DIZIONARIO SISTEMATICO DEL DIRITTO DELLA CONCORRENZA

a cura di

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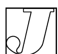
ESTRATTO



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Private enforcement of Antitrust Law in Brasil

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I. Introduction

Competition policy and legislation in Brazil are relatively young as the country's economy opened to free trade and free market only two decades ago.

Besides its youth, competition enforcement in Brazil has grown soundly, especially in the last decade or so, with new and effective investigative tools such as the leniency program, authorized dawn raids and wire-tapping.

Competition decision-making in Brazil has shown maturity also by sanctioning state-owned giants, long-standing cartels and huge and aggressive quasi-monopolists with record fines and other penalties.

CADE is struggling since 2002 to confirm its prerogatives in the banking and financial sectors against a Government decision[1] dated 2001 that deemed the Central Bank of Brazil, the financial and banking regulator, as responsible for scrutinizing conducts and reviewing transactions.

The Competition System in Brazil has very recently gone through a deep change as the merger review system shifted from a post-merger to a pre-merger one, bringing many challenges to the country's competition authorities as we point below.

In this work we will review the historical background of the creation of a Competition Law and Policy in Brazil, as well as the ancient and current institutions and specific legislation dealing with conducts and mergers and acquisitions.

Furthermore, we will analyze the approved new competition legislation for Brazil, which was effective May, 29th, 2012, with important changes in relation to the unification of institutions, new merger review mechanism, new criteria for submission of transactions and new criteria for imposing fines and other sanctions.

Finally, we offer a brief analysis of the status of private antitrust enforcement in Brazil and the enormous possibilities to increase such activity in the country.

II. Historical background

The history of competition law and policy in Brazil dates from 1962, when CADE – the Administrative Council for Economic Defense – was created through Law n. 4.137 as a consulting Government commission with powers only to present recommendations to the Executive branch as at that time the State controlled prices in most sectors, and many of the country's largest enterprises were either state owned or publicly sanctioned private monopolies.

Law n. 8.884/94 transformed CADE into an independent administrative tribunal with extensive new powers. Its decisions became final and appealable only to the judicial courts.

The promulgation of the new competition law in Brazil followed major economic changes brought by the 1988 Constitution and the "Real Plan" that created a new currency and implemented strict fiscal policies, as well as re-opened the economy through the elimination of in-

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[1] Parecer AG.U. GM - 20, of April, 5th, 2001. Available at: *http://www.agu.gov.br/sistemas/site/PaginasInternas/NormasInternas/AtoDetalhado.aspx?idAto=8413.*

ternational trade barriers and launched a broad privatization process.

All these economic adjustments carried intensive and progressive in-flow of foreign capital into the country what, among other reasons, culminated with many operations of mergers and acquisitions.

In order to perform competition and antitrust scrutiny, Law n. 8.884/94 also created two secretariats to help CADE: the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance, responsible for instructing merger and acquisition cases and presenting recommendations to CADE; and the Secretariat of Economic Law in the Ministry of Justice, in charge of instructing conduct cases and presenting recommendations to CADE also.

This three-agency system was then called "The Brazilian Competition Policy System - BCPS".

III. The New Brazilian Competition Law

1. *Conducts*. – The Brazilian Constitution provides unequivocal basis for competition policy. Article 173, paragraph 4 provides that "[t]he law shall repress the abuse of economic power that aims at the dominance of markets, the elimination of competition, and the arbitrary increase of profits".

Article 170 ponders also that the "economic order" shall be "based on the appreciation of the value of human labor and on free enterprise". It establishes that some principles must be respected, including "free competition", "consumer protection", "private property" and "social role of property".

As a corollary of Constitutional provisions, Article 1 of the current Brazilian Competition Law (Law n. 12.529/11) states that the statute's objective is to "set out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power".

Articles 36 and 88 of Law n. 12.529/11 are considered the most substantive provisions of Brazil's current competition law. Differently from the laws of many other Jurisdictions, that separately proscribe anticompetitive agreements and abusive conduct by single firms, Article 36 deals with all types of anticompetitive conduct. In turn, mergers, acquisitions, and similar transactions are addressed in Article 88.

Article 36 of the law provides that "any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order".

The specified effects are (1) to limit, restrain or in any way injure open competition or free enterprise; (2) to dominate/control a relevant market of a certain product or service; (3) to increase profits on a discretionary basis; and (4) to abuse dominance.

The article defines that the "market control/dominance" violation described in item (2) does not include control achieved by means of "competitive efficiency". Another provisions states that market control is "presumed" when a company or group of companies holds a 20 per cent share, and vests CADE with authority to change the 20 per cent presumption with respect to specific sectors of the economy.

Article 36, § 3° presents an extensive but illustrative (*numerus apertus*) list of conducts that are considered unlawful if they produce the effects enumerated in the first part of Article 36. The listed practices include various kinds of horizontal and vertical agreements and unilateral abuses of market power. But, again, they are only examples of possible unlawful practices and do not exhaust the possible other conducts not listed.

With respect to horizontal agreements, the list covers collusion among competitors, including agreements to fix prices or terms of sale, divide markets, rig bids, and limit research and development. The listed vertical agreements include resale price restraints and other restrictions affecting sales to third parties (including limits on sales volumes and profit margins), as well as price discrimination and tying.

As to unilateral conducts, the list specifies various actions to exclude or difficult new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels.

Other unilateral practices cited in Article 36, § 3° are those to impose unreasonable contractual terms or conditions, "bar the use of industrial or intellectual property", "unreasonably sell products below cost", discontinue production or other business activities without good cause, "affect third-party prices by deceitful means", hoard or destroy raw materials and intermediate or finished goods (including agricultural products), "require or grant exclusivity in mass media advertisements", impair the operation of manufacturing or distribution equipment, impose "abusive prices", or "unreasonably increase the price of a product or service".

2. *Mergers*. – Article 88 of Law n. 8.884 is the one applicable to mergers and its § 5° reads that:

Mergers and acquisitions that imply the elimination of competition in a substantial portion of the relevant market, or that may create or strengthen a dominant position or may result in the control of relevant market of goods or services shall be prohibited, except in exceptional conditions set forth in § 6° of this article.

Section 6° of Article 88 provides that a transaction submitted for review may be approved if it meets all four of the following conditions: "(1) It is intended to "increase productivity; improve quality of product or service; cause an increased efficiency or foster technological or economical development. (2) It generates benefits that are equitably allocated between the merging parties and consumers. (3) It does not eliminate 'a substantial portion of the relevant market for a product or service'. (4) Its provisions are no more restrictive than necessary to obtain the beneficial effects[2].

The current Horizontal Merger Guidelines state (paragraph 2) that "the rule of reason [is] the fundamental principle in the review of mergers", attributing this proposition to the statement of objectives set out in Article 1 of the Competition Law.

This language, along with that of Article 88 itself, could be construed to place the burden on the merging parties of showing that their transaction is economically beneficial.

In practice, however, CADE has not imposed such a requirement, intervening only when it concludes that, on balance, there would be a significant lessening of competition. Thus, Section 6° of Article 88 is considered to establish an efficiencies defense, to be applied only in the case of mergers that are otherwise deemed anticompetitive.

Such a provision is found in some form in the merger review systems of several countries, allowing the approval of otherwise anticompetitive mergers on the grounds of overriding national interest. To date, however, no merger or acquisition in Brazil has been approved under this provision.

Article 88 Section 3° also requires that transactions must not be consummated before clearance from CADE and empowers CADE to sanction the non-compliance with the requirement by imposing a fine of not less than BRL 60 thousand and up to 60 million (USD $24,900 to USD $24.9 million), besides annulment.

While most notifications submitted under Article 88 relate to mergers and acquisitions, some are for agreements involving distribution, franchising, licensing, joint ventures and private consortia.

The chapeau of Article 88 establishes special notification thresholds for mergers, stating that notification is mandatory when, cumulatively: "(*i*) at least one of the groups involved in the transaction had total turnover in the previous year of BRL 750 million (USD 375 million) within Brazil; (*ii*) at least another group involved in the transaction had total turnover in the previous year of BRL 75 million (USD 37,5 million) within Brazil.

[2] Competition Law and Policy in Brazil - A peer review. Inter-American Development Bank and Organization for Economic Co-operation and Development. 2005. Accessible at: *http://www.oecd.org/dataoecd/12/45/35445196.pdf*.

Transactions notified to CADE under Article 88 may be decided in three possible ways: unconditioned approval, approval with conditions, or denial.

IV. Current Brazilian Competition Institutions

1. *Cade*. – Law n. 12.529 deems CADE as "an independent federal agency", associated with the Ministry of Justice for budgetary purposes (Art. 4). CADE's role in competition law enforcement is to adjudicate alleged violation of the law and impose appropriate remedies and fines as well as make a final review and determination for mergers and acquisitions.

CADE is composed of: (*i*) the Administrative Tribunal of Economic Defense; (*ii*) the General Superintendence; and (*iii*) the Department of Economic Studies. The administrative tribunal consists of a President and six Commissioners appointed by the President of the Republic and approved by the National Senate for not renewable terms of 4 years (Art. 6). Appointees must be citizens of more than thirty years of age and "renown for their legal or economic knowledge" and "unblemished reputation". They may be removed from office only after not appealable court decision for certain criminal or administrative offences specified by law (Art. 7). Members of CADE, while in office, may not undertake outside employment (except of an academic nature) or engage in political activities.

Law n. 12.529/11 also provides for an independent Chief Counsel for CADE who is appointed by the Minister of Justice, after consultation with the Attorney General of the Republic, and commissioned by the President of the Republic after Senatorial approval.

The Chief Counsel serves under the same conditions as applied to Commissioners with respect to qualifications, and removal (Art. 16). However, its term of office shall be of 2 years, with the possibility of one re-appointment.

The Chief Counsel's statutory duties are to provide legal advice to CADE, render opinions on cases pending before CADE for judgment, defend the agency in court, arrange for judicial execution of its decisions, and (with CADE's preliminary approval) enter into settlements of cases pending in court (Art. 15).

From November, 2002 on a representative of the General Prosecutor's Office also seats at CADE public hearings and handles cases submitted to CADE for review. CADE may request the General Prosecutor's representative to enforce CADE decisions in court and take other judicial action in furtherance of the Prosecutor's statutory duty to protect the economic order. A description of the Public Prosecutor's role and relation to other Brazilian legal agencies appears below.

2. *SEAE - Secretariat for Economic Monitoring*. – The Secretariat for Economic Monitoring – SEAE is headed by a Secretary appointed (and dismissible) by the Minister of Finance and has three main responsibilities: (1) to perform certain competition advocacy functions under the competition law, (2) to provide economic analysis for economic regulatory programs (including analysis of prices), and (3) to monitor market conditions in Brazil.

V. Most Substantial Changes in the New Brazilian Competition System

On November 30th, 2011 Law n. 12.529 was enacted restructuring the Brazilian Competition Policy System (BCPS).

As seen above, by its provisions the current Administrative Council for Economic Defense (CADE), will be composed of two main bodies: one decision-making – the Competition Tribunal – and the other an instruction and recommendation one – the General Superintendence – in place to the former Secretariat of Economic Law (SDE) previously placed in the Ministry of Justice.

In addition to these structural changes, the new law redefines the functions of the Secretariat of Economic Monitoring of the Ministry of Finance (SEAE), focusing on the activities of "competition advocacy", including within the public sector.

The "new CADE" and SEAE will form

then the new Brazilian Competition Policy System - BCPS.

The new Brazilian Competition Law is effective since May 29th, 2012.

1. *New Pre-Merger Analysis System*. – One of the main changes brought by the new law is the introduction of the pre-merger analysis system, in line with what most world leading antitrust Jurisdictions already do.

Previously (under past Law n. 8.884/94), transactions had to be notified to competition authorities up to 15 business days after its consummation (binding agreement).

The new legislation intends to avoid legal uncertainty and transactional costs associated with any decision by CADE to disinvest in a scenario where subsequent acts to the transaction were already accomplished and implemented.

It is natural that after a while, companies involved in a merger or acquisition seek economic advantage of synergies, making a separation of operationally complex business processes and routines.

Intuitively, it is also more difficult to reverse a merger or acquisition ever undertaken than to prevent that it initially exists, that is, when it is just a set of intentions and understandings.

Despite legislative changes in line with international best practices, there is a considerable gap between the written law and the reality of daily practice.

Thus, in a crucial moment of antitrust transition in the country, much has been debated over how to avoid that the new pre-merger analysis system implies significant delays in the implementation of operations.

2. *Agility, Legal Certainty and Economic Timing*. – There is reasonable consensus in the Brazilian antitrust community on the inefficiency and anachronism of maintaining a system with several different instances, involving multiplication of opinions and repetition of hearings and meetings.

With the new law, merger cases will initially be scrutinized only by the General Superintendence, which could approve them without consulting the Tribunal, except for the possibility of a callback of the case by any member of the Tribunal.

If there is no callback, the tribunal will only be triggered when the General Superintendent concludes that the operation generates or may generate harm to competition, and, therefore, requires some State intervention, situation in which the case will be sent to the Tribunal for final decision.

In the system of the new law, cases of potentially anticompetitive conduct will be analyzed preliminarily as "administrative investigations" (AIs), passing to a higher stage of "administrative processes" (APs) when evidences become more robust and deserve further analysis.

All APs must be reviewed by the Tribunal, even in the case that the Superintendent concludes that no company or individual involved in the investigations shall be sanctioned.

However, if an AI does not present sufficient evidence it will not go further to the next stage (the AP) and will be terminated.

Following the procedure in merger cases, any member of the Tribunal may question the termination of an IA and call it back for further analysis.

Another significant change introduced by the new law is related to the role of the Federal Prosecutor's Office. Under the new system, the Federal Prosecutor's Office opinion on merger and acquisition cases will no longer be mandatory. That, however, in our view, does not preclude its general participation in line with its institutional functions and prerogatives, including the protection of diffuse interests of society.

With respect to potentially anticompetitive conducts, the new law maintained an outstanding performance of the prosecutors regarding the investigations and the implementation of the leniency program.

Another important innovation was the creation of the Department of Economic Studies of CADE, serving both the Superintendence and the Tribunal. This legal innovation responds to the growing so-

phistication of antitrust economic analysis, often permeated by complex econometric opinions and studies.

The new law also strengthens the independence and autonomy of the members of the Tribunal and the General Superintendent. The terms of the President and Board members (Commissioners) of the Tribunal are extended from 2 to 4 years, removing the possibility of renewal. Commissioners' terms will be unmatched in order to allow substitutions to occur in order to preserve as much institutional integrity as possible. The General Superintendent, in turn, will have a renewable 2-year-term.

3. *New Criteria for Notification of Mergers and Acquisitions*. – Another relevant change that intends to offer more flexibility in the analysis of mergers and acquisitions concerns the amendment of the criteria for notification of transactions in order to reduce the amount of transactions submitted to CADE.

Current parameters have led to an excessive number of notifications with little competitive impact.

Past law provided that operations in which any of the participants had shown revenues exceeding BRL 400 million (US$ 200 million) in Brazil, or that resulted in a concentration equal to or greater than 20 per cent of a relevant market should be submitted.

Under the new legislation, the criterion of market share is removed and introduced an "additional criteria" on revenue through which the second (or other) parties to the operation will have to present a revenue (turn over) of at least BRL 75million (US$ 37 million) in Brazil, besides un upgraded main party BRL 750 million (US $ 375 million) revenue criterion.

That is, in current reality, any operation performed by a large economic agent, albeit in conjunction with other(s) small economic agent(s), should be compulsorily notified to CADE for review.

With the new law criteria, operations without any impact on the market will no longer be notified, saving public and private resources and time.

With regard to new revenue criteria, it is to be highlighted that an important provision establishes a safeguard to CADE, which within one year from the date of consummation of a transaction, may require the submission of operations that do not fit the revenue criteria described generically by the law.

4. *New Criteria for Fines*. – Differently from the past legislation that provided that undertakers could be fined for anticompetitive behavior from 1 (one) per cent up to 30 (thirty) per cent of their gross total revenue; the new law sets that fines will range from 0.1 (zero point one) per cent up to 20 (twenty) per cent of the revenue in the specific "branch of business" where the conduct took effect (taxes[3] excluded).

For executives, fines may reach up to 20 (twenty) per cent of fines imposed to companies and the rules of responsibility are based on negligence, not strict liability as it used to be under past legislation.

Also, under past legislation, fines for executives could vary from 10 (ten) per cent up to 50 (fifty) per cent of the fines imposable to the companies involved.

It seems a little detail the slight difference in the wordings "imposed" and "imposable", but they, in fact, carry a substantial distinction in terms of the possible amount of fines.

"Imposable" means what is possible, not the actual sanction. If the criteria are that fines to companies may range from 0.1 to 20 per cent, then the percentage of fines applicable to executives may be calculated over the possible ranging of fines related to companies (from 0.1 to 20 per cent), and not over the percentage effectively imposed to companies.

5. *Cartels, Leniency Agreements and Settlements*. – It is well recognized that one of the most effective tools for fighting cartels is leniency. This assertion is also valid for the Brazilian reality. Many im-

[3] Past and new law mention that only one type of tax («*imposto*») is to be excluded from the calculation of fines.

portant cases of cartels in Brazil only arrived at a conviction on the grounds of leniency.

The new law brings significant changes in relation to the leniency program. Under current applicable legal texts, leaders of a cartel could never start or join a leniency agreement.

This is reversed by the new law and no restrictions are made on that direction, ideally creating more incentives to support the Brazilian leniency program, increasing the countries anti-cartel policy.

The law also extends the effects of leniency to the same group of companies (*de jure or de facto*) and employees involved in the conduct.

Such changes bring more legal certainty to possible applicants and, therefore, have the potential to increase the effectiveness of such policy.

On the other hand, recent CADE regulations have modified the basis for settlements in cartel cases. Under the new regulations, parties involved in a cartel practice now must mandatorily confess guilt or, at least, admit participation in the practice in order to be able to start negotiating a settlement with CADE.

VI. Private actions for damages (Private Enforcement)

It is worldwide acknowledged the compensatory and deterrent potential of antitrust private lawsuits for damages and their contribution to a healthy competitive environment, increased social well-being and the protection of public interest.

According to a research by Connor and Helmers[4] analyzing international cartels prosecuted in various Jurisdictions in the world between 1990 and 2005, 38% of the economic consequences imposed to participants in international cartels came from private lawsuits.

Civil antitrust claims in Brazil that have the scope of repairing damages caused by anticompetitive practices are independent from CADE's proceedings[5].

While the administrative procedure aims at the imposition of a fine for an administrative violation, the lawsuit seeks compensation for damages caused or the cessation of the conduct. There is, of course, a superposition of the effects of these two proceedings.

In both, it is possible to obtain cessation of anticompetitive practice and that the offending agent that caused the damage suffers economic loss, either by paying administrative fines or by compensating the victims.

This type of lawsuit is prescribed by the Brazilian Federal Constitution, the Civil Code and Law n. 12.529/11 (the Competition Law). Such claims have strong potential for deterrence of anticompetitive practices and thus to enforce antitrust law and policy, as they allow the repair of damages, what is not the case for the administrative procedures within CADE.

A study published in 2008[6], concerning almost 400 court cases in Brazil, concluded that most of private antitrust lawsuits are filed in the rich and central states of Minas Gerais, São Paulo and Rio Grande do Sul, and in the "Financial Products and Services" and "Fuels" sectors.

Other conclusions of that paper are that: (1) the number of court decisions on the matter have grown significantly since 2006; (2) lawsuits that deal with anticompetitive practices in the civil sphere are not necessarily based on the provisions of the Competition Law; and (3) that there is a general lack of knowledge about the ap-

[4] John Connor e Gustav Helmers, Statistics on Modern Private International Cartels, 1990 - 2005, in Working Paper No. 7-1 American Antitrust Institute. Accessible at: *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039#PaperDownload*.

Apud Gisela Ferreira Mation, *As Ações Civis para Cessação e Reparação de Danos Causados por Condutas Anticoncorrenciais no Brasil*. III Prêmio SEAE/2008. Available at: *http://www.seae.fazenda.gov.br/conheca_seae/premio-seae/iii-premio-seae/estudantes-de-graduacao*.

[5] Jayme Vita Roso, Novos Apontamentos à Lei Antitruste Brasileira. LTr. São Paulo, 1998.

[6] Gisela Ferreira Mation, *As Ações Civis para Cessação e Reparação deDanos Causados por Condutas Anticoncorrenciais no Brasil*. III Prêmio SEAE/2008. Available at: *http://www.seae.fazenda.gov.br/conheca_seae/premio-seae/iii-premio-seae/estudantes-de-graduacao*.

plication of the Brazilian Competition Law in the civil sphere.

Recommendation 6.2.20 from OECD[7] advises CADE to "treat the civil antitrust lawsuits for damages as an opportunity for competition advocacy and to disseminate information about the competition impact of these disputes", pointing the need for mapping such lawsuits:

«In this sense, CADE should also commit to develop a database that contains information about the volume, nature and outcome of civil actions for antitrust damages, filed pursuant to Article 29 of Law n. 8.884/94 and other laws, such as the Code of Consumer Protection and code of Civil Procedure, which can serve as a parameter for antitrust damage claims. Such information is needed to assess whether private antitrust actions are helping or hurting the enforcement of competition law in the country».

In a recently published work entitled "Private Enforcement against International Cartels in Latin America: the U.S. Perspective", Crane[8] stresses that the characteristics of the Latin America environment that affect most lawsuits by private agents with claim for damages caused by anticompetitive practices are: (*i*) aggregation of demands; (*ii*) access to information; and (*iii*) administrative and judicial antitrust knowledge and skills.

The Brazilian context is apparently quite advantageous in terms of aggregation of demands and mechanisms of collective actions.

This seems to be a sensitive issue even in countries where private enforcement is considered much more developed. The European Commission White Paper[9], for example, suggests that Member States take measures to promote:

«(1) Lawsuits brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified victims or, in a relatively limited number of cases, identifiable victims; and

(2) Collective proceedings by accession, in which victims expressly decide to combine their individual claims in a single action».

In general, such mechanisms are now available under Brazilian law.

The mechanisms of collective protection of free competition in the Brazilian Judiciary are: (1) public civil actions (*ações civis públicas*); and (2) collective actions for protection of homogeneous individual rights (*ações coletivas para tutela de direitos individuais homogêneos*).

Although many individual consumers are legitimated to file antitrust lawsuits, there is a natural difficulty for both, the filing of an individual claim itself, and the mutual articulation among interested individuals.

It is precisely in an effort to aggregate such different individual demands that the Prosecutor's Office in Brazil can be of crucial aid.

One of the great difficulties of antitrust lawsuits in the civil sphere is the access to information necessary to prove the conduct and the damage. This problem is reflected in both the lack of knowledge of the existence of a conduct by individuals or entities to file a legitimate lawsuit against those who caused the damage, as well as the difficulty in estimating the damage.

The results of a jurisprudence research[10] related to legislative reference and carried out in 2008 show that Law n. 8.884/94 is still quite less used to ground antitrust damage claims than others legal statutes, as the Civil Code and the Code of Consumer Protection, even in cases where terms referring directly to anticompetitive conducts are used, such as "tying arrangement" and "cartel".

[7] Competition Law and Policy in Brazil - A peer review, Inter-American Development Bank and Organisation for Economic Co-operation and Development, 2005. Accessible at *http://www.oecd.org/dataoecd/12/45/35445196.pdf*.

[8] Daniel A. Crane, *Private enforcement against International Cartels in Latin America: a U.S. Perspective*, April 2008. Cardozo Legal Studies Research Paper n. 231. Available at: *http://ssrn.com/abstract=1120069*.

[9] Commission of European Communities. White Paper on damages actions for breach of Community rules in the antitrust field. Available at: *http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/citizen_pt.pdfp. 4-5*.

[10] Gisela Ferreira Mation, *op. cit.*, p. 67.

Furthermore, Law n. 12.529/11 (or its predecessor Law n. 8.884/94) is used also to substantiate claims in respect of conducts that do not fall within the scope of competition law, such as "disloyal competition" or "dumping". This data indicate both a degree of unawareness about the Competition Law as well as that under the Brazilian legal culture such instruments are not used in the most appropriate manner.

In this context, CADE has a pivotal role in making its decisions the most public possible, easing the access to information and reducing the lack of familiarity of individuals and institutions involved with the competition law.

In the recent and so called "Gas Cartel Case"[11], CADE for the first time made specific and direct recommendations for victims to go to court in order to get possible compensation for their damages.

The reporting and leading vote[12] on the case specifically stressed that the sanction imposed by CADE was dedicated primarily to address the harm caused to competition as a means of guiding economic activity in Brazil.

CADE explained that the fine imposed by the Council did not repair the material and moral damages caused to individuals and that the compensation for such damage should be engendered by the appropriate judicial process.

For CADE, the most effective route in Brazil for that intent is the public civil action. According to art. 1, section V of Law n. 7.347/85, a public civil action may be filed in relation to an "infringement of the economic order and the popular economy". Such specific lawsuit is an essential element for the general policy of protection of competition.

For that reason, CADE submitted the decision to the representative of the Prosecutor's Office for examining the possibility of structuring a public civil action in that endeavor.

CADE also reasoned that it was noteworthy the possibility of the filing of private lawsuits by victims of the cartel in seeking compensation for damages. Also, that the usefulness of private lawsuits for the promotion of competition had already been proven in foreign Jurisdictions.

In the United States, for instance, where the law provides that those affected by a cartel are entitled to an amount equivalent to three times the compensation ordinarily applicable to private litigation has already become a key part of antitrust policy in the country. It is a further disincentive to breaking the law.

Further on, the Brazilian Competition authority clarified that in the country; however, private lawsuits for damages caused by cartels are still rare. In that context, the country loses an important factor to discourage the practice of collusion and victims are not properly compensated.

Given the need to stimulate and promote the filing of private lawsuits by victims of that sanctioned cartel, CADE found imperative to disclose such possibility to the potential interested parties. For that reason, a copy of the decision was immediately sent to the following organizations: 1) Federal Council of Medicine, 2) the National Confederation of Industry, 3) National Association of Private Hospitals, 4) Brazilian Federation of Hospitals, and 5) Ministry of Health. It was expected that those agents had better ability to identify and notify potential applicants for compensation of damages.

Another important point presented by CADE, refers to the provision of evidence for lawsuits for damages. CADE's decision on the case contains only the authority's interpretation of the evidence. The documents themselves, including those electronic, can not be provided to the public by CADE, which is committed to maintaining the confidentiality of such material. The lack of access to regular and electronic documents clearly impairs the ability of victims to demand appropriate compensation.

For this reason, CADE recommended to the courts involved in the criminal investigation related to the process to publicize all documents obtained at the begin-

[11] Case Law n. 8012.009888/2003-70. Available at: *http://www.cade.gov.br/temp/D_D000000551201660.pdf*.

[12] Reporting commissioner Fernando de Magalhães Furlan. Available at: *http://www.cade.gov.br/Default.aspx?59d92dfb3aef0212e234c199ab*.

ning of the investigation. More than six years had gone through already since documents were seized. The Brazilian authority pondered that they no longer had relevant business value and, therefore, there would be no harm in disclosing them.

Such documents had been examined by the main competitors of each company involved, what reinforced the view that they had no more value to those concerned.

Moreover, the Council settled that no personal information was found in the documents obtained. Therefore, no harm to privacy would be encountered in the disclosure of such documents.

CADE finally ruled that if there was an objection to the full disclosure of documents, it was alternatively possible to provide only the information specified in the decision, which focus and content were associated essentially only to the unlawful practice.

As a positive result of this new approach by CADE towards civil antitrust litigation in Brazil is the information that the Association of Hospitals of Minas Gerais has obtained, at the 28th Civil Court of Belo Horizonte, an injunction requiring companies sanctioned by CADE (Praxair, Air Liquide Brazil, Linde Gases, Air Products Brazil and SBI) to reduce the prices charged by the medicinal gas (oxygen) supply to 260 hospitals in that Brazilian state.

VII. Conclusions

Competition policy in Brazil celebrated 50 years of existence in 2012.

Many new challenges will continue to defy the Administrative Council for Economic Defense (CADE) this year such as the transition and implementation of a brand new law that incorporates a pre-merger analysis system and enables the unification of agencies.

Such challenges come after an international recognition of the work of CADE in the last recent years. The agency was elected “Agency of the Year - Americas” in 2011 by the editorial board and by the subscribers of the English publication *Global Competition Review*, considered one of the most respected in the world on the subject. In the 2013 version of GCR Prize, CADE was again nominated as a finalist in 3 categories: Agency of the Year - Americas, Merger Control Matter of the Year - Americas and Behavioral Matter of the Year - Americas, even though did not win any.

The Brazilian Congress approved last October the New Competition Law for the country which brings many novelties and challenges as they were detailed above.

However, beyond legislative changes, it is crucial that Brazilian competition enforcers and business community accompany the spirit and fundamentals of this new legislative approach.

Undertakers in Brazil have got used to a post-merger analysis system that, in one hand, means less legal and regulatory certainty, but on the other, allows businesses to go on with their natural integration process until final decision.

In that context, competition enforcers in Brazil are also accustomed to work without deadlines as in the current system any diligence or document request suspends the flow of the case.

The challenge, therefore, is that both, undertakers and enforcers learn together how to navigate in these “unknown waters”.

Examples and experiences from other Jurisdictions are very helpful but do not overcome the need for constructive, open and respectful dialogue between enforcers and business representatives, as well as clear and extensive guidelines.

The transition period from current legislation and practice to the new system is the key to its success. Specialized law and consultancy firms must adapt their internal procedures, filling the gap between corporate and antitrust professionals as under the new merger review system, corporate “engineering” must be designed with the participation of antitrust specialists.

Challenges include also responsibilities towards investigation and scrutiny of conduct cases, as much of the attention and resources will certainly be directed to the merger review transitional process.

CADE has built its name and credibility worldwide based on principles of transparency, due process, professionalism and knowledge as well as on the firm belief on mutual respect, sense of balance and maturity.

The "New CADE" has many challenges ahead, but the future of Competition in Brazil relies also on the achievements and lessons from its past.

On the subject of antitrust private litigation in Brazil, it is clear that it is still a developing issue in the country. Recent researches have shown that the legal culture towards private claims for antitrust damages is yet incipient.

However, recent court rulings in Brazil have used CADE's findings on cartel cases as a reference for deciding in favor of victims of such collusive agreements.

It is, therefore, vital that CADE maintains its approach towards bringing as much information, evidence and clarification as possible to help private agents harmed by anticompetitive conducts to pursue their rights in court.

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