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Brazil: Case Law on Abuse of Dominance

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Introduction

The Brazilian Federal Constitution, in its Title VII (which regulates the Economic and Financial Order), ensures the freedom of enterprise and valuation of human work, observing the principles of national sovereignty, private property, free competition and consumer protection, among others, and also postulates the repression of abuses of economic power intended for market domination, elimination of free competition and arbitrary increase of profits.

Based on such constitutional guarantees from 1988, and aiming to set up a regulatory framework concerned with their implementation, Law 8.884/94 was enacted to prevent and punish infringements to the economic order through the Administrative Council for Economic Defense (CADE) and related administrative bodies of the Brazilian System of Competition Defence (SBDC), ensuring an environment of free competition with the ultimate objective of promoting consumer welfare.

Law 8.884/94 remained in full force until 28 May 2012, in view of the new Brazilian Competition Act (Law 12.529/11), enacted on 30 November 2011 after a long period of discussion before the National Congress. The main purpose of the new legislation was to update the Brazilian antitrust regime, expediting the course of preventive and repressive administrative proceedings, and contributing to the country's economic and social development.

The analysis of SBDC's new operational structure[2] shows that the authorities' work is now faster and more efficient, to the extent that duplicate analysis are no longer performed. When it comes to merger submissions (known as 'concentration acts') it shall be observed that the purpose of expediting the procedural analysis of the cases has been reached by CADE, as well as improvements on reducing the inventory of cases submitted under the former law. The average time of analysis of concentration acts significantly dropped from 154 days in 2011 to 25 days in 2012.[3] However, this is the result not only of a more efficient structure, but also of the significant reduction of cases notified due to the increase of the revenue criteria by the new law[4] and the elimination of the market share criteria.[5]

On the other hand, when it comes to the repressive role of the SBDC, there has not been a significant increase of speed in the opening of new investigations. In view of the high stock of cases, CADE has been more focused on revaluating the investigations in course in order to separate those cases where no evidences have been presented or in which procedural aspects, such as statutory limitation, have not been observed and that would tend to be shelved, from those good cases in which evidences are presented, even if further instructions are required for a successful outcome from the authorities' standpoint. Naturally, CADE has been focusing more on cartel infringements, in particular those initiated through leniency applications, most of which involving global applications.

A greater focus on national cartels, local leniency applications and dawn-raids is still to be seen, although a certain movement in this regard has apparently begun.[6] Also, it is hoped that CADE will put more emphasis on abuse of dominance cases in which enforcement has been, with minor exceptions, marginally conducted. All of this is under the expectation that the reduced number of merger review cases being brought to the authorities will permit CADE to better use its limited resources on current and future investigations.

In this regard, it should be noted that article 36 of Law 12.529/11 provides that a violation of the economic order might exist whenever a given conduct is capable, even potentially, of limiting, restraining or in any way lessening free competition or free enterprise, leading to the control of a relevant market; increasing profits on a discretionary basis; or constituting an abuse of a dominant position in a relevant market. In turn, paragraph 3 of the same article sets forth a non-exhaustive list of conducts that, to the extent they result in, or may potentially result in, one of the effects provided for on article 36 caput, may be considered illegal. Among such practices, one may list collusive practices such as cartels and bid rigging, as well as unilateral conducts that may characterise an abuse of dominant position, such as, among others:

- the limitation or restraint of market access for new companies;
- the imposition of difficulties for competing firms to operate in the market;
- resale price maintenance practices;
- predatory pricing schemes;
- exclusivity agreements;
- discrimination among clients or suppliers;
- tie-in arrangements; or
- refusals to deal.

The existence of market power is not considered to be a violation of the economic order per se under the Brazilian legislation. In order for a dominant firm to be censured by the SBDC, an abuse of dominance should be verified, if the firm enjoys a dominant position in the relevant market and such dominant position is used in a way that could actually, or even potentially, produce any of the anti-competitive effects listed on article 36 of the Brazilian Competition Act. In this regard, under the new Brazilian Competition Act, a dominant position is presumed whenever a company, or group of companies, is able to change, unilaterally or coordinately, the market conditions, or whenever it holds 20 per cent or more of a relevant market.[7]

Among the penalties for infringements to the economic order specified under article 37 of the Brazilian Competition Act are the administrative fines for the companies involved that may vary between 0.1 per cent and 20 per cent of its gross turnover, and may take into account its economic group or conglomerate's turnover, obtained in the year prior to the commencement of the administrative proceedings, in the field of business activity in which the conduct has occurred, and that shall never be lower than the advantage obtained from the conduct, whenever the latter can be estimated. In the case of any other legal entities, public or private, that are not engaged in business activities, the fine shall vary between 50,000 reais and 2 billion reais. Finally, in the case of management

personnel directly responsible for the infringement, provided fault or malicious intent is demonstrated, a fine of 1 per cent to 20 per cent of that imposed to the company may apply.

Case law on unilateral conducts

Notwithstanding the legal provisions and all apparatus assembled by the SBDC for persecuting collusive behaviours and unilateral conducts, the latter has never deserved priority at the Brazilian authorities' agenda.

As mentioned above, within the last few years the SBDC has been very focused in persecuting cartels and bid-rigging conducts. With regard to unilateral conducts, the antitrust authorities have mainly driven their attention to local medical cooperatives for their imposition of exclusivity clauses that prevent doctors from rendering medical services to competing cooperatives. Such cases, which amount to a significant number, have been decided under the framework of unilateral abuses and, in its great majority, have been condemned by CADE, which further requires the cooperatives to terminate and refrain from exclusivity arrangements.

Although some relevant abuse of dominance cases have been recently settled or condemned by CADE, empirically, the majority of such cases have been shelved by the authorities, as it will be observed below.

Companhia de Bebidas das Américas (AmBev) has been represented before CADE in view of its alleged conduct of offering loyalty rebates and bonus schemes to the bars, grocery stores and supermarkets that joined its 'Tô Contigo' loyalty programme. According to the complainant, these programmes were hindering competitors' sales to the extent that one of the requirements for the programme was exclusive purchase of AmBev's products. In 2009, AmBev was convicted and fined more than 350 million reais for the imposition of exclusivity to its clients, which, according to the antitrust authorities, would have inhibited sales of competitor's beer brands, ultimately harming consumers.[8]

Another case involving AmBev concerned the allegation that 630ml returnable bottles limited the shared use of recycling bottles by AmBev's competitors, due to the fact that they were distinguished in terms of size and also contained AmBev's trademark stamp; this would impose extra costs on competitors for identifying and returning 630ml bottles, putting at risk the sharing systems for returnable bottles that have been in force in Brazil for many years. AmBev ultimately entered into a cease and desist commitment (TCC) with CADE in 2010, with no contribution being imposed, but with AmBev's commitment to cease use of its 630ml bottles within a given time period.[9]

A third complaint against AmBev regarded the introduction of one-litre returnable bottles, in which CADE concluded that selling a different distinguished bottle from the compared traditional ones available in the market would not harm free competition, irrespectively of AmBev's ensign in the bottle, thus dismissing the administrative process on May 2012; [10] a quite controversial decision if one considers the commitments agreed between CADE and AmBev on the former administrative process regarding 630ml bottles.

Another relevant case recently decided by CADE involved Visa and VisaNet, on claims that the exclusivity clauses that enabled VisaNet to become the only certificating company of commercial establishments for the acceptance of Visa card payments in Brazil had anti-competitive effects. The defendants entered into a TCC with CADE whereby the parties agreed to allow the certification of establishments by other certificating companies, ceasing the verified exclusivity arrangements.[11] Also, radius clauses aiming exclusivity commitments on shopping centres have been recurrently challenged by the SBDC in recent years, the most recent case involving Shopping Jardim Sul and other companies, which decided to settle with CADE under the condition that they refrain from imposing radius clauses on their tenants, and that they amend existing contracts.[12]

It is important to mention CADE's recent willingness to challenge cases involving sham litigation claims. The most recent example is the conviction, on 18 August 2010, of a publicity and marketing agency, which was fined 1.7 million reais for sham litigation practices. The conduct involved Box 3 Vídeo e Publicidade Ltda.[13]

In addition to the cases mentioned above, another important discussion involves the interaction between Intellectual Property Rights (IPRs) and Competition Laws. These cases involved not only trademarks and patents dully registered before the Intellectual Property National Institute (INPI), which have arguably been used abusively by their owners, but also claims of abusive exercise of rights on issues involving patent pools and technological standard creation. Most of these cases have been shelved by the authorities, although they could have brought interesting issues to be discussed. No cases yet have claimed abusive exercise of IPRs in the context of FRAND commitments, as observed elsewhere around the world.

Microsoft, for instance, had been under the spotlight in Brazil for its alleged anti-competitive conducts. In one of such cases, it was accused of refusing to license its Windows 2000 operational system technology. Visual Black version 6.0, the standard tool for the translation of programs, which has, as its basis, the Windows 95 operational system, did not include Portuguese translation tools with the new reformulation of the operational system. Microsoft was also accused of preventing the development of software companies in the financial application market for Windows, since it included its Money program as part of its Microsoft Office for Small Business software package, using its dominant position to create difficulties for competitors and impeding the development of the free exploitation of industrial and intellectual technology. The case was shelved by CADE in 2007 based on lack of evidence on the infringements.[14]

Microsoft has been also accused of:

- tying its operation system, internet browser and applications;
- charging excessive prices on product updates;
- arbitrarily fixing profit margins;
- conceding licences of restrictive use, in particular with respect to the Exchange program; and
- imposing anti-competitive clauses in their training contracts.

CADE also shelved the case in 2007 based on a lack of evidence brought by the complainants. However, in view of similar cases and condemning decisions abroad, CADE has determined SDE (currently, the General Superintendence) to further investigate Microsoft's conduct. Thus, a new proceeding has been initiated by SDE, which is still pending, no opinion being produced up to now.[15]

Monsanto has also been accused of conditioning the sale of transgenic soya seeds to the sale of herbicides, as well as impeding access of its competitors to the seeds, in an attempt to eliminate competition. The complainant asserted that Monsanto refused to make its genetically modified seeds available for testing by its competitors. The case was shelved in 2007 based on a lack of evidence of tying and based on the legitimate interest of Monsanto not to supply the seeds, in view of the fact that such seeds had not yet, at the time, been launched in the market.[16]

The *Alcoa* case, shelved in 2010, involved a major steel producer accused of restricting the offer of aluminium structures for doors

and windows by means of alleged deceitful requests for the registry of industrial design, patents and utility models, followed by judicial claims filed against the alleged infringing parties. In addition, Alcoa was accused of disclosing to the market intellectual property rights over aluminium structures that hadn't actually been registered. The Brazilian authorities have treated the cause under the sham litigation theory and decided, ultimately, that there was no infringement since the registries of the industrial designs were submitted to the competent agency, which did not amount to an opportunistic conduct in view of possible gaps on the intellectual property right concession proceeding. Also, the authority based the shelving of the case on the fact that the disclosure to the market ultimately involved duly registered trademarks from Alcoa.[17]

Cases involving the licensing of intellectual property rights in the context of technological standards, however, were first brought before the SBDC with a complaint from Gradiente Eletrônica SA (Gradiente) and Cemaz Indústria Eletrônica da Amazônia SA (CCE) against Koninklijke Philips Electronics NV (Philips) and Philips do Brasil Ltda (Philips Brasil).[18] The complainants alleged that Philips was abusing its dominant position in the market of technology supplied for the production of DVD players, by attempting to leverage its position in the downstream market of DVD players through the exclusion of its competitors. According to the complainants, the technology for reading and reproducing DVDs encompasses 39 inventions, 18 of which protected by patents registered before the INPI. The companies holding such IPRs were organised into two different pools: 3C and 6C. Philips was part of the 3C pool and was also in charge of representing the 3C patent pool in negotiating the licensing agreements in Brazil. Fundamentally, what the complainants alleged was that royalties charged by the SEP holders were abusive, which would imply a margin squeeze of the rivals profits to the point which would prevent an effective challenge to the market power of the dominant firms. CADE shelved the case in 2009, supporting its decision, essentially, on insufficient information provided in the case records to verify whether there has been any abusive pricing.

A second case under a similar context was brought by Videolar SA (Videolar) also against Philips, under allegations that the latter was promoting the elimination of competing media formats in Brazil aiming to leverage its dominant position in the technology market, as well as charging abusive prices for the licensing of essential patents for digital media production.[19] The conducts were pursued in the market of optical media or recordable storage, specifically CD-R and the DVD-R discs. CADE ultimately concluded that the performance and outcome of the VHS market did not relate to any conduct committed by Philips, but merely resulted from the technological pre-eminence of optical media in relation to magnetic media, represented by better quality of reproduction, storage and durability, as a typical example of Schumpeter's creative destruction. With respect to the abusive pricing allegation, the complainant asserted that prices being charged in Brazil were significantly higher to the values charged abroad, and that it would be possible to buy CD-R and DVD-R from companies abroad with and without royalty payments, to be delivered in Brazil. CADE concluded that there was no evidence of a strategy to exclude competitors or illicit conducts that could somehow refute the legitimacy on price increases, and therefore that it could not be characterised as an infringement on competition. It was noted that the represented party charged a fixed global price for licensing its patents and that the complainant was actually paying less than the royalty standard charges, in view of the discounts promoted by Philips to reward companies honouring their contractual obligations.

Perhaps the most important case under the scrutiny of the SBDC involving competition and IP rights was brought by the Association of Independent Auto-Parts Producers (ANFAPE) against three of the biggest original equipment manufacturing (OEMs) in Brazil.[20] In short, ANFAPE alleges that OEMs were abusing their market power by legally enforcing intellectual property rights – industrial designs of external auto parts – against independent auto parts manufacturers. Such rights aim at inhibiting the production and sale of copies of protected products in the market. To be noted in this regard is the fact that all judicial decisions related to the issue have confirmed OEMs' intellectual property rights, thus ordering seizure measures of the products and preventing the defendant from continuing to produce auto-parts subject to protected industrial designs. Although SDE's legal opinion suggested the shelving of the case, based on the arguments that the protection granted to the OEMs' industrial designs was in compliance with the Intellectual Property Act, validly registered and that such restriction of IPRs did not foreclose the auto parts market since such companies could develop their own alternative and similar auto parts without copying the protected products, CADE promoted the conversion of the preliminary investigation into Administrative Process in December 2010 and sent the case for further instruction and investigation by SDE. The reporting commissioner based its decision on the fact that:

- IPRs granted OEMs monopoly in the aftermarket;
- the market in question involved lock-in effects;
- competition in the primary market did not seem sufficient to guarantee competition on the secondary market;
- effective exercise of market power in the aftermarket was possibly resulting in consumer losses; and
- there were a lack of plausible objective justifications.

The case is pending decision and currently under investigation by the General Superintendence.

The latest decision issued by CADE regarding unilateral conducts, issued in 2013, was the condemnation of SKF do Brasil Ltda for resale price fixing. It is worth mentioning that, until the judgment of the referred case, CADE had not effectively analysed the issue, mainly as a result of the antitrust agency's inability to prove the inefficiency and consequent illegality of resale price maintenance practices in those cases reviewed. Thus, from such cases judged up to the new referred decision, it was possible to infer that there were no competition concerns in cases of:

- maximum resale prices fixing;
- mere price suggestion; or
- in which the involved company lacked market power, including minimum resale prices.

In the recent decision involving SKF do Brasil Ltda,[21] however, CADE further reviewed the issue regarding resale price maintenance, and a more objective criteria for the configuration of the anti-competitive conduct was established. According to the majority of the commissioners currently at CADE's Tribunal, the imposition of minimum resale prices or margins is an illicit conduct by its own object. CADE thus understood that it is upon the defendant, and not the authorities, to prove the lack of market power or, alternatively, that the conduct generated economic efficiencies that surpassed its potential anti-competitive effects. Thus, CADE concluded that in cases regarding minimum resale price fixing, the burden of proof is inverted. It is important to note that, according to CADE's analysis, vertical restrictions were established based on the imposition, but

not the mere suggestion, of prices or minimum margins for resale by SKF to its distributors.

CADE has thus provided guidance, based on Commissioner Marcos Paulo Veríssimo's vote, for the analysis of those 'acts that aim at restraining competition, and therefore would have as their sole purpose such restriction, deserving a more stringent treatment, from those that only indirectly restrain competition, being this last one, indeed, ancillary to an independent and originally licit business purpose'. In other words, a differentiation was made between illicit conducts by their object and illicit conducts by their effects.

In view of the above, CADE stated that the imposition of minimum prices has the ability and purpose of restricting competition and only in exceptional cases, depending on specific analysis, could such conduct be considered as ancillary to other rational and lawful conduct. In other words, CADE stated that the imposition of minimum prices is presumed as unlawful conduct, which entitles the antitrust authorities to merely prove the material occurrence of the fact (tacit or written agreement for resale price maintenance or imposition of minimum resale prices). If the conduct's materiality is proven, then there is a relative presumption of its illicit character and it will be upon the defendant to refute such.

According to Commissioner Marcos Paulo Veríssimo, this presumption of illegality could be refuted if neither the manufacturer, nor the distributors, jointly hold 20 per cent or more of market share; and none of the manufacturers or distributors involved in the conduct (jointly considered) are among the four largest players in the relevant market, if the joint share of such players is above 75 per cent of the relevant market. If the defendant is not able to prove the lack of market power, it shall prove that the conduct generated economic efficiencies that couldn't be achieved by other vertical agreements or other less restrictive means, and which are clearly more significant than the potential negative effects generated by the conduct, resulting in a proven greater benefit to consumers.[22]

CADE's described decision brings an important guidance to the companies in relation to resale price-fixing practices. In the words of CADE's president: 'Any behaviour that means a restriction directly related to price may be targeted by CADE, whereas there is certain scepticism related to efficiencies that compensate the anti-competitive risks, deriving, for example, from an incentive for parallel behaviour among companies.'

While on one hand the decision sets an important precedent from CADE, since there are now clearer standards considering the situations in which resale price maintenance practices are deemed anti-competitive, on the other hand, a major discussion has been raised regarding the constitutionality of the presumption of illegality and the inversion of the burden of proof with regards to the principle of presumption of innocence and rule of reason that permeates the Brazilian legal system and competition rules.

Conclusion

As noted above, until recently the investigation of unilateral conducts has been far from the SBDC's enforcement priorities. However, changes on such enforcement policies are expected and, although timidly, have already began to ascend. Much in view of the restructuring of the Brazilian competition system which has significantly reduced the number of concentration acts submitted for the analysis of the antitrust authorities, it is now expected that their resources and efforts will be shifted towards investigations. Although cartel enforcements and leniency applications shall remain central to the Brazilian antitrust police, there shall be space, and definitely a need, for more investigations involving unilateral conducts.

The poor legacy of the former enforcement decade regarding abuse of dominance in Brazil can be further confirmed in view of the disperse attempts to discipline this nature of conduct, as verified from the analysis of the case law referred in this paper. In most attempts, there has been either poor instruction from complainants or a lack of resources from the authorities to further investigate the cases and conclude on their effects, failing to providing further guidance on the conduct examined. And in fewer sparse decisions, such as the recent decision on resale price maintenance, there have been some attempts to clarify certain issues regarding the Brazilian antitrust authorities' understanding of unilateral conducts. However, even in such cases, there is not yet a recognisable standard put forward which is able to provide the minimum legal certainty demanded by the business community.

In this sense, a hope for better signalling by the authorities in the future could depend upon the expected progressive increase in the number of CADE's personnel and the expected shift of enforcement priority described above. Relying on cooperation with foreign authorities and pursuing cases involving global issues on the agenda of more mature authorities may also provide the needed expertise to the Brazilian Competition Authorities, as much as the required confidence to bring future complex claims, in particular those involving abuse of dominance issues.

Notes

1 Mário Roberto Villanova Nogueira and Bruno De Luca Drago are partners of the Competition Department at Demarest Advogados, in São Paulo, Brazil. Also contributing to the present article are associates Fabianna Vieira Barbosa Morselli and Marco Antonio Fonseca.

2 The new SBDC is composed of CADE and the Secretariat of Economic Monitoring (SEAE), the latter with residual functions related to competition advocacy. The General Superintendence (SG) was also created and inherited the functions previously performed by SDE. Besides, SG is empowered with the function of deciding Concentrations Acts analysed under the fast-track procedure.

3 www.cade.gov.br/Default.aspx?59ec3dcc24f90e15e16fc191a6aa.

4 Article 88 from Law No. 12.529 was modified by Administrative Rule No. 994, from 2012, which sets 750 million reais and 75 million reais as the revenue criteria. These numbers must be verified considering the economic groups involved.

5 Article 54, section 3 from Law 8.884/94, revoked by the new antitrust law, Law 12.529/2011.

6 In March 2013, CADE's General Superintendence promoted search and seizure in a cartel investigation in the market of wheat flour in Brazilian northeast. In November 2012, a search and seizure operation was performed in several cities to investigate cartel practices in the silicate market. In September 2012, another search and seizure operation was performed in an investigation regarding an alleged cartel in the salt industry in Rio Grande do Norte. In the same month, another search and seizure was performed in a bid-rigging investigation regarding uniforms, backpacks and school material purchase on São Paulo state. In July 2013, dawn raids were performed at the headquarters of companies under investigation for alleged bid rigging on the acquisition of train wagons, maintenance and construction of rail and metro lines.

7 Article 36, section 2, of Law 12.529/11.

8 Administrative Proceeding No. 08012.003805/2004-10.

9 Requirement No. 08700.001238/2010-57.

10 Administrative Proceeding No. 08017.002474/2008-24.

11 Requirement No. 08700.003240/2009-27.

12 Requirement No. 08700.003933/2009-10.

13 Administrative Proceeding No. 08012.004283/2000-40.

14 Preliminary Investigation No. 08012.002034/2005-24.
15 Preliminary Investigation No. 08012.010027/2007-68.
16 Preliminary Investigation No. 08012.008659/1998-09.
17 Preliminary Investigation No. 08012.005727/2006-50.
18 Preliminary Investigation No. 08012.001315/2007-21.
19 Preliminary Investigation No. 08012.005181/2006-37.
20 Administrative Proceeding No. 08012.002673/2007-51.
21 Administrative Proceeding No. 08012.001271/2001-44.
22 It is important to highlight that the hypotheses mentioned above does not constitute the only possibilities of repelling the presumption of illegality, since it is possible that parties eventually investigated are successful in demonstrating other efficiencies resulting from resale price maintenance.

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