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PARENTAL AND SHAREHOLDER ANTITRUST LIABILITY IN BRAZIL: A WARNING CALL TO GLOBAL COMPANIES

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Parental and Shareholder Antitrust Liability in Brazil: A Warning Call to Global Companies

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1. Introduction

A general principle of law incorporated by different legal systems around the globe is that shareholders of a corporation are insulated from liability for the acts of the corporation and that a parent company may only be held liable for acts of its subsidiary in exceptional circumstances. However, a number of recent judicial decisions and enforcement actions in the U.S., the U.K. and at the European Union level put the doctrine of limited liability under attack and Brazil is no exception to this trend.

Similarly to other jurisdictions, under the corporate law doctrine of "piercing the corporate veil", in Brazil injured third-parties can seek to hold shareholders liable for the debts and acts of a corporation when the corporate form is misused as a mere instrumentality or alter ego of its owner. Furthermore, depending on the area of law at issue,[1] legal entities of the same economic group may be held jointly and severally liable for offenses performed by any other entity of the group. This means that not only the parent company, but also sister companies, may be held responsible for the misconduct of any company of the group. Brazil's Consumer Protection Law (Article 28), Brazil's Labor Law (Article 2), Brazil's Social Security Law (Article 30), and Brazil's Antitrust Law (Article 33) are examples of statutes that provide for joint and several liability or secondary liability *among all entities of the group* for offenses committed by one of its entities.

Brazilian courts have been aggressively enforcing the above-mentioned legal provisions. In a recent case adjudicated by Brazil's Superior Court of Justice (Brazil's highest court for non-constitutional cases), for instance, *a subsidiary was held liable for the acts of its foreign parent company*. The court held that the Brazilian subsidiary of a major U.S. corporation was severally liable (as opposed to secondarily liable, as provided for in the consumer protection law) for offenses against consumers performed by the parent company as the subsidiary was supposedly acting on behalf of the parent company, giving the appearance, before the general public, of a single enterprise

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[1] Pursuant to Article 265 of Brazil's Civil Code, joint and several liability shall only be established by law or by the parties' will.

(Brazilian courts refer to this theory as the "theory of appearance").[2] To reach this conclusion, the court took into account the fact that the parent company held 97% of the subsidiary and that they both presented themselves before the consumers under the same brand.

One area of law that deserves special attention from global companies conducting activities in Brazil is antitrust law enforcement. Over the last decade, antitrust enforcement landscape has significantly changed in Brazil: in 2000 new investigative tools were granted by Congress (dawn raids and leniency agreements), and since 2003 the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that placed hard-core cartel prosecution as the top priority. As a result, Brazil now has an increasing number of investigations, including of alleged international cartels, and record fines of up to roughly US$ 1.3 billion in a single case for antitrust offenses. A new competition law was passed in 2011 (Law No. 12,529) and starting from May 2012, Brazil's antitrust authority, CADE, may calculate the fine for an anticompetitive practice on the basis of the turnover of the entire economic group, similarly to the rule applied by the European Commission, which makes the present moment particularly appropriate to discuss parental liability issues in Brazil.

2. Overview of Brazil's Antitrust System

Brazil's antitrust system features both administrative and criminal enforcement[3]. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis[4]. Also, parties engaged in anticompetitive conduct may be subject to civil suits in Brazil. Brazil's Antitrust Law provides that consumers may sue directly or through associations, prosecutors, or Consumer Protection Units for damages related to anticompetitive conduct. There are a few private claims pending before the Judiciary, most of them related to alleged cartels[5].

At the administrative level, antitrust law and practice in Brazil is governed by Law No. 12,529/2011, which entered into force on May 29, 2012 and replaced Law No. 8,884/94.

The new antitrust law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defense ("CADE"). CADE's new structure includes (i) a Tribunal composed of six Commissioners and a President; (ii) a Directorate-General for Competition ("DG"); and

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[2] See Superior Court of Justice, RESP No. 1.021.987 - RN (2008/0002443-8), Justice Fernando Gonçalves, adjudication date: October 7, 2008; Defendant: Yahoo! do Brasil Internet Ltda. See also Cour of Justice of Rio Grande do Sul, 9ª Câmara Cível, AI n.º 70015755952, Reporting Justice Marilene Bonzanini Bernardi, adjudication date: August 9, 2006, Defendant: Google do Brasil Internet Ltda.

[3] At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990, as amended by Law No. 12,529/11, and Law No. 8,666/1993. Federal and/or state public prosecutors have sole enforcement responsibility, and act independently of the administrative authorities. Also, the police (local or federal) may initiate investigations of anticompetitive conduct and report the results of their investigation to prosecutors, who may indict the reported individuals.

[4] In Brazil, corporations can only be prosecuted for antitrust offenses at the administrative level (and not at the criminal level).

[5] Article 942 of Brazil's Civil Code provides that participants to an illegal conduct are jointly and severally liable for the damages caused by the conduct.

(iii) an Economics Department. The DG is the chief investigative body in matters related to anticompetitive practices. CADE's Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review.

2.1 Anticompetitive conduct and applicable sanctions

Article 36 of Law No. 12,529/2011 deals with all types of anticompetitive conduct other than mergers, and provides that an antitrust infringement is "*...any act in any way intended or otherwise able to produce the following effects, even if any such effects are not achieved … I. to limit, restrain or in any way harm competition or free enterprise; II. to control a relevant market of a certain product of service; III. to increase profits on a discretionary basis; or IV. to abuse one's market power* [6]".

Article 36, § 3o, further provides examples of anticompetitive conduct, including various types of horizontal and vertical agreements and unilateral abuses of market power, such as agreements to fix prices or terms of sale, divide markets, rig bids and limit research and development, resale price maintenance, price discrimination, tying, refusals to deal, limitations on access to distribution channels, and predatory pricing.

Individuals, corporations and business associations may be prosecuted by CADE for anticompetitive conduct with actual or potential effects in Brazil[7]. Under the new competition law, fines for legal entities range between 0.1 and 20 per cent of the company's or group of companies' pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. CADE's Resolution No. 3/2012 broadly defines 144 "*sectors of activity*," which includes, among others, beverages and agriculture. CADE may resort to the total turnover, whenever information on revenue derived from the relevant "*sector of activity*" is unavailable. Moreover, as under the previous law, the fine may be no less than the amount of harm resulting from the conduct. However, due to challenges associated with quantifying damages, CADE has rarely proceeded to the calculation of the harm caused by an anticompetitive conduct to determine the applicable fine and we do not expect the agency to start doing so in the short run.

The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. Infra-legal regulation was expected to define the criteria that would be applied to distinguish when fines would be imposed against the company, or the group of companies, but this issue was not addressed in the regulations published to date. Under the previous law, sanctions could only be calculated based on the turnover of the actual defendants included in the proceedings. Therefore, although the range from 0.1 to 20 percent of the sector of activity turnover

[6] The law provides that a market power is presumed when "*a company or group of companies*" controls at least 20 per cent of a relevant market.

[7] Article 2 of Brazil's antitrust law establishes that Brazilian authorities have jurisdiction over an anticompetitive conduct if one of the following criteria is met: (i) the conduct took place in Brazil (territorial test), or (ii) the conduct generated actual or potential effects in Brazil (effects test). The legal provision does not clarify if effects that should be considered include both direct and indirect effects. Existing case law does not offer further guidance regarding this matter. The only two international cases adjudicated in Brazil until the present date were the so-called "vitamins cartel" in 2007 and the "hydrogen peroxide cartel" in 2012. In the first case there were imports into the Brazilian market, which constituted evidence of direct effects, while in the latter case, part of the conduct took place in Brazil and therefore the territorial test was met.

provided for in the new law is narrower than the 1 to 30 percent of the total turnover set forth by the previous statute, it is unclear whether its scope will be constricted or expanded, since CADE could consider parent companies' turnover when determining the amount of the fine.

The "decisive influence" test discussed below and the seriousness of the offense are the two criteria that are likely to inform CADE's decision on whether to calculate the fine based on the turnover of the defendant directly responsible for the conduct or on the one generated by its economic group. In any case, under Brazil's general principles of law, the fine imposed shall be fair and reasonable; and any amount imposed may be challenged before the courts.

CADE has factored in fairness considerations to calculate the amount of the fine due on several occasions. In the "vitamins cartel" case, for example, the former antitrust investigative agency, SDE, included as defendants in the proceedings both the foreign parent companies and their Brazilian subsidiaries. CADE dismissed the case against the subsidiaries based on the fact that there was no direct evidence in the files to support SDE's claim that the subsidiaries were also involved in the conduct. CADE then found the foreign parent companies liable for cartel conduct that affected Brazil, but when calculating the fine, took into account exclusively revenues regarding exports into Brazil instead of their total turnover.

The table below provides a summary of the main antitrust investigations sanctioned or settled[8] by CADE and the fines imposed (except for the case in the beer market, all the others relate to cartel investigations):[9]

Case	**Initiation of the Investigation – Adjudication**	**Fines (US$)**	**% of the Total Turnover**
Hydrogen Peroxide	2004-2012	70 million	Not available
Beer (abuse of power)	2003-2010	170 million	2%
Industrial Gases	2003-2010	1.3 billion	25% (50%)[10]
Steel Bars	1996-2005	210 million	7%
Crushed Rock	2002-2005	45 million	15-20%
Flat Steel	1996-1999	38 million	1%
Security Services	2003-2007	25 million	15-20%
Vitamins	1999-2007	10 million	20%
Sand Extractors	2006-2008	1.35 million	10-22.5%
Case	**Initiation of the Investigation – Settlement**	**Settlement (US$)**	
IT Services	2005-2011	20 million	
Compressors	2009-2009	60 million	
Plastics Bags	2006-2008	15 million	
Cement	2006-2007	25 million	
Compressors	2009-2009	50 million	

[8] CADE has entered into approximately ten settlements in connection with cartel cases since 2007, including with members of international cartels.

[9] Pending cartel investigations include cases related to the following product-markets: gas-insulated switchgear, marine hose, air cargo, TFT-LCD, TFT-LCD, cathode ray tubes, cathode ray tube glass, compressors, air freight forwarders, DRAM and soda ash.

[10] One of the defendants had its fine doubled for recidivism.

Case	Initiation of the Investigation – Settlement	Settlement (US$)
Marine Hose	2007-2008, 2009, 2011 and 2013	12 million
Air cargo	2006-2013	7 million

Apart from fines, other sanctions that may be imposed by CADE to legal entities include: (i) Corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects associated with the wrongful conduct; (ii) Publication of the decision in a major newspaper at the wrongdoers expense; (iii) Prohibition of the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to 5 years; (iv) Inclusion of the wrongdoer's name in the Brazilian Consumer Protection List; (v) Recommendation to the tax authorities to block the wrongdoer from obtaining tax benefits; (vi) Recommendation to IP authorities to grant compulsory licenses of patents held by the wrongdoer.

Law No. 12,529/11 provides that directors and other executives found liable for anticompetitive behavior may be sanctioned with a fine calculated as 1 to 20 per cent of the fine imposed against the company.[11] Although, on the one hand, the level of fines that may be imposed on the individual has been reduced when compared with the previous statute,[12] on the other hand, it is now more reasonable to expect individuals to be personally liable for paying the fine. The new law also provides that individual liability for executives is dependent on proof of guilt or negligence (the provision recalls the "dishonesty" requirement of the U.K. law). This change is expected to reduce the number of defendants and consequently to increase the speed of antitrust investigations in Brazil, especially in connection with investigations involving foreign defendants.

2.2 Law provisions related to parental and shareholder liability

Brazil's antitrust law adopts a strict approach to the issue of liability among entities of the same economic group. Article 33 of the new competition law, as did the previous competition law (Article 17), provides that legal entities of the same economic group may be held jointly and severally liable for anticompetitive practices performed by any entity of the group. A literal interpretation of the law leads to the conclusion that a company may be held responsible for the anticompetitive conduct performed by any of its sister companies without need to prove its direct involvement in the infringement. Also, the wording of Article 33 allows CADE to hold the parent company liable even if the fine was not calculated on the basis of its turnover.

Brazil's antitrust law does not define "economic group". Under CADE's case law,[13] an economic group is comprised by all entities over which a given company exercises

[11] Other individuals are subject to fines ranging from R$ 50,000.00 to R$ 2,000,000,000.00.

[12] Under the previous law, directors and officers of companies in violation could be fined between 10 and 50 percent of their company's fine.

[13] The Anglo-American concept of binding judicial precedent, *i.e.*, *stare decisis*, is virtually non-existent in Brazil, meaning that CADE Commissioners are under no obligation to follow past decisions / statement in future cases. Legal certainty is only be achieved if CADE rules in the same direction at least ten times, after which they codify a given statement via the issuance of a binding statement.

decisive influence. For purposes of prosecuting an anticompetitive behaviour,[14] CADE has traditionally taken the view that an undertaking has a decisive influence over a company if at least one of the following circumstances exist: (i) the undertaking has the majority of voting rights in the company; (ii) the undertaking as a shareholder of the company has the right to appoint or remove the majority of members of the Board of Directors and/or officers; or (iii) the undertaking, on the basis of agreement with other shareholders, has sole or joint control of the majority of voting rights in the company. Differently from other jurisdictions, day-to-day operational control is not relevant for the purposes of finding a "decisive influence".

More recently, CADE took the view that different legal entities would be considered to belong to a single economic group if they are subject to the same "*competitive strategic plan*"[15] (*i.e.*, behave as a single unit in the market). CADE has not detailed the extent of such test, and generally stated that the following dimensions shall be taken into account: price, costs, quality, brands, distribution channels, financial strategy, relationship with the parent company and relationship with the government.

The wording of the law allows CADE to reach conclusions aligned with EU case law and hold joint venture parents liable for any anticompetitive conduct of a 50-50 joint venture (*e.g.*, T-77/08 *Dow Chemical v. Commission*, and T-76/08 *El du Pont de Nemours and Others v. Commission*). Also, although CADE has never discussed the issue, it would be reasonable to assume that a parent company would be held liable for the conduct of its subsidiary even in the presence of successive holding companies separating the subsidiary of the parent company.

Furthermore, Article 34 provides that corporate veil may be pierced in case of fraud, abuse of power, wrongful acts, violations of corporate statutes, bankruptcy, and company's closure due to poor management. In other words, under such provision, CADE may look beyond the corporate form only for the defeat of fraud or wrong or the remedying of injustice. The agency generally resorts to this provision if, at the end of the investigation, the defendant included in the proceedings is not in a position to pay the fine or fulfil any ancillary obligations determined by CADE. If this is the case, the agency may go after any shareholder -- even minority shareholders, be them legal or natural persons.

Finally, under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices performed by the company. Considering the stiff sanctions that have been imposed to legal entities by CADE to date, this provision has been nearly forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

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[14] CADE adopts different criteria for merger control purposes. Pursuant to CADE's Resolution No. 2/2012, the following entities shall be considered as part of the same "economic group" for the purposes of calculating the group's revenues: (i) entities subject to common control; (ii) all the companies in which any of the entities subject to common control holds, directly or indirectly, at least 20% of the voting or total capital stock. In private equity transactions, the turnover of the following entities shall be taken into account for the purposes of determining whether a filing is mandatory: (i) management company; (ii) funds under the same management company; (iii) limited partners that hold at least 20% of at least one of the funds mentioned in item (ii); and (iv) the portfolio companies in which one of the funds mentioned in item (ii) holds at least 20% of their voting or total capital stock.

[15] See Proceedings No. 08700.005448/2010-14, Reporting-Commissioner Carlos Ragazzo, defendant: Unimed Araraquara, adjudication date: December 14, 2011 (available at http://www.cade.gov.br/temp/D_D000000643561902.pdf).

3. Conclusion

Parental and shareholder antitrust liability issues in Brazil are first and foremost symptoms of a system which is no longer in its infancy. A refinement in law enforcement is expected so as to ensure predictability and legal certainty in this area. In this process, Brazilian courts and enforcers will likely borrow from EU case law and policy, and distance its rulings from US practice.

The new antitrust law provisions, allowing Brazil's antitrust agency to calculate the applicable fine on the basis of up to 20 per cent of the turnover of the whole economic group in the sector of activities affected by the infringement, sends a clear warning call to global companies with activities in Brazil: they must ensure full compliance of antitrust rules by all companies of the group as it would be hard to avoid liability for acts generating harmful effects in Brazil performed by their directly and indirectly controlled entities, including joint ventures and other non-wholly owned subsidiaries. Sister companies are also at risk as they are joint and severally liable for any anticompetitive conduct performed by other legal entities of the group. CADE has still to provide guidance on how such broad legal provisions will be construed in practice.

As for succession issues, in light of the aggressive approach in the antitrust front taken by enforcers in Brazil (both in terms of initiation of investigations and imposition of fines), it is advisable to carefully assess strategies for structuring M&A transactions in order to reduce antitrust exposition – in this sense, and taking into account only antitrust concerns, it would be preferable to structure an asset deal ("pick and choose" approach) rather than a share deal whenever possible. And if there is a pending antitrust investigation, the buyer shall try to have the seller settle the case with CADE before closing the transaction and reflect any amount due in the final price.