
THE DOMINANCE AND MONOPOLIES REVIEW

SECOND EDITION

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LAW BUSINESS RESEARCH

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Chapter 3

BRAZIL

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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

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- 1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Thiago Nascimento dos Reis for his help in updating 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 anti-competitive 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 anti-competitive 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 anti-competitive 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 anti-competitive investigations. CADE was structured solely as an administrative tribunal,

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 new DG is the chief investigative body in matters related to anti-competitive 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 legal services, which represent 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.

The first Brazilian competition law dates from 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.

There are around 70 pending investigations for alleged abuse of dominance, including allegations of sham litigation in the pharmaceuticals and auto-parts markets. Many of the most relevant unilateral conduct investigations initiated since 2007 have been settled with CADE, including investigations into the construction, telecommunications,

composed of six Commissioners and a President, which made final rulings in connection with both merger reviews and anti-competitive practices.

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

tobacco, banking and financial sectors. The record fine imposed for an abusive practice was 352 million reais⁵ in connection with an exclusive dealing case in the beer market.⁶

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 been imposed to date against individuals for abuse of dominance practices.

II YEAR IN REVIEW

In 2013, CADE adjudicated 38 administrative proceedings related to anti-competitive conduct investigations; of these 16 were dismissed, while in 22 other cases CADE found an infringement. In 2013, CADE also adjudicated 39 preliminary investigations and in most cases followed the opinion issued by the investigative agency, dismissing them given the lack of evidence of anti-competitive behaviour. The number of cases where sanctions were imposed is the highest registered in the past five years – CADE found an infringement only in two cases in 2012 and in only one in 2011. CADE believes that such an increase is due to the fact that, under the new Competition Law, its Tribunal has been able to focus on anti-competitive matters, rather than on reviewing competitively innocuous mergers.⁷

Of the 22 cases sanctioned by CADE in 2013, 18 referred to cartel investigations, nine of them regarding the fuel retail sector, while the remaining four cases concerned abuse of dominance, three of which involved exclusivity clauses in the health-care sector. Total fines imposed amounted to 491,631,148.31 reais.⁸

In January 2013, CADE sanctioned auto-parts manufacturer SKF for setting a minimum sales price.⁹ Pursuant to the decision, resale price maintenance (RPM) will be deemed illegal unless defendants are able to prove efficiencies. An infringement would be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) or whether or not the distributors followed the minimum sales prices, as CADE considered the conduct to be illegal by object. Elaborating further, the Reporting Commissioner Vinícius Marques de Carvalho, who later became CADE's president, explicitly stated that a given company having a low market share is not in itself

5 Roughly \$177 million.

6 Administrative Proceeding No. 08012003805/2004-10; Defendant: Companhia de Bebidas das Américas – AmBev; Reporting Commissioner: Fernando Furlan; 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 investigation. 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).

7 CADE, 'CADE strengthens anticompetitive conducts repression in 2013', 30 January 2014. Available at: www.cade.gov.br/Default.aspx?eb5faf79889d72b144f1421d371a.

8 Roughly \$222 million.

9 Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda; Reporting Commissioner: César Mattos; adjudication date: 30 January 2013.

sufficient reason for the authority to conclude that there is an absence of anti-competitive effects. In its decision, the agency notably disregarded the efficiency defence. In fact, there is no instance in CADE case law of the Brazilian antitrust authority clearing an anti-competitive merger or dismissing an anti-competitive 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.

In 2013, CADE also imposed sanctions in three cases regarding the imposition of exclusivity clauses by cooperatives on their affiliated physicians¹⁰ – the agency has placed particular emphasis on tackling antitrust offences in the health-care sector. Unimed is Brazil's largest health-care network, with operations in 75 per cent of the country. The most important case concerned one of the Unimed cooperatives in the south of Brazil – CADE imposed a fine of 2.9 million reais, doubled for recidivism. CADE has also settled with 42 Unimed defendants where Unimed agreed to stop requiring exclusivity relationships from its affiliated physicians in different Brazilian cities.

Apart from the above-mentioned Unimed cases, CADE has also settled several important unilateral investigations. For example, in January 2013 Souza Cruz agreed with CADE to end exclusivity arrangements with their dealers prohibiting the display of their competitors' products and in-store advertisements.¹¹ While Philip Morris, which was also the subject of the investigation, settled the case in July 2012 subject to a payment of 250,000 reais,¹² Souza Cruz agreed to pay 2.9 million reais.¹³ In August 2013, InfoGlobo agreed with CADE on conditions under which it could sell advertisements.

In a few cases, the Tribunal has disagreed with the views taken by the antitrust investigative agency. In December 2013, when reviewing a preliminary investigation into the alleged abuse of dominant position of the Gemini Consortium – a joint venture involving Petrobras, White Martins and GNL Gemini to sell liquid natural gas – the Tribunal decided to open administrative proceedings to investigate price discrimination practices, departing from the opinion issued by CADE's legal services and DG to

10 Administrative Proceeding No. 08012.007205/2009-35; Defendant: Unimed Nordeste Goiano; Reporting Commissioner: Ricardo Ruiz; adjudication date: 3 July 2013.

Administrative Proceeding No. 08012.010576/2009-02; Defendant: Unimed – Cooperativa de Serviços de Saúde dos Vales do Taquari e Rio Pardo; Reporting Commissioner: Ricardo Ruiz; adjudication date: 6 November 2013.

Administrative Proceeding No. 08012.001503/2006-79; Defendant: Uniodonto de Lençóis Paulista – Cooperativa Odontológica; Reporting Commissioner: Ricardo Ruiz; adjudication date: 4 December 2013.

11 Administrative Proceeding No. 08012.003921/2005-10; Defendants: Philip Morris Brasil SA and Souza Cruz SA; Reporting Commissioner: Alessandro Octaviani.

12 Roughly \$125,000.

13 Roughly \$1.5 million.

dismiss the case.¹⁴ Reporting Commissioner Ana Frazão also decided to review the 2006 Tribunal decision approving the formation of the consortium itself,¹⁵ which was an unprecedented position for the agency to take. CADE concluded that the existence of a judicial decision allowing the Gemini Consortium not to comply with transparency requirements determined by CADE when approving the transaction in 2006 is harming competition in the market.

Similarly, in September 2013, the Tribunal dismissed allegations that mobile operators charged abusive termination fees, departing from the opinion of the then SDE (currently the CADE DG) that an antitrust violation was found.¹⁶ The agency took the view that there could be no market abuse as the fees were fixed under the framework provided by the telecommunications regulatory agency. Nonetheless, the DG continues to consider that the antitrust authority plays a key role in fostering competition in the telecommunications industry, despite it being heavily regulated. More recently, in January 2014, the DG recommended that sanctions be imposed against Telemar Norte Leste SA for having monitored clients' phone calls to the call centre of its competitor Vésper, verified their demands and offered specific plans to avoid the migration of its clients to the competitor.¹⁷ Final adjudication of the case was pending before the Tribunal as of 15 April 2014.

Finally, in October 2013, the DG initiated four administrative proceedings for alleged abuse of dominance practices.

One relates to alleged abuse of dominance by Unilever Brazil and Nestlé in the ice cream resale market.¹⁸ The DG is investigating whether the defendants inserted exclusivity clauses into contracts with retailers, mostly small shops and cafes, in exchange for bonuses. The companies are accused of prohibiting retailers from storing rival products in freezers provided by them. CADE also believes Unilever Brazil and Nestlé imposed minimum sales targets on retailers.

Furthermore, following complaints presented by Brazilian shopping comparison websites and Microsoft, the DG launched three antitrust probes against Google relating to (1) Google's allegedly abusive behaviour in displaying its own specialised search services more favourably than competing services, (2) Google's use of content from competing specialised search services in its own offerings, and (3) the portability of online search

14 Preliminary Investigation No. 08012.011881/2007-41; Applicant: Companhia de Gás de São Paulo – Comgás; Defendants: GNL Gemini Comercialização e Logística de Gás Ltda, Consórcio Gemini, White Martins Gases Industriais Ltda and Petróleo Brasileiro S/A – Petrobras; adjudicated on 4 December 2013.

15 Merger Case No. 08012.001015/2004-08.

16 Administrative Proceeding No. 08012.008501/2007-91; Defendant: Americel SA, Claro SA, Tim Brasil Serviços e Participações SA, TNL PCS SA and Vivo SA; Reporting Commissioner: Ana Frazão; adjudicated on 11 September 2013.

17 Administrative Proceeding No. 08012.003918/2005-04; Defendant: Telemar Norte Leste SA.

18 Administrative Proceeding No. 08012.007423/2006-27.

advertising campaigns from Google's AdWords to platforms of competitors.¹⁹ A similar complaint was filed by Brazilian shopping comparison websites before the judicial courts and in September 2012 a first instance judge dismissed antitrust claims against Google after finding that there is extensive competition in the online search market, and that its power in the market cannot be 'mistaken for a monopoly'. The decision is under appeal.

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.²⁰ 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 anti-competitive 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 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).

19 (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.

(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.

20 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 from the 1994 statute's entry into force, Congress amended the law to reduce the presumption to 20 per cent.

IV ABUSE

i Overview

Article 36 of Brazil's new Competition Law deals with all types of anti-competitive conduct other than mergers. The statute did not change the definition or the types of anti-competitive 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 above-mentioned 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. In theory, the authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers. In practice, however, there has been no case in which the authorities concluded that harmful conduct was legal in view of the efficiencies derived from the conduct.

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 the 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 a violation 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 and one of the largest health insurance companies in Brazil. Unimed affiliates contract with local physicians and hospitals for the provision of health-care 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 and recently settled another 39 investigations under the condition that Unimed terminated the exclusivity clauses. Other numerous cases involved 'radius clauses' imposed by shopping centres on their tenants forbidding the tenant from locating a store within a specified distance from the mall. CADE concluded that the restraint was unlawful and should be terminated.

The most important exclusive dealing decision was issued by CADE in 2009. The investigation, initiated in 2004, was about 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 'To 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, foreclosing 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 today the record fine in connection with an abuse of dominance case: 352 million reais. AmBev challenged CADE's decision before the judicial courts and a final decision is still pending.^{21, 22}

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

21 Administrative Proceeding No. 08012003805/2004-10; Defendant: Companhia de Bebidas das Américas – Ambev; Reporting Commissioner: Fernando Furlan; 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).

22 Another alleged exclusionary case involving AmBev had to do with an alleged practice to raise rival's 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 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; Reporting Commissioner: Carlos Ragazzo).

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.

Refusal to deal

Annex I of CADE Resolution No. 20/99 includes as an example of anti-competitive practices refusal to deal. 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 a dominant firm to deal with a rival, including in particular refusals 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.

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. In a recent case, Telesp, a fixed-line provider in the state of São Paulo, was investigated by CADE for having allegedly discriminated against an internet provider and a long-distance provider in its terms of access to its network. Telesp settled the investigation under the condition that it agreed to provide access on a non-discriminatory basis.²³

iv Exploitative abuses

Unfair trading practice may, in theory, be punished under Brazil's Competition Law. The previous law provided as an example of anti-competitive 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. 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.

23 Administrative Proceeding No. 08012.009696/2008-78; Defendant: Telecomunicações de São Paulo SA (Telesp); Reporting Commissioner: César Mattos.

V REMEDIES AND SANCTIONS

Articles 37 and 38 of Brazil's Competition Law set the basis and types of remedies available for antitrust infringements. The main sanction is the imposition of fines, but behavioural and structural remedies are also available.

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'²⁴ 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', 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, 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 5 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 anti-competitive 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 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.

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 (1) for refusing or delaying the provision of information, or for providing misleading information; (2) for obstructing an on-site inspection; or (3) for 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 (Article 87 of the Competition Law). 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, an irreparable damage may be caused to the market (*periculum*

24 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.

in mora). CADE has been adopting interim orders in connection with a significant number of solid abuse of dominance cases.

Apart from fines, CADE may also:

- a* order the 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;²⁵
- c* include the wrongdoer's name in the Brazilian Consumer Protection List;
- d* recommend the tax authorities to block the wrongdoer from obtaining tax benefits;
- e* recommend the IP authorities to 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.²⁶

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

25 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.; Reporting Commissioner: Carlos Ragazzo; adjudication date: 23 May 2012).

26 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.

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 investigations, the defendants may present final arguments, after which the DG may choose to dismiss the case, subject to an *ex officio* appeal to the Tribunal. Upon verifying the existence of an antitrust violation, the DG sends the case files for CADE for final judgment.

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, and Canada, 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.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil²⁷ 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 anti-competitive 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.²⁸

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;²⁹ 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 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.³⁰ 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

27 A previous and 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; <https://www.competitionpolicyinternational.com/private-antitrust-enforcement-in-brazil-new-perspectives-and-interplay-with-leniency/>.

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

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

30 Administrative Proceeding No. 08012.009888/2003-70; Reporting Commissioner: Fernando Furlan; adjudication date: 1 September 2010.

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.³¹

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 Department of Economic Studies within CADE by the new Competition Law is certainly a watershed event in that respect.

Nonetheless, some recent cases (e.g., the above-mentioned RPM case)³² 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. The terms of three out of six CADE Commissioners will expire in 2014. Another two took office in early 2014 and their views on competition law issues in general are still unclear. Also, the term of CADE's Superintendent expires in May 2014. Any speculation on the likely position of CADE in dominance cases to be adjudicated in the near future is therefore difficult.

31 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.

32 Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda; Reporting Commissioner: César Mattos; adjudication date: 30 January 2013.

Appendix 1

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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 United States Department of Justice, and represented Brazil before the OECD. In addition, 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, and has been awarded five prizes for papers written on competition law. *Global Competition Review* named her on its lists 'Top Women in Antitrust' and '40 under 40'. *Chambers & Partners*, *The Legal 500* and *Who's Who Legal* listed her among the world's leading competition practitioners. In 2014, she has been awarded 'Lawyer of the Year – Under 40' by *Global Competition Review*.

Ms Martinez is admitted to practise in New York and Brazil. She holds a Master of Laws from both Harvard Law School and the University of São Paulo (USP) and a PhD degree in criminal law from USP.

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