THE DOMINANCE AND MONOPOLIES REVIEW

Fifth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

CONTENTS

Chapter 4

BRAZIL

Ana Paula Martinez[1]

I INTRODUCTION

At the administrative level,[2] antitrust law and practice in Brazil is governed by Law No. 12,529/11 (the Competition Law), which entered into force on 29 May 2012 and replaced Law No. 8,884/94.[3] The new Competition Law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defence (CADE). CADE's structure includes an Administrative Tribunal for Economic Defence (the Tribunal) composed of six Commissioners and a President, a Directorate-General for Competition (DG) and a Department of Economic Studies. The DG is the chief investigative body in matters related to anticompetitive practices. The Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review.[4] There are also two independent offices within CADE: CADE's Attorney General's Office, which represents CADE in court and may render opinions in all cases pending before CADE; and the Federal Public Prosecutor's Office, which may also render legal opinions in connection with all cases pending before CADE.

---

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Carla Frade for conducting the research needed to update this chapter.

2 Brazil's antitrust system features both administrative and criminal enforcement. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. Private enforcement actions may also be initiated through the judicial courts by aggrieved competitors or damaged parties. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990 (the Economic Crimes Law), as amended by Law No. 12,529/11, and Law No. 8,666/1993 (the Public Procurement Law). Federal 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. In recent years, Brazil has developed a widely recognised programme for criminally prosecuting anticompetitive conduct – primarily cartels – and criminal and administrative authorities frequently cooperate in parallel cases.

3 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defence (CADE). The SDE was the chief investigative body in matters related to anticompetitive practices, and issued non-binding opinions in connection with merger cases. The SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anticompetitive investigations. CADE was structured solely as an administrative tribunal, composed of six commissioners and a president, which made final rulings in connection with both merger reviews and anticompetitive practices.

4 On average, judicial courts confirm over 70 per cent of CADE's decisions.

The first Brazilian competition law dates back to 1962, but it was only in the mid-1990s that the modern era of antitrust in Brazil began, after the country shifted to a market-based economy. Among other reforms, in 1994 Congress enacted Law No. 8,884, which governed Brazil's administrative antitrust law and policy until 2011. From 1994 to 2003, the Brazilian antitrust authorities focused primarily on merger review and substantial resources were devoted to the review of competitively innocuous mergers. In 2003, the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement and placed hard-core cartel prosecution as the top priority, making use of investigation tools such as dawn raids and leniency applications. A more recent development of Brazil's competition law enforcement is related to an increasing number of abuse of dominance cases, which is first and foremost a symptom of a system that is no longer in its infancy.

The basic framework for abuse of dominance in Brazil is set by Article 36 of the Competition Law. CADE has not yet issued a regulation under the new Competition Law covering unilateral conduct, and has been resorting to legislation issued under the previous regime and precedents. The Anglo-American concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent in Brazil, which means that CADE's Commissioners are under no obligation to follow past decisions in future cases. Under CADE's Internal Regulations, legal certainty is only achieved if CADE rules in the same way at least 10 times, after which a given statement is codified via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one (Binding Statement No. 7), which provides that it is an antitrust infringement for a physicians' cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians' cooperatives and health plans.

Although abuse of dominance could also be considered a criminal violation under Article 4 of Law No. 8,137/90, punishable in the case of individuals but not corporations by a criminal fine and two to five years' imprisonment, no criminal sanction has to date been imposed on individuals for abuse of dominance practices.

II YEAR IN REVIEW

In 2016, CADE adjudicated 31 administrative proceedings. Out of these 12 were dismissed, while in 19 cases CADE found an infringement in relation to at least one defendant. This represents a significant drop if compared to 2015, when 52 cases were adjudicated in total, out of which 39 resulted in a conviction. On the other hand, there has been an increasing number of settlements reached between defendants and CADE, totalling 54 executed settlements in 2016 (out of 61 settlement proposals). As a result, imposed fines have increased from 286 million reais in 2015 to 197 million reais in 2016, while settlement sums agreed to be paid with CADE achieved a record 798 million reais, against 465 million reais in 2015 (fines collected in 2015 were 523 million reais, while in 2016 this number increased to 700 million reais). The increasing number of settlements and amounts collected may be explained by the fact that the authority established a more predictable procedure for settling cases, as well as devoting more resources to the prosecution of anticompetitive practices.

In 2016, cartels remained a priority for CADE, which accounted for most of the investigations and infringements found. Out of the 19 convictions, only five of them referred to conduct related to the abuse of dominance: two concerned port activities, one involved a radius clause in lease contracts in shopping centres, another related to price discrimination in the natural gas market and finally there was an exclusive agreement for healthcare services.

Other CADE decisions – whether to open, settle or dismiss a case or recommend the conviction of defendants – included sham litigation and exclusionary practices – namely radius clauses, refusal to sell, price discrimination and the creation of difficulties for market players. Listed below is a comprehensive list of 2016's abuse of dominance cases.

i Regulated industries

In 2016, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services, port services and natural gas.

Financial services

In March 2016, CADE launched administrative inquiries to investigate whether large-scale financial institutions, card issuers and payment acquirers limited competition through exclusivity arrangements and refusal to deal with competitors. The agreements were thought to reinforce the dominant position of credit card providers Cielo and Rede, to the benefit of their controlling banks.

The first inquiry is looking into whether card issuers Elo, Alelo, Amex, Hipercard and Ticket had exclusive relationships with payment acquirers Rede, Cielo or with banks Banco do Brasil, Bradesco and Itaú.[5] The second concerns only banks Banco do Brasil, Bradesco and Itaú-Unibanco, which were accused of refusing to process the receivable amounts schedule (*agenda de recebíveis*) from competitors of Rede and Cielo, their controlled entities.[6] Finally, CADE is investigating whether Rede and Cielo discriminated against competitors by employing encryption technology in their pinpad equipment (machines that capture transactions with debit and credit cards in retail), preventing access from smaller competing payment acquirers.[7]

On 5 April 2017, CADE executed two settlement agreements concerning these investigations. Itaú-Unibanco and Hipercard settled the first inquiry, agreeing to allow access to new payment acquirers and to meet certain targets during a two-year period. Payment acquirer Rede, at its turn, settled the last inquiry by undertaking to allow access to its pinpad equipment, as long as it was given reciprocal treatment.

The investigation is still ongoing for the remaining defendants, who have argued before judicial courts that CADE has no jurisdiction to investigate and sanction in the financial sector and that Brazil's Central Bank would be the agency in charge of enforcing competition provisions regarding financial institutions. This issue is not settled in the judicial courts and there are bills pending in Congress that aim to provide a definitive solution to this controversy.

Ports

Port operators and related parties have been under antitrust scrutiny for several years. The monopolistic situation of port operators and the complex regulation on prices and fees create a variety of disputes between port operators and service providers active in ports, which are subjected not only to administrative antitrust enforcement but also to judicial challenge.

5 Administrative Inquiry No. 08700.000018/2015-11.

6 Administrative Inquiry No. 08700.001860/2016-51.

7 Administrative Inquiry No. 08700.001861/2016-03.

From a competition advocacy perspective, CADE usually recommends the Brazilian National Agency of Waterway Transportation (ANTAQ) to review its regulation to prevent abuse of market power and challenges involving market players.

In February 2016, CADE imposed sanctions on port operators in Salvador and Rio Grande for abuse of dominance.[8] In both cases, the operators charged competitors with disproportional port storage fees (THC2 – Terminal Handling Charge 2) using their monopolistic position in the upstream market to harm competitors downstream. The total amount of fines exceeded 10 million reais, and both parties are challenging CADE's decision before the judicial courts. Salvador has managed to secure a decision suspending the effects of CADE's decision, based on a previous ruling that stated that the THC2 fee was legal.

In June 2016, CADE dismissed an investigation against Tecondi Margem Direito S/A and Santos Brasil SA – Tecon for raising rivals' costs in the market of warehousing in ports. CADE's Commissioners concluded that the fees charged by the operator could be justified in view of the costs faced by port operators.[9]

In January 2017, following a failed attempt at a settlement agreement, CADE imposed sanctions on Associação Comercial dos Transportadores Autônomos (ACTA) and Sindicato dos Transportadores Rodoviários de Cargas e Granel de Santos, Cubatão e Guarujá (SINDIGRAN) for several anticompetitive practices, including influence to adopt uniform practices and creation of barriers to rivals in the cargo road transportation to the Port of Santos. The alleged conducts consisted, among others, of charging competitors abusive fees, limiting the number of trucks operating in the market and requiring rivals to contract unnecessary intermediate services.[10] Fines imposed amounted to 78,000 UFIR[11] for ACTA and 250,000 UFIR for SINDIGRAN.

Natural gas

CADE opened an investigation in 2013 on whether the Gemini Consortium, a joint venture involving Petrobras, White Martins and GNL Gemini, benefited from cross-subsidies or lower prices for gas supplied by its shareholder Petrobras, raising rivals' costs.[12] Although the creation of Gemini had been approved by CADE in 2006, some of the restrictions imposed were overruled by a federal court.

In April 2015, CADE's DG considered the gas-supply agreement between Petrobras and Gemini risked placing the consortium at an unlawful advantage over competitors, and, thus, issued an injunction to prevent state-owned oil company Petrobras from supplying the consortium at lower prices. CADE's Tribunal confirmed the injunction, and White Martins challenged it before a federal court, securing a suspension of the order in June 2015. After a series of opposing decisions, the injunction was finally confirmed by the Brazilian Superior Tribunal of Justice.

8 Administrative Proceedings No. 08012.003824/2002-84 and 08010.005422/2003-03.

9 Administrative Proceeding No. 08012.005967/2000-69.

10 Administrative Proceeding No. 08012.000504/2005-15 and 08012.008142/2011-59.

11 Fiscal Unit of Reference. Under the previous statute, potential fines for trade association and entities that do not carry out economic activities ranged from 6,000 to 6 million UFIRs. 1 UFIR = 1.0641 real. This provision is still in force with regard to associations and trade unions that practised unlawful conduct before the enactment of Law No. 12,529/2011, as it is considered a more favourable penalty than the one established by the new statute.

12 Administrative Proceeding No. 08012.011881/2007-41.

Throughout 2016, all of its three members filed settlement agreements proposals, but terms were not reached. The case was then sent for final ruling in December that year, and CADE's Tribunal found that Petrobras and White Martins gave the consortium an unjustified preferential treatment in natural gas supply pricing, allowing it to undercut prices charged by rivals, leading to market foreclosure.

Gemini Consortium members were fined a combined 21.5 million reais. Also, companies were ordered to comply with the terms of the injunction or, alternatively, Petrobras could opt to supply Gemini with gas at unsubsidised prices, pursuant to Petrobras' new price policy.

Also under CADE's scrutiny are Petrobras' alleged preferential discounts for natural gas, in which distributors that solely traded Bolivian gas would not be granted discounts. As a result, Petrobras' integrated natural gas distributors were given beneficial treatment, harming competing gas distributors such as Comgás, which had filed the claim.[13] In August 2016, the DG concluded for the existence of a violation and sent the case for final judgment by CADE's Tribunal. Judgment was still pending as of 1 May 2017.

ii Exclusivity clauses

During 2016, CADE dealt with a series of cases involving exclusivity clauses. Besides the investigations into banking services mentioned above, CADE continued to scrutinise exclusivity clauses in different markets, such as soccer broadcasting contracts. In July 2015, CADE dismissed an investigation into how soccer broadcasting rights are negotiated in Brazil after finding no evidence of anticompetitive prices.[14] However, in February 2016, CADE opened a preliminary investigation for potential antitrust infringements in television broadcasting contracts for soccer games in 2019.

In June 2016, CADE settled with North Shopping Fortaleza shopping mall for imposing a radius clause that prevented retailers from opening other shops within a 5km distance of the shopping mall, which was considered to be anticompetitive.[15] North Shopping undertook to adjust its radius clause within the parameters set forth by CADE's case law and to pay a settlement sum of over 460,000 reais.

In August 2016, CADE adjudicated a similar case, which involved radius clauses in lease contracts with retailers within Porto Alegre city.[16] CADE's Tribunal found that said clause could lead to market foreclosure, and that the lease contract was not duly negotiated with retailers, especially the smaller ones. Nine out of 12 defendants were fined a combined amount of 15 million reais and were ordered to remove the radius clauses from their contracts. The remaining three defendants were acquitted as the investigation concluded they had not signed the lease contracts.

iii Sham litigation

Sham litigation complaints have also set the tone for CADE's activity in 2016, and the following cases deserve attention.

The first one of them was the investigation into media production companies MC 3 Vídeo Produções, Léo Produções e Publicidade, Shop Tour International e Shop Tour TV and Luiz Antonio Cury Galebe, which were accused of filing misleading and contradictory

13 Administrative Inquiry No. 08700.002600/2014-30.

14 Administrative Inquiry No. 08700.009863/2014-70.

15 Administrative Proceeding No. 08700.004938/2014-27. Settlement Proposal No. 08700.003063/2016-16.

16 Administrative Proceeding No. 08012.012740/2007-46.

lawsuits against competitors to prevent them from offering certain TV shows.[17] Despite DG's recommendation to impose sanctions on the defendants, the Tribunal concluded that Box 3, the economic group to which the defendants belong, had already been penalised in a previous proceeding that investigated the same facts, and that a new conviction would lead to double jeopardy.

Another interesting case refers to a settlement agreement entered into with Ediouro Publicações in July 2016, the first ever executed for sham litigation practices. The company was accused of signing non-compete agreements and of creating difficulties for competitors to access distributors. Ediouro paid over 1.6 million reais to settle the case. In February 2017, CADE also entered into a settlement agreement with Instituto Aço Brasil (IABr), Brazil's steelmakers association, which filed a number of lawsuits to impede competitors from importing steel bars into the national market. IABr undertook to abandon the lawsuits and agreed to pay over 270,000 reais.

Ongoing investigations include an administrative proceeding against taxi drivers' unions and individuals for the alleged use of unlawful strategies to exclude and block the entry of the online platform for ridesharing Uber in the market of paid individual transportation.[18] The investigation started based on complaints filed by students' associations in Brasilia and Uber. In November 2015, the DG stated that, despite current controversies about whether services offered by Uber are legal, the company should be seen as a regular competitor and, by filing lawsuits in different states and also pushing local lawmakers to prohibit Uber in different cities, taxi drivers' associations practised sham litigation. The DG also identified episodes of violence against Uber's drivers. Meanwhile, CADE's Department of Economic Studies issued a report on the market of paid individual transportation, concluding that Uber's entry in the market had limited effects on demand for taxi rides. DG is currently gathering evidence, after which it is expected to issue an opinion on the lawfulness of the conduct.

Also, CADE's DG just recently issued an opinion that Brazil's national postal service provider (ECT) should be fined for harming competitors in the order and delivery services market. ECT is accused of engaging into sham litigation, as it had allegedly filed duplicate lawsuits in different courts claiming it has legal exclusivity in the delivery of small and medium packages, and of discriminating against some companies that need to use its infrastructure. The case will now be referred to CADE's Tribunal for a final ruling. Other companies remain under antitrust scrutiny for alleged sham litigation practices, such as Lundbeck and AstraZeneca.

iv Other

In November 2016, CADE dismissed an investigation against Oi, which had been accused by competitor GVT of unauthorised cutting of GVT phone cables, performing fake calls to GVT to cancel portability requests, making physical and moral threats to GVT employees, interruption of services (backbone/data), increased number of incidents on interconnection routes and a slow response to abnormality reports.[19] According to Commissioner João Paulo de Resende, who reviewed the case and had the deciding vote, Oi did in fact undertake illegal conduct against its competitor, but it could not be punished in the antitrust sphere as there was no evidence that linked its actions to its dominant position.

17 Administrative Proceeding No. 08012.000778/2011-52.

18 Administrative Proceeding No. 08700.006964/2015-71.

19 Administrative Proceeding No. 08700.010110/2012-46.

Ongoing investigations concern three 2013 antitrust probes against Google, relating to its allegedly abusive behaviour in displaying its own specialist search services more favourably than competing services, Google's use of content from competing specialist search services in its own offerings and the portability of online search advertising campaigns from Google's AdWords to the platforms of competitors.[20] During 2015, the DG heard Google's arguments and sent questionnaires to several companies about the alleged misconduct. Some content providers, such as Catho and OLX, have already stated that they do not see negative effects arising from Google's AdWords. On the other hand, Microsoft sent CADE a long list of considerations pointing to the alleged anticompetitive effects of terms imposed by Google. All the investigations were still ongoing as of 1 May 2017.

Finally, one of CADE's most expected ruling concerns the investigation into carmakers Fiat Chrysler, Ford and Volkswagen, which have been accused of abusing their intellectual property rights in the spare-parts aftermarket when blocking independent makers from producing and selling certain spare parts. In June 2016, CADE's DG found that the conduct imposes barriers to entry and restricts supply, which increases prices and eliminates independent manufacturers from the aftermarket, and, thus, recommended that carmakers be fined and that their design rights no longer be valid in the aftermarket. The case was referred to CADE's Tribunal and assigned to a commissioner, who has already asked parties to submit their final defences in the probe, indicating that a ruling approaches.

III MARKET DEFINITION AND MARKET POWER

Brazil's Competition Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market.[21] Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with practices in other jurisdictions, especially the United States and the EU. CADE has traditionally interpreted the expression 'group of companies' to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

The new CADE is yet to issue secondary legislation setting formal criteria for the analysis of alleged anticompetitive conduct, and the agency has been relying on regulations issued under the previous law, primarily CADE Resolution No. 20/1999.

Annex II of CADE Resolution No. 20/99 sets criteria for the definition of the relevant market in terms of both product and geographic dimensions. The methodology is mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the 'SSNIP test', aiming to identify the smallest market within which

20 (1) Administrative Proceeding No. 08012.010483/2011-94; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda; Defendant: Google Brasil Internet Ltda; (2) Administrative Proceeding No. 08700.009082/2013-03; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; Defendants: Google Inc and Google Brasil Internet Ltda; and (3) Administrative Proceeding No. 08700.005694/2013-19; Plaintiff: Microsoft Corporation; Defendant: Google Inc. The first complainants are part of a wider coalition, known as FairSearch, which has also promoted antitrust cases against Google in other jurisdictions.

21 Under the original wording of Brazil's previous competition law, the law presumed a market power to exist if the parties jointly held a share of at least 30 per cent of the market. In 1995, less than one year after the 1994 statute's entry into force, Congress amended the law to reduce the presumption to 20 per cent.

a hypothetical monopolist could impose a small and significant non-transitory increase in price – usually taken as a price increase of 5 to 10 per cent for at least 12 months. Supply-side substitutability is also sometimes considered for market definition purposes. As for measures of concentration, reference is made to both the CRX index and the Herfindahl-Hirschman Index (HHI).

IV ABUSE

i Overview

Article 36 of Brazil's new Competition Law deals with all types of anticompetitive conduct other than mergers. The statute did not change the definition or the types of anticompetitive conduct that could be prosecuted in Brazil under the previous law. The Competition Law prohibits acts 'that have as [their] object or effect' (1) limitation, restraint or, in any way, harm to open competition or free enterprise; (2) control over a relevant market of a certain good or service; (3) an increase in profits on a discretionary basis; or (4) engagement in market abuse. Article 36 specifically excludes from potential violations, however, the achievement of market control by means of 'competitive efficiency'. Under Article 2 of the Competition Law, practices that take place outside the territory of Brazil are subject to CADE's jurisdiction, provided that they produce actual or potential effects in Brazil.

Article 36, Section 3o, contains a lengthy but not exclusive list of acts that may be considered antitrust violations provided they have as their object or effect the aforementioned acts. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Enumerated vertical practices (they could be abusive if imposed unilaterally) include RPM and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

Annex II of CADE Resolution No. 20/99 generally provides for the review of unilateral conduct under the rule of reason, as it might have pro-competitive effects. Authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers.

ii Exclusionary abuses

Exclusionary pricing

Annex I of CADE Resolution No. 20/99 defines predatory pricing as 'deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels'. This definition specifically sets as a condition for the finding of predatory pricing the possibility or likelihood of recoupment of the losses. Given such stringent standards, CADE has never found any conduct to be an abuse of dominance on the basis of predatory pricing. Margin squeeze may be a stand-alone abusive behaviour, and generally requires a differential between wholesale and retail prices that impedes the ability of a vertically integrated firm's wholesale customers to compete with it at retail level. CADE has been particularly concerned with alleged margin-squeeze practices in the telecommunications sector.

Exclusive dealing

In recent years, CADE has investigated and imposed sanctions against numerous exclusive arrangements. Exclusive dealings and other contractual provisions can constitute violations of Article 36 of the Competition Law if they lead to the foreclosing of competitors from accessing the market. Most of the cases have involved Unimed, a physicians' cooperative with operations in 75 per cent of the country. Unimed affiliates contract with local physicians and hospitals for the provision of healthcare services, and often such providers are prohibited from affiliating with any other health plan. CADE prohibited such exclusivity arrangements and imposed sanctions against Unimed in all cases where it held a high market share (usually around 50 per cent). CADE has sanctioned more than 70 of these cases – including a fine of 2.9 million reais imposed in 2013 against a Unimed cooperative in the south of Brazil, doubled for recidivism[22] – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses.[23] The most recent conviction concerned Unimed from Missões region, in southern Brazil, where it was also imposing exclusivity arrangements.[24] Also, in February 2016 CADE reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system, closing the investigation.[25]

CADE's most important exclusive dealing decision was issued in 2009. The investigation, initiated in 2004, concerned a loyalty programme instituted by AmBev, Brazil's largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme, named 'Tô Contigo', awarded points to retailers for purchases of AmBev products, which could be then exchanged for gifts. CADE concluded that the programme was implemented in a way that created incentives for exclusive dealing, preventing competitors from accessing the market; there was no extensive discussion of the distinction between fidelity and volume rebates. The agency based its findings on documentary evidence seized in an inspection conducted at AmBev's premises. CADE imposed what is still the record fine in connection with an abuse of dominance case: 352 million reais. AmBev challenged CADE's decision before the judicial courts and, in July 2015, reached an agreement with CADE through which it agreed to pay 229.1 million reais and terminate the conduct.[26, 27]

22 Administrative Proceeding No. 08012.010576/2009-02.

23 On 19 February 2014, CADE's Tribunal closed an investigation into whether a Unimed cooperative in the State of Bahia had prevented local physicians from affiliating with other health plans after concluding there was no evidence of such exclusivity. Administrative Proceeding No. 08012.008739/2007-17; Defendant: Unimed de Itabuna.

24 Administrative Proceeding No. 08700.009890/2014-43.

25 Administrative Proceeding No. 08700.001743/2014-25. Settlement Proposal No. 08700.010029/2015-17.

26 Administrative Proceeding No. 08012003805/2004-10; Defendant: Companhia de Bebidas das Américas – Ambev; adjudication date: 22 July 2009. The amount of the fine was equivalent to 2 per cent of the total turnover of the defendant in the year preceding the initiation of the investigations. AmBev has challenged the decision before the judicial courts and a final decision is still pending (Judicial Courts, 16th Circuit, 2009.34.00.028766-7).

27 Another alleged exclusionary case involving AmBev had to do with an alleged practice to raise rivals' costs by introducing a proprietary reusable bottle in the market. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have a standard size (600ml), allowing all market players to coordinate their recycling (for reuse) programmes. AmBev introduced a 630ml proprietary bottle, which was physically very similar to the 600ml bottle, allegedly causing confusion in the recycling programme of rivals and

Tying and other leveraging practices

Annex I of CADE Resolution No. 20/99 defines tying as the practice of selling one product or service as a mandatory addition to the purchase of a different product or service. Similarly to the European Commission's approach, CADE generally requires four conditions to find an infringement for tying: (1) dominance in the tying market; (2) the tying and the tied goods are two distinct products; (3) the tying practice is likely to have a market-distorting foreclosure effect; and (4) the tying practice does not generate overriding efficiencies.

CADE recently dismissed two probes related to allegations of tying arrangements in World Cup events due to lack of evidence. In December 2014, the DG closed an inquiry aimed at investigating whether Match Services – a Swiss company chosen by FIFA to provide 'hospitality' services in the 2014 World Cup – tied the sale of rooms to game tickets and inflated the price of accommodation.[28] More recently, in March 2015, the DG closed an inquiry into whether the Brazilian Soccer Confederacy and a tour operator tied the sales of tickets to packaged tours for the 2006 World Cup in Germany.[29]

Refusal to deal

Annex I of CADE Resolution No. 20/99 includes refusal to deal as an example of anticompetitive practices. Brazil's antitrust agency acknowledges that, as a general rule, even monopolists may choose their business partners. Under certain circumstances, however, there may be limits on this freedom for dominant firms to deal with rivals, particularly including refusal to license intellectual property rights. CADE Resolution No. 20/99 considers denial of access to an essential facility as a particular type of refusal to deal. Under CADE case law, for an infringement to be found, access to the facility must be essential to reach customers, and replication or duplication of the facility must be impossible or not reasonably feasible.

In April 2014, the Tribunal dismissed an inquiry into elevator manufacturer Thyssenkrupp, which was under scrutiny for allegedly denying maintenance companies access to software to repair elevators.[30] In September, CADE closed an investigation into logistics companies controlled by Vale active in the Port of Itaguaí (Rio de Janeiro). The case was filed in 2005 by Brazilian National Water Transport Agency (ANTAQ) after the defendants allegedly refused to transport loads from exporters. The authority found, however, that exporters were able to contract with the defendants and that the transport restrictions were due to lack of idle capacity.[31] On 22 December 2014, CADE dismissed an inquiry concerning the alleged refusal of Rima Industrial to supply metallic magnesium to other companies that need it in order to operate. The authority reasoned that the fact that Rima asked companies to present an environmental licence as a condition to supply the ore was not enough for a refusal to deal finding, even though such licence was not required under

raising costs for points of sale that also offered AmBev's competitors' products. In November 2010, AmBev agreed to stop commercialising the 630ml bottle through a consent decree with CADE (Administrative Proceeding No. 08012.001238/2010-57).

28 Administrative Inquiry No. 08700.007338/2013-30.

29 Administrative Inquiry No. 08012.002019/2006-67. Defendants: Confederação Brasileira de Futebol, Irontour Agência de Viagens Ltda. – Planeta Brasil.

30 Administrative Inquiry No. 08700.004336/2007-41.

31 Administrative Proceeding No. 08012.004397/2005-02. Defendants: Companhia Portuária Baía de Sepetiba and MRS Logística SA; adjudication date: 3 September 2014.

Brazilian law.[32] In January 2015, the DG recommended the dismissal of an investigation into Brazilian helicopter manufacturer Helibrás, which was accused of refusing to supply technical manuals and replacement parts to maintenance company Líder Signature.[33]

In October 2016, CADE dismissed a refusal to deal involving cement makers.[34] Although CADE concluded that violations did occur, it also found that all these conducts were part of cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and that some of the defendants had already been punished for it. The remaining defendants were acquitted owing to lack of evidence.[35]

Resale price maintenance

Annex I of CADE Resolution No. 20/99 establishes resale price maintenance (RPM) as a potentially illegal conduct when it refers to either minimum or maximum prices. According to CADE, RPM may increase the risk of collusion in the upstream market and also a manufacturer's unilateral market power.

In January 2013, in a landmark abuse-of-dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price.[36] Pursuant to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be *per se* illegal. Elaborating further, the reporting commissioner Vinícius Marques de Carvalho, who later became CADE's president, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence – in fact, there is no instance in CADE's case law clearing an anticompetitive merger or dismissing an anticompetitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF's total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of the commissioners, departs from previous decisions issued by Brazilian authorities on RPM and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.

iii Discrimination

Annex I of CADE Resolution No. 20/99 makes reference exclusively to price discrimination, even though non-price discrimination practices could also be subject to Brazil's Competition Law provided they unreasonably distort competition. The imposition of dissimilar conditions to equivalent transactions would be deemed an antitrust violation to the extent that it is predatory or otherwise excludes competitors from the relevant market.

CADE has recently recommended conviction in two investigations for alleged discriminatory practices. In November 2013, the DG launched a probe into Brazil's national

32 Administrative Inquiry No. 08700.000671/2014-07.

33 Administrative Proceeding No. 08012.007505/2002-48.

34 Administrative Proceeding No. 08012.008855/2003-11.

35 Administrative Proceeding No. 08012.010208/2005-22.

36 Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.

postal service provider ECT for alleged abuse of dominance practices through discrimination in the market for express parcel.[37] As previously mentioned, CADE's DG recommended the imposition of fines in April 2017.

Besides the aforementioned investigations against Petrobras for alleged discrimination in the natural gas sector, there is also an ongoing proceeding into an alleged abuse of dominance in the fuel retail market in Brazil's Federal District.[38] Petrobras Distribuidora is believed to ensure favourable contractual terms to gas stations affiliated with a specific chain. CADE is still collecting evidence on this case.

iv Exploitative abuses

Unfair trading practice may, in theory, be punished under Brazil's Competition Law. The previous law provided as an example of anticompetitive practice the charge of 'abusive prices, or the unreasonable price increase of a product or service'. This example was excluded from the current Competition Law because CADE has traditionally taken the view that excessive pricing would only be considered an antitrust infringement if it had exclusionary purposes. In recent years, CADE has reviewed more than 60 cases dealing with alleged abusive pricing, most of them related to pharmaceuticals, and dismissed all the complaints in view of the absence of an exclusionary purpose.

V REMEDIES AND SANCTIONS

i Sanctions

Brazil's Competition Law applies to corporations, associations of corporations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company's or 'group of companies'[39] pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. CADE Resolution No. 3/2012 broadly defines 144 'sectors of activity' to be considered for the purposes of calculating the fine under Law No. 12,529/2011. In November 2016, CADE issued Resolution No. 18/2016, under which such 'fields of activities' may be further limited to ensure that the sanction will be proportionate to the specificities of the conduct. CADE may resort to the total turnover, whenever information on revenue derived from the relevant 'sector of activity' is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 10 per cent of the company's turnover in connection with abuse of dominance violations. On rare occasions (all related to cartel investigations), CADE has proceeded to calculate the harm resulting from the conduct.

The Competition Law further provides that directors and other executives found liable for anticompetitive behaviour may face sanctions of 1 to 20 per cent of the fine imposed against the company. Under the new Competition Law, individual liability for executives is

37 Administrative Inquiry No. 08700.009588/2013-04. Defendant: Empresa Brasileira de Correios e Telégrafos – ECT.

38 Administrative Proceeding No. 08012.005799/2003-54.

39 The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. CADE was expected to issue regulation defining the criteria that would be applied to distinguish when fines would be imposed against the company, the group of companies, or the conglomerate, but has not yet done so.

dependent on proof of guilt or negligence, which makes it hard for CADE to find a violation on the part of the company's executives. Historically, while CADE has been investigating the involvement of individuals in cartel cases, it has rarely done so in abuse of dominance cases. In July 2014, CADE settled an investigation with six individuals who allegedly participated in the development and implementation of the aforementioned Tô Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.[40]

Other individuals and legal entities that do not directly conduct economic activities are subject to fines ranging from 50,000 to 2 million reais.

Individuals and companies may also be fined for: (1) refusing or delaying the provision of information, or for providing misleading information; (2) obstructing an on-site inspection; or (3) failing to appear or failing to cooperate when summoned to provide oral clarification.

ii Behavioural remedies

At any stage of the investigation, CADE may adopt an interim order to preserve market conditions while a final decision on the case is pending.[41] An interim order may be adopted only if: (1) the facts and applicable law establish a *prima facie* likelihood that an infringement will be found (*fumus boni iuris*); and (2) in the absence of the order, irreparable damage may be caused to the market (*periculum in mora*). CADE has been adopting interim orders in connection with a significant number of solid abuse of dominance cases. The most recent one was the interim measure ordered by CADE in April 2015 against the Gemini Consortium, which was ordered to disclose the price of gas that it was supplied with.

Apart from fines, CADE may also:

a order publication of the decision in a major newspaper at the wrongdoer's expense;

b prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;[42]

c include the wrongdoer's name in the Brazilian Consumer Protection List;

d recommend that the tax authorities block the wrongdoer from obtaining tax benefits;

e recommend that the IP authorities grant compulsory licences of patents held by the wrongdoer; and

f prohibit an individual from exercising market activities on its behalf or representing companies for five years.[43]

The new Competition Law also includes a broad provision allowing CADE to impose any 'sanctions necessary to terminate harmful anticompetitive effects', which allows CADE to

40 Administrative Proceeding No. 08012.010028/2009-74; Defendants: Felipe Szpigel, Bernardo Pinto, Paiva, Rodolfo Chung, Ricardo Tadeu, Marcelo Miranda and Marcelo Costa.

41 Article 87 of the Competition Law.

42 In 2012, CADE, for the first time, imposed this sanction in connection with an abuse of dominance case (see Administrative Proceeding No. 08012.001099/1999-71; Defendants: Comepla Indústria e Comércio *et al*; adjudication date: 23 May 2012).

43 The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision.

prohibit or require a specific conduct from the undertaking at issue. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

iii Structural remedies

Under the Competition Law, CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects associated with the wrongful conduct. CADE has never resorted to structural remedies in connection with abuse of dominance cases.

VI PROCEDURE

The first step of a formal investigation is taken by the DG, which may decide, spontaneously (*ex officio*) or upon a written and substantiated request or complaint of any interested party, to initiate a preliminary inquiry or to open an administrative proceeding against companies or individuals, or both, which may result in the imposition of sanctions.

After an administrative investigation is initiated, the DG will analyse the defence arguments and continue with its own investigations, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even conducting inspections and dawn raids. Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and paper data. In 2009, a computer forensics unit was created by the Brazilian agencies for the purpose of analysing electronic information obtained in dawn raids and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

Once the DG has concluded its investigation in the administrative proceeding, the defendants may present final arguments, after which the DG will send the files for CADE for final ruling with a recommendation to impose sanctions against the defendants or to dismiss the case.

At the Tribunal, the case is assigned to a reporting commissioner. While the reporting commissioner reviews the case, CADE's Attorney General may issue an opinion on the case. The reporting commissioner may also request data, clarifications or documents from the defendant, any individuals or companies, public entities or agencies prior to issuing its opinion. After doing so, the case is brought to judgment before CADE's full panel at a public hearing, where decisions will be reached by a majority vote. CADE may decide to dismiss the case if it finds no clear evidence of an antitrust violation, or impose fines or order the defendants to cease the conduct under investigation, or both. CADE's decisions are subject to judicial enforcement if they are not complied with voluntarily.

At any phase of the proceeding, CADE may enter into a cease-and-desist commitment (TCC) with the defendant whereby the defendant undertakes to cease the conduct under investigation. Should a defendant enter into a TCC, it will not necessarily result in an admission of guilt as to the practice under investigation, nor necessarily require the payment of a settlement sum. The case is put on hold if and to the extent that the TCC is complied with, and sent to CADE's archives after a predetermined time if the conditions set out in the TCC are fully met.

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies. In February 2009, Brazil's former administrative antitrust investigative agency (SDE) and Brazil's federal police launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the US Department of Justice and the European Commission. Brazil's antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, Argentina, Canada, Chile, China, Colombia, Equador, France, Japan, Peru, Portugal, Russia and South Korea, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases. CADE has also entered into cooperation agreements with the World Bank Group, and with the Inter-American Development Bank, allowing for the exchange of information and for consultations on matters of common interest.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil[44] has been on the rise over the past five years. This may be due to reasons such as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, CADE; as well as the increasing general awareness of competition law in Brazil.

Pursuant to Article 47 of Brazil's Competition Law, victims of anticompetitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazilian Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation in the form of pecuniary damages (for actual damage and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.[45]

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. As in other jurisdictions, both corporations and individuals may be sued individually (e.g., by competitors, suppliers, or direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations. The pass-on defence is not applicable to misconduct against consumers;[46] for other cases, there are no statutory provisions or case law issued to date.

Individual lawsuits are governed by the general rules set forth in the Brazilian Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective

44 A more detailed version of this section was published at CPI Antitrust Chronicle, 'Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency', Mariana Tavares de Araujo, Ana Paula Martinez, 16 April 2013; www.competitionpolicyinternational.com/private-antitrust-enforcement-in-brazil-newperspectives-and-interplay-with-leniency.

45 Punitive damages are not expressly provided for in the Competition Law, but some plaintiffs have been awarded those as well.

46 See Brazil's Consumer Protection Code, Article 25.

rights is relatively restricted, and only governmental and publicly held entities are allowed to file. State and federal prosecutors' offices have been responsible for the majority of civil suits seeking collective redress, most of which related to consumers' rights complaints.

In 2010, CADE, Brazil's antitrust court, for the first time included in an infringement decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.[47] Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country. As would be expected, follow-on litigation depends on the strength of CADE's case. CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued by the agency, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts.[48]

In December 2016, CADE put under public consultation a draft Resolution (the Draft Resolution) on third-party access to documents and information deriving from leniency agreements, settlement agreements and search and seizures, as well as its draft proposals (the Proposed Legislation) for modifying Article 47 of Law 12,529/11, related to private antitrust litigation. The explanatory note put forward by CADE sets forth that its aim is to 'coordinate the antitrust public and private enforcement'. As CADE states, 'On the one hand, rules that overencourage private enforcement can damage public enforcement. On the other, rules too restrictive could jeopardise compensation of the injured party by the offense to the economic order and limit antitrust enforcement.'

The drafts are generally in line with international best practices, and reflect CADE's efforts to strike a balance between the two goals. However, there is room for improvement regarding some aspects of the Draft Resolution and of the Proposed Legislation, and in particular on the need for CADE to change the approach adopted in the Proposed Legislation regarding the triggering event for the statute of limitation for damage claims.

Pursuant to Brazilian legislation, the statute of limitations for private damages claims is three years. Courts, however, have still not signalled whether the time should be counted from (1) the date on which the violation occurred (*actio nata* doctrine) or (2) when the claimants became or could reasonably have become aware of the illegal conduct. In order to reduce uncertainty, CADE suggests including two paragraphs under Article No. 47 of Law 12,529/11.

The first paragraph would establish that a decision to press charges issued by CADE's General Superintendency would interrupt the statute of limitations for filing damage claims. According to CADE, the purpose of this would protect harmed consumers' right to a private claim. The second draft paragraph states that the initial term starts to run 'from the unequivocal acknowledgement of the offence to the economic order', therefore, establishing option (2) above for the initiation of the statute of limitations. According to CADE, this would mean either the publication of CADE's Tribunal decision on the case in Brazil's Official Journal or the final ruling of a criminal lawsuit, when applicable. This would not prevent claimants from filing a claim before them (e.g., following a dawn raid or when charges are pressed), but access to restricted case records would only be granted (under the Draft Resolution) at that point.

47 Administrative Proceeding No. 08012.009888/2003-70; adjudication date: 1 September 2010.

48 In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, concluded that there was no antitrust violation and therefore did not award any compensation to the plaintiffs. See the decision rendered by the 14th Chamber of the State Court of São Paulo in Public Civil Action No. 0029912-22.2001.403.6100.

CADE's initiative to reduce uncertainty regarding the commencement of the statute of limitations is of course welcome. However, considering that CADE's investigations may take many years to conclude, the proposed changes would expose companies to the risk of being sued for damages potentially over a decade after the facts giving rise to the claim became public.

Therefore, to balance the need to allow companies to properly defend themselves, and enhance legal certainty with respect to the triggering event of the statute of limitations, ideally CADE would adopt the first public acknowledgement of the existence of an investigation as the triggering event (i.e., a publication of the commencement of a CADE investigation, or of a public disclosure of a leniency or settlement agreement, so long as it is specific enough to alert potential claimants of the existence of the case).

VIII FUTURE DEVELOPMENTS

There are two major – and conflicting – trends that currently contribute to defining CADE's stance in abuse of dominance cases. The first is the increasing availability of an apparatus that enables the competition authority to employ economic analysis and evidence. The use of economics in Brazil has grown in competition matters dramatically over the recent years and is expected to play a major part in every important abuse of dominance case. The creation of the Department of Economic Studies within CADE by the 2011 Competition Law is certainly a watershed event in that respect.

Nonetheless, some recent cases seem to point out a second trend that is at odds, apparently, with the ever-growing sophistication of competition analysis. That trend could be defined as an enhanced scepticism or outright disregard for the role of efficiencies in vertical practices. The reason the latter trend is counter-intuitive and somewhat paradoxical in light of the larger role currently played by economics in antitrust analysis is obvious: standard economic analysis would recommend caution against 'over-enforcement' regarding unilateral conduct. Still, it seems CADE has not been (and will continue not to be) shy about intervening.

It will be very interesting to follow future developments and see the interplay of those two undercurrents: it can be hoped that in the end they will balance out and we will have a CADE that is more proactive but still selective in the abuse of dominance arena.

Furthermore, intervention of rivals and customers as third parties in cases pending before CADE with more aggressive approaches, as well as the issuance of injunctions for ceasing potentially harmful practices before a final decision is issued by the agency, are expected to increase in the coming years.

Appendix 1

ABOUT THE AUTHORS

ANA PAULA MARTINEZ

Levy & Salomão Advogados

Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil's federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), alongside the US Department of Justice, and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a non-governmental adviser to the ICN. Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review* (*GCR*) named her on its lists 'Top Women in Antitrust' and '40 under 40'. *Chambers and Partners*, *The Legal 500* and *Who's Who Legal* listed her among the world's leading competition practitioners. In 2015, she was selected as one of the top five lawyers globally in merger clearance matters by *GCR,* and in 2014 and 2016 *GCR* awarded her 'Lawyer of the Year – Under 40'. Ms Martinez is admitted to practise in New York and Brazil. She holds master of laws degrees from both Harvard Law School and the University of São Paulo (USP) and a PhD degree in criminal law from USP

LEVY & SALOMÃO ADVOGADOS

Av. Brigadeiro Faria Lima 2601
12th floor
São Paulo
01452-924
Brazil
Tel: +55 11 3555 5059
Fax: +55 11 3555 5048
amartinez@levysalomao.com.br
www.levysalomao.com.br