The Dominance and Monopolies Review

Fourth Edition

Editors
Maurits Dolmans and Henry Mostyn

Law Business Research

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For further information please email
nick.barette@lbresearch.com

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PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
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CONTENTS

EDITORS' PREFACE

This new edition of *The Dominance and Monopolies Review* tracks the evolution of abuse of dominance rules around the world.[1] The sheer range of global enforcement – from established agencies, such as the EU and the US FTC, to intensifying enforcement in India, China and emerging economies – makes identifying common trends difficult. But books such as the *The Dominance and Monopolies Review* make the task of comparatively analysing developments manageable.

This editorial picks out four such developments. First, the approach competition authorities over the world have taken to assessing product design improvements. Second, the possible expansion of abuse of dominance rules to cover privacy issues. Third, the application of abuse of dominance concepts to essential patents. And fourth, and probably most important, the evolution of the 'object versus effect' dichotomy under Article 102 TFEU.

The first trend is most evident in the different approach that global authorities have taken to reviewing Google's search result designs. In previous years, the US Federal Trade Commission, as well as courts in Brazil and Germany, have found that Google's search result designs improve quality and are pro-competitive.[2] In August 2015, the Taiwanese Fair Trade Commission (TFTC) – which has not shied away from enforcing competition laws against high-tech multinational companies such as Microsoft, Intel and Apple in the past[3] – reached a similar conclusion. The TFTC reviewed Google's display of a map in its search results and

1 The editors and their firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc, FTC File Number 111-0163, 3 January 2013; District Court of Hamburg, Ref 408 HKO 36/13 *Verband der Wetterdienstleister v. Google*, order of 4 April 2013; and *BUSCAPE v. Google*, 18th Civil Court of Sao Paulo, Lawsuit no. 583.00.2012.131958-7, Summary Judgment Ruling.

3 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

found that the design provides 'convenience to users and is in line with users' benefits. It's hard to say it's anticompetitive and adopt the refusal to trade concept in this case.'[4] And in Canada, the Competition Bureau completed its 'extensive' investigation of Google, finding that Google's designs and algorithmic changes 'improve user experiences' and are 'beneficial to consumers'. The Bureau found no evidence that Google's designs 'had an exclusionary effect on rivals'.[5]

Likewise, the High Court of Justice of England and Wales in the *Streetmap* litigation, discussed in the United Kingdom chapter of this book, found that Google's display of a map in its search results is lawful. Mr Justice Roth held that displaying a map was 'pro-competitive' and an 'indisputable' product improvement.[6] Showing a map was not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if it had such an effect, the design change was in any event objectively justified because it improved quality. Alternative solutions to creating this improvement, such as showing rivals' maps in search results, were not 'effective or viable' because they would, among other things, create delays and reduce quality.[7] These cases are important because they involve a range of jurisdictions and products, and were based on alleged theories of harm that applied well beyond the specific facts of the case.

By contrast, in April 2015, the EU Commission issued a statement of objections focused on the allegation that Google favours its own comparison shopping service in its search results. The design the EU Commission challenges is an ad format for merchant product offers that Google shows with pictures and prices. Google's response to the statement of objections argued and showed that this design constitutes a product improvement valued by users and advertisers. It therefore represents competition on the merits.[8]

Interestingly, the statement of objections appeared to contemplate as a remedy that Google should show ads 'sourced and ranked by other companies within [Google's] advertising space'.[9] But showing rivals' ads would seem, on its face, to lead to the same quality problems as showing rivals' maps that Roth J found in *Streetmap*. And showing rivals' ads should be legally justified only where a company has a duty to supply its rivals (i.e., where an input is indispensable and there is no other way for rivals to reach customers), as the TFTC held in its investigation. Yet given the many ways that websites can attract traffic, from direct traffic to apps, and from social networks to partnerships with others sites, the statement of objections did not argue the essential facility standard applied to Google. If a duty to supply

4 PARR, 'Taiwan regulator finds no antitrust infringement in Google's search, Play Store practices', 5 August 2015, available at: http://app.parr-global.com/intelligence/view/1287782.

5 See the Canada chapter of this book; and Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google, 19 April 2016, available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

6 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 84. Leave to appeal denied, *Streetmap v. Google*, Court of Appeal (per Richards LJ), A3/2016/1210, 27 May 2016. See the United Kingdom chapter of this book.

7 Ibid., paragraphs 155, 166 and 171.

8 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

9 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

rivals is imposed beyond the essential facility situation, this would very substantially change the law and commercial practice, potentially dampening investments in new solutions and assets to the detriment of consumers.

In India, the Director General of the Competition Commission issued a preliminary report challenging various aspects of Google's search and ad businesses. The report is, in the words of former Commissioner Ashok Chawla, 'only a beginning'; it allows Google to be heard on the preliminary concerns before the Commission comes to a final decision.[10] Given the thriving competition evident in India's online sector,[11] the CCI's action arguably risks condemning a product improvement without evidence of competitive or consumer harm. As David Balto commented, the 'question is whether Indian regulators will risk chilling innovation and harming competition in such a vibrant sector, particularly as there has been no harm to Indian consumers'.[12]

As to the second development, in March 2016, the German Bundeskartellamt initiated proceedings against Facebook on suspicion that its terms of services on the use of user data constitute an abuse of dominance.[13] Intriguingly, the press release suggests that the Bundeskartellamt views Facebook's use of data to be an exploitative abuse – allegedly, because Facebook's conditions of use violate data protection provisions. The Bundeskartellamt's investigation will look at whether Facebook unlawfully collects 'large amounts of personal user data' that enables its advertisers 'to better target their advertising activities'.[14] Of course, companies using customer data to better target their ads is not a new (or even online-specific) phenomenon.[15] But the Bundeskartellamt proceedings are the first case of which we are aware where it has been suggested that this may constitute an abuse of dominance.

On its face, the Bundeskartellamt's investigation has some appeal: why should extracting and using personal data in a way that harms consumers be any different to charging an excessive price or imposing unfair terms? That Facebook's terms of service may also violate data protection laws is no barrier – a dominant company setting fire to its rival's factory to solidify its dominance can also be an abuse of dominance, even if it also violates other laws. But it is arguably an inefficient use, and perhaps even a misuse, of regulatory powers to use

10 *Economic Times*, 'Probe Report on Google only a 'beginning' says CCI chief Ashok Chawla', 18 September 2015, available at: http://articles.economictimes.indiatimes.com/2015-09-18/news/66677418_1_cci-chief-ashok-chawla-investigation-arm-director-general-google-case.

11 See, e.g., *The Economist*, *India Online*, 'The battle for India's e-commerce market is about much more than retailing', 5 March 2016, available at: www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online?cid1=cust/ednew/n/bl/n/2016033n/owned/n/n/nwl/n/n/NA/n.

12 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

13 Bundeskartellamt Press Release. 2 March 2016. www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.htm. See the Germany chapter of this book.

14 Ibid.

15 *Forbes*, K Hill, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did', 16 February 2012, available at: www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#306f377a34c6.

competition law to pursue privacy goals. This appears to be what the Court of Justice had in mind when it held that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.'[16] Indeed, the goals of privacy law – to protect individuals from government and enterprise control – differ from the goals of competition law, which is to protect the generation of consumer welfare through the competitive process.

More fundamentally, it seems questionable whether – as some have suggested[17] – data always have the inherent qualities of a 'currency' or are the 'oil' of the new economy. For example, data are not fungible; they have no durable value; and they are not freely transferrable.[18] Moreover, consumers do not give data as 'payment' because data are (typically) non-rivalrous: if I tell a service that I live in Hampstead, like to sail, and enjoy Robertson Davies' Deptford trilogy novels, nothing prevents me from telling that to another service. The data are not 'used up' like oil. Accordingly, the value that a service like Facebook might derive from data comes not from the data as such (which is ubiquitous),[19] but from the skill in extracting information from the data, translating that information into usable knowledge, and turning that knowledge into action.[20] How the Bundeskartellamt grapples with these various issues, including in its joint study on 'big data' with the French competition authority, could prove one of the more fascinating developments of 2016 and beyond.

The third development concerns the circumstances in which the owner of an SEP can seek injunctive relief for a violation of its IP. As discussed in the European Union chapter of

16 Case C-238/05, *Asnef-Equifax*, paragraph 63. See also COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 164 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.'

17 'Personal data is the currency of today's digital market', speech by Vice Commissioner Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age – Innovation Conference Digital, Life, Design', Munich, 22 January 2012. Available at: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

18 As one study found, '90 per cent of the data in the world today has been created in the last two years [...] 70 per cent of unstructured data is stale after only 90 days.' RIS, Analytics Insights Deliver Competitive Differentiation (July 2013) (quoting Citi Research 2013 Retail Technology Deep Dive).

19 Every few days, humanity now generates five exabytes worth of data. This roughly corresponds to the volume of data produced in the entire period between the dawn of time and 2003. See 'La concurrence dans l'economie numerique', Fabien Curto Millet, A Quoi Sert La Concurrence. See also EU Commission, 'Digital Economy – Facts & Figures', March 2014: 'The digitization of products and processes has made a huge and exponentially increasing amount of data available'.

20 See, e.g, EU Commission Expert Group on Taxation of the Digital Economy, 13 and 14 March. ('The existence of data alone is not sufficient to generate value; the value comes from maximising the efficacy of use from the actual data; but the challenge is deciding at which point and where the value is created. Furthermore, the data that is the lifeblood of the digital economy is increasingly being generated by users, rather than the companies themselves.')

this book, on 6 July 2015, the Court of Justice issued its *Huawei* ruling, setting out a test that aims to strike the balance between maintaining effective free competition and safeguarding proprietors' IP.[21] The ruling confirms at the highest judicial level that EU competition law matters in SEP licensing. In particular, where SEP holders are in a dominant position, and commit to grant licences on FRAND terms in the context of a standardisation procedure, they are subject to special conditions before they can seek an injunction against potential infringers without violating Article 102 TFEU.[22]

The *Huawei* judgment, however, leaves a number of issues unaddressed, including when an SEP holder will be considered dominant in the first place. The judgment provides no guidance on what amounts to FRAND terms. Instead, it requires national courts to play a greater role by assessing whether offers made by parties are objectively FRAND. And the judgment, intriguingly, by relying on a theory of harm based on 'legitimate reliance', leaves open the possibility that the principles apply beyond SEPs to other essential IPRs.

The first national decision applying the Huawei ruling was the Düsseldorf Regional Court's decision in *SISVEL v. Qingdao Haier Group*. The Court held that Qingdao was infringing SISVEL's patents in certain mobile telecommunication standards. Qingdao raised the FRAND defence set out in *Huawei*. The Court found, however, that Qingdao had not provided appropriate security nor rendered accounts when SISVEL rejected Qingdao's counter-offer. The *Huawei* conditions were therefore not satisfied. The Court left open the question whether SISVEL's offer was FRAND in the first place. That is, the Court found that the rendering of accounts and security must be complied with independently of the specific details of the offer and the counter-offer. Arguably, this finding conflicts with the Court of Justice's requirement in *Huawei* that the SEP holder's offer, and the SEP user's counter-offer, must be on FRAND terms.[23]

How national courts apply the *Huawei* ruling – including the issues of whether a SEP confers a rebuttable presumption of dominance, and what constitutes FRAND prices and terms, and whether similar principles could apply to patent assertion entities' use of non-SEP essential patents – is likely to be one of the hotly litigated issues of 2016 and onwards. In the UK, for example, the UK High Court in *Unwired Planet v. Huawei* is scheduled in October 2016 to determine how to apply FRAND licensing principles for patents said to be essential to 2G, 3G and 4G.

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21 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*.

22 These conditions are as follows: (1) SEP holders must alert SEP users of the alleged infringement; (2) SEP users must indicate a willingness to conclude a licence on FRAND terms; (3) SEP holders must present a detailed written offer for a licence on FRAND terms; (4) SEP users must respond promptly and in good faith, and not engage in delaying tactics; (5) if the SEP user does not accept the offer, it must submit, promptly and in writing, a specific counter-offer on FRAND terms; (6) if no agreement is reached, an SEP user that is already using the technology must provide appropriate security and be able to render accounts; (7) the amount of the royalty may, by common agreement, be determined by a independent third party; and (8) SEP users can challenge validity, essentiality, and infringement in parallel to licensing negotiations and also after conclusion of the licence agreement.

23 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, paragraphs 63 and 65.

As to the fourth development, the previous edition of this book commented on the threatened re-emergence in Europe of form-based analysis, at the expense of the economic analysis of foreclosure effects in abuse cases, following the General Court's decision in *Intel*. We suggest that a close reading of recent EU case law, including the Court of Justice's decision in *Cartes Bancaires*, reveals that the exemption from the obligation to show anticompetitive effects applies only in a limited set of circumstances – specifically, for conduct that is 'by its very nature' abusive. This means, effectively, that based on past practical experience and economic theory, the conduct is always restrictive and harmful to consumers, and never justified except in unusual circumstances.

This reading is reinforced by recent decisions of the Court of Justice and national courts. In *Post Danmark II*, the Court of Justice confirmed that even in the case standardised, retroactive, conditional rebates applied by a statutory monopoly in a market protected by high barriers to entry,[24] anticompetitive effects must be 'likely' or 'probable'. [25] The Court also rowed back from Advocate General Kokott's fulmination against the as-efficient competitor test – a 'disproportionate use of the resources of the competition authorities and the courts' – finding the test to be 'one tool amongst others for the purposes of assessing whether there is an abuse'.[26]

The Court did state, however, that 'fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified'.[27] But the statement is limited to conduct that it is 'by its very nature abusive'.[28] Under consistent EU case law, these exceptional cases are already exempted from the requirement to show anticompetitive effects – so the judgment in this sense is not that surprising. In addition, the Court's rationale for dismissing an appreciability threshold was that 'the structure of the market has already been weakened by the dominant undertaking, so any further weakening of the structure of competition may constitute an abuse of a dominant position.'[29] The reasoning is therefore limited to cases where the effects of the conduct are alleged to occur on the same market as which the company is dominant. The finding would not apply, for example, to related-market abuses. In the *Streetmap v. Google* judgment discussed above, Roth J distinguished *Post Danmark II* for this precise reason. Roth J held that it would be 'perverse' to find that a product improvement on a dominant market 'contravenes competition law because it may have a *non-appreciable* effect on a related market where competition is not otherwise weakened'.[30]

Roth J's finding for related market abuses appears axiomatic. As the editors of this book, we would see the law go further: like leading commentators, [31] we consider that there

24 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraph 73.

25 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraphs 67 and 74.

26 Ibid., paragraph 61.

27 Ibid., paragraph 73.

28 Ibid., paragraph 73.

29 Ibid., paragraph 72.

30 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 98. Emphasis in original.

31 See, e.g., Whish & Bailey, *Competition Law* (8th edition, 2015), page 212; and Faull & Nikpay, *The EU Law of Competition* (3rd edition, 2014), paragraph 4.929.

should be a *de minimis* threshold in all Article 102 cases, as there is for Article 101 and the assessment of mergers. This would neither undermine existing rules concerning 'by nature' abuses, nor lead to unreasonable burdens on the European Commission or national competition authorities. And it would remove the contradiction that EU competition law may theoretically apply to conduct that cannot be shown to have even a miniscule effect on competition.

We would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fourth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions 2016 holds for the next edition of this book.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2016

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

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank João Victor Freitas 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

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.

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 2015, CADE adjudicated 52 administrative proceedings. Out of these 13 were dismissed, while in 39 cases CADE found an infringement in relation to at least one defendant. While the number of cases where sanctions were imposed is the same as the number that was registered

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.

in 2014, in 2015 CADE achieved a record in the amount of fines imposed and settlement sums collected (524 million reais against 169 million reais in 2014). Such an increase is certainly because of the fact that, under the new Competition Law, CADE's Tribunal has been able to focus on anticompetitive matters, rather than on simply reviewing competitively innocuous mergers, as well as because the authority established a more predictable procedure for settling ongoing investigations of antitrust violations.

Of all cases sanctioned by CADE in 2015, 10 made reference to hard-core cartels, 14 referred to anticompetitive practices in the health sector, nine were related to unions or trade associations influencing the adoption of uniform conduct and four discussed abuse of dominance, including sham litigation, raising rivals' costs, exclusionary practices, and resale price maintenance practices in the fuel retail market. Out of the investigations dismissed by the Tribunal, three referred to alleged hard-core cartels, five to abuse of dominance, one to influencing the adoption of uniform practices and abuse of dominance, and four were connected with influence of coordinated practices in the healthcare market. Regarding the 12 administrative proceedings adjudicated by CADE in 2015, two referred to abuse of dominance practised by port operators and one concerned influencing uniform practices in the healthcare market.

Specifically regarding abuse of dominance, in April 2015, CADE's DG issued an injunction to prevent the state-owned oil company Petrobras from supplying Gemini Consortium (a joint venture involving Petrobras, White Martins and GNL) with lower prices. The authority opened an investigation in 2013 on whether the consortium benefited from cross-subsidies or lower prices for gas supplied by its shareholder Petrobras, raising rivals' costs. Although the creation of Gemini was approved by CADE, some of the restrictions imposed were overruled by a federal court. According to the DG, the gas-supply agreement between Petrobras and Gemini risks placing the consortium at an unlawful advantage over competitors. CADE's Tribunal confirmed the injunction and White Martins challenged it before a federal court. The injunction was confirmed by the Brazilian Superior Tribunal of Justice (STJ) and the antitrust investigation is still ongoing.[5]

The issues that deserved special attention from Brazil's competition authority in 2015 in connection with unilateral practices are related to regulated industries, exclusivity clauses and sham litigation. Also, it is worth listing the investigations covering alleged abuse of dominance practices that were settled by the defendants in 2015.

i Regulated industries

In 2015, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services and port services.

Financial services

New investigations

In June 2015, the DG opened six administrative proceedings against the following financial institutions: Itaú Unibanco, Caixa Econômica Federal, Santander, Bradesco, Banco do Estado do Rio Grande do Sul (Banrisul) and Banco de Brasília (BRB)[6] to investigate whether

5 Administrative Proceeding No. 08012.01181/2007-41.

6 Administrative Proceedings No. 08700.005770/2015-58, 08700.005766/2015-90,08700.005781/2015-38, 08700.005761/2015-67,

they violated the antitrust law by imposing exclusivity clauses for the provision of payroll loans to civil servants. The investigation started in 2012 after a settlement reached by CADE and Banco do Brasil, through which the defendant agreed to pay an amount of 65 million reais and committed to remove exclusivity arrangements from all contracts. During the investigation, Banco do Brasil stated that other banks were involved in the same practice. The investigations against the six mentioned banks are ongoing. CADE has been allowing third parties, such as Aneps (Associação Nacional das Empresas Promotoras de Crédito), to join the investigation as interested parties that could have had their interests affected by the alleged anticompetitive conduct.

In March 2016, CADE launched administrative inquiries against Itaú-Unibanco, Banco do Brasil, Bradesco, Rede and Cielo to investigate whether large-scale financial institutions and credit card providers limited competition through exclusivity arrangements and refusal to deal with competitors.

In all such cases, the defendants claim 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.

Dismissed investigations

In May 2015, CADE dismissed an investigation targeting Bradesco, Banco do Brasil, Banco ABN, Banco Nossa Caixa and Companhia Brasileira de Soluções e Serviços (CBSS) – a joint venture involving the banks listed previously – for alleged tie-in practices and exclusive deals in the Brazilian market of meal vouchers. CADE found no evidence that the defendants required customers to acquire Visa Vale as a condition to access other financial services. With regards to the exclusivity clause, CADE concluded that such clause had already been accepted by the authority when the transaction was reviewed in the context of the merger review system.[7]

Ports

Ports 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. 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.

Recommendation by CADE's DG to impose sanctions

In January 2016, the DG recommended the imposition of 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

08700.005759/2015-98 and 08700.005755/2015-18.

7 Administrative Proceeding No. 08012.002096/2007-06.

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.[8]

Dismissed investigations and recommendations to dismiss

In October 2015, CADE dismissed an investigation against Tecon Suape and Suape – Complexo Industrial Portuário Governador Eraldo Gueiros for allegedly imposing anticompetitive clauses in their contract for operating the port in Pernambuco. CADE concluded that the conduct under investigation was compliant with the applicable regulatory framework and no sanction was imposed.[9]

In December 2015, the DG recommended CADE's Tribunal to dismiss an investigation against Marimex – Despachos, Transportes e Serviços for raising rivals' costs in the market of warehousing in ports. In its assessment, the DG concluded that the fees charged by the operator could be justified in view of the costs faced by port operators.[10]

Sanctions imposed

In December 2015, CADE fined four port operators in Porto Alegre and the port's personal management body, Órgão de Gestão de Mão de Obra do Trabalho Portuário Avulso do Porto Organizado de Porto Alegre/RS (OGMO), for imposing a disproportional fee to new players seeking to employ workers at the port. In its decision, CADE concluded that since dealing with OGMO was the only way to access that market, the unreasoned fees created a significant barrier to competition.[11] Fines imposed amounted to 10 per cent of the defendant's turnover in the year before the initiation of the investigation.

More recently, in February 2016, CADE imposed sanctions to port operators in Salvador and Rio Grande for abuse of dominance. In both cases, the operators charged competitors with disproportional port storage fees using their position of monopolists in the upstream market to harm competitors downstream. The total amount of fines exceeded 10 million reais[12] and both parties are challenging CADE's decision before the judicial courts.

Settlements

In August 2015, CADE signed a settlement with Rodrimar Transportes, Equipamentos Industriais e Armazéns Gerais in connection with an investigation on whether the company violated antitrust laws by charging customers with an additional fee to release cargo. In the settlement, Rodrimar committed to pay 150,000 reais, implement an antitrust compliance programme and adopt an open doors policy for antitrust authorities.[13]

In July 2015, CADE declined to settle a court case with Santos Brasil. The company was sanctioned by CADE in 2005 for imposing a fee known as Terminal Handling Charge 2.

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

9 Administrative Proceeding No. 08012.006504/2005-29.

10 Administrative Proceeding No. 08012.005967/2000-69.

11 Administrative Proceeding No. 08700.005326/201370.

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

13 Administrative Proceeding No. 08012.009690/2006-39.

The defendant challenged CADE's decision before a federal court and Santos Brasil proposed to pay the fine, but the company did not agree to cease the conduct, which is why CADE rejected the proposal.

Judicial review

In February 2015, a federal judge annulled a 2005 decision by CADE that sanctioned a logistics company for charging an allegedly illegal fee based on the argument that the antitrust authority lacked jurisdiction over the issue.[14]

ii Exclusivity clauses

During 2015, 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.[15] However, in February 2016, CADE opened a preliminary investigation for potential antitrust infringements in television broadcasting contracts for soccer games in 2019.

In November 2015, CADE dismissed an investigation against shopping centres and shopping administrators for radius clauses in lease contracts within São Paulo.[16] According to CADE, the probes had to be closed because of statute of limitation issues, given that between 2010 and April 2014, there was no investigative action capable to stop the clock (if there is government inaction for three years, the case is time-barred). On the other hand, in March 2016, CADE's DG recommended the Tribunal to sanction North Shopping Fortaleza shopping mall for imposing a radius clause that prevents retailers from opening other shops within a 5km distance of the shopping mall.

iii Sham litigation

Sham litigation complaints have also set the tone for CADE's activity in 2015. In February 2015, CADE dismissed an investigation into nutritional supplement company CMW Saúde e Tecnologia Importação, accused by its rival Support of sham litigation practices. In its assessment, CADE concluded that the legal disputes between the companies show no evidence of anticompetitive conduct.[17]

In 2007, Pró-genericos filed a complaint against Eli Lilly do Brasil and Eli Lilly and Company for allegedly abusing their rights regarding Gemzar, a drug to treat cancer, to prevent generics entry.[18] Among other alleged practices, Eli Lilly filed six different claims before the judicial courts to enforce its rights and required one additional five-year period

14 Federal Court of the 3rd Region (TRF-3); Appeal No. 0014995-56.2005.4.03.6100/SP; Appellants: Santos Brasil Participações SA and Marimex Despachos Transportes e Serviços Ltda; adjudication date: 26 February 2015.

15 Administrative Inquiry No. 08700.009863/2014-70.

16 Administrative Proceeding No. 08012.012081/2007-48; Defendants: Multiplan Empreendimentos Imobiliários SA and others.

17 Administrative Inquiry No. 08012.007213/2011-04.

18 Case No. 08012.011508/2007-91. Defendants: Eli Lilly do Brasil Ltda, and Eli Lilly and Company. Reporting Commissioner: Ana Frazão.

of exclusive marketing rights given the discovery of a new use for the drug. An injunction ensured an additional protection for eight months, and for three months the pharmaceutical company Sandoz was not allowed to offer the competing drug Gemcit in the market. According to CADE, during this period the price offered by Eli Lilly in public bids was 540 reais – more than double the price offered by the same Eli Lilly following the reversal of the injunction (189 reais). In June 2015, CADE's Tribunal found that Eli Lilly abused its rights by presenting misleading information to courts, with 'serious harm to public health and economy'. According to the agency, the drug maker did not clearly explain before the courts that the request for a patent was never granted, an omission that was considered to be strategic and malicious, enabling the company to exclude competitors from the market. According to the Reporting-Commissioner, 'the company behaved in an anticompetitive manner by presenting multiple claims before several courts, omitting information to obtain artificially the monopoly in the sale of the medicine, besides unduly obtaining an exclusive right to sell the drug'. CADE imposed a fine of 36.6 million reais. When calculating the fine, CADE doubled the expected fine in view of recidivism considering Eli Lilly's sanction in the alleged cartel against generic drugs. In its decision, CADE stated that 'measuring market share is irrelevant in sham litigation cases, where the success of a judicial claim may be sufficient to exclude competitors from the market.'[19] This position might be stricter than the one adopted by foreign competition agencies.

In June 2015, CADE's DG recommended the imposition of sanctions against three media production companies, MC 3 Vídeo Produções, Léo Produções e Publicidade, Shop Tour International e Shop Tour TV and Luiz Antonio Cury Galebe, as it concluded that the defendants filed misleading and contradictory lawsuits against competitors to prevent them offering certain TV shows.[20]

In November, CADE initiated 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.[21] The investigation started based on complaints filed by students' associations in Brasilia and Uber. 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.

CADE also dismissed an investigation derived from complaints filed by Associação Boa Vista de Táxi against Uber.[22] According to the association, Uber practised unfair competition

19 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. 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 US and the EU.

20 Administrative Proceeding No. 08012.000778/2011-52.

21 Administrative Proceeding No. 08700.006964/2015-71.

22 Preliminary Inquiry No. 08700.004530/2015-36.

and did not follow regulatory provisions. When assessing the complaint, CADE stated that the association did not report any antitrust violation and legal and regulatory controversies were beyond CADE's jurisdiction. However, after a complaint filed by the Brazilian Chamber of Deputies, CADE opened a new investigation against Uber to assess whether the company adopted anticompetitive strategies to dominate the market.[23] Finally, CADE asked for its admission as *amicus curie* in lawsuits pending before São Paulo and Rio de Janeiro's courts questioning the constitutionality of local legislations.

Other companies remain under antitrust scrutiny for alleged sham litigation practices, such as Lundbeck, AstraZeneca, Brazil's national postal service provider, ECT, and a steel manufacturers' association.

iv Settlements

CADE settled several important unilateral investigations in 2015. On 10 June 2015, CADE signed a settlement with Ambev, Brazil's largest beer manufacturer, through which the company committed to several changes in its policy of distribution, provision of points of sale displays (POS displays) and refrigeration practices. CADE investigated whether, through exclusivity deals and other commercial conditions, Ambev blocked competitors to access point of sales. The settlement imposes a variety of restrictions to ensure that competitors will have access to points of sale, including Ambev agreeing that up to 8 per cent of Ambev retailers in given regions would be allowed or required to exclusively stock an Ambev-branded refrigerator or exclusively sell Ambev brands. The settlement also establishes higher standards of transparency for Ambev's refrigeration policy.[24] Ambev was not required to pay a fine.

Ambev also signed with CADE a settlement to end a dispute pending before Brazilian Federal Courts over sanctions imposed by the authority for exclusionary practices in the context of loyalty programme 'Tô Contigo'. The company received a discount on the imposed fine for settling the case and agreed to pay 229.1 million reais as well as terminating the conduct.

v Other

On 24 June 2015, CADE dismissed an investigation related to exclusionary practices by Intercement Brasil (previously Camargo Corrêa Cimentos), allegedly against Liz Cimentos (previously Soeicom). The authority investigated whether Intercement, through its exclusive deal with the steel producer Usiminas, unlawfully prevented Liz Cimentos from buying scoria – a by-product of steel production and an important input for cement manufacturing. Although CADE concluded that Intercement violated antitrust laws by unduly storing and destroying inputs to harm competitors, raising rivals' costs arbitrarily and refusing to deal, the authority concluded that all these conducts were part of the cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and Intercement has already been punished for these violations. CADE thus dismissed the investigation because of double jeopardy issues.[25]

In March 2015, CADE convicted Oi for abuse of dominance as a result of its practice of monitoring clients' phone calls to the call centre of its competitor Vésper, verifying their

23 Preliminary Inquiry No. 08700.010960/2015-97.

24 Administrative Proceeding No. 08012.002608/2007-26.

25 Administrative Proceeding No. 08012.010208/2005-22.

demands and offering specific plans to avoid the migration of its clients to its rival. The two-to-one decision imposed a fine of 26.5 million reais for antitrust violations, in addition to the 11.5 million reais fine previously imposed by the National Telecommunications Agency (ANATEL) for the same conduct. According to Commissioner Frazão, the existence of a previous sanction imposed by another agency was considered to reduce the applicable sanction.

Following complaints presented by Brazilian shopping comparison websites and Microsoft, in 2013 the DG launched three antitrust probes against Google, relating to Google's 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.[26] 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 29 April 2016.

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.[27] 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

26 (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.

27 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.

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).

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. 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 have concluded that harmful conduct was legal in view of the efficiencies derived.

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[28] – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses.[29]

The most important exclusive dealing decision was issued by CADE 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.[30, 31]

28 Administrative Procedure no. 08012.010576/2009-02.

29 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.

30 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).

31 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 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).

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.[32] 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.[33]

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.[34] 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.[35] 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 Brazilian

32 Administrative Inquiry No. 08700.007338/2013-30.

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

34 Administrative Inquiry No. 08700.004336/2007-41.

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

law.[36] Finally, 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.[37]

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.[38] 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 initiated two investigations for alleged discriminatory practices. In November 2013, the DG launched a probe into Brazil's national postal service provider ECT for alleged abuse of dominance practices through discrimination in the market for express parcel.[39] In April 2014, the DG also started an investigation about Petrobras' alleged preferential discounts to its integrated natural gas distributor, harming the competing gas

36 Administrative Inquiry No. 08700.000671/2014-07.

37 Administrative Proceeding No. 08012.007505/2002-48.

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

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

distributor Comgás.[40] There is also an ongoing proceeding into an alleged abuse of dominance by Petrobras for ensuring favourable contractual terms to gas stations affiliated with a specific chain.[41]

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'[42] 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 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 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

40 Administrative Inquiry No. 08700.002600/2014-30.

41 Administrative Proceeding No. 08012.005799/2003-54.

42 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.

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.[43]

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.[44] 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. Recently, in April 2015, following a request by the natural gas distributor Comgás, CADE adopted an interim measure ordering Petrobras to cease discriminatory treatment in the supply of gas to Gemini Consortium, which is run by Petrobras, White Martins and GásLocal.[45]

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;[46]

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.[47]

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

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

44 Article 87 of the Competition Law.

45 Administrative Proceeding No. 08012.011881/2007-41.

46 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).

47 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 judgment 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, 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 Brazil[48] 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.[49]

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;[50] 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

48 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.

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

50 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.[51] 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.[52]

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.

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

52 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.

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