THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'. Nobel Prize economist Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets

out a prediction for future developments. From those thoughtful contributions, we identify three themes in 2018 enforcement.

Scrutiny of digital platforms

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* 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'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that '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'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

Focus on pharmaceutical sector

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

a The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

b The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

c When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to

reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

Standard-essential patents

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

a The 'no licence, no chips' policy is anticompetitive.

b Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

c Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

d Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this seventh edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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June 2019

Chapter 5

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. The Competition Law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defence (CADE). CADE's structure includes an Administrative Tribunal for Economic Defence (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 cases investigated by the DG: all decisions are subject to judicial review.[3] 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 began in Brazil. 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 ranked hardcore cartel prosecution as the top priority, making use of investigation tools such as dawn raids and leniency applications. A more recent development in Brazil's competition law enforcement is related to the increasing number of abuse of dominance cases, which is first and foremost a symptom of a system that is no longer in its infancy.

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1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Lucas Griebeler da Motta 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).

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

The basic framework for abuse of dominance in Brazil is set out in 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 except 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 2018, CADE adjudicated 25 administrative proceedings. Out of these, 13 were dismissed, while in 12 cases, CADE found an infringement in relation to at least one defendant. This represents a significant increase if compared with 2017, when 13 cases were adjudicated in total, out of which, nine resulted in a conviction. There has been an increasing number of settlements reached between defendants and CADE, totalling 60 proposals that resulted in settlements executed in 2018. In 2018, fines reached 627.26 million reais, and the settlement sums agreed with CADE achieved a new record of 1.327 billion reais. The increasing number of settlements and amounts imposed and collected may be explained by the fact that the authority has established a more predictable procedure for settling cases, and is devoting more resources to the prosecution of anticompetitive practices.

In 2018, cartels remained a priority for CADE, accounting for 20 out of the 25 investigations and infringements found. Other CADE decisions – whether to open, settle or dismiss a case, or recommend the conviction of defendants – included exclusionary practices, namely refusal to deal, price discrimination and the creation of difficulties for market players. To follow is a comprehensive list of 2018's abuse of dominance cases, including settlements.

i Regulated industries

In 2018, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services, port services and natural gas.

Financial services

On 21 March 2018, CADE made public a complaint filed by Nubank, a Brazilian fintech and card issuer, against the five major banks in Brazil: Banco do Brasil, Bradesco, Caixa Econômica Federal, Itaú-Unibanco and Santander.[4] According to the allegations presented by Nubank, the banks had been creating barriers and refusing to provide Nubank with the

4 Administrative Inquiry No. 08700.003187/2017-74.

services needed for its regular development. Moreover, Nubank argued that the banks had been jointly lobbying for banking and financial policies against fintechs. The investigation is ongoing at the time of writing.

Following probes opened by CADE into the payment industry in March 2016, Itaú-Unibanco, a major financial institution, and its vertically integrated subsidiary, Rede, a dominant payment acquirer, agreed to cease conduct that may have led to exclusive-payment arrangements in Brazil.[5] Through an agreement reached on 4 July 2018, the parties committed:

a to make available relevant information on the receivables portfolio of their clients to rival payment service providers hired by their clients, in order to facilitate the structuring of loan transactions and securitisation by small and medium-sized financial institutions;

b to refrain from locking-in their clients, allowing them to switch the custody of the receivables processed by Rede from its controlling shareholder, Itaú-Unibanco, to other non-integrated financial institutions;

c not to retaliate on clients that opt to shift from Itaú-Unibanco to another bank, maintaining the commercial relationship with Rede, or clients that choose to hold their accounts with Itaú-Unibanco, but process payments with other acquirers or processors;

d not to offer better commercial conditions to their clients, conditional on the acquisition of both services (tie-in of banking services and payment processing services); and

e to abstain from demanding their clients to meet minimum targets in terms of sales volume processed by Rede.[6]

On 19 September 2018, Bradesco, Banco do Brasil and Cielo, the former two, leading financial institutions and the controlling entities of Cielo, another dominant payment acquirer in Brazil, entered into a similar agreement with CADE.[7]

On 3 October 2018, B3 – Brasil, Bolsa, Balcão (B3) , a financial market infrastructure company providing trading services in an exchange and over-the-counter environment, and CADE, reached an agreement by means of which B3 agreed to adopt certain practices to address refusal to deal concerns raised by Americas Clearing System and Americas Trading System Brazil (ACS/ATS).[8] ACS/ATS were structuring another IT infrastructure provider to compete with B3 and allegedly required access to B3's infrastructure to be able to compete.

Port services

On 8 August 2018, the Tribunal found that Rodrimar[9] and Tecon Rio Grande,[10] two logistics and vertically integrated storage companies, abused their dominant position within their influence area by charging competitors a fee to increase the costs of non-integrated competitors active in the storage of imported goods market. Rodrimar is a crane operator with activities at Santos seaport, the largest seaport in Brazil, operating under a monopoly regime. In its turn, Tecon Rio Grande has similar activities at Rio Grande seaport, the fourth largest in Brazil. Both companies are responsible for handling containers and loading and

5 Administrative Inquiry No. 08700.001860/2016-51.

6 Cease-and-Desist Agreement No. 08700.003638/2018-54.

7 Settlements No. 08700.005211/2018-91, 08700.005212/2018-35, and 08700.005251/2018-32.

8 Settlements No. 08700.001323/2018-72, Administrative Inquiry No. 08700.002656/2016-57.

9 Administrative Proceeding No. 08012.001518/2006-37.

10 Administrative Proceeding No. 08700.001020/2014-26.

unloading cargo for the benefit of maritime freight companies. They are granted exclusive concession and license to perform such services, so all other players active in the same chain (ground transportation and storage stages, in particular) are dependent on them.

In line with the complaints of Marimex and Multi Armazéns, warehouses and direct competitors of Rodrimar and Tecon Rio Grande in the storage services market, CADE found that the imposition of custody fees and a fee called terminal handling charge 2 (THC2) on non-integrated competitors distorts competition once it creates favourable conditions for integrated storage providers belonging to Rodrimar's and Tecon Rio Grande's groups to provide logistics services at lower prices. In other words, if a shipowner or importer opts to use Rodrimar or Tecon Rio Grande as the sole provider of the whole portfolio of services in connection with cargo handling and storage, the custody fees and THC2 will not be charged.

The litigation also involved discussions on the application or not of the State Action Doctrine[11] and the Pervasive Power Doctrine, as Brazil has a federal agency, the National Agency of Ports and Navigation (ANTAQ), with jurisdiction to monitor and oversee all players active in the port industry. However, the Tribunal took the view that there is no public policy exempting the port industry from CADE's antitrust enforcement.

Telecom and internet-related services

On 9 June 2016, the Federal Public Prosecutor's Office filed a complaint against the four major internet service providers in Brazil (Claro, Oi, Telefônica/Vivo, and TIM) due to alleged negative effects that had arisen from the practice of zero-rating[12] – when an internet service provider applies a zero price to the data traffic associated with a particular app or website, or class of app or website, and the data do not count towards any data cap in place on the internet access service, which is very common in social media and music streaming apps.

According to the complaint, zero-rating practices would have the ability to distort competition among app and content providers, in the sense that all major internet service providers in Brazil only offer zero-rating for very popular apps, such as Facebook, Instagram, WhatsApp and Twitter: that is, by exempting consumers from the utilisation of some data packages, there would be incentives for the strengthening of the dominant position held by major content providers, to the detriment of small players and entrants, as consumers would be more inclined towards using free apps and content on their mobile phones.

On 31 August 2017, CADE dismissed the case as it found that there was no causal nexus between zero-rating and the success of the major apps and content providers; for example, the increase in the number of users of Facebook, Instagram, WhatsApp and Twitter, and the number of times these apps were accessed, was not dependent on zero-rating offers. Even if the investigated telecoms companies ceased all offers involving zero-rating, consumers would use the aforementioned social media apps to the same intensity. Additionally, by not charging for streaming associated with the popular apps, the practice would allow consumers to use their data packages to access less popular apps.

Another relevant case was initiated by a complaint filed by British Telecom (BT) in December 2015, against Claro, Oi and Telefônica, which collectively own most of the telecoms infrastructure in Brazil.[13] In accordance with BT's allegations, the defendants

11 For more information, see www.ftc.gov/sites/default/files/documents/public_statements/returning-state-action-doctrine-its-moorings/121003stateaction.pdf, p. 3.

12 Administrative Inquiry No. 08700.004314/2016-71.

13 Administrative Inquiry No. 08700.011835/2015-02.

refused to deal with BT and, therefore, the complainant was deprived of competing on the merits in the context of a public bidding launched by the Brazilian Postal Services, Correios, with the aim of improving the networks and the interconnection among all local agencies of Correios. BT also alleged that Claro, Oi and Telefônica foreclosed the market and impeded competition because they formed a consortium, and through this, collectively abused their market power. CADE has been collecting evidence on the case since August 2017, when the investigation was made public.

Natural gas

Under CADE's scrutiny are Petrobras' alleged preferential discounts for natural gas, under which distributors that solely traded Bolivian gas would not be granted discounts. As a result, Petrobras' integrated natural gas distributors were given beneficial treatment, harming competing gas distributors such as Comgás, which filed the claim.[14] In August 2016, the DG concluded the existence of a violation and sent the case for final judgment to the Tribunal. Judgment is still pending at the time of writing.

Finally, on 29 March 2018, the DG dismissed a claim presented by Âmbar Energia, an operator of thermopower plants, against Petrobras, the supplier of most of the natural gas needed for the operation of a plant located near the border region of Brazil and Bolivia.[15] Following a frustrated private negotiation between Âmbar and Petrobras, Âmbar presented a claim before CADE against Petrobras, requesting the opening of an antitrust investigation. At the beginning of the case, Âmbar alleged price discrimination against it by Petrobras, which supposedly supplied thermopower plants owned by Petrobras under more favourable commercial conditions. After signing a transitory natural gas supply agreement, Petrobras terminated such agreement due to the fact that the shareholders of Âmbar executed a plea bargain with the Brazilian Federal Prosecution Service, admitting corrupt practices in connection with the negotiation of the terms and conditions of the mentioned agreement, which prompted new allegations by Âmbar of a refusal to deal. The DG dismissed the case due to lack of evidence. Additionally, the DG acknowledged that Petrobras has the discretion to terminate agreements in cases of noncompliance with anticorruption policies.

ii Mergers and remedies adopted by CADE to address concerns with unilateral effects

CADE has been actively reviewing mergers with vertical concerns in recent years – especially following the *AT&T/Time Warner* case in 2017 – imposing remedies to address antitrust concerns primarily raised by competitors. The participation of interested third parties in the design of merger control agreements is also a trend that should be highlighted.

In the global merger between Bayer and Monsanto, besides structural remedies resulting in the divestiture of some seed assets to BASF (cotton, soybean and herbicides), CADE imposed behavioural obligations in connection with the licensing of patent rights held by the parties, including provisions to guarantee isonomic access of rivals to new solutions and technologies developed by the parties, in particular those related to biotechnology enhancements designed for soybean and cotton.[16] CADE also determined that the parties shall not require exclusivity

14 Administrative Inquiry No. 08700.002600/2014-30.

15 Administrative Inquiry No. 08700.009007/2015-04.

16 Merger Case No. 08700.001097/2017-49.

from their distributors or practice tie-ins involving Bayer's or Monsanto's products. CADE and the parties signed a merger control agreement on 7 February 2018, and the transaction was cleared subject to conditions.

In the *Itaú-Unibanco/XP Investimentos* case, CADE analysed the acquisition, by Itaú-Unibanco (the largest financial institution in Brazil and Latin America), of 30 per cent of the voting shares of XP Investimentos, the major non-integrated investment firm in Brazil, which offers securities brokerage, investment advisory and insurance brokerage services.[17] To close the deal, the parties offered the following non-discrimination commitments:

a XP Investimentos shall make available its online investment platform to non-integrated bond issuers and investment funds; and

b Itaú-Unibanco shall make available its financial products and solutions offered via XP Investimentos to competing platforms.

The transaction was conditionally cleared on 14 March 2018.

iii Digital markets: probes into Google's behaviour and most-favoured nation clauses

Antitrust probes against Google

During the past few years, CADE has been investigating Google's practices in digital markets through four different antitrust probes.[18]

The first probe is the Brazilian case of *Google Shopping*, the same practice scrutinised by the European Commission, which imposed a fine of €2.42 billion for abusing dominance as a search engine by giving illegal advantage to its own comparison shopping service.[19] The inquiry was initiated by a complaint filed by e-Commerce, owner of the comparison websites Buscapé and Bondfaro, on 20 December 2011.[20] According to the complainant, Google, which operates a search engine website and a downstream-related product, its price comparison platform, has systematically placed its own price comparison service in prominent visual positions when a consumer enters a query into Google's search engine. Apart from this practice, e-Commerce also accused Google of using an algorithm to manipulate the potential traffic that rival price comparison platforms could have, demoting the ability of consumers to find attractive results and offers via competitors, which were placed only on page four or five of Google's search engine. After seven years analysing factual and economic evidence, on 19 November 2018, the DG issued an opinion recommending the Tribunal to close the probe without imposing any penalties. According to the DG, the Brazilian antitrust case is different from the European case, since the European Commission found substantial evidence on discrimination and negative impacts on the market arising from Google's strategy. Following a market test conducted by the DG, the traffic experienced by non-integrated price comparison platforms mostly derived from Google search engine and such traffic has been increasing over the years. Additionally, no evidence was found on the usage of Panda Algorithm, the one supposedly used by Google within the European Economic Area to demote rival websites. At the time of writing, the case is pending final adjudication.

17 Merger Case No. 08700.004431/2017-16.

18 Based on the best publicly available information.

19 Press release of the European Commission: 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', 27 June 2017, http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

20 Administrative Proceeding No. 08012.010483/2011-94.

The second inquiry concerned Bing and Microsoft's complaints that AdWords, an online platform owned by Google, responsible for the management and delivery of ads and marketing campaigns, was hindering the interoperability and 'multi-homing' of advertising campaigns between Google and Bing's search engines.[21] According to Bing and Microsoft, Google has created difficulties for providers of goods and services, as well as the advertising agencies used by those providers, to simultaneously launch ad campaigns for different search engines. As Google holds a majority in terms of the number of searches made, with an estimated market share greater than 80 per cent, most companies tend to prepare ad campaigns to be delivered to their prospective targets (i.e., users potentially interested in a given product or service – for instance, a car, a dress, a handset) only via Google, setting aside rival and small search engines. After Bing and Microsoft reached an agreement with Google to terminate all litigation involving the parties, the complainants dropped the case in Brazil, and the investigation was proceeded *ex officio* by the DG. To assess the alleged anticompetitive behaviour of Google, the DG sent several requests for information (RFIs) to clients of Bing, advertising agencies and large companies, such as Coca-Cola, Citigroup, Heineken, Gol Airlines and Volkswagen. From the data gathered from market participants, on 11 May 2018, the DG issued an opinion recommending the dismissal of the investigation, once most of Bing's clients and advertising agencies stated they did not find hardships in dealing with distinct platforms, but rather preferred to use Google owing to the possibility of a wider reach in terms of internet users. The DG also concluded that, with small adjustments, interoperability between platforms may work well. At the time of writing, the case is pending final adjudication.

The third probe, also filed by e-Commerce, involved complaints of illegal copy and content scraping (users' reviews), by Google Shopping, from rival price comparison websites.[22] Through this practice, Google allegedly removed recommendations and positive feedback of competitors posted by clients from its search engine, and 'stole' such recommendations and positive feedback, including them in Google Shopping pages. The DG recommended the case to be dismissed once:

a no evidence of harm to Brazilian customers was found;
b there were no other competitors of e-Commerce or Google reporting the same practice of content scraping;
c the practice was limited to very few situations because of a computer bug; and
d Google has addressed the bug that caused the problems reported by e-Commerce.

At the time of writing, the case is pending final adjudication.

The last investigation originated from a complaint brought by Yelp, a search and advertising company, which alleged that, after Google launched a new service called Google Places, Google had abused its dominance in the search engine market to favour its integrated services to the detriment of non-integrated competitors.[23] Yelp and Google Places have the main purpose of providing their users with further information on given places (such as public parks, restaurants, hotels, shops and shopping centres), including ratings, reviews and tips from clients, opening hours, capacity, prices, discounts and promotions. In accordance with the views of Yelp, prior to the establishment of Google Places, Yelp had more data

21 Administrative Proceeding No. 08700.005694/2013-19.
22 Administrative Proceeding No. 08700.009082/2013-03.
23 Administrative Inquiry No. 08700.003211/2016-94.

traffic and users because the Google search engine was functioning properly; that is, without the deployment of an algorithm used to sidestep the standard logic of the ranking process of the results of a query entered into the Google search engine. However, after the launch of Google Places, the Google search engine diverted traffic away from rival services, giving unfair prominence to its own services and putting Yelp and other rivals in unattractive positions to avoid access and clicks from users. At the time of writing, the case is still at a preliminary stage.

Price comparison websites: most favoured nation and price parity clauses

On 27 June 2016, the Forum of Brazilian Hotel Operators (FOHB) filed a complaint before CADE against Expedia, Decolar.com and Booking.com covering most-favoured nation (MFN) and price parity clauses.

According to FOHB, MFN clauses prevent hotel operators from granting lower prices to direct customers and clients, so that Expedia, Decolar.com and Booking.com, as the dominant price comparison websites, would always be able to provide clients with more attractive commercial conditions and room availability on internet sales platforms.

On 29 March 2018, Expedia, Decolar.com and Booking.com settled the case with CADE and agreed to cease the use of a broad parity clause with hotel operators, preventing the price comparison websites from blocking hotel operators from granting better offers to their clients in offline and online sales channels. However, to reduce incentives for free-riding, in the event that a hotel operator is found through an online platform (such as Expedia, Decolar.com or Booking.com), such online platform may require hotel operators to ensure price parity to mitigate the chances of sellers and buyers connecting through online platforms but finalising transactions through other channels, with lower prices, in typical free-rider behaviour.

iv Antitrust and IP

Finally, on 14 March 2018, the Tribunal issued one of CADE's most anticipated rulings involving an investigation into car makers Fiat Chrysler, Ford and Volkswagen, which have been accused of abusing their intellectual property (IP) rights in the spare parts aftermarket by blocking independent makers from producing and selling certain spare parts.[24] Even though in June 2016, the DG found that the conduct was illegal, recommending the imposition of a sanction, the majority of the Tribunal concluded that there was no abuse of IP rights, but only the exercise of exclusive rights granted by Brazilian IP law.

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. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', although the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with that in other jurisdictions, especially the United States and the European

24 Administrative Proceeding No. 08012.002673/2007-51.

Union. CADE has traditionally interpreted the expression 'group of companies' to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

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

Annex II of CADE Resolution No. 20/99 sets criteria for the definition of the relevant market in terms of both product and geographic dimensions. The methodology is mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the small but significant and non-transitory increase in price 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.

IV ABUSE

i Overview

Article 36 of the 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':

a a limitation or restraint on, or, in any way, harm to, open competition or free enterprise;
b control over a relevant market of a certain good or service;
c an increase in profits on a discretionary basis; or
d 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 resale price maintenance (RPM) and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

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

ii Exclusionary abuses

Exclusionary pricing

Annex I of CADE Resolution No. 20/99 defines predatory pricing as the '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 and 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 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[25] – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses. The most recent conviction concerned Unimed in the Missões region, in southern Brazil, where it was also imposing exclusivity arrangements.[26] In February 2016, CADE also reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system, closing the investigation.[27]

CADE's most important exclusive dealing decision was issued in 2009. The investigation, initiated in 2004, concerned a loyalty programme (Tô Contigo) instituted by AmBev, Brazil's largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme 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. CADE imposed what is still the record fine in connection with an abuse of

25 Administrative Proceeding No. 08012.010576/2009-02.

26 Administrative Proceeding No. 08700.009890/2014-43.

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

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.[28,29]

Another interesting case involving exclusive dealing concerns Unilever, owner of Kibon, one of the most famous brands of ice creams in Brazil.[30] Following a complaint filed by competitor Della Vita, on 16 October 2019 the Tribunal found that some exclusive arrangements entered into by Unilever and strategic retailers – located in the states of São Paulo and Rio de Janeiro – violated antitrust laws. Initially, CADE opened a probe against Nestlé and Unilever, since there was preliminary evidence of the existence of agreements through which both companies demanded that some distributors and retailers should only purchase ice creams and related products from one supplier (that is, only from Nestlé or from Unilever). In addition, the ice cream manufacturers were supposedly imposing minimum volume of sales and exclusivities related to marketing campaigns on their clients. On the one hand, after further evidence was gathered, CADE concluded that Nestlé had no market power and only followed the commercial strategy adopted by the market leader Unilever, which at that time accounted for a market share higher than 50 per cent in certain regions of Brazil. On the other hand, after the DG performed market tests by sending RFIs to market participants (competitors, distributors, strategic clients, etc.), CADE found that, despite the fact Unilever did not insert explicit exclusivity clauses in its contracts, it offered significant discounts and bonuses based on the volume of products purchased from Unilever (a practice similar to that sanctioned by CADE in *Tô Contigo*, against AmBev). This practice resulted in market foreclosure by means of *de facto* exclusivity: five of Unilever's competitors reported to CADE that they had difficulties in selling non-Nestlé and Kibon ice creams to well-placed retailers in São Paulo and Rio de Janeiro. In addition to this, CADE concluded that the strategy adopted by Unilever was quite successful, since 74.2 per cent of Unilever's total turnover in the segment derived from distributors and retailers with exclusive arrangements. Unilever was sanctioned to pay 1 per cent of its gross sales in the relevant market affected by the practice.

28 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.

29 Another alleged exclusionary case involving AmBev concerned 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 retailers 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).

30 Administrative Proceeding No. 08012.007423/2006-27.

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:

a dominance in the tying market;
b the tying and the tied goods are two distinct products;
c the tying practice is likely to have a market-distorting foreclosure effect; and
d the tying practice does not generate overriding efficiencies.

In recent years, CADE 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.[31] 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.[32]

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 IP 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 October 2016, CADE dismissed a refusal to deal involving cement makers.[33] Although CADE concluded that violations did occur, it also found that all these conducts were part of cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and that some of the defendants had already been punished for it. The remaining defendants were acquitted owing to lack of evidence.[34]

Resale price maintenance

Annex I of CADE Resolution No. 20/99 establishes 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.

31 Administrative Inquiry No. 08700.007338/2013-30.

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

33 Administrative Proceeding No. 08012.008855/2003-11.

34 Administrative Proceeding No. 08012.010208/2005-22.

In January 2013, in a landmark abuse of dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price.[35] 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.

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 parcels.[36] The DG recommended the imposition of fines in April 2017, but a final decision is pending.

There is also an ongoing proceeding into an alleged abuse of dominance in the fuel retail market in Brazil's Federal District.[37] Petrobras Distribuidora is believed to be ensuring favourable contractual terms to petrol stations affiliated with a specific chain. CADE is still collecting evidence on this case.

iv Exploitative abuses

Unfair trading practices 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 has dismissed all of the complaints.

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

36 Administrative Inquiry No. 08700.009588/2013-04; defendant: Empresa Brasileira de Correios e Telégrafos.

37 Administrative Proceeding No. 08012.005799/2003-54.

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'[38] pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of an investigation. CADE Resolution No. 3/2012 broadly defines 144 'sectors of activity' to be considered for the purposes of calculating the fine under Law No. 12,529/2011. In November 2016, CADE issued Resolution No. 18/2016, under which such 'fields of activities' may be further limited to ensure that a sanction will be proportionate to the specificities of the conduct. CADE may resort to the total turnover, whenever information on revenue derived from the relevant 'sector of activity' is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 10 per cent of a 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 a company's executives. Historically, while CADE has investigated the involvement of individuals in cartel cases, it has rarely done so in abuse of dominance cases. In July 2014, CADE settled an investigation with six individuals who allegedly participated in the development and implementation of the aforementioned Tô Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.[39]

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

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

ii Behavioural remedies

At any stage of an investigation, CADE may adopt an interim order to preserve market conditions while a final decision on a case is pending.[40] An interim order may be adopted only if the facts and applicable law establish a prima facie likelihood that an infringement will be found (*fumus boni iuris*); and that, in the absence of the order, irreparable damage may be caused to the market (*periculum in mora*). CADE has been adopting interim orders

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

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

40 Article 87 of the Competition Law.

in connection with a significant number of solid abuse of dominance cases. The most recent was the interim measure ordered by CADE in April 2015 against the Gemini consortium, which was ordered to disclose the price of gas that it was supplied with.

Apart from fines, CADE may also:

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

b prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;[41]

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.[42]

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 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 a 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 the conducting of 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

41 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).

42 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.

and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

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

At the Tribunal, the case is assigned to a reporting commissioner. While the reporting commissioner reviews the case, CADE's Attorney General may issue an opinion on it. 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 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, SDE, Brazil's former administrative antitrust investigative agency, and Brazil's federal police launched the first simultaneous dawn raid in connection with an international cartel investigation together with the US Department of Justice and the European Commission. Brazil's antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, Argentina, Canada, Chile, China, Colombia, Ecuador, France, Japan, Korea, Peru, Portugal and Russia, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases. CADE has also entered into cooperation agreements with the World Bank Group and the Inter-American Development Bank, allowing for the exchange of information and for consultations on matters of common interest.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil[43] 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 and 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.[44]

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;[45] 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 have been related to consumers' rights complaints.

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

The drafts are generally in line with international best practices, and reflect CADE's efforts to strike a balance between the two goals. However, there is room for improvement

43 A more detailed version of this section was published in *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-new-perspectives-and-interplay-with-leniency/.

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

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

regarding some aspects of the draft resolution and of the Proposed Legislation, and in particular on the need for CADE to change the approach adopted in the Proposed Legislation regarding the triggering event for the statute of limitation for damage claims.

VIII FUTURE DEVELOPMENTS

There are two major, and conflicting, trends currently contributing to defining CADE's stance in abuse of dominance cases. The first is the increasing availability of apparatus that enables the competition authority to employ economic analysis and evidence. The use of economics in Brazil has grown dramatically in competition matters over 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 to a second trend that is apparently at odds 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. Guidelines on vertical restraints and recommended commercial practices for dominant firms would ensure legal certainty and allow more predictability for market players when designing their commercial practices.

Having said this, four out of the six CADE commissioners' terms will expire in the second half of 2019. Any speculation on what would be the likely position of the Tribunal in dominance cases to be adjudicated in the near future is, therefore, difficult.

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 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* have 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.

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