The Dominance and Monopolies Review

Eighth Edition

Editors
Maurits Dolmans and Henry Mostyn

The Law Reviews

© 2020 Law Business Research Ltd

THE

Dominance and Monopolies Review

Eighth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

© 2020 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Sarah Andreoli

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2020 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at June 2020, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-446-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANJARWALLA & KHANNA

ANJIE LAW FIRM

BAKER MCKENZIE LLP

BECCAR VARELA

BERNITSAS LAW

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CMS

DE BRAUW BLACKSTONE WESTBROEK NV

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

HOMBURGER AG

JONES DAY

KOIKE & KASHIWAGI LAW OFFICE

LANE NEAVE

LEVY & SALOMÃO ADVOGADOS

P&A LAW OFFICES

SK CHAMBERS

SPASOV & BRATANOV LAWYERS' PARTNERSHIP

VINGE

WOLF THEISS

© 2020 Law Business Research Ltd

CONTENTS

PREFACE vii
Maurits Dolmans and Henry Mostyn

Chapter 1 ARGENTINA 1
Camila Corvalán

Chapter 2 AUSTRALIA 12
Prudence J Smith. Jason A Beer and Mitchell J O'Connell

Chapter 3 AUSTRIA 30
Bernt Elsner, Dieter Zandler and Vanessa Horaceck

Chapter 4 BELGIUM 44
Robbert Snelders, Nuna Van Belle and François-Guillaume de Lichtervelde

Chapter 5 BRAZIL 71
Ana Paula Martinez

Chapter 6 BULGARIA 91
Kremena Yaneva-Ivanova and Georgi Spasov

Chapter 7 CANADA 107
Arlan Gates and Eva Warden

Chapter 8 CHINA 130
Zhan Hao and Song Ying

Chapter 9 CZECH REPUBLIC 145
Tereza Mrázková and Robert Pelikán

Chapter 10 EUROPEAN UNION 158
Thomas Graf and Henry Mostyn

© 2020 Law Business Research Ltd

Chapter 11 FINLAND 179
Jussi Nieminen and Kiti Karvinen

Chapter 12 FRANCE 191
Antoine Winckler, Frédéric de Bure and Sarah Aït Benali

Chapter 13 GERMANY 230
Romina Polley and Katharina Apel

Chapter 14 GREECE 247
Marina Androulakakis, Tania Patsalia and Vangelis Kalogiannis

Chapter 15 INDIA 260
Anand S Pathak

Chapter 16 ITALY 275
Matteo Beretta, Gianluca Faella and Natalia Latronico

Chapter 17 JAPAN 310
Yusuke Kashiwagi

Chapter 18 KENYA 337
Dominic Rebelo and Edwina Warambo

Chapter 19 MALAYSIA 350
Shanthi Kandiah

Chapter 20 NETHERLANDS 364
Bart de Rijke

Chapter 21 NEW ZEALAND 379
Anna Ryan, Ellen Sewell and Kristina Sutherland

Chapter 22 RUSSIA 394
Maxim Boulba and Maria Ermolaeva

Chapter 23 SINGAPORE 403
Daren Shiau, Elsa Chen and Scott Clements

Chapter 24 SPAIN 414
Francisco Enrique González-Díaz and Ben Holles de Peyer

© 2020 Law Business Research Ltd

Chapter 25 SWEDEN.....428
Marcus Glader and Trine Osen Bergqvist

Chapter 26 SWITZERLAND.....442
Marcel Dietrich, Franz Hoffet and Yves Bianchi

Chapter 27 TURKEY.....460
Gönenç Gürkaynak

Chapter 28 UNITED KINGDOM.....472
Paul Gilbert and John Messent

Chapter 29 UNITED STATES.....499
Kenneth S Reinker, Daniel Culley and Benjamin Reese

Appendix 1 ABOUT THE AUTHORS.....513
Appendix 2 CONTRIBUTORS' CONTACT DETAILS.....535

© 2020 Law Business Research Ltd

PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It's] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued 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.' Similarly, Professor 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'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

© 2020 Law Business Research Ltd

previous years, each chapter – authored by specialist local experts – 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 notable points from last year's enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms' costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that 'it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices'. In a similar vein, on 27 March, Commissioner Vestager explained that 'a crisis is not a shield against competition law enforcement' and that the European Commission (EC) 'will stay even more vigilant than in normal times if there is a risk of virus-profiteering'. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.[1]

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to 'intervene directly to correct excessively high prices'. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result.'

1 For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

© 2020 Law Business Research Ltd

In a nutshell, the Court of Appeal held that competition agencies have a 'margin of manoeuvre' in deciding how to prove their cases, including the 'Cost Plus' method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency's methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency's duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants' evidence regarding the prices of phenytoin capsules because it was prima facie evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority's (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse's price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google's termination of three advertisers' Google Ads accounts was abusive. The authority's theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not 'reap a trading benefit' from the trading partner, as required by United Brands and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook's terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook's terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook's appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl's warning in the *Latvian Banks* case – remain rare and

© 2020 Law Business Research Ltd

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudge the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

© 2020 Law Business Research Ltd

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

> *it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".*

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

© 2020 Law Business Research Ltd

As a recent CMA report into competition and regulation recognised, 'greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.' Similarly, in her speech on 'Remembering Regulatory Misadventure', FTC Commissioner Wilson recalled that attempts to prescribe 'fairness', 'non-discrimination', and 'reasonable and just' prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations 'significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus'. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

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 eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2020

© 2020 Law Business Research Ltd

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.

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Lucas Griebeler da Motta, Gabriela da Costa Carvalho Forsman and Isabella Tanuy 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 65 per cent of CADE's decisions (data from the yearbook of CADE for 2019).

© 2020 Law Business Research Ltd

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 2019, CADE adjudicated 28 administrative proceedings. Out of these, 17 were dismissed, while in 11 cases, CADE found an infringement in relation to at least one defendant. Those figures are consistent the ones related to CADE's activities in 2018, when 25 cases were adjudicated in total, out of which, 12 resulted in a conviction. As most cases started by CADE in the context of Operation Car Wash were settled in 2018, there was a significant drop in the number of settlements reached between defendants and CADE, totalling 21 proposals that resulted in settlements executed in 2019. In 2019, fines reached 792.6 million reais, and the settlement sums agreed with CADE amounted to 165.6 million reais, approximately 10 per cent of the record achieved in 2018: 1.327 billion reais.

In 2019, cartels remained a priority for CADE, accounting for 15 out of the 28 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 2019's abuse of dominance cases, including settlements.

i Digital and regulated industries

In 2019, CADE continued to be active in the review of alleged abuse of dominance practices in the digital and regulated industries, with a special focus on financial services, oil refining and natural gas.

Financial services

In April 2019, DG launched an investigation against Itaú-Unibanco and Redecard,[4] respectively a bank and a payment processor belonging to the same economic group, after Itaú-Unibanco and Redecard had issued a joint statement communicating that all clients of

4 This case was preceded by another investigation against Itau-Unibanco and Rede, which was settled in 2018. Following probes opened by CADE into the payment industry in March 2016, Itaú-Unibanco, a

© 2020 Law Business Research Ltd

Redecard that operate Itaú-Unibanco bank accounts would benefit from shorter compensation and settlement periods with no additional costs.[5] Redecard would start advancing - within two days – receivables derived from credit card transactions for Itaú-Unibanco clients for free, while Redecard's clients with bank accounts offered by competitors of Itaú-Unibanco would receive the amounts due within 30 days.

The SG sent several requests for information (RFIs) to market players and associations. Some of them accused Itaú-Unibanco and Redecard of predatory prices, margin squeeze, tie-in and discrimination, especially because independent, small and medium-sized payment processors would not be able to meet the same commercial conditions granted by Redecard. According to competitors, Itaú-Unibanco and Redecard have the ability to behave in such a way due to the fact that they are vertically integrated and have significant market power to leverage their operations in both segments and cross-subsidise themselves.

Following a market test, DG found that, after one month those commercial conditions had been in place, there were material increases in the number of Redecard's clients with Itaú-Unibanco bank accounts and new clients of Redecard, as a result of migrations from competing banks and payment processors.

In October 2019, a temporary restraining order (TRO) was issued by the DG against Itaú-Unibanco and Redecard to prevent them from: (1) conditioning the receivables advance oferered by Redecard on maintaining bank accounts at Itaú-Unibanco; and (2) announcing via marketing campaigns the commercial conditions that are part of the scope of the antitrust investigation. The TRO also contemplated an obligation for Redecard to: (1) remove from the market all ads and campaigns of the new commercial conditions; and (2) send notices to the clients it acquired after the joint statement in the sense that they are not required to maintain bank accounts at Itaú-Unibanco to benefit from shorter compensation and settlement periods with no additional costs.

Itaú-Unibanco and Redecard appealed the DG's decision. Except for granting a reduction in the daily fines and an extension for Itaú-Unibanco and Redecard to comply with DG's decision, CADE's Tribunal upheld the TRO in December 2019. Following that, Itaú-Unibanco and Redecard extended the commercial conditions regarding the anticipation of receivables to Redecard's clients using bank accounts offered by all competitors of Itaú-Unibanco on a non-discriminatory basis. Notwithstanding that, Itaú-Unibanco and Redecard filed a writ of mandamus against CADE's TRO and they obtained a suspension of the TRO effects. The matter is still pending final adjudication as at April 2020.

---

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. Through an agreement reached on 4 July 2018, the parties committed: (1) 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; (2) 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; (3) not to retaliate against 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; (4) 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 (5) to abstain from demanding their clients to meet minimum targets in terms of sales volume processed by Rede.

5 Administrative Proceeding No. 08700.002066/2019-77.

© 2020 Law Business Research Ltd

Automatic payment services for highway tolls and parking lots

In November 2018, Veloe, an entrant in the market for automatic payment services for highway tolls and parking lots, filed a complaint against Sem Parar, an incumbent in the aforementioned market.[6] According to Veloe's arguments, ConectCar has been imposing difficulties on the development of Veloe through abusive conduct, such as refusing to share infrastructure (antennas for the communication between, on the one hand, tolls and parking lots, and, on the other hand, transponders installed on cars) and entering into exclusivity clauses with the main parking lot operator in Brazil, Estapar.

Veloe also reported that Sem Parar unjustifiably delayed to present answers to Veloe's queries on commercial and technical conditions for the sharing of infrastructure. Several months later, after Veloe having insisted on the discussions, Sem Parar submitted for Veloe's consideration a commercial proposal that was not consistent with market practice (higher prices and restrictions when compared to those applicable to competitor ConectCar, the second largest in Brazil). Following receiving inputs from market players, the DG formally opened an investigation against Sem Parar and ConectCar, once they have been sharing their respective infrastructures under terms and conditions that harm competing firms.

Veloe requested a TRO to refrain the investigated companies from practicing the conducts under scrutiny, but CADE's DG denied the request. In February 2019, Veloe appealed to CADE's Tribunal and in March 2019, Commissioner Paula Farani de Azevedo Silveira granted an injunction through which Sem Parar and ConectCar were obliged to: (1) immediately terminate all exclusivity agreements entered into by and between the incumbents and parking lots operators; (2) extend to all competitors the commercial and technical conditions applicable to the infrastructure sharing agreement between Sem Parar and ConectCar; (3) charge their competitors only for the actual use of their antennas, as opposed to all installed base in Brazil.

In her opinion, Commissioner Paula Farani pointed out that in 2015, Sem Parar and ConectCar submitted to CADE's consideration Consultation No. 08700.007192/2015-94, where they requested CADE's Tribunal's consent and views on the first infrastructure-sharing agreement they had envisaged executing. At that time, CADE's Tribunal affirmed that such an agreement may create incentives for Sem Parar and ConectCar to discriminate against their competitors and create barriers to entry. To address the antitrust concerns raised by CADEs Tribunal in the context of that consultation, Sem Parar and ConectCar stated that they would not foreclose the market and would make available their installed infrastructure to competitors on a non-discriminatory basis. Thus, it was found that Sem Parar and ConectCar did not follow their previous commitment to CADE.

The case is still pending final adjudication as at April 2020.

Consigned credit operations (salary-linked employee loans)

In December 2012, the DG started investigations against banks that lend and offer credit lines with lower interest rates to government employees (from federal, state, and local levels) called consigned credit operations (CCOs). CCOs are transactions through which an employee may take loans offering their salaries as a guarantee to the lender. Notwithstanding the similarities of facts, the DG opened seven probes, each of them targeted at a distinct bank.

6 Administrative Inquiry No. 08700.006268/2018-15.

© 2020 Law Business Research Ltd

The first one was launched in 2010 and involved Banco do Brasil (BB), the largest public bank in Brazil.[7] Such an investigation was dismissed in 2012 after BB having agreed to end exclusivity clauses it practiced in the context of a wide commercial relationship it had with certain departments and entities of the public sector for the management of payroll accounts. Pursuant to the clauses that were challenged, BB had the exclusive right to offer CCOs to government employees whose employers had signed a master agreement with BB. As a result, the affected government employees – who had never consented to any exclusivity agreement – were obliged to maintain bank accounts at BB to receive their salaries and were not allowed to borrow at lower interest rates under CCO with competitors of BB.

The other six probes aimed at Banco de Brasília (BRB),[8] Banrisul,[9] Bradesco,[10] Caixa Econômica Federal (CEF),[11] Itaú-Unibanco,[12] and Santander.[13] The scope of those investigations was the same of that against BB, but the government employees supposedly harmed in those cases were not the ones impacted by the practices under scrutiny in the probe against BB of 2010. Whereas the investigations involving other banks were dismissed due to lack of market power, the one concerning BB, the largest bank offering loans to public employees, had a different outcome.

The DG and CADE's Tribunal found no evidence of harm derived from the practices of BRB, Banrisul, Bradesco, CEF, Itaú-Unibanco, and Santander. The cases were dismissed on 24 April 2019 without imposition of any penalties because: (1) the market shares of the aforementioned banks were low (in most cases, less than 5 to 10 per cent); (2) the exclusivity clauses were not unilaterally imposed by the banks, but rather requested by the government departments and entities, as they could sell to the banks a portfolio of clients (i.e., bank accounts for all employees to receive their salaries) at higher prices; (3) a significant part of all master agreements signed after 2011–2012 by and between the banks and the governments did not contemplate exclusivity clauses; (4) even in cases in which there were exclusivity provisions for CCO, those provisions were not enforced against the employees, so that these employees were free to take CCO from competing banks (some investigated banks reported that they had stopped enforcing those clauses after the settlement agreement between BB and CADE); and (5) except for BB, which accounted for more than 30 per cent of the CCO market, the structure of the CCO market was disperse, with several players active in the segment.

Oil and gas

The Brazilian oil and gas market has been subject to several monopolisation investigations across the years. Petrobras, the largest state-owned enterprise in the country, had a state monopoly over the whole supply chain of natural gas, crude oil and refining until the enactment of the Constitutional Amendment No. 9/1995 and Law No. 9,478/1997, which

7 Administrative Proceeding No. 08700.0030701/2010-14.
8 Administrative Proceeding No. 08700.005781/2015-38.
9 Administrative Proceeding No. 08700.005770/2015-58.
10 Administrative Proceeding No. 08700.005766/2015-90.
11 Administrative Proceeding No. 08700.005759/2015-98.
12 Administrative Proceeding No. 08700.005755/2015-18.
13 Administrative Proceeding No. 08700.005761/2015-67.

© 2020 Law Business Research Ltd

aimed at opening the sector to private companies. Notwithstanding the modifications in the legal framework, the conditions and the structure of the oil and gas market in Brazil materially remained the same.

With respect to the natural gas industry, it is worth pointing out to the two most recent probes that led Petrobras to execute a consent decree with CADE by means of which Petrobras committed, among other conditions, to divesting transportation pipelines (Nova Transportadora do Sudeste (NTS), Transportadora Associada de Gás (TAG) and Transportadora Brasileira Gasoduto Bolívia-Brasil (TBG), as known as Brazil–Bolivia pipeline) and shareholdings in natural gas utility companies by December 2021.

The first one relates to a complaint filed on 1 April 2014 by Companhia de Gás de São Paulo (Comgás), the largest independent piped natural gas distributor in Brazil.[14] According to Comgás, from 2011 to 2015 Petrobras had sold natural gas to its vertically integrated companies under commercial terms and conditions more favourable than those available to independent and non-integrated competitors. On 5 August 2016, the DG issued an opinion recommending the conviction of Petrobras for abuse of dominance implemented via price discrimination and attempts to migrate large size customers from Comgás to Gás Brasiliano Distribuidora (GBD), a subsidiary of Petrobras in the State of São Paulo. On 26 June 2019, the Reporting Commissioner voted for the dismissal of the case, but on the same day another Commissioner requested the case files for further consideration.

The second case refers to a complaint filed by the Brazilian Association of Piped Natural Gas Distributors (Abegás) against Petrobras on 16 July 2015.[15] Some aspects of this complaint overlapped with those of Comgás, but the second probe had a wider scope that encompassed discounts, ship-or-pay/take-or-pay clauses and refusals to deal with thermal powerplant operators. In short, Abegás sought to address all antitrust concerns it and its members perceived at the time of filing. Throughout the discovery stage of this case, the DG sent a number of RFIs to market participants to obtain their views on the competitiveness level of natural gas industry and issues that should be addressed by CADE. Due to the settlement reached by and between CADE and Petrobras, this case was suspended until Petrobras fulfils all the obligations set forth in the consent decree.

The refining segment was also a target of CADE's prosecuting efforts. An unusual investigation was started by an economic study jointly elaborated by CADE's Department of Economic Studies (DEE) and the National Agency of Oil & Gas (ANP).[16] The study found that, apart from the quasi-monopoly in the exploration and production of crude oil, approximately 98 per cent of the refining capacity in Brazil is owned by Petrobras and its subsidiaries. According to CADE and ANP's findings, this configuration makes Petrobras also a monopsonist in the refining market, giving the company all the powers to set prices, supply level, and entry barriers. It was found that most private and independent refineries were sold to Petrobras over the decades and that the only two rivals have filed for bankruptcy due to margin squeezes supposedly practiced by Petrobras.

On 5 December 2018, CADE's President submitted the paper prepared by DEE and ANP for the review of CADE's Tribunal, and, by the majority of its Commissioners, it determined the SG to initiate a new probe against Petrobras. On 24 May 2019 Petrobras filed a draft commitment letter through which it had undertaken to divest eight refineries, which

14 Administrative Proceeding No. 08700.002600/2014-30.

15 Administrative Inquiry No. 08700.007130/2015-82.

16 Administrative Inquiry No. 08700.006955/2018-22.

© 2020 Law Business Research Ltd

represent almost 50 per cent of all assets of the company in the refining segment. The plants that will be sold are located in seven different states, and a single buyer may not acquire more than one refinery to avoid the creation of regional private monopolies. On 11 June 2019, the majority of CADE's Tribunal approved the settlement, and the deadline for Petrobras to divest is December 2021.

Due to the covid-19 outbreak, the uncertainty surrounding OPEC, and the drastic decrease in demand and crude oil prices, it remains uncertain whether Petrobras will be able to comply with the deadline to sell its assets in the natural gas and refining industries.

Other cases

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.[17] According to the allegations presented by Nubank, the banks had been creating barriers and refusing to provide Nubank with the 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 still ongoing as at April 2020.

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.[18] In accordance with BT's allegations, the defendants 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. The investigation is still ongoing as at April 2020.

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

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.[19] CADE also determined that the parties shall not require exclusivity 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.

17 Administrative Inquiry No. 08700.003187/2017-74.

18 Administrative Inquiry No. 08700.011835/2015-02.

19 Merger Case No. 08700.001097/2017-49.

© 2020 Law Business Research Ltd

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.[20] 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.

In 2019, out of five cases that required the execution of a merger control agreement to be cleared by CADE, only one gave rise to vertical concerns: the acquisition of Mediplan, a local operator of hospitals and healthcare plans, by Grupo Notredame Intermédica (GNDI), one the largest vertically-integrated healthcare players in Brazil.[21] In this case, the DG and CADE's Tribunal found that there may be incentives for GNDI to deny the access to its facilities for customers of competing healthcare plans, as well as to create difficulties for the beneficiaries of its healthcare plans to seek medical treatment at independent hospitals. By means of the merger control agreement executed on 22 May 2019, GNDI committed to, among other conditions, investing in the acquisition of medical equipment, expansion and refurbishment of its hospitals, as well as making them available to beneficiaries of rival healthcare plans. Furthermore, GNDI shall undertake to continue expanding the network of accredited independent hospitals and clinics for the use by its beneficiaries.

iii Digital markets: probes into Google's behaviour

During the past few years, CADE has been investigating Google's practices in digital markets through six different antitrust probes.[22]

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.[23] The inquiry was initiated by a complaint filed by e-Commerce, owner of the comparison websites Buscapé and Bondfaro, on 20 December 2011.[24] 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: (1) manipulation of the potential traffic that rival price comparison platforms could have by means of an algorithm, demoting the ability of consumers to find attractive results and offers via competitors, which

20 Merger Case No. 08700.004431/2017-16.

21 Merger Case No. 08700.005705/2018-75.

22 Based on the best publicly available information.

23 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.

24 Administrative Proceeding No. 08012.010483/2011-94.

© 2020 Law Business Research Ltd

were placed only on page four or five of Google's search engine; (2) discrimination against other comparison websites by blocking access to price listing ads (PLAs); and (3) tie-in sales, with abuse of dominance.

After seven years analysing factual and economic evidence, on 19 November 2018, the DG finally issued an opinion recommending the Tribunal to close the probe without imposing any penalties. On 26 June 2019, CADE's Tribunal dismissed the case, concluding there was no evidence of manipulation of Google's search algorithms in the Brazilian market and that the reduction of comparison websites in the Brazilian market was not a result of Google's commercial practices. In addition, the conducts regarding blocking access to an essential facility, refusal to sell and tie-in sales have not been confirmed since: (1) PLAs were not considered an essential facility (there are many substitutes); (2) there was no evidence of refusal to sell PLAs, since the matter involves issues related to functional compatibility; and (3) no tie-in sales conduct were detected, since the requirement of data is part of the market functioning and is not related to any kind of abuse. The Tribunal also agreed with the DG that 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. CADE's Tribunal also concluded that the Brazilian case points to a pro-competitive innovation, with the consequent increase of value for the Google platform for facilitating the matching between the two sides of the platform (users and advertisers).

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.[25] 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.

On 19 June 2019, CADE's Tribunal unanimously dismissed the case, concluding that the absence of multihoming was not related to Google's alleged conduct. First, the Tribunal concluded that AdWords Terms and Conditions were very similar to most licence agreements' and adhesion contracts' and that there was no evidence of anticompetitive practices. Its main

25 Administrative Proceeding No. 08700.005694/2013-19.

© 2020 Law Business Research Ltd

distinctive features are justified by Google's operations' global scope and by the copyright protection that is given to computer programs. Based on the answers to RFIs, the Tribunal also concluded that the market agents were able to serve advertisements on more than one platform at the same time and that the choice of the way those platforms would be used also depend on the users' profile. In this sense, the use of other multihoming means has no direct link with Google's T&C but is rather related to its commercial features and the Brazilian digital advertising market's. The Tribunal also found that the T&C provide economic efficiencies to advertisers and that multihoming is allowed and encouraged by search websites.

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.[26] 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.

On 19 June 2019, CADE's Tribunal decided to dismiss the administrative proceeding due to lack of evidence. Since no other website reported scraping by Google, the Tribunal concluded it was a single incident, in which a very limited number of reviews collected by Buscapé were included on Google Shopping's website. In this sense, there was no systematic conduct of collecting and misuse, which reinforces Google's allegation of malfunction. In addition, the content was removed from Google's website and the reviews were only published on the foreign version of Google Shopping, which indicates a lack of intention of harming the Brazilian market. Therefore, CADE decided that, although Google holds a dominant position in the relevant markets affected by this investigation, such a single incident is not enough to determine that an anticompetitive conduct has occurred.

CADE's Tribunal also ordered that the DG initiate a fifth probe against Google to assess competition levels and alleged abuses of dominance in the general search market and the news market. A preliminary inquiry was opened by CADE on 9 July, 2019.[27] The investigated practice refers to a potential scraping of journalistic content published on websites of media and news companies. According to the allegations, Google would be abusing its dominant position to leverage the number of accesses to websites it maintains, such as Google Shopping and Google News. So far, the DG has sent many RFIs to market players and associations.

The fifth 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.[28] 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

26 Administrative Proceeding No. 08700.009082/2013-03.
27 Administrative Inquiry No. 08700.003498/2019-03.
28 Administrative Inquiry No. 08700.003211/2016-94.

© 2020 Law Business Research Ltd

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 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.

On 5 June 2019, the DG initiated a sixth investigation against Google, the aim being to assess whether the conduct by Google in *Android* may adversely affect the Brazilian market.[29] The scope of this investigation is similar to that of the European Union, which fined Google €4,342 billion for antitrust violations concerning the Android mobile operating system (i.e., imposition the pre-installation of Google Search and Google Chrome on manufacturers as a condition for the licensing of Google's app store (Play Store), making payments to large manufacturers and mobile network operators on condition that they exclusively pre-installed Google Search on their devices, and prohibition on manufacturers from installing and running alternative versions of Android on mobile devices on which Play Store is installed). As at April 2020, the case is still pending a decision.

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 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.

29 Preliminary Investigation No. 08700.002940/2019-76.

© 2020 Law Business Research Ltd

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

© 2020 Law Business Research Ltd

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[30] – 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.[31] 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.[32]

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 dominance case: 352 million reais. AmBev challenged CADE's decision before the judicial courts and, in July 2015, reached an agreement with CADE[33] through which it agreed to pay 229.1 million reais and terminate the conduct.[34]

Another interesting case involving exclusive dealing concerns Unilever, owner of Kibon, one of the most famous brands of ice creams in Brazil.[35] 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

30 Administrative Proceeding No. 08012.010576/2009-02.

31 Administrative Proceeding No. 08700.009890/2014-43.

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

33 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.

34 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).

35 Administrative Proceeding No. 08012.007423/2006-27.

© 2020 Law Business Research Ltd

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.

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.[36] 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.[37]

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

36 Administrative Inquiry No. 08700.007338/2013-30.

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

© 2020 Law Business Research Ltd

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.[38] 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.[39]

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.

In January 2013, in a landmark abuse of dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price.[40] 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.

38 Administrative Proceeding No. 08012.008855/2003-11.
39 Administrative Proceeding No. 08012.010208/2005-22.
40 Administrative Proceeding No. 08012.001271/2001-44; defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.

© 2020 Law Business Research Ltd

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.[41] 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.[42] 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.

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'[43] 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

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

42 Administrative Proceeding No. 08012.005799/2003-54.

43 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.

© 2020 Law Business Research Ltd

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.[44]

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.[45] 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 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;[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 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.

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

45 Article 87 of the Competition Law.

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.

© 2020 Law Business Research Ltd

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 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

© 2020 Law Business Research Ltd

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[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 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.[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 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

48 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/.

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.

© 2020 Law Business Research Ltd

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 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.

Note that four out of the six CADE commissioners took office 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.

Finally, in the context of the covid-19 outbreak, CADE has already signalled that it will pay attention to price gouging in connection with essential medical items and certain drugs, but will not directly interfere in pricing policies, which is consistent with its previous practice.

© 2020 Law Business Research Ltd

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* 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.

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

© 2020 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-446-0

© 2020 Law Business Research Ltd