in its art. 36, §3, item IX "to impose, in the trade of goods or services, on distributors, retailers and representatives resale prices, discounts, payment conditions, minimum or maximum quantities, profit margin or any other commercialization conditions related to the business of these with third parties".

In turn, the practice of conditioning the sale to the acceptance of tax evasion may be linked to art. 36, paragraph 3, item XI, "refuse the sale of goods or the provision of services, within the payment conditions normal to commercial usages and customs"; and item XII "di-

fficult or break the continuity or development of commercial relations for an indefinite period due to the refusal of the other party to submit to clauses; and unjustifiable or anti-competitive commercial conditions" of the Competition Defense Law (SILVEIRA, 2011).

The unilateral conduct described is certainly classified as a tax offense, with the potential to promote harmful effects on competition. Therefore, the abuse of the right to petition for anti--competitive purposes also deserves to be analyzed jointly by the competition defense agencies and the tax authorities, understanding the meeting of the right to petition and the right to free competition, in addition to their limitations.

4.2.2. Abusive exercise of the right to petition

In the thesis discussed 68 decisions of the Administrative Council of Tax Appeals were verified in the period from 2019 to 2021 alone, which dealt with appeals on Tax credits on Industrialized Products calculated by industries in the soft drink segment due to incorrect tax classification or lack of material regional raw material in concentrates.

When assessing the report for the year 2017, the RFB (2018) disclosed that between August 2016 and January 2018, 45 notices of infraction were drawn up with a total value of BRL 4.2 billion. At that time, 26 inspection procedures for the tax on industrialized products were in progress at beverage bottlers that purchase inputs at the ZFM, with 45 diligences being closed, while another 14 were in progress.

In terms of the results for 2018, the RFB (2019) indicated that the amount entered in the notices of infraction drawn up in beverage manufacturers dispersed throughout the national territory, resulting from the lack of entitlement to incentive credits and the tax classification error, was of 2.2 billion reais and, in addition, 22 inspection procedures at beverage manufacturers were terminated.

It was highlighted that, since 2016, the total amount officially launched was R$6.9 billion; 59 inspection procedures with results in beverage manufacturers were closed; and until the end of 2017, all first and second-instance administrative judgments that examined ex-officio assessments arising from the disallowance of incentivized credits from concentrates were favorable to the Administrative Council of Tax Appeals.

In concluding on abusive tax planning in the beverage sector, the report indicates that, under the authority of the Special Inspection Team, in 2018, inspections ended with releases of tax credits totaling BRL 5.8 billion.

As for the results for 2019, 17 inspection procedures were in progress, the object of which was the classification of concentrate kits and disallowance of values inserted as credit from the Manaus Free Zone, in establishments in the beverage sector. In the aforementioned period, 97 diligences were completed and the results of the sector's launches reached the amount of R$ 16.1 billion (RFB, 2020).

Finally, the last report published by the Federal Revenue with the results of 2020 (RFB, 2021), indicated that 14 inspection procedures were in progress, in establishments in the beverage sector and 5 due diligence procedures, with a balance of 19 inspections closed and 11 stages that year. The result of launches in this segment in 2020 reached the importance of R$ 7.7 billion.

It can be suggested that the actions described are similar to anti-competitive conduct of abuse of the right of petition. Eiras (2019) shows that abuse of judicial procedure for antitrust purposes has the following characteristics: consistent conduct in exercising the right to petition; injury or potential injury to competition as an institution; and a causal link between the exercise of the right of petition and the damage or potential damage.

Although the abuse of procedural means is not explicitly shown in the Competition Defense Law, this conduct can be framed in its art. 36, §3, items III, IV, and V.

The European Court, when dealing with the Promedia and ITT case, considered that, in principle, the proposition of the fundamental right of access to the petition cannot be characterized as abuse, unless a company in a dominant position files an action that cannot be considered as an attempt to establish your rights and therefore can only serve to harass the opposing party; in addition, this action must be conceived within the framework of a strategy whose objective is to eliminate competition (LIANOS and REGIBEAU, 2017).

In precedents, the Administrative Council for Economic Defense has already recognized the possibility of abusive conduct of the right to petition, evaluating criteria such as the reasonableness of the invoked right, the veracity of the information, the adequacy and reasonableness of the means used and the probability of success of the request (CADE, 2003).

It is recalled that the assessed companies would not be entitled to the exemption and the presumed credit of the tax on industrialized products because there was no use of regional raw materials and because of the incorrect tax classification of the kits as a single product. In this circumstance, just the fact that companies file an appeal with the Administrative Board of Tax Appeals requesting the right to the tax benefit, could already be considered as an abuse of right with offensive potential. Given this, it is assumed that industries intend to engage in the abuse

of procedural means in themselves to obtain greater financial returns, that is, to use the process to achieve a supposedly illegal objective.

From this perspective, tax practices may be congruent with the abuse of the right to petition; and the causal link remains clear when observing the values released by the Federal Revenue, thus making it impossible for other competitors to compete on equal terms.

4.2.3. Abusive pricing and/or abuse of intellectual property

As already seen, the Federal Revenue (2017, 2018, 2019 and 2020) understood as abusive tax planning the sharp overvaluation of the prices of beverage concentrates by industries located in the Manaus Free Trade Zone to disguise the following elements: royalties from permission given to manufacturers to use the brand; and financial contributions for use in marketing programs.

Afrebras (2018) criticizes that the price of concentrate produced by the Industrial Pole of Manaus can reach 45 times more than the average price of concentrate in the rest of Brazil and that this type of feat could not occur, since the cost of production in the free zone it is lower due to tax incentives. It also assesses that the sale price of the concentrate produced in the Industrial Pole of Manaus by Ambev, Brasil Kirin (currently Heineken) and Coca-Cola is R$ 85.28/kg when exported. In turn, the price practiced in the national market is equivalent to R$ 415.68/kg, a value much higher than the sale price of concentrate in other states, such as São Paulo, which is estimated at R$ 9.21/kg.

The Competition Defense Law did not expressly include the practice of excessive prices in its exemplary list of violations of the economic order, however, the repression of this conduct is based on its article 36, items III, IV, V, X "discriminate against purchasers or suppliers of goods or services through differentiated pricing, or operating conditions for the sale or provision of services" and XIX "exercise or abuse industrial, intellectual, technology or brand property rights".

A case often mentioned as an example of abusive prices is that of the company United Brands, which discriminated against prices by supplying bananas to different distributors located in countries in northern Europe. The European Commission considered the prices abusive, among other reasons, due to the prices practiced in Germany, Holland and Denmark being at least 100% more expensive than those practiced in Ireland. The European Commission, however, judged that there was not enough proof of the excessive price practiced, opening the possibility

of a series of comparisons for this controversy (AKMAN and GARROD, 2011).

For Faull and Nikpay (2007), the existence of a high-profit margin is not enough, at first one should investigate the excessive disproportion between costs and prices, then verify whether or not the price should be considered excessive, through analysis of the product itself or a comparative analysis with competing products. According to Ragazzo's (2011) explanation, three lines of arguments justify the absence of intervention in the case of excessive prices: belief in the self-correction of excessive prices; risk of the disincentive to innovation; and complexity in measuring a competitive price and, consequently, an excessive price.

In the jurisprudence of the Administrative Council for Economic Defense on abuse of intellectual property rights, the perspective of a right being legitimately and validly achieved was accepted, despite, at the same time, being exercised, in an abusive way, disagreeing with the constitutional principles of social interest; technological and economic development of the country (CADE, 2007).

In this context, it is important to deepen the investigation of the potential conduct of abusive prices and/or abuse of intellectual property by the industries of concentrates for soft drinks in the Manaus Free Trade Zone. However, the analysis must pay attention not only to potential harm to free competition but also to contractual freedom between companies, based on the principle of free enterprise.

5. CONCLUSION

The present work sought to investigate the possibility of tax conduct carried out by the soft drink concentrate industries located in the Manaus Free Trade Zone causing damage to the competitive environment. The Administrative Council of Tax Appeals and the Federal Revenue explained that, sometimes, these industries did not comply with mandatory requirements for the acquisition of presumed tax credits on industrialized products in products manufactured in the Manaus Free Trade Zone. The Federal Revenue also signaled that there was inflation in the price of the concentrate to obtain greater transfers in royalties and marketing by the bottlers. In addition to examining the findings of the tax authorities, the work also identified the possibility of an infringement of the economic order arising from the abuse of the right to petition.

The appropriation of tax credits on industrialized products determined by these industries due to incorrect tax classification or due to lack of regional raw material in concentrates to be supported by the treasury was estimated by the Federal Revenue at approximately 30 billion

reais in the period from 2016 to 2020 Based on this information, it is possible to suggest that the agents' motivation for the acts performed is the search for greater surpluses of wealth and an increase in economic power not generated through their economic efficiencies.

Faced with the vertical relationship between the soft drink concentrate industries and the bottlers, which are usually franchised or belonging to the same economic group as the concentrate manufacturers, it can be suggested that the potential conducts observed are autonomous of an exploratory nature, since there is no rationality economic activity in exclusionary conduct aimed at removing an agent from downstream in the field of action of the same economic group.

If proven, the conduct will bring significant competition concerns to the soft drink market as a whole, since with the increase in revenues of the concentrate industries in an unnatural way, these agents will have a competitive differential that can be used in the reduction of their costs of production, in the differentiation of its products, in the greater integration of its productive chains and the expenses with the strengthening of its brands. In other words, greater barriers to the entry of new competitors will be raised, in addition to harming established economic agents and, consequently, aggravating the concentration in the sector.

In addition, the practices have the potential to be described as opportunistic behavior by companies, resulting in an adverse selection effect, as the concentrate industries signal to the market that the tax conduct adopted can generate extraordinary profits, thus attracting interested industries in the same behaviors. Consequently, they harm soft drink industries that comply with their tax obligations; affect productivity and dynamic efficiencies; prevent the national soft drink market from developing and generate inefficiencies that will have repercussions throughout the sector's production chain, even to final consumers. Thus, it is considered that there are indications of negative net effects on the well-being of consumers, which may be harmed by the reduction of their well-being in the form of price increases or reduced supply of products.

In this context, the potential conducts deserve to be analyzed by the bodies of the Brazilian System for the Defense of Competition, in addition, there must be greater articulation between the tax and competition defense bodies regarding the mode of operation of the industries. Thus, the work concludes that, if confirmed, the conducts have diffuse effects, either on the treasury, which will have to bear the weight of improperly appropriated credits or on the competitive environment, in addition to negatively affecting the well-being of consumers and society in general, since everyone is affected by tax evasion.

These findings are useful for the scientific literature that investigates anticompetitive conduct by bringing empirical evidence of its relationship with tax practices in Brazil, for poli-

cymakers who consider market concentration and tax incentives in their decisions, as well as for society in general that can be harmed for such behaviors. As a suggestion for future research, studies can be proposed on the possibility that these practices can influence the adoption of uniform commercial conduct.

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