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INSTITUTO BRASILEIRO DE ESTUDOS DE CONCORRÊNCIA, CONSUMO E COMÉRCIO INTERNACIONAL

THE FUTURE OF ANTITRUST

Ademir Antonio Pereira Jr. • Adriano Camargo Gomes • Alexandre Barreto de Souza • Anna Binotto • Breno Fraga Miranda e Silva • Bruno Drago • Bruno Droghetti Magalhães Santos • Bruno Renzetti • Bruno Salgado Cremonese • Camila Pires da Rocha • Carol Elizabeth Conway • Caroline Tie Tanaka Battisti Archer • Clara Ji Hyun Lim • Clovis Lores • Constança Burity Simões Barbosa • Cristianne Saccab Zarzur • Daniel Costa Rebello • Daniel Oliveira Andreoli • Daniel Tinoco Douek • Danilo Mininel • Denis Guimarães • Denise Junqueira • Eduardo Frade Rodrigues • Elizabeth Farina • Elvino de Carvalho Mendonça • Enrico Spini Romanielo • Fabiana Tito • Felipe Cardoso Pereira • Felipe Zolezi Pelussi • Fernanda Akiyo Mitsuya • Fernanda Dalla Valle Martino • Flávia Chiquito dos Santos • Frederico Martins • Gabriel de Carvalho Fernandes • Gabriel Silva Takahashi • Gabriela Parra • Igor Carvalho Rocha • Izabella de Menezes Passos Barbosa • João Felipe Achcar de Azambuja • João Marcelo de Lima Assafim • João Ricardo Oliveira Munhoz • José Alexandre Buaiz Neto • Joyce Midori Honda • Julia Namie Maia Pinto Ishihara • Julia Werberich • Kelly Fortes Violada • Leonardo Mansur Lunardi Danesi • Leonardo Peres da Rocha e Silva • Lígia Melo • Lívia de Melo • Lucas Portela de Mauro • Luísa Campos Faria • Luisa Portilho • Luiz Alberto Esteves • Luiz Augusto Azevedo de Almeida Hoffmann • Luiz Eduardo de Queiroz Cardoso Jr. • Luiz Felipe Rosa Ramos • Maíra Isabel Saldanha Rodrigues • Marcel Medon Santos • Marcio de Oliveira Junior • Marcio Soares • Marcos Filipe Sussumu Ueda • Marina de Souza e Silva Chakmati • Matheus Nasaret • Mauricio Oscar Bandeira Maia • Mauro Grinberg • Natan Maximiano Munhoz • Nathália Conde Serra • Patricia Bandouk Carvalho • Paula Camara • Paula Farani de Azevedo Silveira • Pedro P. Anitelle • Pedro Paulo Salles Cristofaro • Polyanna Vilanova • Priscila Brolio Gonçalves • Rachel Pinheiro de Andrade Mendonça • Rafael Rossini Parisi • Raquel Garcia Gripp Novaes • Renan Cruvinel de Oliveira • Renata Arcoverde • Renata Fonseca Zuccolo Giannella • Renata Gonsalez de Souza • Renê Guilherme S. Medrado • Ricardo Lara Gaillard • Ricardo Pastore • Roberto Chacon de Albuquerque • Rodrigo Abreu Belon Fernandes • Sérgio Costa Ravagnani • Silvia Fagá de Almeida • Stephanie Vendemiatto Penereiro • Tatiana Lins Cruz • Thales de Melo e Lemos • Victor Cavalcanti Couto • Victor Santos Rufino • Victoria Malta Corradini • Vinicius da Silva Ribeiro • Vinicius Hercos • Vitor Jardim Barbosa

EDITORA SINGULAR

Autores

Ademir Antonio Pereira Jr. • Adriano Camargo Gomes • Alexandre Barreto de Souza • Anna Binotto • Breno Fraga Miranda e Silva • Bruno Drago • Bruno Droghetti Magalhães Santos • Bruno Renzetti • Bruno Salgado Cremonese • Camila Pires da Rocha • Carol Elizabeth Conway • Caroline Tie Tanaka Battisti Archer • Clara Ji Hyun Lim • Clovis Lores • Constança Burity Simões Barbosa • Cristianne Saccab Zarzur • Daniel Costa Rebello • Daniel Oliveira Andreoli • Daniel Tinoco Douek • Danilo Mininel • Denis Guimarães • Denise Junqueira • Eduardo Frade Rodrigues • Elizabeth Farina • Elvino de Carvalho Mendonça • Enrico Spini Romanielo • Fabiana Tito • Felipe Cardoso Pereira • Felipe Zolezi Pelussi • Fernanda Akiyo Mitsuya • Fernanda Dalla Valle Martino • Flávia Chiquito dos Santos • Frederico Martins • Gabriel de Carvalho Fernandes • Gabriel Silva Takahashi • Gabriela Parra • Igor Carvalho Rocha • Izabella de Menezes Passos Barbosa • João Felipe Achcar de Azambuja • João Marcelo de Lima Assafim • João Ricardo Oliveira Munhoz • José Alexandre Buaiz Neto • Joyce Midori Honda • Julia Namie Maia Pinto Ishihara • Julia Werberich • Kelly Fortes Violada • Leonardo Mansur Lunardi Danesi • Leonardo Peres da Rocha e Silva • Lígia Melo • Lívia de Melo • Lucas Portela de Mauro • Luísa Campos Faria • Luisa Portilho • Luiz Alberto Esteves • Luiz Augusto Azevedo de Almeida Hoffmann • Luiz Eduardo de Queiroz Cardoso Jr. • Luiz Felipe Rosa Ramos • Maíra Isabel Saldanha Rodrigues • Marcel Medon Santos • Marcio de Oliveira Junior • Marcio Soares • Marcos Filipe Sussumu Ueda • Marina de Souza e Silva Chakmati • Matheus Nasaret • Mauricio Oscar Bandeira Maia • Mauro Grinberg • Natan Maximiano Munhoz • Nathália Conde Serra • Patricia Bandouk Carvalho • Paula Camara • Paula Farani de Azevedo Silveira • Pedro P. Anitelle • Pedro Paulo Salles Cristofaro • Polyanna Vilanova • Priscila Brolio Gonçalves • Rachel Pinheiro de Andrade Mendonça • Rafael Rossini Parisi • Raquel Garcia Gripp Novaes • Renan Cruvinel de Oliveira • Renata Arcoverde • Renata Fonseca Zuccolo Giannella • Renata Gonsalez de Souza • Renê Guilherme S. Medrado • Ricardo Lara Gaillard • Ricardo Pastore • Roberto Chacon de Albuquerque • Rodrigo Abreu Belon Fernandes • Sérgio Costa Ravagnani • Silvia Fagá de Almeida • Stephanie Vendemiatto Penereiro • Tatiana Lins Cruz • Thales de Melo e Lemos • Victor Cavalcanti Couto • Victor Santos Rufino • Victoria Malta Corradini • Vinicius da Silva Ribeiro • Vinicius Hercos • Vitor Jardim Barbosa

IBRAC – Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional
Rua Cardoso de Almeida 788 cj 121
05013-001 – São Paulo – SP Brasil
Tel: 55 11 3872 2609 3673 6748
www.ibrac.org.br
ibrac@ibrac.org.br

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Coeditora: Elizabeth Farina

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FOREWORD

A few words about this project

Lauro Celidonio Neto,
Priscila Brolio Gonçalves

When this project was launched in the very beginning of 2020, nobody could imagine the challenges that the whole world would be facing in the upcoming months. Although information of a new virus was already emerging from China and other parts of the globe, it was impossible to foresee that an unprecedented pandemic would put so many lives at risk, people in isolation or quarantine and cause devastating social and economic effects.

The Future of Antitrust was the chosen subject for IBRAC's sixth international publishing initiative (all previous publications can be found at our website – www.ibrac.org.br), aiming to provide insights of the Brazilian antitrust community, among private practitioners and public officials, to relevant subjects in the antitrust field in the next years.

Technology and digital markets have been reshaping the reality for a while now, and posing essential questions to competition authorities, companies, private lawyers and economists, and the academia all over the world. Should the goals of antitrust be revisited? Should existing competition analysis, tests and tools be redesigned? What could be seized from existing laws, regulation, and precedents? Which mergers are most likely to be challenged in the future, which conducts are most likely to be investigated? What would be the priorities of competition authorities? Would judicial claims increase in Brazil? How would institutional coordination and international cooperation look like in the next years?

The pandemic adds challenges to a preexisting disruptive scenario and questions to the already extensive list of important issues for debate. Besides contributing to accelerate the digitalization of the economy, the crisis raises concerns about the application of competition laws under duress. Should there be exceptional measures and antitrust exemptions under the current circumstances?

The bright and diverse group of contributors to this ambitious edition dedicate to these subjects.

The book has been organized in five sections. The first one deals with goals of antitrust law and policy in the digital area, as well as legal tools and economic analysis. Authors discuss

the inclusion of objectives beyond economic welfare in competition policies in the US, Europe and Brazil; consumer choice under the consumer welfare standard; the revival and the role of behavioral economics in antitrust; particularities (or not) of competition in digital markets and multi-sided digital platforms; and data protection (in opposition to data itself) as a potential valuable tool to antitrust analysis.

The second Section of the book is dedicated to merger control, including articles for and against the adjustment of notification thresholds in Brazil; the question about scrutinizing killer acquisitions; the discussion concerning the need of a "new merger analysis" for digital markets; bankruptcy and a screening test for failing firm defense; and trends based in CADE's caselaw, including relevant market definition, complexity declaration, associative agreements, the health industry and the very recent Boeing-Embraer case.

The third Section is about behavior control and is divided into three chapters, beginning with papers applicable to all types of conducts. Contributors discuss tendencies and modifications in the antitrust analysis of competitive behavior in digital markets, and procedural flaws and how to correct them. Among horizontal behavior, authors analyze price algorithms, labor related practices such as wage fixing and non-poaching agreements, hub and spoke infringements and exchange of sensitive information. The reviewing of consequences and concerns related to the hypothetical knock out of a leniency agreement closes this chapter. Among unilateral conducts, articles approach trends based on recent CADE's precedents, and specific practices such as on-line bans, geoblocking and geopricing, bundled payments in the health care industry and the Google shopping case.

Section four is dedicated to competition advocacy and antitrust policy in specifically regulated markets. Authors deal with CADE's role in the pandemic; new regulatory proceedings issued by the Secretariat of Economic Law (SEAE); clauses constraining market shares in public biddings; competition policy in the cryptocurrency market; open banking; and competition in the Brazilian payments industry.

Last but not least, Section five approaches antitrust litigation, ranging from private actions for antitrust damages – the relation between public enforcement and private actions; perspectives; disclosure of relevant materials and information, including in connection to leniency agreements; pass-on-defense – to arbitration in antitrust disputes and specialized courts.

The final result is a very important and interesting book, comprising high valued opinions and personal views on a vast set of contemporary subjects. We congratulate all contributors and hope readers enjoy this journey!

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About the Coordinator

Priscila Brolio Gonçalves. Experienced lawyer with practice focused on Economic Law, especially Antitrust. Founding partner of Brolio Gonçalves Advogados. PhD (2008), Master of Laws (2002) and Bachelor of Laws (1997) (University of São Paulo). Visiting Researcher (LSE, 2008). Director of IBRAC (since 2020). Non-governmental adviser for the ICN. Speaker. Author of books and articles.

About the Authors

Ademir Antonio Pereira Jr. Partner at Advocacia Del Chiaro, leading the Competition and Data Protection teams. PhD and Master of Laws (University of São Paulo). LL.M. with focus on Law, Science and Technology (Stanford University). Fellow at the Stanford Center for Internet and Society.

Adriano Camargo Gomes. Partner at Camargo e Gomes Advogados. PhD in Civil Procedure (University of São Paulo). Master of Laws (University of Oxford). Professor of Civil Procedure and Arbitration (Positivo University).

Alexandre Barreto de Souza. President of CADE since 2017. Civil Servant since 1993, having worked for Federal Government bodies such as the National Treasury, the Department of Inland Revenue, the Senate, and the Court of Accounts. Master degree in Public Administration (University of Brasília). PhD candidate in Political Science (University of Lisboa).

Anna Binotto. Associate at VMCA. Bachelor of Laws (University of São Paulo). PhD candidate in Commercial Law (University of São Paulo).

Breno Fraga Miranda e Silva. Staff at Commissioner Mauricio Oscar Bandeira Maia's Cabinet at CADE. Master of Laws (University of São Paulo). Bachelor of Laws (University of São Paulo).

Bruno Drago. Partner at Demarest's Antitrust team. PhD in Commercial Law, with Major in Competition Law (University of São Paulo). LL.M. in Competition Law (King's College London). Director of Competition at IBRAC.

Bruno Droghetti Magalhães Santos. Chief of Staff at CADE. Former consultant with the Federal Trade Commission. Former competition lawyer at a large law firm in Brazil. LL.M. (University of California – Berkeley). Postgraduate degree in Economic Law (Getúlio Vargas Foundation). Bachelor of Laws (FAAP).

Bruno Renzetti. Associate at Pereira Neto | Macedo Advogados. Master of Laws in Law & Development (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Federal University of Paraná). Ph.D. candidate (University of São Paulo). Professor of Competition Law at IBMEC/SP. Author of *Infraestrutura e Concorrência: concessão de aeroportos no Brasil* (2019).

Bruno Salgado Cremonese. Associate in the Antitrust practice of Tauil & Chequer Advogados. Former trainee at the São Paulo State Court. Former attorney in a specialized corporate criminal law firm. Postgraduate degree in Corporate Criminal Law (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Mackenzie University).

Camila Pires da Rocha. Associate at Brolio Gonçalves Advogados with practice focused on Economic Law, especially antitrust. Bachelor of Laws (University of São Paulo). Master of Laws candidate in Economic Law (University of São Paulo). Teaching assistant and coordinator of study groups at the same institution.

Carol Elizabeth Conway. Director of Regulation and Institutional Matters at UOL Group, PagSeguro and PagBank. Master of Laws (University of São Paulo). Co-founder of WOB – Women On Board. Director of the Council of Legal Studies and Payments at ABRANET. Director at ABBC.

Caroline Tie Tanaka Battisti Archer. Associate at Cascione Pulino Boulos Advogados, with focus on merger control issues, design and implementation of antitrust compliance programs, and anticompetitive practice investigations. Bachelor of Laws (University of São Paulo).

Clara Ji Hyun Lim. Associate at Madrona Advogados. Bachelor of Laws (Mackenzie University).

Clovis Lores. Lawyer. Former Administrative Director at CADE. MBA (Getúlio Vargas Foundation - FGV/DF). Postgraduate degree in Antitrust Law and Regulation (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (University Center of Brasilia).

Constança Burity Simões Barbosa. Associate at Chediak, Lopes da Costa, Cristofaro, Simões Advogados, with focus in corporate law, capital market and arbitration. Bachelor of Laws (Pontifical Catholic University of Rio de Janeiro).

Cristianne Saccab Zarzur. Partner at Pinheiro Neto Advogados, with focus on Competition Law. Foreign Associate at antitrust law firm Howrey Simon Arnold & White LLC (Washington, 2000-2001). Postgraduate degree in Economic Law (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Mackenzie University, 1995).

Daniel Costa Rebello. Partner at Pinheiro Neto Advogados, with extensive experience in investigations and merger review. Former General-Coordinator at CADE (2015-2016). MBA (Getúlio Vargas Foundation, 2013). LL.M. (Columbia University School of Law). Bachelor of Laws (University of Brasília, 2007). Admitted to the Brazilian Bar and to the New York State Bar (USA).

Daniel Oliveira Andreoli. Partner of Demarest antitrust team. LL.M. in Corporate and Commercial Law (King's College London). Councilor for IBRAC.

Daniel Tinoco Douek. Experienced lawyer with practice focused on regulatory, competition and administrative law. Partner of the Competition, Regulatory and Media, Technology, Intellectual Property and Data Protection practices at Pereira Neto, Macedo Advogados. LL.M. in Competition Law (King's College London). Postgraduate degree in State Law and Regulation (Getúlio Vargas Foundation – FGV/Rio).

Danilo Mininel. Partner at Madrona Advogados. LL.M. in Corporate and Commercial Law (London School of Economics and Political Science). Bachelor of Laws (University of São Paulo).

Denis Guimarães. Private practitioner since 2006. Partner at the AGPR law firm (since 2013). Former attorney at the Secretariat of Economic Law (SDE) of the Ministry of Justice (2003-2005). PhD in Economic and Public Finance Law (University of Sao Paulo, (2008). Michigan Grotius Research Scholar (University of Michigan Law School,2014-2015). Editorial Board Member (2018-2021) of the CADE Journal of Competition Defense.

Denise Junqueira. Economist and licensed attorney in São Paulo and New York. Partner at Cascione Pulino Boulos Advogados. Former experience in the USA, including positions at FTC, NYU, and law and consulting firms. LL.M. in Antitrust (NYU School of Law). Bachelor of Laws (PUC-SP). B.Sc. in Economics (University of São Paulo).

Eduardo Frade Rodrigues. Partner at VMCA. Former General-Superintendent of CADE. Master of Laws (University of Brasília). Guest Professor at the FGV Law Program and Visiting Scholar at the George Mason University.

Elizabeth Farina. CEO of Tendências. Former President of CADE (2004-2008). Former CEO at the Sugar Cane Industry Union (UNICA, 2012- 2019). Former Professor and Head of the Department of Economics at University of São Paulo (FEA-USP). PhD and B.A. degree in Economics (University of São Paulo). Councilor for IBRAC, for the Administrative Council of Bonsucro and for the Superior Council of Agribusiness (COSAG) of the Federation of Industries of the State of São Paulo (Fiesp).

Elvino de Carvalho Mendonça. Economic consultant to the law firm Mendonça Advocacia. Former commissioner of CADE. PhD in Economics.

Enrico Spini Romanielo. Partner at Mundie e Advogados. Master of Laws in Commercial Law (University of São Paulo). Postgraduate in Economic Law (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws and Graduate in Economics (Federal University of Uberlândia). Councilor to IBRAC.

Fabiana Tito. Partner at Tendências Consultoria Integrada. Former General Coordinator at the Secretariat of Economic Law (SDE, 2004- 2007). Former international consultant for LECG (Madrid) and RBB Economics (London). Former Assistant Economist at UK Competition Commission (2009). PhD in Economic Theory (FEA-USP). Joint Master degree (Universitat Pompeu Fabra and Universitat Autònoma de Barcelona). B.A. degree in Economics (University of São Paulo) Director of Economics of IBRAC.

Felipe Cardoso Pereira. Practitioner involved in antitrust matters since 2013, with experience both in the public sector and private practice. Bachelor of Laws (University of Brasilia, 2015).

Felipe Zolezi Pelussi. Associate at Pereira Neto Macedo. Bachelor of Laws (University of São Paulo).

Fernanda Akiyo Mitsuya. Associate at Chediak, Lopes da Costa, Cristofaro, Simões Advogados, with main practices in corporate law, capital market and arbitration. Bachelor of Laws (Pontifical Catholic University of Rio de Janeiro).

Fernanda Dalla Valle Martino. Associate at Madrona Advogados. LL.M. in Competition Law (King's College London). Postgraduate degree in Economic Law (Getúlio Vargas Foundation). Postgraduate degree in International Law (Escola Paulista de Direito). Bachelor of Laws (Pontifical Catholic University of São Paulo). Member of the Competition Committee of the Brazilian Bar Association.

Flávia Chiquito dos Santos. Partner and head of the antitrust area at Manesco Ramires Perez Azevedo Marques Sociedade de Advogados. Master of Laws in Economic Law (University of São Paulo).

Frederico Martins. Senior associate at Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados. Master of Laws (Getúlio Vargas Foundation - FGV/SP, 2017). Bachelor of Laws (Federal University of Minas Gerais, 2008), Member of the Litigation Committee of IBRAC.

Gabriel de Carvalho Fernandes. Associate at Pereira Neto Macedo. Bachelor of Laws (Getúlio Vargas Foundation – FGV/SP). Master of Laws candidate (University of São Paulo).

Gabriel Silva Takahashi. Economist at LCA Consultores, with experience on projects relating to antitrust, economic regulation and public policy. Formerly with Cinemark Brasil, working on financial planning (2015-2016). Bachelor of Economics FEA-USP.

Gabriela Parra. Economist at Tendências Consultoria Integrada. Master in Economics (University Carlos III of Madrid). B.A. degree in Economics (University of São Paulo).

Igor Carvalho Rocha. Coordinator of Antitrust Analysis 1 at the General Superintendence of CADE. Master in Economics (University of Brasília). Postgraduate degree in Competition Defense (Getúlio Vargas Foundation). Graduate in Economics (Federal University of Bahia).

Izabella de Menezes Passos Barbosa. Chief of Staff at Commissioner Mauricio Oscar Bandeira Maia's Cabinet at CADE. Master of Laws (University of Brasília). Bachelor of Laws (University of São Paulo).

João Felipe Achcar de Azambuja. Associate at Machado, Meyer, Sendacz e Opice Advogados since 2017, working on the most diverse topics related to competition law. Bachelor of Laws (Getúlio Vargas Foundation – FGV/SP, 2016).

João Marcelo de Lima Assafim. Partner at De Lima Assafim & Advogados Associados, with experience in Private Law, specially technology transfer, competition restrictions, antitrust, know-how and patent license matters. PhD (Universidad de Santiago de Compostela). PhD in Commercial Law (University of São Paulo). Associate Professor at UFRJ, Director of the Master's Program in Law at UCAM, Professor at INPI's Academy of Innovation and at IE UFRJ/FIOCRUZ.

João Ricardo Oliveira Munhoz. Associate at Mudrovitsch Advogados. Bachelor at Laws (University of São Paulo). Master in Economic Law candidate (University of São Paulo).

José Alexandre Buaiz Neto. Partner at Pinheiro Neto Advogados, with extensive experience in antitrust law counselling or litigating in administrative or judicial sphere, including cartel investigations, immunity applications, merger fillings, abuse of dominance investigations,

compliance. Former Commissioner at the Appeals Council of the Brazilian Financial System. LL.M. (Boston University). Bachelor of Laws (University of Brasília).

Joyce Midori Honda. Partner at Cescon, Barrieu, Flesch & Barreto Advogados. LL.M. (London School of Economics and Political Science). Postgraduate degree in Economic Law (Getúlio Vargas Foundation). Bachelor of Laws (Pontifical Catholic University of São Paulo). Vice-President of the Competition and Regulatory Committee of the Brazilian Bar Association (OAB-SP).

Julia Namie Maia Pinto Ishihara. Technical Assistant at the General Superintendence of CADE. Bachelor of Laws (University of Brasília).

Julia Werberich. Antitrust lawyer at Figueiredo e Velloso Advogados Associados.

Kelly Fortes Violada. Lawyer at Camargo e Gomes Advogados. Master of Laws candidate (Federal University of Paraná).

Leonardo Mansur Lunardi Danesi. Associate at Cescon Barrieu focusing on Antitrust. Postgraduate degree in Compliance and in Business Administration (Getúlio Vargas Foundation School of Business Administration in São Paulo). Bachelor of Laws (Pontifical Catholic University of São Paulo). Member of the Antitrust Law and Economic Regulation Committee of the Brazilian Bar Association (CECORE-OAB/SP), IBRAC's Economic Litigation Committee and the Brazilian Institute of Criminal Sciences (IBCCRIM).

Leonardo Peres da Rocha e Silva. Partner at Pinheiro Neto Advogados, with over 25 years of experience in competition law matters. Foreign associate at Denton, Wilde & Sapte, England (1999). LL.M. in International Economic Law (University of Warwick, 1999). MBA in Economic and Business Law (Getúlio Vargas Foundation, FGV-DF). Bachelor of Laws (UniCEUB). Bachelor's degree in International Relations (Brasília University).

Lígia Melo. Associate in the Antitrust practice at Tauil & Chequer Advogados (Brasília Office), with focus on cartel investigations, antitrust compliance and litigation. Former CADE's employee. Bachelor of Laws (University of Brasília).

Lívia de Melo. Antitrust associate at Grinberg Cordovil Advogados. Former Coordinator at General Superintendence, leniency unit of CADE.

Lucas Portela de Mauro. Senior Economist at LCA Consultores, with experience on projects relating to regulation, antitrust and sectoral analysis. Former employee at the Corporate Credit Policy Department of Itaú Unibanco (2014-2015). Bachelor of Economics (FEA-USP).

Luísa Campos Faria. Technical Assistant at the Coordination of Antitrust Analysis 1 of the General Superintendence of CADE. Bachelor of Laws (Brasília University).

Luisa Portilho. Economist at Tendências Consultoria Integrada. Bachelor of Economics (University of São Paulo).

Luiz Alberto Esteves. Partner at Pakt Consultoria e Assessoria. Former Chief Economist at CADE.

Luiz Augusto Azevedo de Almeida Hoffmann. Commissioner at CADE. Lawyer in São Paulo (currently licensed). Former Judge of the Court of Taxes and Charges of the State of São

Paulo. PhD in Civil Law (Università di Camerino, Italy; University of São Paulo, Brazil). Bachelor of Laws (Mackenzie University). Specialization degree in Tax Law (Pontifical Catholic University of São Paulo).

Luiz Eduardo de Queiroz Cardoso Jr. Partner at De Lima Assafim & Advogados Associados Master of Laws in Economic Law and Development (Candido Mendes University). Professor of Private International Law and Business Law at Candido Mendes University.

Luiz Felipe Rosa Ramos. Co-head of the privacy and data protection area at Advocacia Del Chiaro, with extensive experience in competition law. Sandwich PhD (University of São Paulo, University of Bielefeld). Master of Laws (University of São Paulo, research at University of Salento). Fox International Alumni of Yale University. Certified Information Privacy Professional/Europe (CIPP/E), with IAPP training in data protection and privacy at Fieldfisher (London).

Maíra Isabel Saldanha Rodrigues. Associate at Cascione Pulino Boulos Advogados, with practice focused on merger control issues, design and implementation of antitrust compliance programs, and anticompetitive practice investigations. LL.M. (New York University Law School). Bachelor of Laws (Brasília University).

Marcel Medon Santos. Lawyer. Former Legal Coordinator and Director of the Secretariat of Economic Law of the Ministry of Justice (SDE/MJ). Postgraduate degree in Antitrust Law (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Pontifical Catholic University of São Paulo).

Marcio de Oliveira Junior. Senior Consultant for Charles River Associates (CRA). Former Commissioner and former interim President of CADE.

Marcio Soares. Partner at Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados, advising clients on all aspects of Brazilian antitrust law, including merger review cases, antitrust investigations and litigation, and general antitrust counseling. Co-Chair of the Cartels Working Group at the Antitrust Committee of the International Bar Association (IBA). Former councilor for IBRAC.

Marcos Filipe Sussumu Ueda. Assistant of Staff at the Tribunal of CADE. Bachelor of Laws (University of São Paulo).

Marina de Souza e Silva Chakmati. Associate at Pinheiro Neto Advogados, with focus on Competition Law. Bachelor of Laws (Getúlio Vargas Foundation -FGV/SP, 2018).

Matheus Nasaret. Associate in the Antitrust practice of Tauil & Chequer Advogados (Brasília Office), advising both local and foreign companies on all areas of competition law and experience in the revision of commercial contracts/practices, corporate internal investigations, cartel investigations, complex high profile merger control procedures, and in the negotiation of immunity and leniency agreements before CADE. Bachelor of Laws (University of Brasilia).

Mauricio Oscar Bandeira Maia. Commissioner at CADE. Master of Laws (AEUDF). Master of Laws (Brasília Institute for Public Law). Degree in Business Administration (University of Brasília). Bachelor of Laws (University of São Paulo).

Mauro Grinberg. Full-time antitrust lawyer. Partner at Grinberg Cordovil Advogados. Former Commissioner of CADE. Former Attorney of the National Treasury. Former President of IBRAC.

Natan Maximiano Munhoz. Senior associate at TozziniFreire, member of the antitrust practice group. Postgraduate degree in Business/Corporate Law (Getúlio Vargas Foundation). Bachelor of Laws (São Bernardo do Campo School of Law).

Nathália Conde Serra. Technical Advisory Assistant at CADE. Bachelor of Laws (University of Brasília).

Patricia Bandouk Carvalho. Partner at TozziniFreire, member of the antitrust practice group. Postgraduate degree in Economic Law from Getúlio Vargas Foundation. Bachelor of Laws (Mackenzie University). Member of CECORE (Commission of Competition and Economic Regulation Studies). Recognized by The Legal 500 as a Next Generation Lawyer and by the Leaders League as a Rising Star in Antitrust Investigation.

Paula Camara. Senior associate at Mattos Filho Advogados, with focus on representing domestic and international clients in connection with mergers cases and cartel investigations, advising clients regarding complex competition issues and projects in regulated sectors, such as healthcare, oil & gas, education and the financial sector. Master of Laws (Stanford Law School).

Paula Farani de Azevedo Silveira. Commissioner at CADE. Former competition and trade law expert at two of the largest firms in Brazil. Former Coordinator at SDE on cartel and unilateral conduct investigations and Mercosur negotiator for competition, services, and intellectual property issues. Masters of Laws in International Economic Law (Georgetown University Law Center). IIEL fellow. Bachelor of Laws (University Centre of Brasília). Professor of Law and Economics and International Trade at the Brasilia Institute for Public Law.

Pedro P. Anitelle. Intern at Mattos Filho Advogados. Law student at the University of São Paulo.

Pedro Paulo Salles Cristofaro. Partner at Chediak, Lopes da Costa, Cristofaro, Simões Advogados, with main practices in competition, arbitration and litigation. Graduation and post-graduation professor at Pontifical Catholic University of Rio de Janeiro. Arbitration and Economic Litigation Officer at IBRAC.

Polyanna Vilanova. Antitrust lawyer at Figueiredo e Velloso Advogados Associados. Former Commissioner at CADE.

Priscila Brolio Gonçalves. Experienced lawyer with practice focused on Economic Law, especially Antitrust. Founding partner of Brolio Gonçalves Advogados. PhD (2008), Master of Laws (2002) and Bachelor of Laws (1997) (University of São Paulo). Visiting Researcher (LSE, 2008). Director of IBRAC (since 2020). Non-governmental adviser for the ICN. Speaker. Author of books and articles.

Rachel Pinheiro de Andrade Mendonça. Partner at Mendonça Advocacia. Former advisor to the Superior Court of Justice. Former lawyer at Embrapa. Master of Laws.

Rafael Rossini Parisi. Chief of Staff at CADE. Bachelor of Business Administration (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Pontifical Catholic University of São Paulo).

Raquel Garcia Gripp Novaes. Associate Lawyer at Cescon, Barrieu, Flesch & Barreto Advogados. Bachelor of Laws (Mackenzie University). Winner of the IBRAC-TIM 2018 Award, in the Undergraduate Category.

Renan Cruvinel de Oliveira. Associate at Mudrovitsch Advogados. Bachelor of Laws (University of Brasilia). Masters in Antitrust Law candidate. Teaching assistant at the University of São Paulo Law School.

Renata Arcoverde. Associate in the Antitrust practice of Tauil & Chequer Advogados (São Paulo Office), with experience with a variety of antitrust and compliance matters, from complex high-profile merger control procedures to cartel investigations and consultations relating to infringements. Bachelor of Laws (University of São Paulo).

Renata Fonseca Zuccolo Giannella. Partner at Mattos Filho Advogados, with focus on competition related issues, including mergers, administrative investigations and court proceedings, audits, development and implementation of competition compliance programs, as well as advising clients in trade defense cases. Master of Laws (King's College London).

Renata Gonsalez de Souza. Associate at Brolio Gonçalves Advogados, with practice focused on Economic Law, especially antitrust advice and litigation. Background in advising and representing companies in civil litigation and due diligences. Master of Laws in human rights and gender equality (University of Salamanca). Bachelor of Laws (Mackenzie University).

Renê Guilherme S. Medrado. Partner at Pinheiro Neto Advogados, with focus on representing local and international companies in merger filings and anticompetitive investigations. Ph.D. (University of São Paulo Law School, 2011). LL.M. with honors (Columbia University School of Law, 2003), Executive MBA (Insper, 2002). Bachelor of Laws (Pontifical Catholic University of São Paulo). Admitted to the Brazilian Bar and to the New York State Bar (USA).

Ricardo Lara Gaillard. Partner at Cescon, Barrieu, Flesch & Barreto Advogados, focusing on Antitrust. Bachelor of Laws (Pontifical Catholic University of São Paulo). Postgraduate in Corporate Law (IBMEC). Certified Compliance & Ethics Professional (by the Society of Corporate Compliance & Ethics). Councilor for IBRAC.

Ricardo Pastore. Partner at Pereira Neto | Macedo Advogados with experience in antitrust, regulation and litigation. LL.M. in International Economic Law Business and Policy (Stanford Law School). Postgraduate in Economic Law (Getúlio Vargas Foundation – FGV/SP). Bachelor of Laws (Pontifical Catholic University of São Paulo). NGA to the ICN's Unilateral Conduct and Merger Working Groups. Former legal counsel to CADE, under the UNDP, providing independent legal counseling for the drafting of the Remedies Guidelines issued in 2018.

Roberto Chacon de Albuquerque. Federal Manager at CADE. PhD in law (University of São Paulo). Master and Bachelor of Laws (University of Brasília). Author of Computer Crime and Computer Property.

Rodrigo Abreu Belon Fernandes. Deputy Attorney General at CADE. Federal Prosecutor at Federal Attorney General. Bachelor of Laws (University of São Paulo). Postgraduate degree in Public Law (University of Brasilia) and in Public Management (Getúlio Vargas Foundation).

Sérgio Costa Ravagnani. Commissioner at CADE. Bachelor of Laws (University of Brasília). Postgraduate degree in Public Law (Pontifical Catholic University of Rio Grande do Sul) and in Public Management and Administration (Getúlio Vargas Foundation).

Silvia Fagá de Almeida. Director of LCA Consultores. PhD in Economics (Getúlio Vargas Foundation – FGV/SP). Former visiting scholar (Columbia University). Former member of EESP-FGV's and FIPE's Economics faculty. Listed since 2015 in the GCR Who's Who Legal: Competition and WWL Thought Leaders (2020). Director of Digital Markets at IBRAC.

Stephanie Vendemiatto Penereiro. Chief of Staff at the Tribunal of CADE. Bachelor of Laws (University of São Paulo). Master of Laws candidate (University of Brasília).

Tatiana Lins Cruz. Partner at TozziniFreire, member of the antitrust practice group. Master of Laws in International Law (University of São Paulo). Bachelor of Laws (Pontifical Catholic University of São Paulo). Recommended by important legal guides, such as The Legal 500 and Who's Who Legal.

Thales de Melo e Lemos. Associate at Cescon Barrieu, Flesch & Barreto Advogados, focusing on Antitrust. Bachelor of Laws (University of Brasilia). Master of Laws candidate in Economics (Brasilia Institute for Public Law). Member of the IBRAC's Antitrust Committee headquartered in Brasília and of the Competition Committee of the Brazilian Bar Association (CDC-OAB/DF).

Victor Cavalcanti Couto. Associate Lawyer at Cescon, Barrieu, Flesch & Barreto Advogados and member of the firm's TechDesk. Postgraduate degree in Business Law (Getúlio Vargas Foundation). Bachelor of Laws (Federal University of Pernambuco). Anti-Corruption and Compliance Professional Certification (CPC-A). Member of IBRAC. Member of the Competition and Regulatory Commission of the Brazilian Bar Association (OAB-SP).

Victor Santos Rufino. Partner at Mudrovitsch Advogados. Former CADE's General Attorney. Masters of Laws in Economic Law (University of Brasília). PhD candidate in Antitrust Law (University of São Paulo). Professor at Brasilia Institute for Public Law and at Getúlio Vargas Foundation.

Victoria Malta Corradini. Associate at the Antitrust and Public Law Practices Group at Marchini Botelho Caselta Advogados – MBC, with emphasis on complex issues related to competition law and advisory on public law matters. Bachelor of Laws (University of São Paulo).

Vinicius da Silva Ribeiro. Associate at Mundie e Advogados. Postgraduate in Economic Law (Fundação Getúlio Vargas – FGV/SP). Bachelor of Laws (Pontifical Catholic University of São Paulo). Member of the Antitrust Committee of the Brazilian Bar Association (São Paulo).

Vinicius Hercos. Associate at Demarest antitrust team. Postgraduate in Economic Law (Getúlio Vargas Foundation). Coordinator of IBRAC's Committee of Litigation & Arbitration.

Vitor Jardim Barbosa. Associate at Stocche Forbes Advogados. Bachelor of Laws (University of São Paulo).

Section 1
Antitrust law and policy in the digital era: goals, legal tools, and economic analysis

HIPSTER ANTITRUST AND THE BRAZILIAN LEGAL SYSTEM

Luiz Augusto Azevedo de Almeida Hoffmann, Nathália Conde Serra, Rafael Rossini Parisi

Abstract: the purpose of this article is to address certain issues invoked by the called Hipster Antitrust movement related to the broadening of the scope of antitrust analysis in view to include other aspects that are not traditionally considered by competition authorities worldwide. Through the study of Brazil's legal system and cases recently examined by CADE, this article aims to identify how topics concerning other themes may be investigated by the competition authority, especially in face of the new challenges provided by the digital age. Thereby, this article hopes to contribute to the book "The Future of Antitrust: perspectives in Brazil", to be published by the Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional ("IBRAC").
Keywords: Hipster Antitrust; consumer welfare; antitrust authorities; scope; case law; Europe; United States; law; CADE.

I. Introduction

Even though the discussion on what is(are) antitrust goal(s) is not exactly new, the antitrust community worldwide seems far from finishing the debate.

The outbreak of modern Antitrust law has as its historical mark the end of 19th century in the United States, mainly due to the enactment of the Sherman Act in 1890, which envisaged fighting against market concentrations occurring at the time (called "great trusts") and, afterwards, of the Clayton Act in 1914. Firstly, antitrust law was predominantly being interpreted under a "big-is-bad" perspective, which resulted in conflicting opinions about what would be the real purpose of antitrust. Pursuant to this rationale, US Courts often presumed that market dominance was *per se* illegal and should be prevented, regardless of taking into account the competitive dynamics of the market and lower prices to consumers.[1] It was just after the 60s, with the rise of the Chicago School, that the majority opinion became considering antitrust's goal to maximize economic efficiency in a view to bring benefit for consumers through lower-priced and/or better-quality products (the "consumer welfare standard").[2]

In Europe, by its turn, the first signs of an antitrust policy date back to the Ancient Times, when, for instance, rules were imposed for preventing businessman from gaining excessive

[1] "To this end, courts viewed the role of antitrust as serving various--often conflicting and even anticompetitive--socio-political goals. Just seven years after the Sherman Act was passed, the Supreme Court in United States v. Trans-Missouri Freight Ass'n, for instance, held the goal of antitrust law is to protect "small dealers and worthy men." The Court, in fact, went so far as to conclude that these small dealers and worthy men should be protected even if doing so came at the expense of "[m]ere reduction in the price of the commodity." WRIGHT, Joshua; *et al*. Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust (2018). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524. Access in February, 2020.

[2] HOVENKAMP, Herbert. The Antitrust Enterprise: Principle and Execution. Harvard University Press, 2005, p. 39-40.

profits in the importation of grains.[3] For a long time tendencies contraries as the ones verified in the United States prevailed, being cartels even considered as something positive, since it could strengthen the position of local firms in other countries, as it occurred in Germany in the first half of the last century.[4] More recently, antitrust policy has been focusing to meet the interests of the common market established by the European Union, being connected with industrial policy.[5]

The debate on the objectives of antitrust gained momentum in the last few years with the movement called Hipster Antitrust, originated mainly due to companies' new business models and the markets' new dynamics (e.g., digital economy). For those who defend the referred movement[6], like Tim Wu[7], Lina Khan and Jonathan Baker, the consumer welfare standard consolidated by the Chicago School cannot be seen as antitrust policy's unique goal, since the traditional methods to examine consumer welfare (mainly based on prices) are not capturing market power abuse, nor other negative effects to competition. Therefore, according to this movement, other elements should be considered in the antitrust scrutiny, such as data protection, labor market, industrial policy, among others.[8]

After making this brief theorical introduction, the purpose of this article will be to, firstly, contextualize how authorities in the United States and in Europe have been facing the issues related to Hipster Antitrust and, afterwards, discuss such topic according to the Brazilian perspective, in light of Brazil's legal framework and of recent cases examined by CADE[9].

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[3] FORGIONI, P. A. *Os Fundamentos do Antitruste*, São Paulo: Revista dos Tribunais, 3ª ed., p. 36.
[4] NUSDEO, Fábio. *Um panorama da tutela concorrencial*, in *Evolução do Antitruste no Brasil*. Ed. Singular, 2018, 1ª ed., C. CAMPILONGO e R. PFEIFFER (Org.), p. 9.
[5] SLOT, Jan Pier; JOHNSTON, Angus. An Introduction to Competition Law. Hart Publishing, 2006, p. 3-4.
[6] The origin of the term "Hipster Antitrust" is attributed to the attorney Konstantin Medvedovsky, who brought it up in a social media page when reflecting about the potential excessive intervention of antitrust authorities. Source: https://twitter.com/kmedved/status/876869328934711296. Access in February, 2020.
[7] Reference to be made, especially, to "The Curse of Bigness: Antitrust in the New Gilded Age", Columbia Global Reports, 2018.
[8] According to Lina Khan, the shift from the structuralism view of market (defended by the Harvard School) to price theory had two major changes for antitrust analysis: (i) relativization of entry barriers; and (ii) dominance of consumer metric as the metric for assessing competition. Please refer to "Amazon's Antitrust Paradox". The Yale Law Journal, 2017, p. 719-720.
[9] Acronym for *Conselho Administrativo de Defesa Econômica* (Administrative Council for Economic Defense), the Brazilian antitrust authority.

II. International Perspective

a. United States

The United States Supreme Court have been reiterating the adoption of the consumer welfare standard in recent antitrust cases.[10] An interesting debate regarding the limits of the scope of antitrust policy in the United States occurs, among others, in cases involving the conduct of predatory pricing. This is because in practice it has been extremely difficult to define what would be a pro and an anticompetitive price reduction. Therefore, authorities are opting to not intervene under such uncertainty, in a view to prevent the risk of causing false-positive errors (unnecessary condemnations).

In *Verizon Communications v. Law Offices of Curtis V. Trinko*, the Supreme Court analyzed whether Verizon violated §2º of the Sherman Act, in addition to the 1996 Telecommunications Act, by refusing to offer telecommunication services to its competitors.[11] The Supreme Court concluded that the conduct had already been treated by a specific sectorial statute and, thus, an intervention under the antitrust perspective would generate few benefits in comparison to the risk of punishing a conduct that could in fact benefit the social welfare.[12] Moreover, the Supreme Court signalized that it could only decide for the condemnation after

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[10] "The Supreme Court has repeatedly embraced the consumer welfare standard and the economic grounding it provides by supra-majority. Justice Kagan, for instance, recognized in her confirmation hearings, "it's clear that antitrust law needs to take account of economic theory and economic understandings." (…) While significant debate remains over how best to apply rules and standards to inherently fact-intensive cases, there is universal agreement that whatever specific route is taken, it must be an economically grounded one that seeks to further consumer welfare" (WRIGHT, 2018).

[11] "The Telecommunications Act of 1996 imposes upon an incumbent local exchange carrier (LEC) the obligation to share its telephone network with competitors, 47 U. S. C. §251(c), including the duty to provide access to individual network elements on an "unbundled" basis, see §251(c)(3). (…) When competitive LECs complained that Verizon was violating that obligation, the PSC and FCC opened parallel investigations, which led to the imposition of financial penalties, remediation measures, and additional reporting requirements on Verizon". Available at: https://supreme.justia.com/cases/federal/us/540/02-682/. Access in March, 2020. Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004).

[12] "Respondent's complaint alleging breach of an incumbent LEC's 1996 Act duty to share its network with competitors does not state a claim under §2 of the Sherman Act. Pp. 5–16. (a) The 1996 Act has no effect upon the application of traditional antitrust principles. (…) Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Here Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in respondent's complaint by imposing fines and other burdens on Verizon. Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs. Allegations of violations of §251(c)(3) duties are both technical and extremely numerous, and hence difficult for antitrust courts to evaluate. Applying §2's requirements to this regime can readily result in "false positive" mistaken inferences that chill the very conduct the antitrust laws are designed to protect". Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004).

conducting an in-depth analysis of the cost structure of the defendant for examining the occurrence of predatory pricing, which is an extremely difficult analysis to verify in practice.[13]

Furthermore, both the US Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have reaffirmed in several cases that the consumer welfare standard is not restricted to price analysis, but it could encompass other theories of harms as a result of mergers, such as reduction in innovation, regardless of an increase in prices. In this sense, the DOJ have rejected the mergers involving Applied Materials/Tokyo Electron[14] and Halliburton/Baker Hughes[15] in 2015 and 2016, respectively.

b. Europe

Perhaps one of Europe's most emblematic antitrust cases was the investigation conducted by the German competition authority against Facebook with respect to the improper dealing of users' personal data. In February, 2019, the *Bundeskartellamt* concluded that the company was forcing its users to consent with the linking of their own personal data contained in other sources (e.g., WhatsApp; Instagram; third parties' websites that connect automatically to Facebook by "like" or "share" commands) to their Facebook account.[16]

As the German authority stated, the antitrust concerns in the case relates to Facebook's dominant position in the market (the *Bundeskartellamt* estimated that the company had an 80% market share)[17], which prevented consumers from switching to other social networks. Consequently, although there was no price increase for consumers, there was a "loss of control". Users had no option but to consent with the conditions imposed by Facebook, otherwise they would not be able to use the social network. According to Maurice Stucke[18], in spite of what the Chicago School approach would conclude, the consumer welfare was indeed harmed since, although zero priced, the products and services that Facebook offers to its users

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[13] Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004). In the same sense: ac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 451, 452-53 (2009); Weyerhaeuser v. Ross-Simmons Hardwood Lumber, 549 U.S. 312 (2007).

[14] Source: https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justicedepartment. Access in March, 2020.

[15] Source: https://www.justice.gov/atr/file/838661/download. Access in March, 2020.

[16] Source: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html. Access in March, 2020.

[17]It is worth mentioning that the relevant market definition consisted of an interesting discussion in the case. The German antitrust authority concluded other social networks, such as Snapchat, Youtube and Twitter, have different functionalities and, therefore, could not be considered as viable alternative for Facebook's consumers.

[18] Source: https://www.wired.com/story/germany-facebook-antitrust-ruling/. Access in March, 2020.

are not free of charge, since consumers acquires them through a compensation (supply of personal data) that has economic value to the company.[19]

The *Bundeskartellamt* concluded that Facebook was uncapable of justifying the need of collecting personal data for offering its services to consumers and determined that the company could only link information obtained from other sources by means of the user's explicit consent, which could not be mandatory for consumers to use the Facebook social network, pursuant to Section 19(1)[20] of the German Competition Act[21]. The Facebook case became emblematic not only in Germany, having similar investigations being initiated in France and in the United States.

In addition to considering data privacy issues, Europe also considers the potential broadening of the role of antitrust agencies in a view to comprise issues related to industrial policy.

In February, 2019, the European Commission prohibited Alstom's acquisition of Siemens, after concluding that the merger would result in the consolidation of the two main companies in the markets of (i) railway and metro signaling systems; and (ii) very high-speed trains; and would likely result in increase of prices and reduction of the output of products in the market, and could even present risks to innovation.[22] Despite the parties' allegations, the European Commission considered unlikely that non-European companies (e.g., Chinese) could contest the parties' market power, nor that the proposed remedies would be capable of addressing the antitrust concerns arising from the transaction.

The decision provoked controversy given that the transaction had the blessings of both French and German governments, which revolted against the European competition authority's decision. Hence, the French and German governments elaborated a joint manifesto requesting the reform of the European antitrust legislation in a view to, among other measures, allow its flexibilization for contemplating interests concerning industrial policy. According to such manifesto, the creation of "European champions" (big European enterprises) is necessary to

[19] In this sense: "*Novos Trustes Na Era Digital: efeitos anticompetitivos do uso de dados pessoais pelo Facebook*", in *Revista de Defesa da Concorrência*, v. 6, n. 1, 2018, p. 198-231.
[20] "§19 - Prohibited Conduct of Dominant Undertakings: (1) The abuse of a dominant position by one or several undertakings is prohibited".
[21] It should be noted that the case is currently being discussed in the German Federal Court, after Facebook obtained a victory with its appeal to the Regional Court of Dusseldorf.
[22] Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881. Access in February, 2020.

compete in a global scale with foreign players (e.g., Chinese companies).[23] The discussion provoked by the Siemens/Alstom case on the need for reforming EU law for enabling European champions endures.[24]

The proposal made by France and Germany highlights another aspect related to the scope of action of competition authorities that does not converge with the ideals of Hipster Antitrust, nor aligns with the traditional consumer welfare standard. Differently than the Hipster Antitrust movement, which defends enlarging the criteria and elements for assessing market power that would justify an antitrust intervention, the defenders of the European champions thesis campaign for a lower level of antitrust intervention, so that protection of competition and of the consumer welfare are shunned in favor of fostering national and regional industrial policy. In other words, according to this perspective, the State should prioritize other public policies (e.g., industrial policy) instead of the antitrust policy.

III. Current Discussion in Brazil

Before setting foot into CADE's case law, it is worth noting the scope of the antitrust authorities according to the Brazil's legal framework. The analysis of Brazilian law becomes even more relevant considering that the country's legal system is historically based in the Roman-Germanic *civil law* system developed in Continental Europe and, afterwards, in several of its colonies. Hence, Brazilian legal system is shaped to highlight the importance of written norms, being statutes the primary source of the law.[25] By contrast, the English-based *common law* system is construed according to the case law and has customs as its foundation (customary law).[26]

In Brazil, antitrust is based on Article 170, of the Federal Constitution of 1988, which deals with the "economic order" and, within the infra-constitutional level, on Law No. 12,529/2011 (competition law currently in force in the country), which addresses the "prevention and repression of infractions against the economic order, oriented by the

[23] Source: https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2. Access in February, 2020.
[24] Source: https://www.competitionpolicyinternational.com/eu-resists-antitrust-reform-plans-until-2021/. Access in March, 2020.
[25] In this regard, the first Federal Constitution of Brazil, of 1824, already prescribed the entitled *legality principle*, by determining that "no citizen shall be obliged to do or not do do something, unless by virtue of the law" (Article 179, Clause I).
[26] BARROSO, Luís Roberto. *Curso de Direito Constitucional Contemporâneo: os conceitos fundamentais e a construção do novo modelo*. 2ª ed. São Paulo: Saraiva, 2010, p. 44.

constitutional precepts of free enterprise, free competition, social purpose of properties, consumer protection and repression against abuses of economic power" (Article 1, *caput*).

As Eric Jasper observes, Law No. 12,529/2011 provides "diffuse objectives" as regard to the purpose of antitrust policy in Brazil, although "with respect to merger filings the legislator was clear in highlighting the consumer welfare (understood as consumer surplus) and economic efficiency".[27]

Briefly discussing about the evolution of Brazilian antitrust legislation, the wording of the revoked Law No. 8.884/1994 made references to elements such as "national economy" and "alteration in employment levels" with respect to administrative proceedings for analyzing merger filings and for investigating anticompetitive conducts, elements which are strange to the traditional antitrust policy.[28] Therefore, it should be noted that Law No. 12,529/2011, by structuring the Brazilian System of Competition Defense ("SBDC", in its acronym in Portuguese), transformed entirely the systematic of merger filing analysis[29], eliminating certain terms that are strange to the typical consumer welfare-based antitrust assessment, such as "national economy" and "levels of employment". As it can be inferred by the legislator's will, such topics should not be addressed thorough the antitrust authority.

In the context of the discussions of the bills No. PL 3937/2004 and No. PL 5877/2005, which resulted in the enactment of Law 12,529/2011, the Legislative Branch stated that the "objective of antitrust is to enhance social welfare by promoting economic efficiency"[30] and that the new law would allow the SBDC to function "efficiently for protecting the interests of consumers for fostering sustainable economic development"[31]. It looks clear from the referred

[27] JASPER, Eric. *Paradoxo tropical: a finalidade do direito da concorrência no Brasil*, p. 180. Available at: http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/424. Access in February, 2020.
[28] According to the referred statute, CADE could approve mergers when required to "attend national economy and common good purposes", as long as it would not "harm consumers or end users" (Article 54, §2º) and the "level of exposure of the sector to international competition and alterations in the levels of employment" should be considered when executing cease-and-desist commitments (Article 58, §1º).
[29] It was just with the enactment of Law No. 12.529/2011 that merger filings started being analyzed in a *priori* manner in Brazil (condition for implementing the deal). While Law No. 8.884/1994 was in force, parties could execute and implement a merger and just afterwards require CADE's approval, which could oblige the parties to undo the merger.
[30] Bill No. 3937/2004, p. 11. Available at (Portuguese only): https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra;jsessionid=52734F72AD797015EB028A1DBBC203D0.proposicoesWebExterno2?codteor=233311&filename=PL+3937/2004. Access in February, 2020.
[31] Bill No. 5877/2005, p. 34. Available at (Portuguese only): https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=339118&filename=PL+5877/2005. Access in February, 2020.

legislative bills that the legislator envisioned a protective law to consumers and to the "economy as a whole"[32].

CADE, by its turn, informs that its attributions are to "analyze and approve (or not) mergers, investigate conducts that harm competition and, if required, impose sanctions to offenders, and disseminate the culture of free competition", constitutional principle that "assures, on one hand, lower prices for consumers and, on the other hand, stimulates creativity and innovation among companies".[33]

Therefore, by means of a systemic analysis of the legal framework, considering the constitutional principles of freedom of competition and consumer protection and the rationale of Law No. 12,529/2011, it is possible to infer that Brazilian law defines CADE's scope of action, which must be founded in the "constitutional precepts of free enterprise, free competition, social purpose of properties, consumer protection and repression against abuses of economic power".

In this sense, CADE's case law has already indicated, in general lines, that the purpose of antitrust policy is to "maximize economic value for consumers"[34], pursue "the economic welfare"[35] or the "consumer welfare or the assurance of lower prices"[36], or even to protect "markets against any kind of abuse"[37].

Having said that, it is important to verify whether recent cases ruled by CADE give a firm indication on what was the authority's position with respect to topics that fall outside the classic consumer welfare approach, such as employment levels, national sovereignty and tax-related issues, as it will be detailed hereinafter.

CADE's General Superintendence ("SG")'s review of the merger filing[38] involving the acquisition by Boeing of the commercial aviation business of Embraer and the joint venture

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[32] Bill No. 5877/2005, p. 36.
[33] Source: http://en.cade.gov.br/servicos/faq-1/general-questions-on-competition-defense. Access in March, 2020.
[34] Commissioner Mauricio Oscar Bandeira Maia's winning vote, issued on March 19, 2018, in Administrative Proceeding No. 08012.002673/2007- 51.
[35] Reporting Commissioner Márcio de Oliveira Júnior's vote, issued on November 25, 2015, in Administrative Proceeding No. 08700.001830/2014- 82.
[36] Commissioner Ana Frazão's vote, issued on August 8, 2015, in Administrative Proceeding No. 08012.004276/2004-71. It was the winning vote as regard the merit of the case, but it did not prevail with respect to the fines to be imposed to the defendants.
[37] Commissioner Ana Frazão's vote (accompanied the winning vote of the case), issued on May, 25, 2015, in Administrative Proceeding No. 08012.008847/2006-17.
[38] Merger Filing No. 08700.003896/2019-11. By the time of the conclusion of this article (March, 2020), the case was still under analysis by CADE`s Administrative Tribunal; thus, the case's *res judicata* is yet to be verified.

between the companies related to the military aviation sector provides a recent example of the discussion on the possibility of broadening the antitrust analysis in Brazil.

In the case, SG reiterated the need of limiting the scope of the antitrust assessment to potential impacts on competition in the affected markets, in the following terms:

> *"In the Brazilian case, it is import to state that the scope of CADE's analysis is limited to the evaluation of potential impacts on competition in the affected markets.* ***Issues related to industrial policy, commercial policy, national sovereignty, labour rights,*** *among others, may be addressed only if related to the antitrust assessment of the case on hand. However, they are not the main object under analysis."*[39] *(emphasis added)*

One could observe that, when faced with a global case which provoked discussions on its consequences to issues not traditionally involved in the consumer welfare-based antitrust analysis, such as, preservation of employment levels[40], maintenance of the national sovereignty and development of the national industry[41], SG affirmed categorically that "[r]egarding CADE, its competence in the analysis of the deal is limited the impacts of the transaction on competition", refraining, in the referred proceeding, from addressing topics strange to competition.

CADE has also discussed the possibility of tax-related infringements result in harmful effects to competition and whether such practices should be persecuted by the antitrust authority. After receiving a complaint in July 2018, SG investigated whether entities of the education sector in Brazil were using unproperly tax resources for purposes not related to the educational goal they were designed to fulfill, harming competition. During its enquiry, SG weighed that such distortions to competition do not necessarily lead to CADE's competence to rule on the case, since they should be dealt in judicial lawsuits or by tax regulation entities. It should be noted that, in such opportunity, CADE shove away the assessment of potential impacts to competition arising from tax infringements, reinforcing the perception that the scope of Law No. 12,529/2011 is to protect the economic order through "constitutional precepts of free enterprise, free competition, social purpose of properties, consumer protection and repression against abuses of economic power".[42]

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[39] Report No. 1/2020, issued on January 27, 2020, in Merger Filing No. 08700.003896/2019-11.
[40] Source: Superior Labour Court: http://www.tst.jus.br/noticia-destaque/-/asset_publisher/NGo1/content/id/24760714 (Portuguese only). Access in March, 2020.
[41] Source: Federal Supreme Court: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=426933 (Portuguese only). Access in March, 2020.
[42] Technical Note No. 19/2018, issued on July 26, 2018, in Proceeding No. 08700.004480/2018-30.

In another case, CADE decided to shelve another proceeding whereby it investigated whether certain kinds of taxation were impairing competition. Similarly as the abovementioned case in the education sector, CADE concluded that the issues concerning the case had eminently taxation characteristics (e.g., evasion of the Tax on Manufactured Products) and should be monitored by other government entities with specific competence, since "CADE could not pronounce on matters that extrapolate its attributions prescribed by the law regarding prevention and repression of infractions to the economic order".[43]

IV. Future Challenges

After demonstrating that antitrust law in the Brazilian legal framework has been developed in a manner so that the focus of CADE's analysis should be strictly related to competition issues, the question is whether certain markets and its new settings (e.g., digital economy) may alter this scenario.

In this sense, it is worth noting CADE's Administrative Inquiry No. 08700.004314/2016-71, concerning a complaint of alleged anticompetitive conducts practiced by telecommunication services' providers (i.e., Claro; Oi; Tim; Vivo), which discussed the services of mobile data offered under the called zero-rating services, and its alleged infringement of the network neutrality principle. Zero-rating is a policy undertaken by mobile internet providers through which no price is directly charged ("zero price") for transferring mobile data related to a certain application (or group of applications).

According to the complaint offered by the Federal Prosecutor's Office, zero-rating policies would require an antitrust scrutiny, given its potential of distorting competition in the market for applications, by discriminating and favoring certain players over others and, thus, by posing and obstacle against the entry and growth of new entrants in the market, pursuant to article 36, §3º, clause IV, of Law No. 12,529/2011. Moreover, zero-rating policies would inhibit innovation and provide incentives for raising the prices for consumers when offering services for connecting to mobile internet, as a measure to compensate the zero-rating policies regarding data transferring.

[43] Reporting Commissioner Ricardo Machado Ruiz's vote, issued in September, 2011, in Administrative Proceeding No. 08700.003984/2010-85.

As SG's Technical Note stated, evaluating the complainant on the alleged infringement of the network neutrality principle[44] is not the role of SBDC, since, in addition of being a controversy issue, SG affirmed that CADE's analysis on the referred case should only lie upon the infringement of the economic order.

However, it should be noted that SG added that understanding the technical aspects of zero-rating policies and its connection with network neutrality was essential for the proper antitrust analysis of the case, since such understanding enabled the full comprehension of the relevant markets' competitive dynamics and operation. In this sense, considerations provided by sectorial entities, such as the National Agency of Telecommunications ("ANATEL") and the Ministry of Science, Technology, Innovation and Communications ("MTIC"), played an important role in helping CADE achieve its convincement on the case. According to such entities, there was no *ex ante* legal prohibition with respect to zero-rating policies and its connection with the network neutrality principle. This conclusion, allied with the high competitiveness of the relevant markets on hand (i.e., personal mobile services; SMP; supply of applications and content) and with the lack of existence of exclusivity (e.g., obligation that a certain app could access zero-rating services with only one mobile data supplier), resulted in CADE's decision for shelving the case without imposing sanctions to the telecommunication companies.

As it can be inferred from the abovementioned case, it is interesting to note that, even by not deciding whether there was a violation to the network neutrality principle, CADE's ruling on the case analyzed such principle in a view to consider whether an infraction to the economic order had occurred.

V. Conclusion

In light of the exposed, one can notice that competition authorities worldwide have been addressing the Hipster Antitrust issues differently, either considering topics not strictly related to competition for ruling on a certain case or, in other occasions, shoving away this approach under the justification that antitrust policy should not address such topics not originally related to antitrust. This fact demonstrates the increasing relevance of the debate, especially

[44] The network neutrality principle lies upon the concept that to every information available on the internet it should be granted the same treatment, the same speed and free access to all users.

considering a constantly evolving and transforming society, characterized by increasing innovation and digitalization.

In this context, antitrust law may not be deemed as an isolated field of law and new economies, such as digital economy, may provoke a broad assessment by competition agencies of the specifics of the relevant markets under scrutiny, as the network neutrality, for example, among other that could raise concerns not only of a regulatory nature, but also from the antitrust perspective.

This does not mean that topics not traditionally considered by antitrust authorities should be taken into account for examining competition issues of the market; instead, it means that given the new dynamics and characteristics of the competitive process, antitrust authorities must acknowledge the sector specifics and/or technical factors, including cooperation with other entities, having in mind ultimately how consumers and free of competition will be impacted.

Therefore, the perspectives for the SBDC and for the future of antitrust in Brazil are not of profound structural changes, but of adequation, in light of the requirements for analyzing complex markets, using as parameters the criteria that the legal framework currently in force establishes, such as the freedom of competition and the consumer welfare.

Certainly, this debate will not exhaust in the near future, since future challenges are being presented for antitrust authorities (worldwide and in Brazil), as, for example, the recently enacted Law on Data Protection (yet to enter into force), and other issues to emerge, contributing for deepening the discussion and the analysis to be undertaken by the competition authority, but which will also require a more complete and comprehensive examination by public agencies.

VI. References

BARROSO, Luís Roberto. *Curso de Direito Constitucional Contemporâneo: os conceitos fundamentais e a construção do novo modelo*. 2ª ed. São Paulo: Saraiva, 2010.

BORK, Robert H. The Antitrust Paradox: a policy at war with itself. The Free Press, 1978.

FORGIONI, Paula A. *Os fundamentos do antitruste*. 3ª ed. Revista dos Tribunais, 2008.

HOVENKAMP, Herbert. The Antitrust Enterprise: Principle and Execution. Harvard University Press, 2005.

JASPER, Eric. *Paradoxo tropical: a finalidade do direito da concorrência no Brasil*, in *Revista de Defesa da Concorrência*, 2018.

KHAN, Lina M. Amazon's Antitrust Paradox. The Yale Law Journal, 2017.

KREIN, Julia. *Novos Trustes Na Era Digital: efeitos anticompetitivos do uso de dados pessoais pelo Facebook*, in *Revista de Defesa da Concorrência*, v. 6, n. 1, 2018, p. 198-231.

NUSDEO, Fábio. *Um panorama da tutela concorrencial*, in *Evolução do Antitruste no Brasil*. Ed. Singular, 2018, 1ª ed., CAMPILONGO, Celso; e PFEIFFER, Roberto (Org.), p. 9.

REZENDE, Gustavo M.; LOPES, Paulo A. *Efeitos Concorrenciais de Práticas Tributárias: avaliação da denúncia de conduta 08700.004480/2018-30 envolvendo SENAI e SENAC in Jurisprudência do CADE comentada*, in *Jurisprudência do CADE comentada*. Thomson Reuters Revista dos Tribunais, 2020, CRISTÓFARO, P. P. S.; e BAGNOLI, Vicente (Coord.), p. 485-515.

SALOMÃO FILHO, Calixto. *Direito Concorrencial*. São Paulo: Malheiros, 2013.

SLOT, Jan Pier; JOHNSTON, Angus. An Introduction to Competition Law. Hart Publishing, 2006.

WRIGHT, Joshua D.; et al. Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust. George Mason Law & Economics Research, Arizona State Law Journal, 2019.

WU, Tim. The Curse of Bigness: Antitrust in the New Gilded Age. Columbia Global Reports, 2018.

THE CASE FOR CONSUMER CHOICE UNDER THE CONSUMER WELFARE STANDARD

Bruno Droghetti Magalhães Santos, Paula Farani de Azevedo Silveira

I. Introduction

The digital revolution has revolutionized our ability to capture and exchange information, and it has enabled entities to amass gigantic amounts of personal information. In digital markets, it has allowed digital platforms to process vast quantities of consumer data, and consequently understand and predict exactly how consumers behave.

While this level of knowledge results in the offering of products and services that meet consumers' desires, consumers have had to give up a certain level of autonomy and privacy. Given that consumers have embraced these new services, it seems that giving away personal information for services is perceived as a positive-sum outcome.

From the digital platforms' perspective, in markets that tend to monopoly, the incumbent holds an even stronger competitive advantage. By combining data and market power, the incumbent can steer consumer behavior into adjacent markets, increase barriers to entry (e.g. by increasing switching costs and/or restricting multi-homing) or decrease the quality of alternative service providers. This is even more pronounced when rival service providers need access to the platform's ecosystem in order to compete.

Assuming that the underlying goal of the antitrust laws is the consumer welfare standard, understood as the "true" standard espoused by Professor Steve Salop[1], this article defends that antitrust enforcement should intervene in anticompetitive conducts that restrict effective consumer choice, since this may result in decreased consumer welfare due to a lessening of competition, loss of variety and, possibly, of quality.

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[1] *"(…) [T]he true consumer welfare standard would condemn conduct if it reduces the welfare of buyers, irrespective of its impact on sellers.* (…) *The true consumer welfare standard is indifferent to conduct that harms competitors – unless the conduct also likely harms consumers.*" *In* SALOP, Steven C. *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard. 22* Loy. Consumer L. Rev. 336. 2010. Available at: http://lawecommons.luc.edu/lclr/vol22/iss3/3. Access on 03.30.2020.

II. Consumer Behavior and Market Power

Recently, renowned institutions and competition authorities worldwide have published a range of reports about competition policy in the context of the digital era. In short, they have contributed to a better understanding of digital markets and on how competition authorities should adapt available legal tools to address the specificities presented by this new world. Amongst their findings, two deserve special attention.

The first is the Stigler Center Report's conclusion that "digital platforms tend to monopolies"[2]. According to the Report:

> *"The markets where* [digital platforms] *DPs operate exhibit several economic features that, while not novel* per se*, appear together for the first time and push these markets towards monopolization by a single company. These features are: i) strong network effects (the more people use a product, the more appealing this product becomes for other users); ii) strong economies of scale and scope (the cost of producing more or of expanding in other sectors decreases with company's size); iii) marginal costs close to zero (the cost of servicing another consumer is close to zero); (iv) high and increasing returns to the use of data (the more data you control, the better your product); and v) low distribution costs that allow for a global reach. This confluence of features means that these markets are prone to tipping; that is, they reach a point where the market will naturally tend towards a single, very dominant player (also known as "winner takes all markets"). An entrant will most likely be unable to overcome the barriers to entry represented by scale economies and data control, as they are difficult to achieve in a quick, cost-effective manner"*[3].

The second, also from the Stigler Center Report, is that consumer behavior generates barriers to entry and entrenches market power. This follows from the fact that in digital platforms market power is measured in consumer attention and use. Therefore, the Report concludes that the same consumer that generates market power is ultimately the one harmed by it.

In digital platforms, it is human behavior that creates or eliminates some of the frictions that take place in the market. For example, whether to continue searching for a better response

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[2] ZINGALES, Luigi; LANCIERI, Filippo Maria. *Stigler Committee on Digital Platforms. Policy Brief.* George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business (2019), p. 3 and 4. Available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/policy-brief---digital-platforms---stigler-center.pdf?la=en&hash=AC961B3E1410CF08F90E904616ACF3A3398603BF. Access on 03.30. 2020.

[3] MORTON, Fiona Scott, *et. al. Report: Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee*. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business (2019), p. 3 and 4. Available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C. Access on 03.30.2020.

to a query or to settle on first-page links; whether to test other internet browsers and compare their functionalities or use the default option, etc.

As such, behavioral economics should be an essential antitrust tool to examine the underlying incentives and competitive strategies of digital platforms, since it considers the real-world behavior of consumers with bounded rationality, willpower, and self-interest[4]. However, the essential aspect of behavioral economics for the purposes of this article is not that consumers are not perfectly rational, but that they do not necessarily reveal their true preferences through choice.

The revealed preference theory developed by Nobel Laureate economist Paul Samuelson (1948) states that "*[b]y comparing the costs of different combinations of goods at different relative price situations, we can infer whether a given batch of goods is preferred to another batch; the individual guinea-pig, by his market behavior, reveals his preference pattern—if there is such a pattern*"[5].

In a recent 2018 speech entitled "*Don't Stop Believin': Antitrust Enforcement in the Digital Era*", Assistant Attorney General of the Antitrust Division Makan Delrahim stated that *"[t]his concept is particularly helpful in understanding dynamic or emerging markets, including digital markets. That is, economic value is demonstrated by consumers' willingness to pay for goods and services*"[6].

However, empirical analysis has shown that this is not always true. Therefore, it is important to understand how and why a consumer would exercise a choice that does not reveal their true preference.

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[4] "*The task of behavioral law and economics, simply stated, is to explore the implications of actual (not hypothesized) human behavior for the law. How do "real people" differ from homo economicus? We will describe the differences by stressing three important "bounds"on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information. People can be said to display bounded rationality, bounded willpower, and bounded self-interest*". *In* JOLLS, Christine; SUNSTEIN, Cass R.; and THALER, Richard H. *A Behavioral Approach to Law and Economics.* 50 Stanford Law Rev. 1471 (1998), p. 1476. Available at: https://ssrn.com/abstract=2292029. Access on 03.30.2020. In this sense, see also: THALER, Richard H. *Doing Economics Without Homo Economicus, in Foundations of Research in Economics: How Do Economists Do Economics?* 227, 230-35 (Steven G. Medema & Warren J. Samuels eds., 1996).
[5] SAMUELSON, Paul A. *Consumption Theory in Terms of Revealed Preference*. Economica, New Series, 15, no. 60 (1948), p. 243-53.Available at: https://www.jstor.org/stable/2549561?origin=crossref&seq=1 . Access on 03.30.2020.
[6] DELRAHIM, Makan. *Don't Stop Believin': Antitrust Enforcement in the Digital Era* (2018). Remarks as Prepared for Delivery at Booth School of Business, the University of Chicago. Available at: https://www.justice.gov/opa/speech/file/1054766/download. Access on 03.30.2020.

We posit, as did the Stigler Report, that consumers are not free to reveal their true preferences on digital platforms for two reasons: (i) behavioral biases and (ii) choice architecture.

III. Behavioral Biases

Antitrust is based on the notion that consumers benefit from competition due to lower prices and improved products and services. As Professor Carl Shapiro (2017) states simply, "*the proper goal of antitrust is straightforward: to promote competition*"[7]. Firms compete in a simultaneous non-cooperative game and the "winner" is the one chosen by the consumer through revealed preferences. This will motivate the "losing" firms to become "better" in order to conquer that consumer in the next rounds.

In digital platforms, the competitive process is similar to the one above, but consumer choice is the element that separates the winner from the loser. Again, as consumer adoption and use generate market power, consumer choice is the critical element. So how do consumers choose?

Psychology (TVERSKY and KAHNEMAN, 1974) and economics (THALER and SUNSTEIN, 2008) have already established that human beings are not capable of perfect rationality. Therefore, they use anchoring and adjustment heuristics – general rules of influence – to simplify the decision-making processes relying on "bounded rationality". The use of these tools can lead to cognitive biases or systematic errors that can influence consumer behavior which may appear irrational, unpredictable and even wrong[8].

So, what happens during the decision-making process? According to Kahneman (2011), human beings have two decision making processes, but prefer "cognitive ease":

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[7]SHAPIRO, Carl. *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?*. Opening Statement at the Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights (2017). Available at: https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Shapiro%20Testimony.pdf. Access on 03.30.2020.

[8] "*Herbert Simon (1955) was an early critic of modeling economic agents as having unlimited information processing capabilities. He suggested the term "bounded rationality" to describe a more realistic conception of human problem solving capabilities. As stressed by Conlisk (1996), the failure to incorporate bounded rationality into economic models is just bad economics—the equivalent to presuming the existence of a free lunch. Since we have only so much brainpower, and only so much time, we cannot be expected to solve difficult problems optimally. It is eminently "rational" for people to adopt rules of thumb as a way to economize on cognitive faculties. Yet the standard model ignores these bounds and hence the heuristics commonly used. As shown by Kahneman and Tversky (1974), this oversight can be important since sensible heuristics can lead to systematic errors*". *In* MULLAINATHAN, Sendhil; THALER, Richard H. *Behavior Economics*. NBER Working Paper Series 7948 (2000), p.5. Available at: https://www.nber.org/papers/w7948.pdf. Access on 03.30.2020.

> *"Human beings are more favorably disposed towards words or experiences to which they have already been exposed and easily understand. Psychologists postulate the "exposure effect" under which we prefer familiar situations because they have been deemed safe. Easy tasks, guided by System 1 intuitions, put one in a good mood. System 1 "is generally very good at what it does: its models of familiar situations are accurate, its short-term predictions are usually accurate as well." But, System 1 has biases as well and often makes mistakes. Perhaps most important, for the purposes of market behavior, is System 1's avoidance of careful rational calculation in favor of an established habit–even when careful calculation would result in a better, "more rational" choice. Further, System 1 "cannot be turned off." Thus, individuals can persist in System 1-guided behaviors even though it may seem "rational" to make other choices"*[9].

The economic literature suggests that consumers prefer System 1 thinking and, as such, prefer to use tools that have the lowest cognitive cost. When online searching, for example:

> *"A growing body of empirical research suggests that consumers find search activities on the internet to be extremely costly–and avoid these costs through habit and other heuristics that may results in suboptimal market results. First, an early and consistent finding is that people do not like search and do not do very much of it–despite it being only a click away. For instance, Eric J. Johnson and his coauthors found almost a decade ago that consumers in fact do very few searches and do not extensively review these searches. Johnson and his co-authors propose that cognitive costs associated with search create a type of lock-in behavior. More recent studies make similar findings. Erik Brynjolfsson, Astrid A. Dicky, and Michael D. Smith show that price dispersion persists in the Internet and that this dispersion is largely due to search cost"*[10].

Therefore, if cognitive cost is relevant to the consumer, then the use of these cognitive shortcuts cannot be ignored when predicting consumer behavior. Thaler (2016) states that "*[w]hen people make choices they do so based on a set of expectations about the consequences of their choices and the many exogenous factors that can determine how the future will evolve. Traditionally, economists assume that such beliefs are unbiased*"[11]. But they are not. In fact, certain behavioral biases are very likely to appear in digital markets, such as the default bias, the privacy paradox and the "free effect".

The default bias represents the preference for cognitive ease and states that if given a default option, a disproportionate amount of people will choose the default[12]. The "privacy paradox" expresses the theory that even though consumers express considerable concerns about

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[9] *In* CANDEUB, Adam. *Behavioral Economics, Internet Search, and Antitrust*. I/S: A Journal of Law and Policy for the Information Society, Vol. 9 (2014). Available at: https://ssrn.com/abstract=2414179. Access on 03.30.2020.
[10] *Op. Cit*., p. 428.
[11] THALER, Richard H. *Behavioral Economics: Past, Present and Future*. Available at: https://ssrn.com/abstract=2790606. Access on 03.30.2020.
[12] THALER, Richard H.; SUNSTEIN, Cass R.; BALZ, John P. *Choice Architecture*. Available at SSRN: https://ssrn.com/abstract=1583509. Access on 03.30.2020 (stating that for reasons of laziness, fear, and distraction, many people will take whatever option requires the least effort, or the path of least resistance).

privacy, and rate it as a critical dimension of product quality, they do not seem to make product decisions with privacy in mind[13].

Finally, the "free effect" is the effect a price of zero has on consumers. Empirical analysis shows that in zero price markets consumers are more strongly lured to free goods because they seemingly have no downside and the zero pricing not only decreases the cost of the good but also adds to its value[14]. Further, consumers are hesitant in accepting a positive price for the same product after it was offered at zero price[15], while at the same time are tolerant of lower quality when receiving a zero-price product.

According to the OECD, "*consumers may decide that since they are receiving a product for free, there is no need to become particularly concerned with variations in quality*"[16]. This may also result from an optimism bias, by which consumers misjudge how effective advertising is, or limited information, consumers may underestimate how much data they are providing to firms in exchange for the products they receive[17]. Some authors argue that, when faced with zero price, consumers are "*affective rather than rational decision makers, perhaps due to an emotional response or to a cognitive bias*"[18].

Gal and Rubinfeld (2016) offer a plausible conclusion that zero price products have a "nudge" quality that may induce consumers to make choices that are different from their actual preferences[19]. While a nudge is thought of as a way to push a person to act in their best interest,

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[13] Organization for Economic Co-operation and Development - OECD. *Quality considerations in digital zero-price markets*. Background note by the Secretariat, 2008, p. 27. Available at: https://www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm. Access on 03.30.2020.

[14] SHAMPANIER, Kristina, *et al*. *Zero as a Special Price: The True Value of Free Products*. 26 MKTG. Sci. 742 (2007). Available at: https://www-2.rotman.utoronto.ca/facbios/file/ZeroPrice.pdf. Access on 03.30.2020. (After conducting experiments on the psychology of free prices, the authors found that when faced with a zero price, dramatically more participants chose the cheaper zero-price option, despite the fact that they gave up an alternative that better served their otherwise revealed preferences).

[15] "*This concern could be particularly relevant when a zero-price good is tied to a positively-priced good, since consumers may disproportionately select the offer of a zero priced good, even if the price of the complement exceeds the total cost of an alternative offering where both the good and the complement have a positive price. In terms of impact, Gal and Rubinfeld (2016, p. 535) note that the tying firm "will have to invest less in the quality of the tying product to create a comparative advantage", creating suboptimal outcomes. If a firm's strategy is to provide a product for free until competitors have been driven out of a market, and funds are required to continue the provision of the product, higher prices and weak competition may result*". *In* OECD. *Quality considerations in digital zero-price markets*. Background note by the Secretariat, 2008, p. 27.

[16] *Op. Cit*., p. 27.

[17] *Ibidem*., p. 36.

[18] GAL, Michal S., RUBINFELD, Daniel L. *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*. Law & Economics Research Paper Series Working Paper No. 14-44, 2014, p. 530. Available at: https://www.law.berkeley.edu/wp-content/uploads/2015/04/80AntitrustLJ521_stamped.pdf. Access on 03.30.2020.

[19] *Op. cit.* p. 531.

in a market setting, because of these biases, a firm can employ a strategy that leads the consumer towards a choice that may not be in their self-interest.

IV. Choice Architecture

Choice architecture is precisely the manner through which nudges occur. A nudge is "*any aspect of choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives*"[20]. Choice architecture is predicated on the notion that decision-makers do not make choices in a vacuum. They exercise bounded rationality, willpower, and self-interest based on the available information and on how the choice is presented. Therefore, a choice architect is responsible for organizing the context in which people decide[21].

For example, humans usually prefer to opt for the path of least resistance[22]. Therefore, the default choice is extremely relevant and unavoidable since every choice architecture node contains a default. The default choice could be in the consumer's best interest – as nudge theory suggests – or they can serve the interests of the choice architect. If the choice architect opts to remove the default choice, it can force the user to choose by implementing "required choice". However, this is not always possible and there are other ways in which a choice can be framed.

Choice architecture is especially prevalent in digital platforms that act as intermediaries between two sided markets. Platforms are, therefore, the ultimate choice architects. Platforms engage in several elements of choice architecture regularly. All elements of the user interface are part of the choice architecture: page design, settings placement, use of clear or confusing language and the so-called "happy path"[23]. A happy path is the shortest distance between the user and the user's objective. In online shopping, for example, it is the shortest path from searching for the desired good and completing the purchase. In contrast to the happy path are the dark patterns which are "*user interfaces that make it difficult for users to express their actual preferences or that manipulate users into taking actions that do not comport with their*

[20] THALER, Richard H., SUNSTEIN, Cass R. *Nudge: Improving decisions about health, wealth, and happiness.* Yale University Press, 2008.
[21] *Op. Cit*., p. 3.
[22] THALER, Richard H.; SUNSTEIN, Cass R., BALZ, John P. *Choice Architecture* (2010), p. 3. Available at: https://ssrn.com/abstract=1583509. Access on 03.30.2020.
[23] Available at: https://humanizing.tech/what-is-a-happy-path-2c62959b6d21. Access on 03.30.2020.

preferences or expectations."[24] This kind of consumer manipulation interferes not only on individual consumer's preferences, but also on the competitive process.

WhatsApp is a good example of this phenomenon. The Stigler Report states that:

> "*[S]tudies have shown a strong link between constant notifications and extreme anxiety, in particular on teenagers. Nonetheless, if iOS users try to turn off all WhatsApp notifications, they will be constantly bombarded by a screen commanding them to turn the notifications back on—there is no option to simply state: "I do not wish to receive WhatsApp notifications, thank you." As WhatsApp is now the primary means of communication in many countries, users cannot simply abandon WhatsApp either*"[25].

One could argue that extreme cases of dark patterns would trigger backlash from consumers, but in digital platforms that tend to monopolies, lack of competition leaves consumers with little or no alternatives[26].

Therefore, while most consumer exploitation is traditionally a consumer protection issue (such as bait and switch strategies and price discrimination), it is important to recognize that firms may exploit consumer behavior in order to increase barriers to entry, attempt to monopolize or exclude rivals from the market, and these strategies should receive antitrust scrutiny.

V. Consumer Choice and the Consumer Welfare Standard

Consumer choice is particularly important in the digital platform setting because market power is mostly created through consumer choice. The more users a platform has, the stronger the network effects and the more users it attracts and so on. Therefore, the framing of consumer choice can be a strategy by which the incumbent sustains its market power, leverages its market share in one market into another related market or makes disruption less likely.

The union of market power, behavioral biases and choice architecture may be particularly dangerous for the competitive process and the consumer welfare standard. In markets that tend to monopolization, an incumbent that is able to generate and later entrench market share by

[24] Available at: https://www.wsj.com/articles/how-tech-giants-get-you-to-click-this-and-not-that-11559315900. Access on 03.30.2020.

[25] ZINGALES, Luigi; LANCIERI, Filippo Maria. *Op. Cit*., p. 13

[26] "***Dark patterns are particularly pervasive when combined with market power:*** *Extreme dark patterns—the ones that truly annoy consumers but can increase acceptance rates by 371%—lead to a consumer backlash against the companies employing them. Thus, consumers punish the most abusive companies. The problem is that, as seen above, many markets where DPs operate are prone to monopolization. The lack of meaningful competitors enables these companies to use very aggressive persuasion strategies.*" *Op. Cit*. p. 12.

framing consumer choice will be able to increase barriers to entry, increase rivals' costs and hinder innovation.

Even though consumers were already vulnerable to choice architecture in brick-and-mortar shops, the Stigler Report highlights that this manipulation is particularly harmful when:

> *"i) the manipulator knows a lot about the potential customers; and ii) there are limited (or no) alternatives, as is the case for most DPs. Framing, nudges, and default options can direct consumers to choices they regret. In addition, there is increasing evidence that many online products are designed to be as addictive as possible, or to keep consumers "hooked" on the platform to increase sales without consideration to well-being. The combination of addiction and monopoly is probably the worst possible"*[27].

Furthermore, considering that platforms can extract the most profit when they make all of the necessary complements themselves or position themselves as a bottleneck between partners and customers, platforms have incentives to manipulate consumer behavior by controlling demand and limiting disintermediation. In turn, this reduces the risk that a platform's rival will be able to take consumers off the platform temporarily or entirely[28]. This full-service, one-click or one-stop-shop strategy, while beneficial for consumers, since it leads them on a "happy path", may also increase barriers to entry, limiting rivals' ability to access the consumer, and reduce quality/variety, since (i) many companies are no longer able to engage in the competitive process in a meaningful way, and (ii) the consumer is not able to reveal their true preferences because they opt for the choice that best suits the incumbent.

This framing of consumer choice is being studied in the digital economy and the literature suggests that the issue is not limited to exploiting consumers in the traditional, rent-extracting sense:

> *"In particular, digital platforms are often very careful to maintain complete control over the user relationship so that they do not face any threat of disintermediation from a complement. These technological and policy choices can be used to reduce the possibility of successful entry by direct competitor. Other strategies such as exclusive contracts, bundling, or technical incompatibilities can also be used by platforms to*

[27] *Op. Cit.*, p. 4.

[28] "*If a platform's partner is able to directly access and serve the platform's customers, it might take them off the platform entirely, reducing the platform's profit. A platform that has total control of demand due to control over framing of consumer choices, policies for complements, and technical standards can steer customers to content and complements of most benefit to it. The most privately beneficial content might be owned by the platform itself rather than provided by independent firms that could extract rent or even challenge the platform's market power in the future. To the extent that consumers single-home, they may not be aware of such steering, or may not have competitive alternatives to which they can turn if they are aware." In* ZINGALES, Luigi; ROLNIK, Guy; LANCIERI, Filippo Maria (org.). *Stigler Committee on Digital Platforms: Final Report*. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business (2019) p. 30. Available at: https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report. Access on 03.30.2020.

> *restrict entry of competitors. Some of these strategies could be violations of existing antitrust law, as discussed below"*[29].

Consumer choice manipulation, therefore, is not restricted to a consumer protection issue in this setting, but, rather, to a broader consumer welfare standard issue with antitrust implications.

The consumer welfare standard is concerned with whether a practice or merger "*reduces the welfare of buyers, irrespective of its impact on sellers*". Under Williamson's consumer surplus model[30], authorities need to "*routinely balance out consumer injuries from allocative inefficiencies against firm gains attributable to production efficiencies*"[31]. That is, rather than measuring the overcharge (i.e. the production efficiency), it focuses on the deadweight loss (i.e. allocative inefficiency), which is then balanced against production efficiency gains. In this situation, production and allocative efficiencies are generally understood as static efficiencies, referring to the process of driving marginal prices down to marginal costs in the short run, reducing, in turn, the deadweight loss. Under this model, authorities look at short-run prices, since the goal is to prevent "*higher prices resulting from the exercise of market power*"[32]

In a competitive digital landscape, insufficient competition and entry result in harms to investment and innovation. The lessening or blocking of innovative entry is of particular concern given its value to consumers. Understanding that high-tech industries are driven by dynamic efficiencies[33] is, therefore, critical to recognizing that an effective antitrust enforcement needs to consider both static and dynamic effects. Consequently, authorities need to "*identify and prevent not only static harms—the raising or restraint of prices—but also dynamic harms—the frustration or foreclosure of new products or processes*"[34]. Under this second (dynamic) approach, the goal is to examine how a practice will affect innovation and quality over time[35].

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[29] ZINGALES, Luigi; ROLNIK, Guy; LANCIERI, Filippo Maria (org.). *Op. Cit*., p. 30
[30] HOVENKAMP, Herbert. *Implementing Antitrust's Welfare Goals*. 81 Fordham L. Rev. 2471 (2013), p. 2478. Available at: https://ir.lawnet.fordham.edu/flr/vol81/iss5/11. Access on 03.30.2020.
[31] *Op. Cit*., p. 2478.
[32] *Ibidem*, p. 2479.
[33] Such efficiencies are known for reducing costs (by refining existing products or processes) and/or creating new (unmet) demand, yielding economic growth and large gains in consumer welfare. For more information, please see: SCOTT-MORTON, Fiona. *Antitrust Enforcement in High-Technology Industries: protecting Innovation and Competition*. Remarks as prepared for the 2012 NYSBA Annual Antitrust Forum 1 (Dec 7, 2012), p. 4 and 5. Available at: https://www.justice.gov/atr/file/518956/download. Access on 03.30.2020.
[34] *Op. Cit*., p. 5.
[35] *Ibidem* p. 4 and 5; and ROSCH, J. Thomas. *Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be?* Remarks before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA, March

Given the characteristics of digital markets, even though competition is mostly characterized as "for the market", digital platforms may artificially stifle competition on their marketplaces in order to protect them from complementors and/or potential rivals (whether *de novo* entrants or established players in other platform markets). Likewise, they can also extend their market power into adjacent markets through anticompetitive means.

As demonstrated by the Report "Competition policy for the digital era" issued by the European Commission[36], "*a dominant platform could have incentives to sell "monopoly positions" to their business users (e.g. in terms of the ranking of results displayed)*", or it "*could design the rules (or apply them) in a way which allows it to engage in abusive self-preferencing to consumers on a platform)*". Hence, by self-preferencing, restricting or foreclosing access to the platform, they will be capable of continue extracting rents from their users without any competitive pressure.

In the Google Shopping case, for instance, Google was found of having breached EU antitrust rules because it abused of its market dominance as a search engine by giving an illegal advantage to its comparison-shopping service. In that case, the European Commission assessed, among other issues, the influence of the positioning and display of the generic search results on user behavior, and it confirmed that the more prominently positioned and displayed it was within Google's general search results page, the more it gained traffic. In addition, the Commission concluded that the conduct was "*likely to reduce the incentives of Google to improve the quality of its comparison shopping service as it does not currently need to compete on the merits with competing comparison shopping services*". Likewise, it concluded that Google's conduct was "*likely to reduce the ability of consumers to access the most relevant comparison shopping services"*[37].

23, 2010, p. 3 and 4. Available at: https://www.ftc.gov/sites/default/files/documents/public_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

[36] CRÉMER, Jacques; MONTJOYE, Yves-Alexandre de; SCHWEITZER Heike. *Report on "Competition policy for the digital era"*. Brussels: European Commission, 2019, p. 11. Available at: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf. Access on 03.30.2020.

[37] Commission Decision (AT.39740 - Google Search (Shopping)). Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, p. 180 and 181. Access on 30.03.2020. In addition, as noted by Margrethe Vestager: "*Google has come up with many innovative products and services that have made a difference to our lives. That's a good thing. But Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search result, and demoting those of competitors"*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784. Access on 30.03.2020.

Given the right choice architecture, self-preferencing is not even needed. Google states that 50% of searches on Google Search do not result in clicks[38]. This statistic needs to be carefully analyzed because it could hold two very different meanings. One could assume that 50% of searches are failed and the user needs to start over or head to another search engine. Another interpretation could be that of these searches, many users find the response to their query without being directed off the platform. Therefore, Google could be able to successfully respond to the user's query and avoid driving traffic to potential rivals. This was one of the main complaints voiced by publishers concerned that the launch of the answer box and snippets would decrease traffic from the search engine to their websites[39].

The Stigler Report highlighted that often "*the actions needed to generate choice for the consumer seem trivial, such as a download and installation, opening another app, or a few clicks*." However, consumers do not act this way because "*inherent behavioral biases such as discounting the future too much and being too optimistic. The situation is worse when the information needed to counteract bias is hard to obtain.*" The tendency to choose in this manner and to single home due to the convenience cost reinforces market power and further entrenches the incumbent's position[40]. Behavioral economics suggests therefore, that the incumbent's position may be stronger, and competition is not necessarily "one click away".

VI. Conclusion

Given the characteristics of digital markets and the way consumers behave, antitrust authorities must begin to examine and seriously consider whether platforms have been exploring behavioral biases and choice architecture to curb the competitive process. Assuming that an effective antitrust enforcement needs to consider both static and dynamic effects, authorities should also look more closely into practices that restrict effective consumer choice,

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[38] Available at: https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/ Access on 12.06.2020

[39] Available at: https://searchengineland.com/google-publishers-concerned-knowledge-graph-searchers-still-need-content-186325. Access on 03.30.2020.

[40] "*The tendency to choose in this manner entrenches the market power of the platform that can control the display of content. Similarly, consumers' preference for instant gratification may lead them to sign away privacy rights they otherwise say they value.64 This allows incumbent platforms to gather data from these consumers that further entrenches their market position. In general, the findings from behavioral economics demonstrate an under-recognized market power held by incumbent digital platforms.*
A second way consumers create entrenched market power is by single-homing. A multi-homing user, for example, checks the price of a ride on both Uber and Lyft each time she needs a car. A user that single-homes bestows market power on the platform she uses exclusively because advertisers and other content providers can only get the user's attention by going through that platform. While users sometimes have the ability to employ multiple services, there is usually a convenience cost to doing so. Making multi-homing easier will be a key element in encouraging competition". In MORTON, Fiona Scott, *et. al. Op. Cit.*, p. 20.

since this may result in decreased consumer welfare derived particularly from a loss of variety and quality.

Given the winner takes all characteristic of digital markets, there is substantial evidence that the combination of market power, behavioral biases and choice architecture may be particularly dangerous for the competitive process and the consumer welfare standard. For these reasons, we posit that antitrust enforcers must expand their toolbox into behavioral economics, psychology and computer programming in order to be able to identify the new ways that anticompetitive practices are implemented, especially those relating to barriers to entry created via consumer choice framing. Furthermore, authorities need to rethink the applicability of the revealed preferences theory in digital markets given the behavioral biases and choice architecture.

VII. References:

CANDEUB, Adam. ***Behavioral Economics, Internet Search, and Antitrust***. I/S: A Journal of Law and Policy for the Information Society, Vol. 9, 2014. Available at: https://ssrn.com/abstract=2414179.

CRÉMER, Jacques; MONTJOYE, Yves-Alexandre de; SCHWEITZER Heike. Report on ***"Competition policy for the digital era***". Brussels: European Commission, 2019. Available at: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

DELRAHIM, Makan. ***Don't Stop Believin'*****: Antitrust Enforcement in the Digital *Era***. Remarks as Prepared for Delivery at Booth School of Business, the University of Chicago, 2018. Available at: https://www.justice.gov/opa/speech/file/1054766/download.

European Commission Decision, AT.39740 - Google Search (Shopping). Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf,

EVANS, David S. ***The Online Advertising Industry*****: Economics, Evolution, And Privacy**. The Journal of Economic Perspectives 37, 2009. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1376607.

____________. ***Attention Rivalry Among Online Platforms.*** Journal of Competition Law & Economics, Volume 9, Issue 2, June, 2013.

____________. ***The Antitrust Economics of Free***. John M. Olin Law & Economics Working Paper, University of Chicago, 2011, No. 555, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1483&context=law_and_economica.

EVANS, David S., SCHMALENSEE, Richard. ***Matchmakers*****: the new economics of platform business**. Boston, Massachusetts. Harvard Business Review Press, 2016.

EVANS, David S.; SCHMALENSEE, Richard. ***The Antitrust Analysis of Multi-Sided Platform Business***. Coase-Sandor Institute for Law & Economics Working Paper No. 623, 2012. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1482&context=law_and_economics.

GAL, Michal S., RUBINFELD, Daniel L. ***The Hidden Costs of Free Goods*: Implications for Antitrust Enforcement**. Law & Economics Research Paper Series Working Paper No. 14-44, 2014. Available at: https://www.law.berkeley.edu/wp-content/uploads/2015/04/80AntitrustLJ521_stamped.pdf

HOVENKAMP, Herbert. ***Consumer Welfare in Competition and Intellectual Property Law*** (March 4, 2014). 9 Competition Policy International 53, 2014; U Iowa Legal Studies Research Paper No. 14-34. Available at SSRN: https://ssrn.com/abstract=2329150 or http://dx.doi.org/10.2139/ssrn.2329150

____________________. ***Implementing Antitrust's Welfare Goals***, 81 Fordham L. Rev. 2471, 2013. Available at: https://ir.lawnet.fordham.edu/flr/vol81/iss5/11

JOLLS, Christine; SUNSTEIN, Cass R; THALER, Richard H. ***A Behavioral Approach to Law and Economics***. 50 Stanford Law Rev. 1471, 1998. Available at: https://ssrn.com/abstract=2292029.

MORTON, Fiona Scott, *et. al*. ***Report:* Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee**. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, 2019. Available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

SCOTT-MORTON, Fiona. ***Antitrust Enforcement in High-Technology Industries*: protecting Innovation and Competition**. Remarks as prepared for the 2012 NYSBA Annual Antitrust Forum 1 (Dec 7, 2012). Available at: https://www.justice.gov/atr/file/518956/download.

SHAPIRO, Carl. ***The Consumer Welfare Standard in Antitrust*: Outdated, or a Harbor in a Sea of Doubt?**. Opening Statement at the Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, 2017. Available at: https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Shapiro%20Testimony.pdf.

SHAMPANIER, Kristina, *et al*. ***Zero as a Special Price:* The True Value of Free Products**. 26 MKTG. Sci. 742, 2007. Available at: https://www-2.rotman.utoronto.ca/facbios/file/ZeroPrice.pdf. Access on 03.30.2020.

MOTTA, Massimo. ***Competition Policy: theory and practice***. Cambridge University Press, 2004

MULLAINATHAN, Sendhil; THALER, Richard H. ***Behavior Economics***. NBER Working Paper Series 7948, 2000. Available at: https://www.nber.org/papers/w7948.pdf.

O'Brien, Daniel, SMITH, Doug. ***Privacy in Online Markets*: A Welfare Analysis of Demand Rotations** (working paper No. 323, 2014). Available at: http://www.ftc.gov/reports/privacy-online-markets-welfare-analysis-demand-rotations.

Organisation for Economic Co-operation and Development - OCDE. ***Quality considerations in digital zero-price markets***. Background note by the Secretariat, 2008. Available at: https://www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm.

______. ***Rethinking Antitrust Tools for Muti-Sided Platforms***, 2018. Available at:https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf.

______. ***Competition Policy and Efficiency Claims in Horizontal Agreements***, OECD/GD (96) 65, Paris 1996. Available at: https://www.oecd.org/competition/mergers/2379526.pdf.

ROSCH, J. Thomas. ***Promoting Innovation*****: Just How "Dynamic" Should Antitrust Law Be?** Remarks before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA, March 23, 2010. Available at: https://www.ftc.gov/sites/default/files/documents/public_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

ROCHET, Jean-Charle, TIROLE, Jean. ***Platform Competition in Two-Sided Markets***. Journal of the European Economic Association, 2003.

SALOP. Steven C. ***Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*****,** 22 Loy. Consumer L. Rev. 336, 2010. Available at: http://lawecommons.luc.edu/lclr/vol22/iss3/3.

SAMUELSON, Paul A. ***Consumption Theory in Terms of Revealed Preference***. Economica, New Series, 15, no. 60, 1948. Available at: https://www.jstor.org/stable/2549561?origin=crossref&seq=1.

THALER, Richard H. ***Doing Economics Without Homo Economicus, in Foundations of Research in Economics: How Do Economists Do Economics?*** 227, 230-35 (Steven G. Medema & Warren J. Samuels eds., 1996).

_________________. ***Behavioral Economics*****: past, present and future**. Available at: https://ssrn.com/abstract=2790606.

THALER, Richard H., SUNSTEIN, Cass R. ***Nudge*****: improving decisions about health, wealth, and happiness.** Yale University Press, 2008.

THALER, Richard H.; SUNSTEIN, Cass R.; BALZ, John P. ***Choice Architecture*** (2010). Available at SSRN: https://ssrn.com/abstract=1583509.

TVERSKY, A., KAHNEMAN, D. ***The framing of decisions and the psychology of choice***. Science, 211 (4481), 1981.

_________________. ***Judgment under uncertainty*****: heuristics and biases**. Science, 185 (4157), 1974.

ZINGALES, Luigi; ROLNIK, Guy; LANCIERI, Filippo Maria (org.). ***Stigler Committee on Digital Platforms*****: Final Report**. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, 2019. Available at: https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report.

ZINGALES, Luigi; LANCIERI, Filippo Maria. ***Stigler Committee on Digital Platforms. Policy Brief***. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, 2019. Available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/policy-brief---digital-platforms---stigler-center.pdf?la=en&hash=AC961B3E1410CF08F90E904616ACF3A3398603BF

THE RELEVANCE OF BEHAVIORAL ECONOMICS IN ANTITRUST

Elizabeth Farina, Fabiana Tito, Gabriela Parra

I. Introduction

Behavioral economics emerged in literature at the end of the 1970s with the work of Kahneman and Tversky (Kahneman & Tversky, 1979). The subject has since evolved in academia and public policy. That Richard Thaler was awarded the Nobel Prize for Economics in 2017 for his contributions to behavioral economics is indicative of the rapidly changing status of this field of research.

According to Stucke (Stucke, 2013), as behavioral economics 'goes mainstream' in both academia and business, one expects lawyers and economists to bring the current economic thinking to competition agencies. From a systematic perspective, the application of behavioral economics to the law gave rise to a new branch of study, Behavioral Law and Economics, which, in turn, spawned the subfield "Behavioral Antitrust."

II. Deviations from neoclassical assumptions: a more realistic approach

Economic analyses of the law are usually based on neoclassical assumptions, whereby perfectly rational market participants are expected to pursue their economic self-interest by force of will. Behavioral economics challenges these traditional premises. Grounded on empirical evidence that individuals show bounded rationality, bounded self-interest, and bounded willpower, this specialty offers a more realistic approach to economic analysis.

By assuming that deviations from traditional economic principles exist, behavioral economics looks at peoples' heuristics and biases to understand human decision making. According to the U.K. Office of Fair Trading (OFT, 2010), "where such [consumer] biases exist, firms can act to exacerbate and exploit them at every stage in the decision-making process". Along the same lines, it is important for market players and antitrust agencies to be aware of these biases and how dominant players might abuse them.

In this sense, Heinemann's work (Heinemann, 2015) is germane: the author presents a summary of the main deviations from the rationality assumption, which are particularly relevant to competition law.

Firstly, the *status quo* bias, which is individuals' tendency to attribute more value to what they own, may be important for a firm that wants to enter the market. When faced with customers who would rather maintain their existing setup (showing default bias), companies may need to offer a lower switching cost to compensate for this skewness. This phenomenon is directly related to the loss-aversion bias, which also plays an important role in marketing strategies.

Framing the reference point in different ways also considerably affects decision making. If one option is described as a forgone opportunity and the alternative as an actual loss, decision makers may be induced to choose the former over the latter, given that a forgone opportunity is given less weight than an actual loss of the same objective value. The legality of framing certain price differences as discounts, for example, has been debated in courts across the world.

Other fallacies may be classified into biases where people take no account, or too little account, of relevant information ("truncated reasoning") or where, conversely, they take into consideration information that is irrelevant ("overreaching reasoning"). Moreover, individuals may underestimate or overestimate the likelihood of low-probability events based on the information available to them.

It is worth mentioning that firms are also subject to cognitive biases. After all, they are not black boxes, but rather complex organizations shaped by the individual behaviors of managers and other employees. Further, whenever a group of people—such as a board of directors—meet, their specific biases may also come into play.

According to Becker & Exposto (Becker & Exposto, 2017), besides individuals and firms, antitrust agencies also face issues relating to their own bounded rationality. Regulators are subject to three main heuristics: (i) availability, which relates to the weight people attribute to recent and salient events; (ii) representativeness, which deals with people's tendency to overestimate probabilities because of their disregard for low baseline probability and small sample sizes; and (iii) hindsight bias, which involves the ex-post assessment of probability.

III. Applications in competition law

Based on the aforementioned deviations from neoclassical assumptions, Andreas Heinemann (Heinemann, 2015) also explores several applications of important behavioral findings from a competitive law perspective. According to the author, not only does behavioral economics influence basic concepts, such as that of relevant markets, it also affects the analysis,

in competition law, of specific actions and arrangements, like vertical agreements, aftermarket practices, tying and bundling, conditional rebates, predatory pricing, and merger control. By the same token, behavioral insights have an impact on how remedies and sanctions are shaped.

Firstly, the author stresses that if consumers are subject to biases that reduce their ability or willingness to access information, **relevant markets** may be narrower than they are when consumers are fully informed and free of prejudice. This may happen, for instance, in markets where there is brand loyalty. Rose (Rose, 2010) discusses such a case in the U.K.: a wholesale company had the exclusive right to use images associated with a particular rock band, and consumers were irrationally paying £18 for a £3 T-shirt simply because of the logo printed on it. In this case, the application of the SSNIP test[1], by revealing demand inflexibility, restricted the relevant market to a certain brand. Therefore, according to Rose (Rose, 2010), without even realizing it, the judiciary was applying behavioral insights.

Additionally, behavioral aspects are also analyzed when **vertical agreements** are discussed. On the topic of regulating resale price maintenance (RPM), for instance, it has been argued that restrictions on intrabrand competition could lead to an increase in interbrand competition. If intrabrand price competition is excluded, distributors are encouraged to invest more in service and promotion. Therefore, RPM would allow new manufacturers to enter the market via motivated distributors (considering that RPM is applied to all distributors and free riding is prevented). However, this could be true only under specific circumstances. If brand loyalty is strong for any reason or bias whatsoever, the trademark owner holds considerable market power, thereby reducing interbrand competition. Behavioral research has also shown that manufacturers use RPM much more often than efficiency warrants. Additionally, the author mentions that loss aversion on the clients' part compels retailers to respect vertical price recommendations, given that the recommended price creates a reference point for consumers above which anything is interpreted as a loss.

Heinemann mentions that the vertical guidelines in the current European competition law already allude to behavioral influences, taking brand loyalty into account and more thoroughly assessing vertical restraints with respect to branded products. He states, however, that this is remote from a systematic reception of behavioral analysis.

[1] Small but Significant and Non-Transitory Increase in Price (SSNIP) test. In competition law, before deciding whether a company has so much market power as to warrant government intervention, a SSNIP test is performed to more thoroughly determine the relevant market.

Another classic competition law case that may involve behavioral analysis is the **status of aftermarkets**. The ultimate question is whether competition restraints on secondary markets should be tolerated if there is enough competition in the primary markets. Behavioral economics shows that antitrust laws may apply because of underestimation biases in the secondary market. In essence, consumers systematically underestimate how often they will need secondary products in the future. Not only that, they also misperceive prices and tend to underestimate the price level of those secondary products.

Behavioral aspects of the aftermarket have been raised by the U.S. Supreme Court in Eastman Kodak Co. v. Image Technical Services, Inc. The latter challenged Kodak's requirement that buyers of Kodak copier machines buy parts exclusively from the original manufacturer. On behavioral grounds, the court's majority rejected the rationality-based counterargument presented by Kodak: it was understood that Kodak's actual aftermarket power derived from the share of those myopic consumers who did not effectively account for future costs.

The foreclosure effects of **conditional rebates** also may be discussed from the standpoint of behavioral economics. Factors such as the irrational relevance of sunk costs, the inherent uncertainty about reaching the threshold until a relevant point in time (the end of the year, for example), and loss aversion may lead the economic agent to continue doing business with a particular supplier even if the expected value of waiving his rebate and buying somewhere else is higher than that of completing the rebate scheme. In this regard, the European Commission and the European Courts suppressed loyalty and target rebates on multiple occasions[2], establishing that their reference period must not exceed three months.

Behavioral economics may also provide an additional argument in the **predatory pricing** discussion, supporting the view that voluntary short-term losses are only incurred if counterbalancing advantages are expected in the future. However, it also points out that, if actors are subject to overconfidence bias and are seeking risk, losses beyond the reference point might lead to predatory practices even when the expected value is negative. In this case, firms may engage in predation regardless of what they recoup.

As stated by Petit & Neyrinck (Petit & Neyrinck, 2010), unlike U.S. antitrust law, E.U. competition law accommodates irrational predation scenarios. As an example, in the France

[2] The main cases were: Hoffmman-LaRoche v. Commission; Michelin v. Commission; British Airways v. Commission; Michelin v. Commission II.; Intel v. Commission.

Telecom[3] ruling, the Court held that proof of recoupment was not a precondition to establishing abuse. According to the Commission's Guidance, abusive predation is determined based exclusively on evidence that prices are lower than costs.

In the case of **merger analysis**, the impact of behavioral insights is ambivalent. On the one hand, it has been suggested that overconfident managers may systematically overestimate efficiencies due to a merger. On the other hand, if firms show a pattern of overconfidence bias and potential competitors systematically overestimate their prospects of success, there may be more market entrants than the existing barriers to entry would explain.

To a certain extent, some authorities already adopt a behavioral approach by including consumer loyalty to a particular brand and its reputation as examples of barriers to entry. However, exploring the impacts of overconfidence on mergers is still valuable, since optimistic overentry tends to persist if the performance feedback required to correct it is relatively slow. Behavioral aspects also have been touched upon in the debate over **tying or bundling** practices. One proper example is the European Microsoft case. The European Commission held that tying the Windows operating system to Windows Media Player (WMP) was an abuse because it prevented Original Equipment Manufacturers (OEMs) from shipping third-party streaming media players, thus hurting competition in the market for streaming media players. The Commission's decision did not rely on a rationality argument, but rather on consumers' actual behavior: although they could download competing media players, they did not have the incentives to do so because of the *status quo* bias.

Another example involving Microsoft could be mentioned to explain how the insights of behavioral economics may be used to better design **remedies**. In 2009, the company was accused of abusing its dominant position by tying its web browser, Internet Explorer, to its Windows operating system. To settle the dispute, Microsoft undertook to making a choice screen available to users asking them to download the browser of their choice in addition to, or instead of, Internet Explorer. From a behavioral perspective, this is by far the better approach.

Finally, behavioral insights have also been applied in the context of **sanctions**. From a behavioral standpoint, here loss aversion plays an even more important role. If players involved in a cartel, for instance, are overconfident and assess the risk of detection as being lower than objectively founded, a fine will be too little to deter them. In this case, treating it as a criminal

[3] 30 Jan. 2007, T-340/03, France Télécom v. Commission, E.C.R., 2007, p. II-00107.

offense would be preferable to fining. In this respect, the U.S. law could serve as a model, seeing as imprisonment is considered an important reason for the decrease in domestic cartel activity.

IV. Criticism

As previously discussed, antitrust agencies also face issues relating to their own bounded rationality. In fact, Behavioral Antitrust has been rebuked several times for allegedly promoting short-termism, paternalism, and exaggerated interventionism. Heinemann (Heinemann, 2015) rejects the reproach of short-term biases by arguing that the application of competition law to innovative markets cannot be reduced to thinking in terms of static efficiency. According to the author, competition authorities usually analyze how intervention affects the incentives all market actors have to innovate.

It has also been discussed whether the Behavioral Antitrust approach could lead to more intervention. In this respect, one must distinguish between the application of specific competition laws and the methodological rationale behind their application. Behavioral Antitrust should be understood as a tool to support more reliable decision making. As such, this field is neutral with regard to the outcome of ensuing decisions.

According to a famous concept, people should be *nudged* toward making better decisions. This idea ties in with the previously discussed default bias. However, it has been argued that when this type of nudge comes from competition authorities, as was the case with Microsoft, it could lead to paternalism. Heinemann (Heinemann, 2015) also rejects this idea by stressing that, while tying and bundling rules may be discussed, there is no disputing the behavioral basis of the remedy imposed by the European Commission, which promoted consumers' active choice.

V. Conclusions

The economic foundation of Antitrust Law rests on several assumptions, including the notion that economic agents are rational actors whose decisions always maximize their objective functions. The virtues of competition are manifold and include productive and allocative efficiencies that maximize consumer and total welfare. Nevertheless, their emergence hinges heavily on the rational behavior of economic agents.

Behavioral economic theory recognizes the existence of boundedly rational consumers, who fail to maximize efficiency or advance consumer welfare. However, if this is

acknowledged, what economic justification is left for protecting competition and enforcing antitrust laws and policies?

At the same time, by accepting bounded rationality and other behavioral assumptions, the antitrust enforcer may better understand how individuals and businesses make some of their decisions, thereby improving the authority's own decision-making process. In this short article, we listed and explained a few strategies adopted by consumers and businessmen that could be better understood through the lens of behavioral economics.

In general terms, behavioral economics could be understood as a tool to correct economic modelling excesses. In the same vein, Behavioral Antitrust is designed to give competition law a more realistic view of how market actors conduct themselves. However, it is fundamental to stress that the use of behavioral arguments in antitrust does not exclude the application of traditional microeconomics theory. Therefore, this development would be more appropriately described as a “behavioral turn” than a “behavioral revolution,” since traditional analysis is not being replaced, but rather complemented.

VI. References

Avishalom, T. (2002). The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy. *Michigan Law Review*, 482-568.

Becker, B. B., & Exposto, M. (2017). Behavioural antitrust in a nutshell. BMA Barbosa Müssnich Aragão, International Law Office.

Heinemann, A. (2015). Behavioural Antitrust—A ‘More Realistic Approach’ to Competition Law. In *European Perspectives on Behavioural Law and Economics, Chapter in K. Klaus Mathis (Ed.)* (pp. 211-242). Heidelberg: Springer.

Kahneman, D., & Tversky, A. (1979). Prospect Theory: An Analysis of Decision under Risk. *47 Econometrica*, 263,291.

Morell, A., Glöckner, A., & Towfigh, E. (2009, July). Sticky Rebates: Rollback Rebates Induce Non-Rational Loyalty in Consumers . *Max Planck Institute for Research on Collective Goods,*.

OFT. (2010, March). What does Behavioural Economics mean for Competition Policy?

Petit, N., & Neyrinck, N. (2010, July 19). *Behavioral Economics and Abuse of Dominance – A Fresh Look at the Article 102 TFEU Case-Law.* Retrieved from SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641431

Rose, V. (2010). The Role of Behavioral Economics in Competition Law: a Judicial Perspective. *Competition Policy International*, Volume 6, number 1. Volume 6, number 1.

Stucke, M. (2013). The Implications of Behavioral Antitrust. *The University of Tennessee: College of Law Faculty Scholarship*.

Tor, A. (2002). The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy. *Michigan Law Review*, pp. 482-568.

Tor, A. (2014). The Market, the Firm, and Behavioral Antitrust. In D. T. Eyal Zamir, & D. Teichman, *The Oxford Handbook of Behavioral Economics and the Law* (pp. 551-553). Oxford.

COMPETITION IN DIGITAL MARKETS: EXPERIENCES AND PERSPECTIVES

Igor Carvalho Rocha, Luísa Campos Faria

I. Introduction: Digital Markets and adaptation to competition

The growing use of digital media to solve problems and satisfying needs in general has produced important changes in the markets that use such tools. This digital revolution is shown not only in the development of innovating products that have caused significant changes in economic, social and interpersonal relationships, but also in important changes in the way old and traditional products are consumed. Whether on the supply side or on the demand side, the changes caused by the diffusion of digital solutions have been having an effect on the competitive dynamics not only of purely digital markets, but also in markets that use digital solutions to optimize their operations and leverage their sales.

In digital markets, innovations are frequent and noticeable to users, with the price often fulfilling a little relevant (or even irrelevant) role for competition, which is mainly due to the launch of new products and features. Owing to these characteristics, it is usual to attribute a predominantly dynamic competition pattern to these markets, to the detriment of a static concept of competition.

However, although the use of a theoretical framework that considers the dynamic aspects of competition is a necessary condition to undertake a rigorous antitrust analysis in digital markets, the mere adoption of such a hypothesis is not a sufficient condition. Indeed, all industries, at some point in time, face dynamic competition resulting from a wave of innovation[1], either within the industry itself, or in new industries that develop innovating products that start to challenge and replace products from the incumbent industry. In addition to innovations, digital markets stand out for the coexistence of different formats that although they vary in scope, medium (mechanism) and business models, after all, they fulfill the same role in the eyes of consumers.

Digital markets are also differentiated by the prolific generation, storage and processing of data. When using digital platforms, users reveal their preferences. Their choices and even

[1] According to Oslo manual "An innovation is a new or improved product or process (or combination thereof) that differs significantly from the unit's previous products or processes and that has been made available to potential users (product) or brought into use by the unit (process)".

their research are recorded generating valuable information that is used by companies to improve their services and guide the offer of new products. In addition to guiding the offer through their actions - research and choices -, users, on certain occasions, “invent” functionalities for digital platforms when they start using them for purposes other than those they had been designed for. Often, this unplanned use takes shape to the point where a platform needs to reorient its performance in order to better serve these “innovative users”.

All of these elements converge in order to make it difficult to define precise boundaries of the relevant markets. Despite these difficulties, the definition of the relevant market has proved to be crucial for the decision making of the antitrust authorities. The hypothesis we raised in this paper relates the concept of competition adopted by the antitrust authority - whether mostly static or dynamic - to the scope of the relevant market for antitrust purposes - if it consists only of companies with similar business models or also of different models - and, finally, the likelihood that the antitrust authority will decide in one direction or another.

In this sense, in order to better understand the decision making by the authorities, a review of previous cases is made. Then, the impact that the adoption of the different concepts can have on the final decision is evaluated. Finally, the conclusion brings a brief comment on the specific cases presented.

II. Decisions previously taken involving digital markets and the market definition adopted

Before starting the presentation and analysis of specific cases, it is important to present the concept of economics used here. Following the definition proposed by Bukht and Heeks (2017)[2], this is the branch constituted by the most diverse digital markets whose production derives exclusively or mostly from business models based on digital goods or services. The concept of platforms[3], in the other hand, constitute the places (physical or virtual) in which economically relevant connections are made between groups. In this sense, there is no need to

[2] HEEKS, Richard; BUKHT, Rumana. Defining, Conceptualising and Measuring the Digital Economy. University of Manchester, UK, 2017. Working paper 68. Available at: <https://pdfs.semanticscholar.org/2297/d561a2fea46907aa40c11570cd95dffd3965.pdf.>

[3] “[...] Platforms are selling connections. They must balance their treatment of all costumer groups to ensure that they have enough of the right members of all groups on the platform [...].Some design decisions involve trade-offs between the interests of different groups, and these decisions must be made with an eye to maintaining the balanced participation that a matchmaker needs to survive”. EVANS, S. David S. and SCHMALENSEE, Richard. *Matchmakers: the new economics of platform business*. Harvard Business Review Press, 2016.

confuse the concept of platforms[4] with digital markets, although the multi-sided platform model[5] is widely used by players in these markets, in addition to being the one that raises the most competitive issues.

It is important to note that it is not intended to scrutinize the relevant market definitions applied in cases involving digital markets. It seeks only to present the general lines of the definitions applied in order to allow comparability between the approach of the antitrust authorities in specific cases and the approach proposed in this work. Given the relative scarcity of specific cases, the following statement will not be limited to a single jurisdiction.

A first example of the difficulty in defining a relevant market in the specific case comes from the operation through which Google acquired the company DoubleClick. Google would actually have two products for advertisers, "AdWords" and "AdSenses", the first focused on textual ads and is remunerated based on the number of clicks for each ad, while the second served ads related to the search pages results generated by the words surveyed by the user.[6]

At the other end of the operation was DoubleClick, a company specialized in providing services related to the display of ads on a web page. DoubleClick, at the time of the operation, operated on two sides of the chain regarding the advertising market, having as customers both those who wish to sell advertising space and those who wish to advertise.

When analyzing this transaction, the European Commission understood that the markets for each of the sites would not be directly related[7]. This conclusion came in the first place because Google would provide aggregated, non-targeted advertising, while DoubleClick, through the use of cookies, was able to pursue an advertising target. In order to reach this conclusion, the commission analyzed that[8]: (i) the price of services offered by one of them did

[4] Not all platforms, in this sense, are virtual. David Evans, for example, brings nightclubs as an example of a platform, since they are places that provide the meeting of people who may come to relate. Aligning with this understanding, we find businesses that have digital sales channels, but that cannot be considered platforms. This is the case, for example, of a website referring to a specific clothing brand, which sells through it. EVANS, S. David S. and SCHMALENSEE, Richard. *Matchmakers: the new economics of platform business*. Harvard Business Review Press, 2016.

[5] For details on the concept of multi-sided markets and platforms, see OECD (2018) *Rethinking Antitrust Tools for Multi-Sided Platforms.* Available at: www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

[6] Legal Advice No. 06612/2Q07/RJ COGCE/SEAE/MF, Act of Concentration No. 08012.005304/2007-11.

[7] COMMISSION OF THE EUROPEAN COMMUNITIES. COMMISSION OF THE EUROPEAN COMMUNITIES. case COMP/M. 4731 - Google/Doubleclick. Regulation (EC) 139/2004. Brussels, 2008.

[8] "The main reasons why the Commission does not believe that the parties' constrain each other in a 'horizontal' sense are set out below: (i) the cost of ad serving services represents a very small part of the total cost of unbundled solutions and therefore, the degree to which the parties' product did constrain each other's pricing pre-merger was

not significantly influence the price charged by the other; (ii) DoubleClick faced direct competition from other companies that were slightly heavier than that exercised by Google, and, this was competition with influence on its pricing policy; and (iii) Google provided advertising space for advertisements in order for them to appear in searches - contextual, therefore - listed on the page and viewed from a search, and DoubleClick, otherwise, provided advertising based on non-contextual image ads.

Google's presence in intermediating the type of ad served primarily by DoubleClick, notably those of image ads, did not even correspond, at the time of the operation, to 1% of the market analyzed. The conclusion reached by authorities around the world (including the Brazilian anti-competitive authority) was that there would be no greater risks of market closure by companies, nor would there be a horizontal overlap.

The fact is that Google ended up being punished for abusive conduct related to the right to privacy of its users, which started to be tracked through cookies without their consent. Such conduct had anti-competitive effects, leveraging Google's activity in one market based on activity relative to another. In 2012, the FTC itself imposed a $ 22.5 million fine for abuse of Google services involving the use of cookies - technology acquired and exploited by the company only after the acquisition of DoubleClick.[9]

A recent paradigmatic case exposed the difficulty of adopting precise definitions for digital markets, the case of Google Shopping. On this occasion, within the scope of the Brazilian competition authority, a discussion was drawn up about the differentiation between general search markets and local search markets. While the Representative party (in the case of Brazil, E-Commerce Media Group Informação e Tecnologia Ltda.) defended the existence of two markets, one being (i) the generic search market, in which Google would have an undeniable dominant position; and the other (ii) the market for price comparison sites, in which there would be competition, even though the latter's players depended on traffic from the generic search; Google advocated operating in only one of them, namely, the information search market.

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minimal; (ii) DoubleClick faces strong competition from other ad serving companies and these direct competitors are the main constraint on DoubleClick's pricing; and (iii) Google's bundled solution and an unbundled solution including DoubleClick's products are not close competitors." COMMISSION OF THE EUROPEAN COMMUNITIES. COMMISSION OF THE EUROPEAN COMMUNITIES. case COMP/M. 4731 - Google/Doubleclick. Regulation (EC) 139/2004. Brussels, 2008.

[9] Available at: <https://nakedsecurity.sophos.com/pt/2012/11/20/judge-approves-22-5m-google-fine-for-violating-safari-privacy/ > Accessed on March 7, 2020.

The plaintiff argued that the alleged vertical relationship between traffic from users of the generic search (upstream) to the market for price comparison sites (downstream) would allow Google to achieve a dominant position also in the price comparison market. In addition, they argued that the definition should be more restricted, since only in the search for products would Google display its price comparator, so that, even if they acted in the search for more types of information, they could not be inserted in the same market.

The Department of Economic Studies of CADE (DEE) and the Tribunal's Reporting Commissioner himself, accepting the definition proposed by the DEE, opted to adopt a more conservative definition of the market - even though, in his own vote, the Reporting Commissioner have not seen a clear differentiation between the two markets considered for analysis purposes.[10] It is perceived, at this moment, a reflection of the Brazilian competition authority on the approach that will be the object of the subsequent session of this work.

Cases that also deserve to be mentioned concern acquisitions made by Facebook. First, in 2012, Facebook proceeded with the acquisition of the social network Instagram, an operation that escaped the scope of analysis by the competition authorities, not only in Brazil, but also in other jurisdictions, since the operation was not mandatory notification. Subsequently, in 2014, Facebook acquired WhatsApp electronic messaging platform. This acquisition, although not subject to analysis by the Brazilian authority, was analyzed within the scope of the European Commission (EC).

According to the analysis carried out, it was concluded by the EC that WhatsApp and Facebook would not be close competitors. Although Facebook has the Messenger application, with functionality similar to that of WhatsApp, both running on smartphones, the EC understood that due to: (i) WhatsApp being linked to the user's mobile number and Facebook to the user ID; (ii) the source of the contacts is different, the device's calendar for WhatsApp and users of the platform for Facebook; (iii) the richest experience on Facebook Messenger due to its integration with Facebook's social network; (iv) the application's privacy policy is different; in addition to (v) issues related to the intensity with which the parties' applications were used, which, however, are not included in the publicly accessible version of the decision.

[10] *"119. Although I adopt this conservative definition for the purposes of the present examination, I confess that I do not see such a differentiation between generic search and thematic search to the point of substantiating different markets."*. Vote of Reporting Commissioner Maurício Oscar Bandeira Maia (SEI 0632170), Administrative Process No. 08012.010483/2011-94.

Although WhatsApp was not active in online advertising, the EC worked with the hypothesis that the acquisition strengthens Facebook's position in this market, either by (i) introducing advertisements on WhatsApp or (ii) collecting WhatsApp data in order to improve the segmentation of ads, concluding at the end that the realization of such hypotheses besides being unlikely would end up not affecting the competitive dynamics.

The decision, at the time, examined whether the transaction could strengthen Facebook's position in that market and harm competition. In particular, the Commission examined the possibility that Facebook (i) introduces advertising on WhatsApp and / or (ii) uses WhatsApp as a potential source of user data to improve the targeting of Facebook ads. It is important to note that Facebook, when investigating the case before the EC, stated that it is not possible to integrate applications, between data referring to the same user.[11] The Commission concluded that, regardless of whether Facebook introduced advertising on WhatsApp or collected and used data from WhatsApp users, the transaction would not raise competitive concerns.

Similar to the Google DoubleClick case, the fact is that in 2016 the EC opened a procedure in order to review the referred operation, understanding that Facebook had been negligent in its response to the EC. Facebook, despite not having made this possibility clear to the EC, would have managed to integrate the data between applications, making it possible to draw a more accurate user profile, with the interchangeability and merging of the information present in both. In a similar way to Google, the aforementioned Facebook conduct, in addition to having misled the EC's understanding of the transaction, which in itself would already lead to a punishment, ended up providing anti-competitive effects in the market, and was fined 110 million euros. in the year 2017.

III. Comments on the previously adopted market definitions and perspectives for future analysis

Using the benefit of retrospective analysis, we can make some observations about the criteria used by antitrust authorities in making decisions in cases involving digital platforms and the repercussions that the adoption of these criteria can have on the competitive environment. Initially, it is worth highlighting the criteria considered when defining the relevant markets. Our hypothesis is that these criteria depend, to a large extent, on the

[11] COMMISSION OF THE EUROPEAN COMMUNITIES. Case No M.8228 – Facebook/WhatsApp, Article 14(1) Regulation (EC) 139/2004. Brussels, 2017. Available at <https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf> Accessed on March 10, 2020.

conception of competition adopted, nominally, whether static or dynamic competition. Associated with a dynamic conception of competition is the complementary hypothesis by which competition in digital markets is mainly due to the coexistence, in the same relevant market, of players that adopt different business models.

If a static design is prioritized, the definition of the relevant market tends to be narrower. Under this concept, the antitrust authority seeks to identify which companies offer very similar products, in a similar way and possibly using the same business model. As an example of this approach, we can mention the definition of relevant market for general internet search. Considering only general searchers in the strict sense, Google holds an unquestionable dominant position in Brazil market.[12]

However, people don't just use Google to search the internet. Users often use localization applications (such as Waze) and social networks to search for local establishments - shops, restaurants, laundries, etc. Knowing this habit, commercial establishments seek to develop their pages and profiles on social networks (such as Facebook and Instagram) to facilitate matching with consumers. The Twitter microblog is often used by those looking for news (especially the latest) and opinions. Also knowing this, media and opinion makers create and feed Twitter pages to be more read. People looking for ideas, trends and references can directly access the Pinterest social network.

Thus, although Google accounts for 97% of searches performed in general search engines, this company accounts for a percentage that is certainly lower than the total number of searches performed on the internet. In the examples mentioned above, users "discovered" that social networks work not only to find friends and share their experiences and opinions with them, but also to find information on topics of interest, in addition to business establishments, various services and a host of other information that, a priori, would have a general search engine as their most obvious search engine.

A narrower definition of the relevant market, which considers only classical general search engines, considers as competitors of Google companies that, in practice, exert little competitive pressure, while effective competitors (in the sense of constituting alternatives massively used by users for certain types of searches) would be outside the relevant market for the purposes of antitrust analysis.

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[12] According to the Stat Counter, Google had, in February 2020, a 97% market share, while Bing and Yahoo hold about 1% and the rest less than 0.2%. Available at: <https://gs.statcounter.com/> Accessed on March 7, 2020.

It is true that, in general, antitrust authorities recognize the “external” competitive pressure exerted by platforms operating in related markets when analyzing rivalry. On many occasions, this option may be related to the lack of data or even metrics that allow comparability between agents that adopt different business models or that were originally designed for different purposes. However, the formal exclusion from the relevant market has objective consequences for the analysis and even for the definition of competitive policy, as will be noted below.

Conversely, the adoption of a dynamic competition concept tends to broaden the scope of the analysis, allowing the incorporation of players that offer different solutions for similar needs into the relevant market. In this case, the emphasis shifts from "how the service / product is offered" to "how the service / product satisfies" the user's need. If the user's need is met, the products / services can be considered as members of the same relevant market.

Indeed, in markets marked by frequent technological innovation, competition occurs not by offering a similar product, but mainly by introducing new solutions to old problems. Thus, due to this dynamic, it is common for products / services with different characteristics to be, in the eyes of the consumer, interchangeable options. Disregarding this reality may imply confusing two different concepts: relevant market and business model, considering as members of the first only companies that adopt the second in an identical way.

Companies involved in mergers and acquisitions often seek to demonstrate that the parties' products and services are complementary and not substitutes. It is an obvious strategy to try to mischaracterize any horizontal overlaps. However, in markets marked by frequent innovations, the tight separation between substitute and complementary goods needs to be viewed with caution and attention under penalty of losing sight of the competitive dynamics in these markets.

Until recently, content made available online could be considered as complementary to the content offered by open or cabled television networks. A TV network, for example, could (and still can) use its own website, third-party platforms and social networks (such as Facebook) to promote its products, interact with viewers, provide extra content, etc. However, there has been an increasing use of digital platforms as almost perfect substitutes for TV.

This is because, on the one hand, a new mass of independent producers started using online platforms to disseminate their content. This new content offering, in turn, attracted a mass of viewers who were already watching television. On the other hand, the big TV networks

started to make their complete content available (TV shows, sporting events, series, etc.) not only on their own digital platforms, but also on third-party platforms, such as YouTube.

At the same time, digital platforms such as social networks and streaming services have increasingly obtained rights to broadcast content historically shown by TV networks such as films, documentaries, football games, so that, for certain products, these digital platforms are currently competitors effective for TV networks.

Therefore, the precise definition of relevant audiovisual markets has become increasingly complicated and the application of traditional criteria, which tend to consider only companies with similar (or even identical) ways of reaching the consumer, runs the in serious danger of losing sight of the competitive dynamics currently existing in these markets.

In addition, for the purposes of antitrust analysis, if consumers value the variety (including the variety of forms of consumption) or have different elasticities for the different formats in which a given product is available, disregarding the substitutability between the different formats can produce adverse effects competitive environment and harms consumers.

To illustrate this reasoning, suppose that in a given market there are two companies A and B offering products X_A and X_B, respectively. X_A and X_B are not perfect substitutes in the sense that they have different formats or different forms of consumption, but both products are used by consumers for the same purpose. A classification of X_A and X_B products as complementary rather than substitutes would facilitate the approval process for a merger between firms A and B.

From a static (immediate) perspective, the merger could expand the merged firm's ability to extract income from consumers. If the product X_A has a higher quality (and possibly a price) than the product X_B and the increase in the price of X_A promotes a shift in demand to X_B and vice versa (assuming the price of the other product remains constant), the merger of the firms A and B would allow the combined entity to ignore the deviation in demand and adjust prices for X_A and X_B products along the lines of a price-discriminating monopolist.[13]

[13] This situation can be illustrated, in the Brazilian case, by the growing substitution between products offered by pay-TV and streaming services. A low speed of the user's internet and the existence of a long delay in the case of sporting events in these cases make the quality of the streaming service inferior to that offered by pay TV. At the same time, the products (content) of streaming services are cheaper than their counterparts offered by subscription TVs. Increases in the price of one of the services may encourage users to exchange for each other, so that the existence of one service puts a deterrent pressure on the increase in prices of the other service. If both platforms (TV and streamings) are owned by the same economic group, this deterrent effect disappears.

However, perhaps more important are the dynamic effects. In digital markets, it is common for a platform originally designed for a particular purpose to be used by users for other purposes. Observing this movement, the company responsible for the platform starts to develop tools that facilitate the use of the platform for these diverse purposes of which it was originally designed. At the end of the day, the platform will be present, in practical terms, in markets other than the one that started its operations. A merger between platforms that were designed for different purposes (or are thus considered by the antitrust authority) can discourage this movement by which the platform also becomes a viable option in other markets.

The disincentive can be illustrated by the following hypothetical example. Suppose that a general search engine and a social network, both with a dominant position in the home markets, decide to unite. If the social network is also used by its users to perform searches, the social network's incentive to improve its search engine and thus attract users of the general search engine tends to be lower from the moment the social network and the general search engine becomes a single company.

In such a situation, if the antitrust authority adopts a narrow view of the relevant market, it is possible that a merger operation between the dominant general search engine and another general search engine with relatively low market share (with few users) will be reject, while a merger with the dominant social network in your specific market may be approved.

Therefore, the use of narrow definitions of relevant market, which emphasize the business model and the original or main purpose of the platform to the detriment of the dynamic character of competition in digital markets and which ignore the functionalities "created" by users, can produce false negatives with adverse effects on the competitive environment.

The European Commission recently decided to punish Google for conducting conduct deemed anti-competitive in the operating system market for mobile devices. The EC defined the relevant market in which the Android operating system is inserted as the "licensable smart mobile device Operational Systems", thus excluding the IOS operating system that runs on Apple smartphones, which is not licensable. This narrower definition of the relevant market gave Android a higher market share than would be measured if IOS also made up the relevant market and therefore facilitated the punishment for Google for abuse of a dominant position.

The question that remains after this decision is: what would be the positioning of an antitrust authority that adopted the same definition of relevant market adopted by the EC in the Google-Android case if a merger that would transfer control of the Android and IOS operating

systems to the same economic group was submitted to it? Android and IOS operating systems? Would it disapprove an operation that, according to the relevant market definition adopted, does not produce horizontal overlap?

There is, therefore, an evident trade-off when defining the relevant market. Narrow definitions facilitate the punishment of a player for anticompetitive conduct, but make it difficult to reject mergers and acquisitions. Conversely, broader definitions of the relevant market, possibly including competition from different business models and the dynamic nature of digital markets, make it difficult to punish conducts on the grounds of the abuse of dominance argument, but facilitate the disapproval of mergers or at least the imposition of remedies that ensure the maintenance of a healthy competitive environment.

IV. Conclusion

Considering the cases analyzed and the prospects for market definition dealt with at this paper, it is suggested that there was, on the part of the competition authorities worldwide, an option to adopt relevant market definitions that may have been too restricted or tied to the business models companies. The case involving the operating system for Android mobile devices is a notable example in which the concepts of business models and the relevant market seem to have been confused. For practical purposes, there was a disregard of competition between this operating system and Apple's iOS, due to the business model adopted by their respective developers - licensable or not to third parties. Nevertheless, it is obvious and clairvoyant that Android and iOS are the two main operating system options on mobile devices for end consumers and for app developers.

Without going into the analysis of the reasonableness of such decisions, we sought to highlight the existence of a clear tradeoff when defining the scope of the agents that make up a relevant market. Stricter definitions, possibly derived from a predominantly static conception of competition, favor the application of sanctions for conduct considered anti-competitive, in contrast they facilitate the occurrence of transactions involving companies that are effectively rivals, but that use different business models and different technologies to satisfy to the needs of its users.

The assumption of this more restricted view by the antitrust authorities facilitates the consummation of operations that are potentially harmful to competition and, ultimately, to final consumers. Price increases, disincentives to innovation and loss of privacy, as explained, are

possible effects of operations between companies that according to the traditional static conception would be in different relevant markets.

On the other hand, the adoption of a mostly dynamic conception leads to broader, fluid and less precise definitions of the relevant market, which often implies expanding the scope of analysis, allowing the authority to test scenarios that would otherwise be ignored.

Although limitations imposed by reality – such as unavailability of data and information asymmetries between the parties and the competition authority – hinder the task of defining relevant markets that really capture the reality of the facts, in particular the competitive dynamics of digital markets, the authorities have endeavored to achieve more appropriate responses to challenges relating to the digital world. CADE's role in this collective effort is highlighted by promoting congresses, workshops, courses, study groups, among other events and activities that contribute to a better understanding of competition in digital markets, as well as possible sources of damage.

V. Bibliography

EVANS, David S. SCHMALENSEE, Richard. The Antitrust Analysis of Multi-sided Plataform Business. NBER Working Paper Series. Working Paper 18783. Available at: <http://www.nber.org/papers/w18783>.

EVANS, David S. SCHMALENSEE, Richard. The Matchmakers: The new economics of multisided plataforms. Harvard Business Review Press, 2016.

STUCKE, Maurice E. "Reconsidering antitrust's goals". Boston College Law Review. v. 53, p. 551-629. 2011.

STUCKE'S, Maurice. Big Data and Competition Policy, Oxford University Press, 2016 (with Allen Grunes) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598128>

STUCKE'S, Maurice. Should we be concerned about data-opolies?, 2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144045>

COMMISSION OF THE EUROPEAN COMMUNITIES. case COMP/M. 4731 - Google/Doubleclick. Regulation (EC) 139/2004. Brussels, 2008.

HEEKS, Richard; BUKHT, Rumana. Defining, Conceptualising and Measuring the Digital Economy. University of Manchester, UK, 2017. Working paper 68. Disponível em: <https://pdfs.semanticscholar.org/2297/d561a2fea46907aa40c11570cd95dffd3965.pdf.>

OECD. Rethinking Antitrust Tools for Multi-Sided Platforms. 2018. Available at: <www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.>

OECD. Oslo manual: Guidelines for collecting and interpreting innovation data. 2018. Paris: Organisation for Economic Co-operation and Development. Available at: < https://www.oecd-ilibrary.org/science-and-technology/oslo-manual-2018_9789264304604-en>

CADE, Act of Concentration No. 08012.005304/2007-1.

CADE, Administrative Process No. 08012.010483/2011-94.

COMMISSION OF THE EUROPEAN COMMUNITIES. Case No M.8228 – Facebook/WhatsApp, Regulation (EC) 139/2004. Brussels, 2017. Available at <https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf>

BRAZILIAN ANTITRUST POLICY FOR MULTI-SIDED DIGITAL PLATFORMS: RECENT DEVELOPMENTS

João Ricardo Munhoz, Renan Cruvinel, Victor Rufino

I. Introduction

Technological development is benefiting enormously economy and society, by making easier and faster innovation processes and social interactions. Each day, more of our daily activities are done using multi-sided digital platforms, leading users to depend on tech companies and digital services. On the other hand, the dominance of digital players and the particularities of digital platforms give rise to competition concerns, especially regarding the concentration of economic power and harm to consumer choice.

How can antitrust policy address those concerns? Competition authorities and academics from all over the world find themselves under increasing pressure to find the answer. The opinions are divided, some defend that antitrust tools are sufficient to solve problems caused by the digitization of the economy, while others defend they should be reviewed.

Traditional methodologies of antitrust policy, centered on principals such as consumer welfare standard, appropriate to digital economies and its peculiarities such as extreme returns to scale, network externalities and the role of data?

Given the relevance of the discussion, the present study intends to present how Brazilian antitrust authority has been dealing with competition in digital economies in view of the presence of multi-sided digital platforms. For this matter, will be especially regarded market definition approach and methodologies to measure market power.

II. Multi-Sided Digital Platforms Impact on Brazilian Competition Policy

From the analysis of CADE's decisions since the new Brazilian Competition Law (12.529/2011) entered into force, we note that the antitrust authority has been following a traditional relevant market definition methodology – characterized, for example, by the market share and revenue analysis – either for merger cases and investigation and anticompetitive conducts involving digital platforms.

However, especially since 2018, the peculiarities of digital markets have been being incorporated to the antitrust assessment, following a strong global tendency. The following

paragraphs show examples of cases where the peculiar digital markets elements were adopted in antitrust assessment in Brazil.

II.1. Merger control

The first case was taken by CADE’s General-Superintendence (SG) on March 2018, referring to Ifood (Naspers Limited) and Delivery Hero transaction[1], when Ifood acquired 13% of Delivery Hero shares, both companies form the online food delivery market. The SG expressly understood that the traditional antitrust methodology would not necessarily apply to the case.

According to SG, the difficulty of applying traditional analysis methods begins with the discussion of relevant markets. As the market in question is new and fast changing, SG concluded it is especially challenging to make diagnoses on competitive dynamics, identify market trends, assess rivalry conditions or even the consumer behavior.

Similarly, a traditional market entry analysis, where it is assessed whether the new player’s entry is 'likely, timely and sufficient', according to SG, is equally inconceivable.

It uses common characteristics from digital markets with multi-sided platforms such as existence for a short time, their maturing condition, high growth rates and presence of diverse startups to justify its conclusions.

Regarding entry on the market, important criteria for SG’s analysis, it stated that there were not enough players stablished to get to any conclusions regarding market power.

On May 2018, when assessing the acquisition of unitary control of Arte Telecom by Allied[2], SG recognized that the online retail market could influence the dynamics of the offline, since the fast changes observed on the consumer behavior repeatedly made the online price be used as reference for the offline price.

This understanding was also applied by SG in the Merger Notification No. 08700.002703/2019-13, in June 2019. Although SG understood that e-commerce and physical stores should be segregated from the consumer point of view, since there are not perfect

[1] BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08700.007262/2017-76**. Judged: March 9 2018.

[2] BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08700.002809/2018-28**. Judged May 16 2018.

substitutes for each other, it recognizes that online price often serves as a price reference for the consumer even in the offline market.

One of the most relevant cases to understand how CADE is dealing with the transformation brought by digital markets was the acquisition of the integrality of Buscapé's capital by Mosaico, both e-commerce platforms, in August 2018[3]. At the time, Brazilian antitrust authority made important considerations regarding the impact of online multi-sided platforms on competition policy and the antitrust law future perspectives.

According to SG, due to the dynamism and flexibility of the services offered, and because it was a digital market, the definition of relevant market was challenging. Based on the European commission study *Competition policy for the digital era*[4], the Superintendence highlighted other concerns raised by digital markets.

The Authority recognized that in the digital world, the market limits not always are as clear as in the traditional markets, considering that it can rapidly change.

In addition, the General-Superintendence assumed that the sides of a multi-sided platform interdependency must become a crucial part of the analysis, which would lead to a substitution of the approach focused on the definition of the relevant market to an approach that seeks to isolate problems. That would demand from the authorities an increased attention to damages theories and to the identification of anticompetitive strategies, rather than the relevant market.

Lastly, similar approach was adopted by SG for the Merger Case regarding Delivery Center's minority shareholding acquisition by Multiplan[5], in June 2019, concerning the online food delivery market. Since it also involved multi-sided digital platforms and its impact on the market analysis, CADE concluded that the best strategy would be to adopt a different relevant market definition than the one adopted on traditional markets. At the time, SG confirmed the understanding from Mosaico/Buscapé case and considered online platforms with different business models as competitors of the online food delivery market.

The following chart summarizes the profile of the merger cases described above.

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[3] BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08700.002703/2019-13.** Judged June 11 2019.

[4] Available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>. Access on 27 March 2020.

[5] BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08700.001962/2019-19**. Judged: August 18 2019.

Merger Notification	Applicants	Procedure Adopted	Transaction Nature	Notification Date	Platform Type	Relevant Market	Final Decision
08700.007262/2017-76	Naspers Ventures BV and Rocket Internet SE	Non-fast track	Shareholding acquisition	20 November 2017	Food delivery	Online food delivery	Unrestricted approval by SG on 9 March 2018
08700.002809/2018-28	Allied Tecnologia and Arte Telecom	Fast track	Unitary control acquisition	2 May 2018	Electronics sales	Electronics and communication devices distribution/ durable consumer goods retail	Unrestricted approval by SG on 16 March 2018
08700.002703/2019-13	Mosaico Negócios de Internet SA and Buscapé Company Informação e Tecnologia Ltda	Fast track	Control acquisition	24 May 2019	Price comparison	Online advertisement/ online price comparison	Unrestricted approval by SG on 11 June 2019
08700.001962/2019-19	Multiplan Empreendimentos Imobiliários S.A. and Delivery Center Holding S.A.	Fast track	Shareholding acquisition	11 April 2019	Online food delivery	Shopping center administration/ online food delivery	Unrestricted approval by SG on 18 August 2019

II.2. Antitrust investigation

Regarding the cases assessed by CADE related to unilateral anticompetitive conducts allegedly perpetrated by multi-sided digital platforms, the ones that bring most valuable contributions to the investigation undertaken here are those involving Google.

In the case that became known as Google Shopping[6], CADE developed it understanding regarding relevant market definition for digital markets. SG concluded, as it did in Mosaico/Buscapé*,* that relevant market definition could not be an end itself, but only a tool for the case analysis, especially when dealing with dynamic markets. That was because, in case of adopting a rigid approach for the definition of the market, important aspects for the identification of potential competitive issues could possibly not be appropriately considered.

SG deemed that there was an important challenge in drawing an accurate line that includes exactly the platforms and services that compete, since the same platform can offer different services, while others are restricted to specific ones. Also, it stated that markets associated with digital technologies are always changing and services offered by certain platforms can quick and constantly change.

In recognizing the dynamicity of these markets, it understood that, regarding these cases, the antitrust authority should ease the scope and definitions of the analysis, in order not to tense is comprehension of the conduct, which could hinder the identification of important aspects of the market in question.

According to SG, in some cases, specifically those involving dynamic markets, a relevant market definition can be seen as an auxiliary guide in conducting the analysis, however, it does not prevent the antitrust authority from working on its definition and scope with certain flexibility, in order not to restrict its understanding and, eventually, fail to take into account any significant aspect of the market[7].

This difficulty, would be increased by the complexity caused not only by the dynamism and innovation that feature the market, but also by the wide use of technology and the distinction between the products in markets marked by multi-sided digital platforms, which raises difficulty of bounding, precisely, the limits of the market.

The vote of the Reporting Commissioner Maurício Maia also highlighted the caution needed when defining the relevant market in the Google Shopping case, among other reasons, because it was facing a multi-sided platform. However, he adopted a conservative definition of the relevant market to assess Google market power, not discussing the numerous controversies

[6] BRAZIL. Administrative Council for Economic Defense. **Administrative Proceeding No. 08012.010483/2011-94.** Judged: July 2 2019.
[7] BRAZIL. Administrative Council for Economic Defense. **Administrative Proceeding No. 08012.010483/2011-94.** Judged: July 2 2019.

regarding zero price digital platforms, with multiple sides and in which innovation has a crucial role for the success of companies.

Another challenge identified on Google shopping case refers to the response given by antitrust authorities to anticompetitive conducts in digital markets. As Maurício Maia defended in his vote, antitrust remedies may have behavioral – usually to do or not to do obligations – or structural nature, such as assets disinvestment.[8]

It is not common to antitrust authorities to impose remedies on products, since they lack technical expertise to interfere in their characteristics. The antitrust authority usually restricts its analysis to the market study, its functioning and its relationship with the different agents of the production chain, always aiming at assessing eventual anticompetitive conduct players with significant market shares, without redefining their products.

According to Maia, to determine such redefinition would be especially difficult in digital markets, considering that the antitrust authority would have no expertise to do so and would be faded to failure. With dynamic products, which are susceptible to constant evolution, it is expected that an aesthetic design remedy prevent innovation in the sector, leading to stagnation, which harms antitrust legislation goals, such as freedom of initiative and fostering innovation. It would be also disregarded that digital markets are interrelated in more intense ways than the traditional sectors of the economy, so that intervention in one company can cause indirect effects to others, modifying the competitiveness among apparently distant players, but that compete for users, advertisers, traffic, regardless of the product that generates these results.

Moreover, the Commissioner emphasized the need to consider different sides of the platform for a proper market examination. He defended that, to evaluate the possibility of abusive exercise of market power in digital platforms, it is necessary that, given the interdependencies between the sides of the platform, all possible restrictions that could be exercised by each side must be considered on the others, due to feedback effects.

He concluded that any analysis that considered only one side of the platform, could lead to a very broad or very restricted definition, which could prejudice the analysis of anticompetitive conducts. One of the main competitive matters of practices that affect one side of a platform is the impact of those practices on the other side of the platform. A practice that increases the price for customers on one side, and therefore reduces their number, will result in

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[8] Read the §629 of vote of the Relator in: BRAZIL. Administrative Council for Economic Defense. **Administrative Proceeding No. 08012.010483/2011-94**. Judged: July 2 2019.

a decrease in demand on the other. Thus, when analyzing whether a business practice can lead to a price increase on one side of the platform, it is necessary to consider both the reduction in demand on the side that saw its price increase, and the subsequent negative feedback effect on the other side[9].

According to the Commissioner, the analysis of the relevant market for a multiple-sided platform must necessarily start from the analysis of all sides and the restrictions that each side imposes on others due to the feedback effect. Thus, one must necessarily consider the interdependencies between the sides of the platform, as well as the products and services provided for each group.

This understanding appeared also on Economics Studies Department analysis. It understood that the disregard of network effects and multiple connections between different consumer groups, which can contribute significantly to the enhancement of market power, could lead to an incorrect analysis of the anticompetitive conduct under investigation.

In that context, attention was drawn to the indirect network effects that are characteristic of the markets discussed. Given the interdependencies between the different sides of the platform, it would be possible for an agent with market power to practice prices below its marginal cost on one side of the platform, which could lead to the incorrect conclusion that it is facing a false positive, for example.

In the same way, because it is a multi-sided platform, it would be possible that the limitations imposed to one side generate efficiencies on the other. For that reason, the multiples connections between the different sides of the platform and its effects on the analysis of the competitive restricting practice could not be disregarded.

The second anticompetitive conduct case is Google AdWords[10], which also referred to the necessity of considering the indirect externalities of these digital markets, examples of indirect effects from one side of the platform on the other. According to SG, in search platforms, as the one in question, indirect externalities can be perceived, since the more users in one side would lead to increase of users on the other.

[9] Read the technical note issued by SG in: BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08012.010483/2011-94**. Judged: July 2 2019.
[10] BRAZIL. Administrative Council for Economic Defense. **Merger Notification No. 08700.005694/2013-19**. Judged: June 25 2019.

In their technical opinion, SG pointed out how the analysis of the market power abuse is more sensitive in cases involving multi-sided platforms, because they lead to the creation of indirect externalities that cannot be replicable to smaller competitors on different sides of the platform.

SG also stated that, regardless the type of the market, the greater the dominance of a given agent, the greater the impacts of certain conducts on the competitive environment, which requires greater caution regarding conducts of dominant companies that may have an illegitimate effect on its competitors.

The case also involved debates regarding the importance of the access to the digital platforms. When it comes to dominant companies with relevant market share, oftentimes there are discussions that approximate the platforms to the concept of essential facilities.

In this context, questions related to the importance of the platform to the entry or maintenance of the market agent and about the possibility of competition despite the anticompetitive conduct become relevant.

The following chart summarizes the profile of the administrative proceedings described above.

Administrative Proceeding	Applicant	Defendant	Filling Date	Conduct Investigated	Market Involved	Final Decision
08012.010483/2011-94	E-Commerce Media Group Informação E Tecnologia Ltda.	Google Brasil Internet Ltda.	20 December 2011	Scraping	Online search websites/ Online price comparison	Investigation closed by CADE`s Court on 2 July 2019
08700.005694/2013-19	Microsoft Corporation	Google Inc. and Google Brasil Internet Ltda.	27 June 2013	Vertical restriction in advertiser's access to competitor's platforms	Sponsored search websites	Investigation closed by CADE`s Court on 25 June 2019

III. Conclusion

Even though the digital economies, marked by the multi-sided platforms, create innumerous benefits to the costumers, they also give rise to relevant challenges to competition policy. The adaptation of antitrust tools or the proposition of new ones has been a recurrent theme when discussing among competition authorities all around the world, pursing to guarantee a healthy competitive environment in the digital era.

Concerning the Brazilian context, from the analysis, we conclude CADE is progressively using new tools and analysis criteria when it comes to merger control. On the other hand, concerning antitrust investigation, it still sticks to the traditional analysis based on the rule of reason, aiming to verify if there are any legitimate reasons to the investigated conducts. Therefore, its analysis intends to examine whether the conduct is in fact discriminatory or exclusionary or whether it consists in the regular market power exercise.

DATA OR DATA PROTECTION? ANTITRUST IMPLICATIONS OF A MISSING DISTINCTION

Ademir Antonio Pereira Jr., Luiz Felipe Rosa Ramos

I. Introduction

The growth of the digital economy is closely related to a significant increase in the collection and use of data. As computing processing capacity increases and becomes widely available, data plays an ever-growing role in many companies' decision-making strategies, and competition law has increasingly recognized the need to understand the importance of data in market dynamics. Can data lead to market power in certain contexts or can data lead to barriers to entry are examples of questions that competition agencies started to pursue, and that pose significant challenges to competition enforcers around the globe. This paper does not seek to address these questions though. In fact, a central contention in this paper is that such category of questions – whether data can result in market power or increase barriers to entry – are very different in nature and should be separated from a debate as to the relationship of privacy and data protection with competition law. While these debates may intersect at some point, a clear distinction is key for a proper analysis of the problems at hand and the competition tools available.

The debate about the role of data in market dynamics focuses on the economic impacts of data. It recognizes that just like production inputs or distribution chains, the ability to collect and manipulate data may have an economic impact in certain industries and, as such, it that can be analyzed using the competition law toolkit. Privacy and data protection, on the other hand, are legal constructs not directly connected to market power[1]. The incorporation of legal principles and rules associated to privacy and data protection in the competition analysis is not easy and should be done with parsimony.

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[1] Therefore, we will use the terms "privacy" and "data protection" in accordance with the following: privacy is the general idea of "letting one alone" (as judge Cooley, quoted by Warren and Brandeis, famously stated). Firms can compete on privacy by allowing greater or lesser intrusion on individuals' personal sphere. Data protection refers to the standards on a specific dimension of privacy: the ability to control personal data, which is all information that can be related to an identified or identifiable natural person (so excluding data related to legal entities). The minimum standards a firm should attend on data protection are increasingly reflected in data protection legislations.

European precedents expose the separation of these categories of debates. In several cases, the European Commission investigated the role of data as an element of the competition dynamics, seeking to determine whether it could increase market power or constitute a substantial barrier for rivals. On a different note, the German Bundeskartellamt recently ruled that Facebook`s violation of data protection rules constituted a competition law violation (the "Facebook decision"). The decision does not contain an attempt to build an exclusionary theory of harm based on foreclosure of rivals' access to data. Instead, the Facebook case focused on the pure violation of the data protection regime as a punishable form of alleged exercise of market power.

The Facebook case calls for an extensive debate about the role of data protection in competition enforcement. The goal of this paper is to identify the legal and economic questions involved in this line of cases and to urge competition enforcers to take a cautious approach. Drawing from the European experience, the next section seeks to clearly differentiate concerns related to (i) the economic impacts of data from (ii) an analysis of "competition on privacy", and its corollary in the Facebook case, represented as competition on "data protection". The third section focuses on the Brazilian experience, discussing three precedents that consider privacy and/or data protection concerns in different fashions. At last, a short section provides final comments.

II. The separation of concerns related to economic impacts of data from "competition on privacy/data protection"

Data can be a product that companies sell, or they can be an input or byproduct of processes. Because data may have economic impact in certain industries, competition agencies and scholars have increasingly incorporated concerns related to how and when data collection and use can generate market and constitute a key differentiation element. However, as data often present certain specificities – they are readily available, replicable, non-rival (different entities can often collect and use the same or similar set of data without foreclosure concerns) can become obsolete quite quickly, etc. – the existence of competitive concerns is subject to case-by-case assessments. The debate about the role of data in competition dynamics is very contentious, and a prolific literature has evolved around this debate[2].

[2] See, among others, Nathan Newman, *Search, Antitrust and the Economics of the Control of User Data*, Yale Journal on Regulation, (2014) 30, n. 3; Michal Gal, Daniel Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement* (2015) New York University Law and Economics Working Papers, n°

Beyond an analysis of data economic impacts on market dynamics, legal principles and rules have construed the view that personal data is connected to the dignity and personality of individuals, so that protection of personal data would be central in respecting the fundamental right to privacy. As concerns around collection and use of personal data gained relevance, many countries around the globe have passed legislation containing data protection provisions. The General Data Protection Regulation (GDPR) substituted former regulations and is now the main body of law disciplining data protection in the European Union, and has influenced similar initiatives in many countries, including in Brazil, where an extensive data protection regulation was enacted and should enter into force in the near future (Law n. 13.709/2018, known as "LGPD").

As a result of the growing concerns around collection and use of personal data by companies with leading market positions, some have claimed that competition law and privacy overlap, so competition agencies should take action. Several authors argued that privacy should be one of the several competitive parameters market players can compete on (one of the elements of competition on quality). Arguing that consumers' decisions could be influenced by the level of privacy offered by product or service providers, there should be "competition on privacy". While this view places harm to privacy inside the competition toolkit (quality degradation), it is quite difficult to implement in practice. First, there is no indication that market concentration is associated with a decrease in privacy[3]. Furthermore, any antitrust requirements for data practices that exceed current legal data protection requirements must be justified as necessary to sustain competition[4]. Such approach brings with it all the difficulties of economics to measure quality and to stablish a causal link between the market power created or enhanced by the merger and the negative effect on data protection standards. Moreover, the observation of quality degradation in products or services is difficult to measure in real-world

403; Allen Grunes, Maurice Stucke. *Big Data and Competition Policy* (2016), Oxford, Oxford University; Roisin Comerford, Daniel Sokol, *Does Antitrust Have a Role to Play in Regulating Big data?* (2017), in *Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Cambridge, Cambridge University.; David S. Evans. *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights but Not Sleepy Monopolies* (2017), Competition Policy International; Greg Sivinski, Alex Okuliar and Lars Kjolbye, *Is Big data a Big Deal? A Competition Law Approach to Big Data* (2017), European Competition Journal, 13, n. 2-3: Andressa Fidelis, *Data-driven mergers: a call for further integration of dynamic effects into competition analysis* (2017) Revista do IBRAC, v. 23, n. 2.

[3] See Darren Tucker, The Proper Role of Privacy in Merger Review (2015), CPI Antitrust Chronicle.

[4] See Mark MacCarthy, *Can Antitrust Enforcement Improve Privacy Protection? Privacy as a Parameter of Competition in Merger Reviews* (2018), 8. Also Renato Nazzini, *Antitrust Enforcement and Privacy Standards* (2019) ("Legally binding privacy standards should, nevertheless, be distinguished from market-based privacy standards. In theory, only the latter are relevant to competition analysis. If privacy standards are a qualitative parameter of competition, what matters is how market players compete on this parameter").

situations. Alleged degradation of quality related to privacy could be balanced by price discounts (e.g. more data could be used to monetize through more effective adds, lowering subscription prices or even leading to zero-pricing), more access to relevant data by competitors or improvement of certain aspects of the product/service offering through the use of additional data.

Such criticism has generated substantive skepticism as to the ability of competition law to determine "limiting principles" for intervention in cases involving a potential reduction of "competition on privacy"[5]. More recently, the debate has turned to whether data protection regulation should be a part of competition enforcement and serve as a parameter to assess anticompetitive behaviors. In brief, some claimed that *"[d]ata protection law – a framework designed to identify and achieve an optimal level of personal data protection – can provide the normative guidance that competition law lacks in relation to non-price competitive parameters."*[6] Based on this view, data protection law can serve as a parameter to assess anticompetitive behaviors, so that infringements of data protection provisions could indicate exercise of market power through consumer exploitation or use of unlawful methods of competition to the detriment of rivals.

European precedents expose these different categories of debates – data and its economic impact on one side and competition on data protection on another.

For instance, in Asnef-Equifax the European Court of Justice (ECJ) considered whether a group of financial organizations operating in Spain restricted competition in the credit market by exchanging credit and solvency data about their customers. Following a referral from the Spanish Supreme Court, the European Court of Justice (ECJ) was asked to rule whether such an agreement had the object of restricting competition in the credit market (Article 81[1] of the European Commission Treaty) or produced positive effects to consumers (Article 81[3]). The decision that came out in 2006 deals with the impact of data in market dynamics[7]. The ECJ observed that the essential purpose of the credit information exchange system was to make available to creditors relevant information about borrowers. It used personal data from existing

[5] See Maureen K. Ohlhausen and Alexander Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy* (2015), Antitrust Law Journal, 80; see also Darren Tucker, The Proper Role of Privacy in Merger Review (2015), Francisco Costa-Cabral and Orla Lynskey, *Family ties: the intersection between data protection and competition in EU Law (2017),* Common Market Law Review, 54.
[6] See Francisco Costa-Cabral and Orla Lynskey, *Family ties: the intersection between data protection and competition in EU Law (2017),* Common Market Law Review, 54.
[7] *Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (2006) ECJ November 23.*

or potential clients as regards the way in which they have previously honored their debts. According to the Court, the exchange of information was in principle likely to improve the functioning of the credit supply, by reducing the default rate for borrowers through use of both positive and negative data regarding their financial behavior. As a conclusion, the Court ruled that the system in place did not restrict competition, given that such a system did not allow creditors to be identified, the market was not concentrated and access by financial institutions was not discriminatory.

While an analysis of the nature of the personal data involved and its economic impact was central in the competition assessment, data protection rules did not play a central role[8]. According to the Advocate General, "any problems related to sensitivity personal data can be resolved by other instruments, as data protection legislation". And he continued: "of course (…) it is necessary to communicate debtors what data are recorded and give them the right to check and correct (…) this seems to be assured in the light of Spanish law applicable". The ECJ followed the same path, stating explicitly that personal data issues "are not as such covered by competition law". The European Commission took a similar posture in the review of Google/Doubleclick and Facebook/WhatsApp mergers[9].

These precedents show that, at least in the Community level, the competition review was limited to the role of data as an economic input and did not enter a discussion about competition on privacy. In stark contrast with this approach, the German Bundeskartellamt released a decision against Facebook in February 2019 that inaugurates a new approach to the intersection of data protection and competition. The Facebook Decision focuses on an alleged data protection violation as the core element of an anticompetitive conduct, holding that the collection of "*user and device-related data from sources outside of Facebook constituted an abuse of a dominant position on the social network market in the form of exploitative business*".

In brief, the Facebook Decision is divided in three main steps. First, the Bundeskartellamt held that Facebook was dominant in the national market for social networks for private users.

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[8] For a criticism of such approach considering Equifax posterior data breach, Olivia Altmayer, *The Tipping Point – Reevaluating the ASNEF-EQUIFAX Separation of Competition of Data Privacy Law in the Wake of the 2017 Equifax Data Breach*, (2018) 39 Nw. J. Int'l L. & Bus. 37

[9] In Google/Doubleclick, the EC stated that its decision referred "exclusively to the appraisal of this operation with Community rules on competition". In Facebook/Whatsapp, while the EC recognized that market players could compete on privacy, the Commission did not consider whether the merger could result in a reduction of competition on privacy or result in lower compliance with data protection rules. In any event, the Commission investigated whether the merger could result in the introduction of adds on Whatsapp and whether Facebook could further improve its advertisement offer using Whatsapp' data.

Second, it proceeded with an assessment of Facebook's data policy under the GDPR, and concluded that Facebook's practices violated the GDPR because (i) there was no effective consent pursuant to Art. 6(1a) of the GDPR for Facebook to collect and process data from users in services and apps outside of Facebook's website[10]; (ii) Facebook did not have to process data to fulfil its contract pursuant to Art. 6(1b) GDPR; and (iii) Facebook's interest in collecting and using the data did not outweigh other interests (Art. 6(1f) GDPR). Finally, the German regulator concluded that "the violation of data protection requirements found is a manifestation of Facebook's market power." On this point, the Facebook decision claimed that "individuals have only been able to use Facebook's social network if they agreed to the terms of service stipulating that Facebook can collect many data outside of the Facebook website"[11], and that *"represents above all a so-called exploitative abuse. Dominant companies may not use exploitative practices to the detriment of the opposite side of the market, i.e. in this case the consumers who use Facebook. This applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data."*[12]

The Facebook decision therefore develops a theory of exploitative abuse. There is no claim that rivals have been excluded and that competition has been reduced[13]. The problem to be resolved is an alleged exploitation of customers, who must cope with a data policy deemed abusive because it violated the data protection regulation (GDPR). As a result, the remedy imposed does not target any change in competition dynamics. Rather, it purely demands compliance with the data protection regulation forcing Facebook to obtain voluntary consent from users to process data from third-party sources.

The Facebook decision is currently suspended by a decision of the Dusseldorf Court. It is highly contentious and has raised substantive questions. For example, it is unclear why the

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[10] See *Background information on the Bundeskartellamt's Facebook proceeding*, availabe at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6). Access on May 15, 2020.

[11] See *Background information on the Bundeskartellamt's Facebook proceeding*, availabe at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6. Access on May 15, 2020.

[12] See Press Release, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2. Access on May 15, 2020.

[13] Even though the Facebook decision claims that the exploitative abuse allow Facebook to gain "a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook's market power towards end customers", the theory of harm is not based on exclusion of rivals. As the decision itself recognizes, the theory of the case is of an exploitative abuse. See Case Summary, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4, at 11. Access on May 15, 2020.

Facebook conduct would constitute a manifestation of market power. Several companies and even individuals without market power may equally violate the GDPR; in fact, it seems that compliance with GDPR is unrelated to market power and the Bundeskartellamt did not submit any evidence that Facebook would behave differently if it was not for its alleged dominance. Furthermore, if there is a data protection violation, an intervention based on competition law can lead to significant distortions of the enforcers' mandate. In fact, if the GDPR is able to provide relief (as the remedy clearly shows), there is no reason for another form of intervention. On a similar vein, the Facebook decision also fails to show a decrease in consumer welfare. While some consumers might want Facebook not to collect third-party data, it is unclear how such conduct actually harms the consumers that actually prefer the improvement in the product that Facebook may provide. Competition Law is expected to protect consumer welfare through the preservation of the competitive process, and not pick and choose the specific interests of certain groups of consumers.

III. Data protection in CADE's precedents

In Brazil, three decisions issued by the Federal Competition Agency – CADE reveal different approaches to the intersection of competition law and data protection.

a. Telefonica/Phorm merger review: data protection concerns beyond the mandate of competition enforcers

In 2010, CADE approved an MoU signed by Telefônica Data S.A. and Phorm Veiculação de Publicidade Ltda. with the aim of establishing a partnership to implement technology to display online advertising[14]. Phorm planned to collect user data directly from Internet Service Providers (ISPs), and entered into agreements with Telefonica and Oi, two of Brazil's largest ISPs.

During the merger investigation, the Consumer Protection Department (DPDC) issued an opinion noting that because Phorm's technology was installed directly on the ISP, Phorm would reach the content of Internet communications regardless of end-user control. The use of DPI (Deep Packet Inspection) techniques enabled scanning of entire communications carried out between the end user and any content provider in the internet. Such a technology would

[14] Merger No. 08012.010585/2010-29. A similar analysis, of an agreement between Phorm and Oi, had reached the same outcome. See Merger 08012.003107/2010-62.

raise questions regarding the security of the personal information processed, the possibility of reverting anonymization and the effects of consumer profiling on the privacy of Internet users[15].

The Reporting Commissioner qualified such concerns as of "great relevance", but noticed they were beyond CADE's mandate. Other Commissioner noticed that even though different methods to obtain information about browsing patterns and user preferences with advertising purposes may not be equivalent from a privacy standpoint, they should not be treated differently from a competition law perspective.

In any event, recognizing the intrusiveness of the technology, a majority of Commissioners agreed to send CADE's decision for the Consumer Protection Department and the Internet Governance Committee so they would further investigate the technology[16].

b. Vesper v. Telemar: unlawful data processing at the core of an exclusionary conduct

In 2015, CADE held that the processing of user data in violation of regulatory provisions to target customers with specific offers and discounts constituted an anticompetitive conduct.

From 2002 until 2004, the incumbent Telemar Norte Leste ("Telemar") accessed data from phone calls and web interactions its clients maintained with the entrant Vesper. The data included the duration of the call to Vesper, average phone bill expenditure and default history. Based on the duration of the calls, customers were categorized as "curious", "interested" or "very interested". Telemar would then reach customers and offer discounts based on their categorization, trying to prevent them from switching to Vesper.

The Federal Telecommunications Agency – Anatel had punished Telemar for such conduct, holding that the data collection violated specific rules of the regulation of telecommunications services, including provisions that prevented use of data obtained from rivals in the context of a services agreement[17]. Because of Anatel's decision, CADE's

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[15] Moreover, according to the information provided, a consent given only once would be deemed by the system as valid for every website accessed, and potentially for any user of the same computer. Such type consent would likely not pass the thresholds of an "informed consent", since the end user would not be informed of the main purpose of the system (profiling). The system was also in charge of deciding whether personal data was sensitive or not, and it was not careful as to the possibility of use by children or other individuals who shared the computer and had not provided their own consent.

[16] Commissioners also discussed whether the access to personal data of users through ISPs would be an essential facility in the online advertising market, as big ISPs would allow access to large volumes of data. The majority of Commissioners, nevertheless, held that there were many ways to collect user data and it was not clear that collection directly via ISPs would be essential for competition.

[17] The regulatory provisions cited in the case files were less of a data protection nature and more related to the use of competitor's information. Nevertheless, Brazilian Telecommunication Act guarantees for users a specific right of "respect for privacy in the billing documents and in the use of personal data by the service provider".

Commissioners unanimously acknowledged that the data which enabled Telemar's promotional activities had been unlawfully obtained. However, there was disagreement as to the impacts of such conduct from a competition standpoint. According to the Reporting-Commissioner, while the data collection was unlawful, the promotional activities themselves were legal from an antitrust perspective, as they were part of Telemar's efforts to compete with Vesper and had no predatory content (no evidence that offers were predatory and would require losses).

The dissenting vote, followed by the majority of CADE's Tribunal, took a different approach. The majority decision held that monitoring a competitor's call centers while violating the "guarantee of secrecy inherent to the users" was an unlawful mean of competition. To the majority, the resource to such an unlawful method of competition had the potential to produce anticompetitive effects given Telemar's dominant position and the ability it acquired (though unlawful means) to target specific customers and undercut Vesper's efforts to attract new users. Even though the conditions Telemar offered to customers were not predatory and would be acceptable under normal conditions, the conduct should be deemed anticompetitive because it was based on an unlawful collection of data that allowed Telemar to exclude Vesper by specifically targeting customers leaning towards the entrant.

The majority decision raises several questions related to the standard of proof and the level of evidence of anticompetitive effects required. For the purpose of this paper, however, a key point is the recognition that data processing based on an illegal method can be an element of an exclusionary conduct. Different from the Facebook case, the data processing was not in and of itself a problem under competition law – the processing was instrumental to other behaviors (i.e. targeting customers for promotions and discounts) that allegedly had the potential to exclude rivals.

c. The Credit Bureau merger: data protection as a limit for competition remedies

Like in the Asnef/Equifax case, credit personal data were also at the heart of a merger ruled by CADE in 2016[18]. The investigation involved a joint venture among Brazilian main five banks to create a new credit bureau. While CADE acknowledged the creation of a new bureau could increase competition and help to reduce information asymmetry in the credit market, the joint-venture also involved a vertical integration of Brazil's top 5 banks (which

[18] Merger No. 08700.002792/2016-47.

allegedly amounted for 90% of the banking industry) with the market of credit bureaus. Such vertical integration increased the risks that such banks would no longer provide data or consult with pre-existing bureaus. As a result, the data basis of rival bureaus would dehydrate, harming their ability to compete; the new bureau, in turn, could refuse to provide services to clients other than its shareholders. Therefore, CADE conditioned approval of the merger to several non-discrimination obligations agreed with the Parties.

One of the remedies was directly affected by data protection considerations. The remedy addressed a concern related to the "positive" register[19]. CADE observed that banks could create mechanisms to induce customers to share personal data only with the new bureau, since the opt-in form was not standardized. CADE then discussed two types of forms. A "closed" form would oblige a consumer to opt-in the positive and share information with all existing bureaus. Such alternative was seen by most Commissioner as superior from a competition point of view. An "open" form, in turn, enabled consumer to select which bureaus would receive her or his data. Such alternative would allow banks to induce consumer behavior in favor of their own bureau, and was considered less desirable in terms of effectiveness of the remedy.

The Brazilian National Secretariat of Consumer argued in the files that the "closed" form would not be compatible with consumer protection rules, which required informed consent, informational self-determination and specific authorization (opt-in) for protection of consumer's privacy. A few Commissioners tried to argue the "closed" form (or a variation of it) would be in the consumers best interest. Based on the nature of the personal *data,* such Commissioners concluded that competition conditions would be enhanced by the "closed" form: cost of credit would decrease, and range of choice would increase, with consumer discretion guaranteed by the right to opt-out from any bureau. But the majority of CADE's tribunal decided to avoid a remedy that could be seen as violating the *data protection* provision in the Consumer Protection Code and voted for an intermediary solution. According to the prevailing view, CADE should not substitute consumer choice, but could help to reduce information asymmetry, making sure that a list with all existing bureaus is presented to consumers within the form.

[19] "Positive" register encompasses the complete financial record of a consumer, while the "negative" register includes only data on defaults.

IV. Concluding remarks

The cases discussed above make it clear that enforcers should clearly differentiate concerns related to *data* as an element of the competition dynamics (i.e. whether it could increase market power or constitute a substantial barrier for rivals) from *data protection*.

The insertion of legal principles related to data protection in the competition analysis should be done with caution. Precedents from the European Commission indicate that competition enforcers are reluctant to incorporate pure data protection concerns in the competition analysis, recognizing they are beyond the scope of competition law. More recently, however, the Facebook case in Germany placed a pure violation of the data protection regime at the center of the competition review, generating a heated debate.

The Brazilian experience supports the view that data protection concerns are generally beyond the scope of Competition Law. Antitrust is expected to protect the competitive process, not personal data. Notwithstanding, precedents indicate that violation of data protection rules can be instrumental to an exclusionary conduct or serve as a limit for antitrust intervention when remedies violate such dimension of privacy.

Section 2

Merger control

MERGER CONTROL IN THE DIGITAL ERA: SHOULD BRAZIL REVISE ITS THRESHOLDS?

João Felipe Achcar de Azambuja

I. Introduction - notification thresholds toolbox

Merger control as a mean of restricting or preventing the combination of corporate structures that will likely lead to competitive harm generally relies on thresholds that limit the scope of merger review in terms of (i) the definition of economic concentrations of corporate structures that are "suitable" for merger review; and (ii) material nexus, so as to screen out transactions that will likely have no competitive impact on a given jurisdiction[1]. Merger control regimes worldwide apply notification thresholds so as to limit public and private resources spent with the notification and review of mergers that are unlikely to raise any competition concerns, balancing the need to review as many transactions that may harm competition, but keeping the review process and costs as manageable, predictable and reasonable as possible[2].

Despite the development of internationally recognized best practices for merger control publicized by international bodies such as the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), there is no consensus on optimal notification thresholds, as merger control regimes have specific features in each jurisdiction (in terms of *ex-ante* or *ex-post* merger review, nature of concerns reviewed by the authority, information requirements, timing of the analysis, etc.) that are taken into account in merger control design. When it comes to delimitating the minimum material nexus for a transaction to merit merger review, the most frequent types of criteria applied worldwide are sales/turnover and assets, value of transaction and market shares[3], each presenting advantages and disadvantages in catching transactions that are likely to cause anticompetitive harm.

Sales and turnover (sometimes coupled with assets) are objective measures of the potential competitive impact of a transaction and local nexus in a given jurisdiction, and data on sales and turnover are often easily available to the parties involved. In brick and mortar competition, this threshold is thought to be able to catch transactions with potential adverse

[1] OECD. Working Party No. 3 on Co-operation and Enforcement: Local nexus and jurisdictional thresholds in merger control. Background Paper by the Secretariat, p. 4.
[2] Ibid., p. 5.
[3] Ibid., p. 8.

impact on competition, while increasing legal certainty for the companies. However, many argue that sales, turnover and assets may not be adequate proxies of competition relevance when non-price parameters play a more important role, as sometimes happens in the digital environment[4].

Transaction value is an interesting proxy to reflect the relevance of the transaction to the parties involved, which however does not necessarily correspond to the competitive impact of that transaction, especially in the case of global deals, being unsuitable to establish local nexus on its own[5].

Finally, market share can more adequately predict the potential competitive impact of a given transaction and is well suited to establish local nexus, as they refer to both product and geographic relevant market dimensions[6]. However, given that merging parties usually do not have this information available or the ability to accurately define relevant markets, especially in economic segments that are new or that are not frequently found in caselaw (as often happens in the digital environment), this criterion imposes excessive costs and burdens that may outweigh its potential benefits.

In Brazil, merger control developed significantly especially after the enactment of the current Brazilian Competition Law, in force since 2012, which adopted a pre-merger notification regime, abandoned the market share threshold[7] and established a turnover threshold for both buy-side and sell-side[8].

In an increasingly digital economy, however, notification thresholds designed for brick and mortar industries are often called into question, as they may not catch relevant mergers involving startups or zero price markets. In this context, in which relevant market definitions might be blurry and a company's turnover is not necessarily an indication of its competitive relevance, this article discusses whether the current merger notification thresholds in Brazil

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[4] See, for example, PIRES-ALVES, Camila; GONZALO, Manuel; LYRA, Marcos P. O.; Startups and Young Innovative Firms Mergers & Acquisitions: an Antitrust Debate? Lessons From the ICT Tecno-Economic Paradigm.

[5] OECD. Working Party No. 3 on Co-operation and Enforcement: Local nexus and jurisdictional thresholds in merger control. Background Paper by the Secretariat, p. 15.

[6] Ibid., p. 14.

[7] Pursuant to the former Brazilian Competition Law, a transaction would be reportable to the Administrative Council for Economic Defense (CADE) if either a market share threshold or a turnover threshold was met.

[8] The turnover threshold is met when one of the economic groups involved in the transaction (as buyer or seller) had Brazilian gross turnover or volume of business of at least R$750 million in the fiscal year immediately prior to the transaction, and the other economic groups involved in the transaction had Brazilian gross turnover or volume of business of at least R$75 million in the in the fiscal year immediately prior to the transaction.

needs revision in the light of the contemporary international experience and recent digital mergers affecting Brazil.

II. Have merger control rules failed to catch digital transactions?

According to the OECD, "*The digital economy is an umbrella term used to described markets that focus on digital technologies*", facilitating the trade of goods and services through electronic commerce[9]. The modern digital economy has brought challenges in all areas of antitrust practice and special attention has been given to merger control, due to increasing M&A activity between technology companies and the uncertainty regarding potential anticompetitive effects arising out of such mergers. While many scholars, authorities and policymakers discuss whether theories of harm should be redefined when it comes to transactions involving digital companies, one thing is certain: many digital mergers – some involving well-known companies – were not caught in several jurisdictions under the current notification thresholds due to the very digital nature of the parties' businesses[10].

In fact, in digital markets the turnover of a company is not necessarily an indication of its market relevance: digital companies (especially new and disruptive ones) often extract value from non-monetary features, such as data, innovative potential and/or network effects – this could be the case of a zero-price platform, for example[11].

Similarly, market share may be a particularly unsuitable threshold for mandatory notification in the digital economy. Relevant market definition and consequently market share calculation is troublesome due to the innovative and dynamic nature of technology, potential competition with offline channels, interconnected functionalities and multi-sided online platforms. The fact that goods and services in the digital economy are often offered at zero-price and that intangible proxies such as data and network effects may more adequately reflect a company's market power than value or volume of sales, capacity or output may also pose challenges to market share calculation.

As of today, there are several examples of global digital transactions involving companies with undisputed market relevance and millions of consumers/users in Brazil that were not subject to merger control in Brazil, the most remarkable being Facebook/Instagram

[9] OECD. Hearings on the Digital Economy held at the Competition Committee sessions of October 2011 and February 2012, p. 5.
[10] UNCTAD. Competition Issues in the Digital Economy. Note by the UNCTAD Secretariat, p. 9.
[11] NEWMAN, John M. Antitrust in Zero-Price Markets: Foundations, p. 163.

(2012), Google/Waze (2013), Facebook/Whatsapp (2014), Apple/Shazam (2018) and Google/Fitbit (2019). These examples suggest that current merger control rules failed to detect important transactions when it comes to digital markets[12].

On the other hand, there is a number of digital mergers in a variety of economic sectors that were subject to mandatory notification and were reviewed by CADE in recent years. In the report BRICS in the Digital Economy: Competition Policy in Practice produced by the BRICS Working Group on the Competition Issues in the Digital Market, transactions such as the creation of Quod, a credit bureau controlled by Brazilian largest commercial banks (2016)[13]; the acquisition of LinkedIn Corporation by Microsoft Corporation (2016)[14]; the acquisition of Time Warner Inc. by AT&T Inc. (2017)[15]; the acquisition of Monsanto Company by Bayer AG (2018)[16]; the acquisition of a stake in XP Investimentos S.A. by Itaú Unibanco S.A. (2018)[17]; the acquisition of a stake in Rocket Internet SE (Delivery Hero) by Naspers Ventures B.V. (iFood and Spoonrocket) (2018); and the acquisition of Twenty-First Century Fox by The Walt Disney Company (2019)[18] were highlighted as benchmark cases of CADE's enforcement in digital markets[19], but the list is far more extensive[20].

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[12] Many more low-profile transactions involving digital companies with unclear competitive impact surely have followed the same path. Authors Pires-Alves, Gonzalo and Lyra identified at least the following cases of startup acquisitions not submitted to CADE in the segments of e-commerce, education, employer review, business process management and health apps: acquisitions of Takerna (2013), Ideas Tecnologia (2013) and Sieve (2015) by B2W; Studiare (2015) by Kroton; Chaordic (2015), Neemu (2015), Shopback (2017), Percycle (2017) and DCG (2018) by Linx; Love Mondays (2016) by Glassdoor; One Cloud (2016) by Tivit; Dr. Vem (2017) by Docway; and AppProva (2017) by Somos Educação. See PIRES-ALVES, Camila; GONZALO, Manuel; LYRA, Marcos P. O.; Startups and Young Innovative Firms Mergers & Acquisitions: an Antitrust Debate? Lessons From the ICT Tecno-Economic Paradigm, p. 27-28. To that list one could also include mergers between mobility startups Cabify/Easy Taxi (2017) and Yellow/Grin (2019), the latter having already closed a substantial part of its operations in Brazil.

[13] Merger Filing No. 08700.002792/2016-47 (Applicants: Banco Bradesco S.A., Banco do Brasil S.A., Banco Santander (Brasil) S.A., Caixa Econômica Federal and Itaú Unibanco S.A.).

[14] Merger Filing No. 08700.006084/2016-85 (Applicants: Microsoft Corporation and LinkedIn Corporation).

[15] Merger Filing No. 08700.001390/2017-14 (Applicants: Time Warner Inc. and AT&T Inc.)

[16] Merger Filing No. 08700.001097/2017-49 (Applicants: Bayer Aktiengesellschaft and Monsanto Company).

[17] Merger Filing No. 08700.004431/2017-16 (Applicants: Itaú Unibanco S.A. and XP Investimentos S.A.).

[18] Merger Filing No. 08700.004494/2018-53 (Applicants: The Walt Disney Company and Twenty-First Century Fox, Inc.).

[19] BRICS Working Group on the Competition Issues in the Digital Market. BRICS in the Digital Economy: Competition Policy in Practice, p. 30-33; 45-48.

[20] Considering only transactions filed in 2019 onwards, examples of cases involving online platforms or data-driven companies include Merger Filings No. 08700.000826/2020-45 (Applicants: Delivery Center Holding S.A., BR Malls Participações S.A. and Multiplan Empreendimentos Imobiliários S.A.); 08700.005679/2019-66 (Applicants: CLSS Participações Ltda. and Lomadee Administradora de Plataforma de Afiliados Ltda.); 08700.004677/2019-50 (Applicants: Cyrela Commercial Properties S.A. Empreendimentos e Participações and Delivery Center Holding S.A.); 08700.001962/2019-19 (Applicants: Multiplan Empreendimentos Imobiliários S.A. and Delivery Center Holding S.A.); 08700.003863/2019-71 (Applicants: ODATA Brasil S.A. and T-Systems do Brasil Ltda.); 08700.002703/2019-13 (Applicants: Mosaico Negócios de Internet S.A. and Buscapé Company

CADE is also active in the investigation of potential anticompetitive practices involving digital companies. Recent examples include investigations on parity clauses applied by online travel agencies, such as Booking.com, Expedia and Decolar.com[21]; alleged cartelization and price fixing practices by Uber[22]; and investigations against Google for abusive practices related to scraping content and its Google Shopping and Google Search tools[23], to name a few.

Horizontal, vertical or conglomerate concerns in traditional antitrust enforcement are also present in digital markets. However, specific features of this environment may raise challenges related to less obvious concerns associated with abuse of dominance in online platforms; accumulation of data as an entry barrier and capable of conferring market power; killer acquisitions and consolidation of technologies for enhancing portfolio power, for example[24]. Nonetheless, these competition concerns are arguably mitigated to some extent by the volatile nature of the digital economy, which allows entry and expansion opportunities through innovation, cross-platform rivalry, low entry costs, multi-homing and reversible network effects, so that dominant firms are frequently toppled by newcomers with a disruptive technology or business model[25]. As such, digital markets may require a more cautious and less interventionist antitrust approach, especially when it comes to merger control, demanding from competition agencies in-depth knowledge and expertise on adequate analytical tools for digital environments.

Informação de Tecnologia Ltda.); 08700.002837/2019-26 (Applicants: TecCloud Serviços de Tecnologia AHU Ltda. and Stefanini Participações S.A.); 08700.003290/2019-86 (Applicants: J&F Participações and PicPay Serviços S.A.); and 08700.000611/2019-91 (Applicants: Truckpad Tecnologia e Logística S.A. and Estrela Comércio e Participações S.A.).

[21] Administrative Inquiry No. 08700.005679/2016-13 (Plaintiff: Fórum de Operadores Hoteleiros do Brasil; Defendants: Expedia do Brasil Agência de Viagens e Turismo Ltda., Decolar.com Ltda. e Booking.com Brasil Serviços de Reserva de Hotéis Ltda.).

[22] Preparatory Proceeding No. 08700.008318/2016-29 (Plaintiffs: Associação de Motoristas Autônomos de Aplicativos and Ministério Público do Estado de São Paulo; Defendant: Uber Tecnologia do Brasil Ltda.).

[23] See Preparatory Proceeding No. 08700.002940/2019-76 (Plaintiff: CADE ex officio; Defendants: Google INC. and Google Brasil Ltda.); Administrative Inquiries No. 08700.003498/2019-03 (Plaintiff: CADE ex officio; Defendant: Google Brasil Internet Ltda.); 08700.003211/2016-94 (Plaintiff: Yelp, Inc.; Defendant: Google Brasil Internet Ltda.); and Administrative Proceedings No. 08700.005694/2013-19 (Plaintiff: CADE ex officio; Defendants: Google Inc. and Google Brasil Internet Ltda.); 08700.009082/2013-03 (Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; Defendants: Google Inc. and Google Brasil Internet Ltda.); and 08012.010483/2011-94 (Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; Defendants: Google Inc. and Google Brasil Internet Ltda.).

[24] CAPOBIANCO, Antonio; NYESO, Anita. Challenges for Competition Law Enforcement and Policy in the Digital Economy, p. 22.

[25] EVANS, David S. Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies, 33-34.

III. Should we change the rules in Brazil or is the current framework up to the task?

Merger control challenges in the digital economy have led agencies in several jurisdictions worldwide to discuss the possibility of changing notification thresholds. The issue became particularly evident after Facebook's acquisition of WhatsApp: despite a transaction value of approx. USD 19 billion, the deal was not reportable under the rules of the European Commission and most of its member states, as well as in many other jurisdictions worldwide, including Brazil, given that WhatsApp did not reach the *de minimis* turnover thresholds in these jurisdictions[26].

Taking the lead, Austria and Germany have amended their competition laws in a reaction to the fast and challenging developments of the digital economy. In 2017, Germany moved from a purely turnover-based material nexus threshold to add a transaction value threshold (more than EUR 400 million) applicable when the lower turnover threshold is not met, but the target has "*substantial operations*" in Germany[27]. Similarly, Austria also amended its competition law in 2017, shifting from purely turnover-based thresholds to a transaction value threshold (more than EUR 200 million) coupled with aggregated turnover thresholds, applicable only when the target "*is active to a large extent on the domestic market*"[28].

Following the early movers, the European Commission is studying the introduction of value-based notification thresholds and other relevant EU member states may also adapt their merger control framework[29]. EU Commissioners admit that the agency missed out on reviewing a number of digital mergers that did not meet turnover thresholds and that introducing a threshold based on transaction value would capture some of those deals[30], but lowering notification thresholds to catch digital mergers would also result in the submission of

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[26] Competition Policy International (CPI). Germany/Austria: merger notification rules updated for digital economy transactions.
[27] See article 35 of Germany's Act against Restraints of Competition (GWB), available at: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf.
[28] See article 9 of Austria's Federal Cartel Act, available at: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-_Federal_Cartel_Act_final.pdf.
[29] See, for example: (i) recent press release of the Dutch Government with suggested measures to tackle digital concerns: https://www.government.nl/latest/news/2019/05/27/dutch-government-change-competition-policy-and-merger-thresholds-for-better-digital-economy; and (ii) the French Competition Authority's contribution paper to the debate on competition policy and the challenges raised by the digital economy, available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020.
[30] CONNOR, Charley. Vestager: EU is considering value-based thresholds. Global Competition Review (GCR).

a large volume of transactions with no competition concerns, demanding excessive enforcement efforts[31].

In the context of peer review process for acceptance of CADE as a permanent member of the OECD, several measures were recommended for dealing with merger control challenges. In terms of notification thresholds, the OECD recommended CADE to introduce a new notification criterion based on the asset value of a transaction[32], which, in the context of the Brazilian legal framework, would necessarily require the amendment of the Brazilian Competition Law.

CADE's staff frequently expresses that challenges of the digital economy are a matter of concern to the authority. There are visible efforts to study this subject through initiatives such as the technical reports on individual passenger transport sector[33] and the participation in the above-mentioned BRICS' report on digital economy. However, so far it is not clear whether CADE will actively advocate in favor of changing the current notification thresholds as suggested by the OECD[34].

Some would argue that CADE is already equipped with the proper tools for a wider antitrust scrutiny of digital mergers[35]. This is because Brazilian Competition Law allows CADE to request the submission of non-notifiable mergers within one year of the

[31] In this context, the chief economist at the European Commission's Directorate-General for Competition said at a conference that the European Commission is not thinking about lowering notification thresholds to catch digital mergers, pointing out that *"if we start fishing with a net with finer mesh, we are going to get a lot of small fish that we frankly do not have the resources to deal with"*. CRAIG, Emily. European Commission won't lower thresholds, says Régibeau. Global Competition Review (GCR).
[32] OECD. Peer Reviews of Competition law and Policy: Brazil. 2019, p. 169.
[33] See: (i) CADE. Rivalidade Após Entrada: o Impacto Imediato do Aplicativo Uber Sobre as Corridas de Táxi Porta-a-Porta. Documentos de Trabalho 003/2015; and (ii) CADE. Efeitos Concorrenciais da Economia do Compartilhamento no Brasil: A Entrada da Uber Afetou o Mercado de Aplicativos de Táxi entre 2014 e 2016? Documento de Trabalho 001/2018.
[34] On a Trial Session held on March 4th, 2020, CADE's President suggested the creation of a working group to discuss the revision of notification thresholds, but did not indicate whether the group would tackle the changes suggested by the OECD for the challenges of the digital economy. In the report prepared by the BRICS Working Group on Digital Economy, it is observed that "*In Brazil, no particular formal changes in the legislation are under consideration to specifically address the digital economy. The same applies for changes in notification thresholds, as the Brazilian Competition Law provides the Administrative Tribunal of the Brazilian Competition Defense System with the possibility of reviewing any merger and acquisition upon its request, within one year of the execution of the agreement, regardless of the parties' annual gross sales or total turnover*". See: BRICS Working Group on the Competition Issues in the Digital Market. BRICS in the Digital Economy: Competition Policy in Practice, p. 42.
[35] See: COUTINHO, Diogo R; GONÇALVES, Priscila B. O antitruste, a regulação e as big tech: Revisão de fusões e aquisições já aprovadas nos mercados de plataformas digitais não demandaria alteração legislativa no Brasil.

consummation of the deal. Such power could be used for the review of specific digital mergers that may entail competitive concerns.

While reviewing a non-notifiable transaction, CADE has the power to (a) request the parties to execute an agreement for the preservation of the reversibility of the transaction, by means of which the parties will agree on the measures to be adopted for the unwind of the transaction in the event it is not approved; and/or (b) issue injunctions for the adoption of any measures required for the preservation of competition.

Residual jurisdiction mechanisms have been adopted by a number of countries worldwide to address potential competition concerns in mergers that do not meet notification thresholds. For reasons of legal certainty and adequate management of public resources, requesting the review of non-notifiable transactions shall be deemed an exceptional tool. As of today, CADE has resorted to the residual jurisdiction tool in only four occasions since the enactment of the Brazilian Competition Law[36]. None of such cases involved the digital environment and competition concerns generally derived from high market shares and successive acquisitions[37].

IV. Conclusion

Merger control rules in Brazil do not necessarily catch important digital mergers. However, CADE's residual jurisdiction is an exceptional measure that can and should be used when dealing with digital mergers that may be harmful to competition. Through this mechanism CADE can not only review transactions, but also resort to injunctions to preserve

[36] Merger Filings No. 08700.006497/2014-06 (Applicants: Greca Distribuidora de Asfaltos Ltda., Betunel Indústria e Comércio Ltda. and Centro Oeste Asfaltos Ltda.); 08700.005959/2016-21 (Applicants: Guerbet S.A. and Mallinckrodt Group S.à.r.l.); and 08700.005972/2018-42 (Applicants: SM Empreendimentos Farmacêuticos Ltda. and All Chemistry do Brasil Ltda.), as well as APAC No. 08700.005079/2019-06 (Applicants: Sacel – Serviços de Vigilância e Transporte de Valores – Eireli and Prosegur Brasil Transportadora de Valores e Segurança S.A.), which has not been formally filed with CADE as of today.

[37] Only one of these cases was subject to remedies: a transaction involving the acquisition of All Chemistry do Brasil Ltda., a company active in the distribution of inputs for manipulation pharmacies, by SM Empreendimentos Farmacêuticos Ltda. CADE found that SM had acquired a series of small companies in the past and conditioned the acquisition of All Chemistry to the adoption of behavioral remedies. According to the merger control agreement entered into with SM, the company committed to (i) not take part in mergers with companies operating in the market for distribution of inputs for manipulation pharmacies for two years, and (ii) submit to CADE any transaction involving companies in markets horizontally, vertically or in any other way related to the markets affected by the transaction, regardless of meeting mandatory notification thresholds. CADE's approach in All Chemistry/SM demonstrates that it is willing to eliminate competition concerns in non-notifiable transactions, and that it may favor monitoring measures over interventionist measures, imposing on the applicants the burden of communicating CADE of a transaction with potentially adverse effects even if it is not subject to mandatory notification. Such remedies could also be applied in digital mergers with players involved in successive acquisitions or with presence in particularly problematic market segments.

the competitive environment in the course of the review, and at the end of the day impose remedies or block that transaction.

Therefore, amending notification thresholds to cover a greater number of digital mergers, a measure that would entail both legislative costs and significant antitrust enforcement costs, seems unnecessary. There is no need to incur in such burden as long as digital mergers are on CADE's radar and are subject to antitrust scrutiny whenever they might be harmful to competition.

The Brazilian authority is attentive to the developments of the antitrust debate involving the digital economy and has participated in discussions and institutional studies on the matter, such as the BRICS report and the interactions with the OECD, for example. This is an interesting path to consolidate expertise and develop analytical tools that can be applied in both in merger control and conduct cases.

V. Bibliography

BRICS Working Group on the Competition Issues in the Digital Market. *BRICS in the Digital Economy: Competition Policy in Practice*. September 17, 2019.

CADE. *Rivalidade Após Entrada: o Impacto Imediato do Aplicativo Uber Sobre as Corridas de Táxi Porta-a-Porta*. Documentos de Trabalho 003/2015. December 2015.

CADE. *Efeitos Concorrenciais da Economia do Compartilhamento no Brasil: A Entrada da Uber Afetou o Mercado de Aplicativos de Táxi entre 2014 e 2016?* Documento de Trabalho 001/2018. April 2018.

CAPOBIANCO, Antonio; NYESO, Anita. *Challenges for Competition Law Enforcement and Policy in the Digital Economy*. Journal of European Competition Law & Practice. January 2018.

Competition Policy International (CPI). *Germany/Austria: merger notification rules updated for digital economy transactions*. July 10, 2018.

CONNOR, Charley. *Vestager: EU is considering value-based thresholds*. Global Competition Review (GCR). June 19, 2019.

COUTINHO, Diogo R; GONÇALVES, Priscila B. *O antitruste, a regulação e as big tech: Revisão de fusões e aquisições já aprovadas nos mercados de plataformas digitais não demandaria alteração legislativa no Brasil*. JOTA. March 21, 2019.

CRAIG, Emily. *European Commission won't lower thresholds, says Régibeau*. Global Competition Review (GCR). February 27, 2020.

EVANS, David S. *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies*. July 25, 2017.

NEWMAN, John M. *Antitrust in Zero-Price Markets: Foundations*. University of Pennsylvania Law Review, Vol. 164: 149, 2015.

OECD. *Working Party No. 3 on Co-operation and Enforcement: Local nexus and jurisdictional thresholds in merger control*. Background Paper by the Secretariat. June 2016.

OECD. *Hearings on the Digital Economy held at the Competition Committee sessions of October 2011 and February 2012*. 2012.

United Nations Conference on Trade and Development – UNCTAD. *Competition Issues in the Digital Economy*. Note by the UNCTAD Secretariat. May 2019.

OECD. *Peer Reviews of Competition law and Policy: Brazil*. 2019.

PIRES-ALVES, Camila; GONZALO, Manuel; LYRA, Marcos P. O. *Startups and Young Innovative Firms Mergers & Acquisitions: an Antitrust Debate? Lessons From the ICT Tecno-Economic Paradigm*. Revista de Economia Contemporânea, vol. 23 n. 2, May/August 2019.

THE NECESSITY OF ADJUSTING THE CURRENT MERGER NOTIFICATION THRESHOLDS IN BRAZIL

Victoria Malta Corradini

I. Introduction

In Brazil, since the enactment of the Federal Law No. 12,529/2011 (the "Antitrust Law"), the percentage of transactions that do not cause competition concerns and, for this reason, are subject to a simplified review by the Brazilian antitrust authority ("Cade") is extremely high. On the other hand, the number of deals that were either submitted to a more detailed analysis or that were blocked due to their antitrust concerns is comparatively much lower.

This scenario raises at least two important questions. The first is whether Cade has been deploying resources in an efficient manner. The second is whether it is necessary to adjust the rules for merger submissions. Both questions, as one can see, are directly connected to the importance of decreasing public expenditures and regulatory costs with the submission of deals that do not pose antitrust concerns.

In addition, the Antitrust Law adopted the turnover thresholds as the only criteria for merger control and does not consider other notification criteria, such as the value of the assets involved in the deal. For this reason, the parties of transactions that potentially raises concerns in the digital market involving IT and digital companies often do not reach the turnover thresholds set forth in the Antitrust Law and, consequently, such mergers and acquisitions are not "caught" by local merger control.

The purpose of this article is to debate the challenges that will need to be faced by Cade on the necessity of reforming the existing merger thresholds to address (i) the need to reduce the significant number of filings of transactions that do not pose risks from the antitrust perspective to avoid compromising public resources, and (ii) the fact that many acquisitions in the digital market may escape the Cade's jurisdiction because they take place by companies that do not yet generate sufficient turnover to meet the turnover thresholds set out in the Antitrust Law.

II. Steps taken since 2011 by the Legislative Branch and by Cade to improve the criteria for merger submissions

The former antitrust law, the Federal Law No. 8,884/1994, established a post-merger control and required the mandatory submission of any transaction related to economic concentration, whether through merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or in which any of the participants has reached in its latest balance sheets an annual gross revenue equivalent or superior to BRL 400 million.

Law No. 8,884/94 adopted a broad concept of "concentration act", which included several types of transactions subject to merger control, requiring the submission of cooperative agreements, acquisitions, joint ventures and acquisitions of non-controlling stakes. In addition, there was a lot of uncertainty on how to define the relevant market for the purposes of calculating if the merging parties reached the 20 percent market share test and on whether the turnover threshold should be calculated based exclusively on revenues obtained in Brazil or not.

Due to Cade's expansive interpretation of the Law No. 8,884/94, transactions submitted to merger control in the former regime included agreements such as long-term exclusive supply contracts, which compromised public resources and staff employed in the review and clearance of non-problematic deals.

To tackle many of these issues, the Brazilian Legislative Branch enacted in 2011 the Antitrust Law that entered into force in 29 May 2012, which introduced a pre-merger notification system and new thresholds for triggering merger notification duties.[1]

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[1] In relation to the 2011 reform of Brazil's merger control regime, the OECD highlights that "*The new Law also introduced pre-merger notification, to deal with problems arising from the previous post-merger notification regime, which had procedural and substantive ramifications. A procedural effect was to lengthen the review process. A substantive implication was the effect on remedies available to CADE if it found the merger unlawful. Specifically, CADE's ability to prohibit a transaction entirely was complicated by having to undo a consummated merger, a notoriously difficult task, which may have accounted for the very small number of prohibitions. Furthermore, the system undermined the effectiveness of remedies imposed by CADE. Due to the reluctance of parties to divest part of the acquired assets once the merger has been consummated, CADE usually opted for behavioural rather than structural remedies. With the new Law, Brazil has joined a majority of jurisdictions in which clearance by the competition authority is mandatory before notifiable deals can be implemented. The Law also provides for significant changes regarding the notification thresholds and sets out more straightforward statutory time periods for the review of transactions*" (Please refer to OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm, page 20). Access on June 01, 2020.

The Antitrust Law adopted a narrower language when defining the types of transactions that falls into the concept of a “concentration act”[2]. More importantly, the Antitrust Law introduced a pre-merger notification system based exclusively on the turnovers of the merging parties’ economic groups, by creating a minimum turnover threshold for the second party and eliminating the 20 percent market share test.

In addition, as soon as the Antitrust Law entered into force, the Ministries of Justice and Finance decided to further increase the turnover thresholds set forth therein, from BRL 400 million/BRL 30 million to BRL 750 million/BRL 75 million.[3]

As a result, under the Antitrust Law, a “concentration act” is only notifiable if: (i) at least one of the economic groups[4] involved in the deal has registered annual gross sales equivalent or superior to BRL 750 million in Brazil in the year preceding the transaction, and (ii) at least another economic group involved has registered annual gross sales equivalent or superior to BRL 75 million in Brazil in the year preceding the transaction.

By adopting two turnover thresholds (rather than the previous single turnover threshold) in higher amounts and by eliminating the market share test, the Antitrust Law aimed to reduce the number of expected notifications, to avoid the submission of filings that do not raise concerns from the antitrust perspective and to give companies more certainty in defining transactions that are subject to mandatory notification.

Additionally to the above, CADE issued several rules and regulations to give guidance and more certainty to merging and contracting parties, such as: (i) CADE’s Internal Guidelines, which details the procedural steps for the submission of transactions; (ii) Resolution No. 2/2012, which established standard notification forms and more detailed provisions for the fast-track proceeding applicable to simpler transactions; (iii) Resolution No. 16/2016, which established a 30-day deadline for the approval of fast-track eligible transactions; (iv) Resolution No. 17/2016, which defined the non-merger transactions known as “associative

[2] Article 90 of the Antitrust Law defines a “concentration act” as any operation in which: (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, by contract or by any other means or way, the control or parts of one or more companies; (iii) one or more companies incorporate one or more companies; or (iv) two or more companies enter into associative, consortium or joint venture agreements.

[3] Inter-ministerial Ordinance 994 of May 30, 2012.

[4] The definition of an “economic group” for the purposes of calculating the turnover thresholds encompasses (i) entities subject to common control and (ii) entities in which any company subject to common control holds a direct or indirect share of at least 20 percent (Cade’s Resolution No. 2/2012).

agreements" and detailed the hypotheses for the mandatory notification of such agreements; (v) Guidelines for Horizontal Mergers, which set parameters and proceedings for the assessment of transactions involving competitors; (v) Guidelines for the analysis of previous consummation of transactions, which set parameters to avoid gun-jumping practices; and (vi) Remedies Guidelines, which provides guidelines to instruct companies on the negotiation of remedies in transactions that raise competition concerns.

Due to the modernization of the Antitrust Law and to the efforts above, there was a reduction in the number of filings submitted to Cade's clearance[5] and an increase in efficiency of the merger control regime in Brazil, since the General Superintendence at Cade has been deciding the vast majority of the cases in a very expedited way by applying the fast track procedure review.

In respect to such improvements, the OECD stressed that "*CADE has successfully implemented the new pre-merger notification system and addressed a number of challenges that the new system posed by publishing guidelines and training its staff to increase their capacity to conduct economic evaluations of complex mergers*".[6]

However, after almost 8 (eight) years that the Antitrust Law entered into force, the public data made available by Cade shows that most transactions submitted to merger control in Brazil posed no concerns from the antitrust perspective and were cleared under the fast-track proceeding, which puts into question whether public resources are employed by Cade in an efficient manner. In parallel, the evolution of the digital market has imposed new challenges for merger control regimes around the world, including in Brazil, raising questions in respect to whether the local jurisdictional thresholds are sufficient to "catch" transactions that may pose antitrust concerns in the digital economy.

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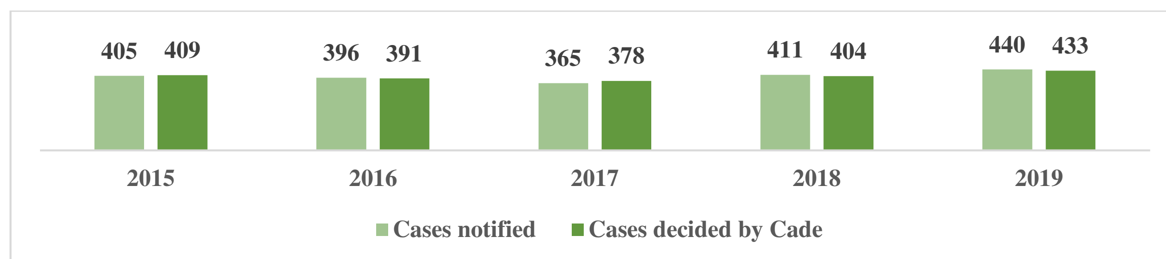
[5] For instance, the number of concentration acts reviewed and decided by Cade in 2010, 2011 and 2012 reached, respectively, 660, 716 and 825 cases (source: "Antitrust Defense in Brazil – 50 years", available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/cade_-_defesa_da_concorrencia_no_brasil_50_anos-1.pdf). On the other hand, the number of cases reviewed in the first, second and third year since the entrance into force of the Antitrust Law reduced, respectively, to 249, 378 and 411 cases (source: "Overview of the first three years of the Law 12,529/2011", issued by Cade on May 2015, available at http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-do-trienio-da-lei-12-529-11.pdf/view). Also, the number of concentration acts reviewed and decided by Cade in 2015, 2016, 2017, 2018 and 2019 was, respectively, of 409, 391, 378, 404 and 433 cases (source: "Cade in numbers", available at http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true). Those numbers reflect a significant reduction in the number of filings compared to the previous scenario of the Law No. 8,884/94. Access on June 01, 2020.

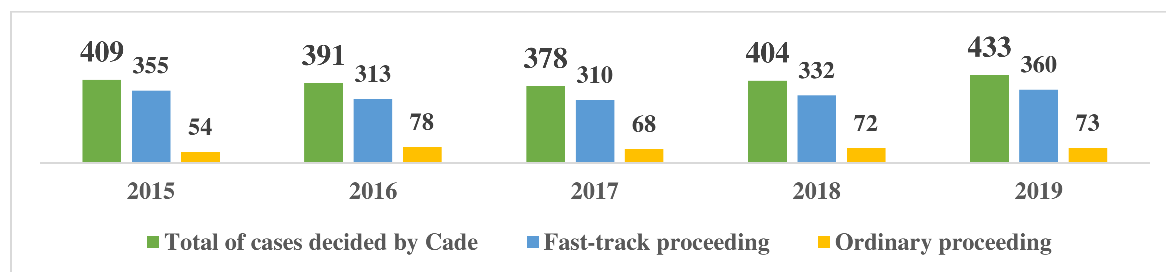
[6] Please refer to OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm. Access on June 01, 2020.

III. Significant number of non-problematic transactions submitted to merger control

From 2015 to 2019, more than 2,000 deals were submitted to merger control and reviewed by Cade[7], as summarized below:



In respect to the total number of deals decided by Cade in each year, the comparison between the cases decided under the fast-track proceeding (applicable to transactions that do not require a more detailed analysis) and the ones decided under the ordinary proceeding (applicable to transactions that may pose concerns from the antitrust perspective)[8] is revealing:



Out of 2,015 deals decided by Cade between 2015-2019, 1,670 were reviewed under the fast-track proceeding (corresponding to approximately 83%) while 345 cases were assessed under the ordinary proceeding (corresponding to approximately 17%), indicating that the vast majority of the cases were decided by Cade by applying the fast-track procedure.

In relation to the review times and procedures, the Antitrust Law and CADE's Internal Rulings provide well-defined processes and strict timeframe for merger review. The maximum waiting period under Article 88 of the Antitrust Law is 330 days (240 days, extendable for a maximum period of 90 days). Also, the General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment[9]. In practice, since the enactment of

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[7] Source: Cade in numbers. Available at http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true. Access on June 01, 2020.

[8] Source: Cade in numbers. Available at http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true. Access on June 01, 2020.

[9] As established in CADE's Resolution No. 16/2016.

the Antitrust Law (from 2012 to 2019), fast-track cases are decided in an average of 17 days, and ordinary cases are reviewed in an average of 79 days, which indicates that the review of transactions is concluded in an average period significantly inferior to the maximum legal deadlines.

In respect to the nature of Cade's decisions, out of 2,015 deals decided by Cade between 2015-2019, 1,881 were cleared by Cade without any remedies or restrictions, which represents more than 93% of the cases[10]. On the other hand, to this date, Cade's Tribunal has only reproved 6 (six) mergers under the Antitrust Law[11].

Also, according to the public data made available by the OECD, less than 1.7%[12] of the cases notified since the entrance into force of the Antitrust Law have ever reached the last stage of in-depth analysis by Cade (i.e., were challenged by the General Superintendence and forwarded for further investigation by CADE's Tribunal)[13].

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[10] For easy of reference, 376 in 2015, 360 in 2016, 355 in 2015, 385 in 2018 and 405 in 2019, which amounts 1,881 cases during this period (source: Cade in numbers, available http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true.). Access on June 01, 2020.

[11] The first case refers to the rejection of a transaction in the PVC pipes market in 2014: the acquisition of Solvay Indupa, the vice-leader of the market, by Braskem S.A., the leader of the market. Cade considered that the merger of the two main companies of the market would result in a high concentration, without efficiencies that could compensate the negative effects (Concentration Act. No. 08700.000436/2014-27). In the following year, 2015, Cade vetoed the acquisition of Condor Pincéis Ltda. by Tigre S/A – Tubos e Conexões (Concentration Act. No. 08700.009988/2014-09). The consequences of the transaction, according to Cade, would be an increase on the levels of concentration in the markets related to paint brushes, brushes, paint rollers and other painting accessories. Although the companies proposed to sign an agreement with behavioral remedies to reduce the competition concerns, Cade considered it insufficient to address the antitrust concerns. In 2017, Cade reproved three mergers: (i) the acquisition of Estácio Participações S/A by Kroton Educacional S/A, two of the biggest players in the segment of private higher education institutions (Concentration Act. No. 08700.006185/2016-56); (ii) the acquisition of Alesat Combustíveis S/A by Ipiranga Produtos de Petróleo S/A, two competitors in the fuel distribution market (Concentration Act. No. 08700.006444/2016-49), and (iii) the acquisition of Mataboi Participações Ltda. by JBJ Agropecuária Ltda., which would result in vertical overlaps in the cattle breeding, cattle slaughtering, trading of boneless fresh beef for the wholesale and trading of fresh meat in retail (Concentration Act. No. 08700.007553/2016-83). The most recent case is the blocking of the acquisition of Liquigás by Ultragaz, in 2018 (Concentration Act. No. 08700.002155/2017-51). The merger in the Liquefied-Petroleum Gas (LPG) market would enhance the probability of market power abuse by Ultragaz, since the two companies were the major players in the sector. Additionally, other characteristics of the market would increase this probability, such as entry barriers and lack of effective competition.

[12] According to OECD, since 2012, only 46 out of 2,588 merger cases were subject to a challenge by the General Superintendence and forwarded for further investigation by CADE's Tribunal. Please refer to OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm, page 90. Access on June 01, 2020.

[13] The General Superintendence may declare, by means of a reasoned decision, that a given transaction is "complex" and that supplementary documents will have to be produced. Upon conclusion of the supplementary production of evidence, the General Superintendence shall either (i) clear the merger without restrictions or (ii) present an objection to the Tribunal, if it considers that the merger should be rejected, approved with remedies/conditions, or that there are no conclusive elements as to the effects of that transaction on the market. CADE's Tribunal will analyze the merger independently.

It is clear, therefore, that the percentage of transactions that raise no issues and are subject to a simplified review in Brazil is significantly high, while there are very few cases submitted to a more detailed analysis or reproved by Cade since the enactment of the Antitrust Law. About this phenomenon in Brazil, the OECD concluded that "*the number of transactions that raise no issues (…) seems to be exceptionally high, particularly for a regime that also allows the competition agency to review merger falling below the merger notification thresholds*." [14].

IV. New challenges faced by Cade in mergers and acquisitions in the digital field

The Brazilian merger control regime is facing a second problem in respect to the suitability of the current merger thresholds, since they are based exclusively on the turnovers of the merging parties' economic groups and do not take other factors into consideration for triggering merger notification duties.

This discussion is especially important in the digital market, since transactions in this sector usually involve acquisitions by dominant platforms of start-ups that do not yet generate sufficient turnover to meet the thresholds set out in the Antitrust Law, but that have a quickly growing user base and significant competitive potential.[15]

The main concern relates to the fact that small, but successful and potentially competitive start-ups, are usually acquired by dominant platforms, which tends to strength the dominance of the acquiring companies and results in the early elimination of the competition enforced by such entrant players.

The purchase of WhatsApp by Facebook in 2014 is an important example of the difficulties that these acquisitions present to the antitrust authorities around the world, including in Brazil. In the first semester of 2014, the turnover of WhatsApp was of USD 15.9 million, with a net loss of USD 232.5 million dollars, and the deal was valued in USD 19.6 billion. However, the transaction was not reviewed by Cade since the merging parties did not reach the local revenues thresholds. Several other deals in the digital market were not reviewed by the Cade due to the same reason, such as Facebook/Instagram (dated of 2012, valued in

[14] Please refer to OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm, pages 168-169. Access on June 01, 2020.

[15] This reflects a worldwide phenomenon. According to the final report "Competition Policy for the digital era" issued by the European Commission (B-1049 Brussels), this is explained because "*many digital start-ups attempt to first build a successful product and attract a large user base while sacrificing short-term profits; therefore, the competitive potential of such start-ups may not be reflected in their turnover*".

USD 1 billion) Google/Waze (dated of 2013, valued in USD 1,15 billion) and Apple/Shazam (dated of 2018, valued in USD 400 million).

As such, many acquisitions in the digital market may escape the Cade's jurisdiction because they take place by companies that do not yet generate sufficient turnover to meet the turnover thresholds set out in the Antitrust Law, which poses new challenger for the local merger control regime.

V. Conclusions: the need to adjust the existing merger notification thresholds

As seen above, due to the modernization of the Antitrust Law, there was a reduction in the number of filings submitted to Cade's clearance. However, after almost 8 (eight) years, most transactions submitted to merger control in Brazil posed no concerns and were cleared without even reaching an in-depth analysis by Cade, which put into question whether public resources have been employed by Cade in an efficient manner. In addition, the evolution of the digital market has imposed new challenges for the local merger control regime, since the local jurisdictional thresholds do not "catch" transactions that may pose antitrust concerns in the digital economy (provided that such transactions usually take place by companies that do not yet generate sufficient turnover to meet the turnover thresholds set out in the Antitrust Law).

This scenario has already been addressed by the OECD, which has recently stressed that, although Cade has successfully implemented several improvements in the Antitrust Law, "*there are a very high number of notifications, coupled with a high number of transactions resolved through CADE's fast-track procedure, which suggests that the notification thresholds could be modified*". In addition, the OECD highlighted that "*A number of OECD countries are considering the assets value of a transaction as a criterion for merger notification to bring their merger control regimes in line with the challenges posed by the digital economy.*" .[16]

To address such issues, the OECD proposed, in summary, the adoption of the following measures: (1) "*Brazil should regularly review its merger notification thresholds*", (2) "*Extend the deadline that Cade has to open an investigation against non-notifiable transactions from*

[16] Please refer to OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil https://www.oecd.org/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm. Access on June 01, 2020.

12 to 24 months"[17], and (3) "*Introduce new notification threshold*" in addition to the existing ones that are connected to the turnovers of the merging parties.

On the other hand, according to the 1st Report recently issued by the BRICS's Competition Authorities[18], Cade stated that "*no particular formal changes in the legislation are under consideration to specifically address the digital economy. The same applies for changes in notification thresholds (….)*". According to the Report, any concerns involving transactions in the digital market are addressed by the fact that Cade has "*the possibility of reviewing any merger and acquisition upon its request, within one year of the execution of the agreement, regardless of the parties' annual gross sales or total turnover*".

To address the issues discussed above, Cade should consider a reform of the merger thresholds.

In respect to the challenges arising from the high level of transactions submitted to merger control that do not pose any risks from the antitrust perspective, Cade should conduct studies on the impact of higher notification thresholds and immediately adjust the local turnover thresholds[19], since such thresholds were established in 2012 and remained unchanged since the entrance into force of the Antitrust Law.

For easy of reference, other jurisdictions established the need to adjust their respective thresholds on a regular basis. For instance, in the United States of America, the statutory thresholds are revised each year based on a formula related to the size of the U.S. economy. In Canada, the threshold is adjusted annually for inflation, typically in January. In Italy, thresholds are updated every year according to the increase in the GDP deflator index. In Uruguay, thresholds are adjusted based on inflation measured by the Consumer Price Index.

By increasing the minimum turnover thresholds, it is possible to expect a reduction in the number of filings submitted to merger control, which will contribute for the use of Cade's

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[17] According to the Antitrust Law, Cade is entitled to request the notification of a certain transaction even though the thresholds for mandatory submission have not been met, within one year of its consummation.

[18] Please refer to the report "BRICS in the digital economy – Competition Policy in practice", available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf. Access on June 01, 2020.

[19] For example, in case the current turnover thresholds of BRL 75 million and BRL 750 million were corrected based on the Brazilian General Market Price Index ("IGP-M"), which measures the local inflation, from May 2012 (date in which the Antitrust Law entered into force) to February 2020, the updated amounts would correspond, respectively, to BRL 119,115,427.50 million and to BRL 1,191,154,275.00 billion. Such adjustment reflects an index of correction of 1.58% in this period.

resources in a more efficient and effective manner and to reduce costs arising from the submission of deals to merger control.

In addition, because many acquisitions in the digital market are not "caught" by the local merger control regime, Cade should assess the introduction of new notification thresholds to review transactions that falls out the current turnover thresholds criteria, but that may pose antitrust concerns, such as, for instance, new criteria based on the value of the assets or on the value of the deal. This would ensure that transactions involving companies that have low turnovers (but high asset values) are subject to Cade's jurisdiction.

For example, in the United States of America, a transaction is potentially reportable depending, among other criteria, on the 'size-of-transaction test'. Also, the German competition authority amended the local antitrust law and introduced alternative criteria based on transaction-size thresholds in order to capture transactions where companies may have low turnover but due to the size of the deal or the value of the transaction the antitrust agency have jurisdiction[20].

Finally, it is worth mentioning that both the OECD and the Cade relies on the deadline that Cade has to open an investigation against non-notifiable deals to address many of the concerns discussed in this article, since such prerogative would allow Cade to request the mandatory submission of transactions involving parties' that do not meet the turnover thresholds. The OEDC has even recommended the extension of the deadline that Cade has to open an investigation against non-notifiable transactions from 12 to 24 months.

However, this "solution" embeds the same legal uncertainty that was present in the post-merger notification system adopted in the prior regime of the Law No. 8,884/94, exposing companies that already closed transactions to post-merger remedial actions, which rules out the possibility of extending the current legal deadline for Cade to require the submission of a non-notifiable transaction. For reference, to date, Cade has only requested the mandatory submission of three non-notifiable mergers, in which the parties did not meet the notification

[20] Please refer to the "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification" issued by the German antitrust authority, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2. Access on June 01, 2020.

thresholds[21], which reinforces that this remedy is not expected to effectively address the above concerns in the digital market.

In light of the above, this article proposes the following adjustments on the existing merger notification thresholds by the Legislative Branch and by Cade: (i) conduction of studies on the impact of higher notification thresholds and adjustment of the turnover thresholds set out in the Antitrust Law, and (ii) introduction of new notification thresholds to review transactions that falls out the current turnover thresholds criteria, based on the value of the assets or on the value of the transaction.

[21] Please refer to the Greca Distribuidora / Betunel / Centro Oeste Asfaltos merger (Concentration Act No. 08700.006497/2014-06), the Mallinckrodt Group acquisition by Guerbet (Concentration Act No. 08700.005959/2016-21) and the All Chemistry acquisition by SM Empreendimentos (Concentration Act No. 08700.005972/2018-42).

DO DIGITAL MARKETS REQUIRE A "NEW MERGER ANALYSIS"?

Gabriel Silva Takahashi, Lucas Portela de Mauro, Silvia Fagá de Almeida.

In 1904, American journalist Ida Tarbell published *The History of the Standard Oil Company*, a series of investigative articles about the company's anticompetitive practices. Her exposé is credited with hastening the breakup of the oil giant into 34 different firms and ushering in a transition in the way antitrust legislation was interpreted in the United States. Above all after the 1929 slump and the depression of the 1930s, enforcement of antitrust law in the US became much stricter, contrasting with the leniency that prevailed in the nineteenth century.

This more interventionist stance was reversed in the 1970s, after a period of harsh criticism led by the "Chicago School". Robert Bork's *The Antitrust Paradox: A Policy at War with Itself* (1978) spearheaded this reversal in the perspective from which the US legislation defending competition and fair trade was interpreted. Consumer welfare became the ultimate standard in the analysis of mergers and conduct, instead of the defence of a specific market structure.

This consumerist approach has become a pillar of antitrust enforcement in most of the world. The traditional method used to judge a case focuses on analysing whether a transaction or business strategy will have a negative effect on the aggregate welfare of consumers as well as all other stakeholders in the economy. However, the rise of the digital economy has fuelled an important debate about the applicability and sufficiency of this method to analyse the particularities of such dynamic markets.

According to *Revue Concurrentialiste*,[1] the most widely read article about antitrust in 2017 was "Amazon's Antitrust Paradox" by Lina Khan, who argues that Amazon's sustained and growing dominance is largely due to anticompetitive practices that have escaped antitrust scrutiny. The reason is not the antitrust framework as such but the consumer welfare principle as the be-all and end-all of antitrust scrutiny, according to Khan.

There is now a consensus that the focus on pricing and narrowly defined markets needs to be adapted, regardless of whether cases involve single firm conduct or mergers. But has the

[1] *Revue Concurrentialiste*, "Top 10 most downloaded antitrust articles of 2017". Available at: https://leconcurrentialiste.com/2018/01/02/top-10-of-2017/. Access: march, 30, 2020.

consumerist paradigm really had its day? According to a recent article by Herbert Hovenkamp,[2] an inaccurate interpretation of the consumer welfare concept proposed by Bork has become prevalent in the discussion. Bork defined "consumer welfare" in antitrust as the aggregate welfare of society, whereas the proper way to apply the principle to the analysis of markets is to seek an equilibrium in which output is maximized, considering not just the end-consumer's surplus but that of each participant in the economy.

If we accept the view expressed by Hovenkamp, we can agree that welfare should not be abandoned as a standard while stressing the need to consider how the combination of characteristics typical of digital markets influences players' decisions on pricing and output. Here we present a brief discussion of the characteristics of digital markets and how they affect the impact of concentration on welfare. We also look at some current proposals to modify the antitrust authorities' stance in reviewing mergers and acquisitions.

I. Competition among digital firms

Without claiming to have created an exhaustive or even sufficient definition, in the present context we consider digital markets to be markets in which competition is grounded in the internet without the constraints inherent in the supply of physical goods or services based on physical components. This condition does not stop digital firms, most of which are platforms, from putting competitive pressure on non-digital competitors or being pressured by them. It does entail a different kind of competition, however.

According to the Final Report of the Stigler Committee on Digital Platforms, published in 2019,[3] this competition is not the product of individual characteristics unique to these markets but of a particular combination of such characteristics that creates snowball effects and favours the concentration of markets in a few firms or even in a single firm. The key aspects of digital market concentration, the report argues, are:

i. Strong network effects;

ii. Strong economies of scale and scope;

iii. Near-zero marginal costs;

[2] "On the meaning of antitrust's consumer welfare principle", January 2020. Available at: https://leconcurrentialiste.com/2020/01/17/herbert-hovenkamp-meaning-consumer-welfare/. Access: march, 30, 2020.

[3] Stigler Committee on Digital Platforms, *Final Report*, 2019 (George J. Stigler Center at the University of Chicago Booth School of Business).

iv. Increasing marginal returns from the use of data.

It is not hard to understand how this combination of characteristics leads to a "winner takes all" kind of competition, as suggested by the report. Network effects raise the cost to the consumer of switching to a different supplier, so that competing services with fewer users become less attractive. Economies of scale, in conjunction with marginal costs close to zero, impose price or cost constraints on new entrants that are disproportionate to those faced by incumbents. Positive marginal returns on data use intensify the concentration cycle and foster strategies that abstain from the pursuit of short-term profit to prioritise high horizontal growth rates. After an initial period of competition, the winner achieves a position that appears practically incontestable.

A concentrated market is not *per se* an antitrust problem, however. In the case of digital markets, scale is the primary source of efficiencies to be shared with consumers. It is also worth noting that the business models of firms operating in digital markets are often based on lowering the transaction cost of acquiring a product or service available in traditional markets. Ordering a pizza or discovering the name of the movie that won the Oscar in 1973 are goals that do not depend on the internet but become trivial in terms of transaction cost when they are intermediated by the internet. Because reducing friction becomes a direct measure of a platform's utility, the creation of "ecosystems" is a frequent strategy, in which incumbents in the execution of a given service offer others in an integrated manner, creating gains for the consumer by reducing transaction costs. Evident examples of this include e-commerce firms that offer logistics services, or social media that enable direct communication.

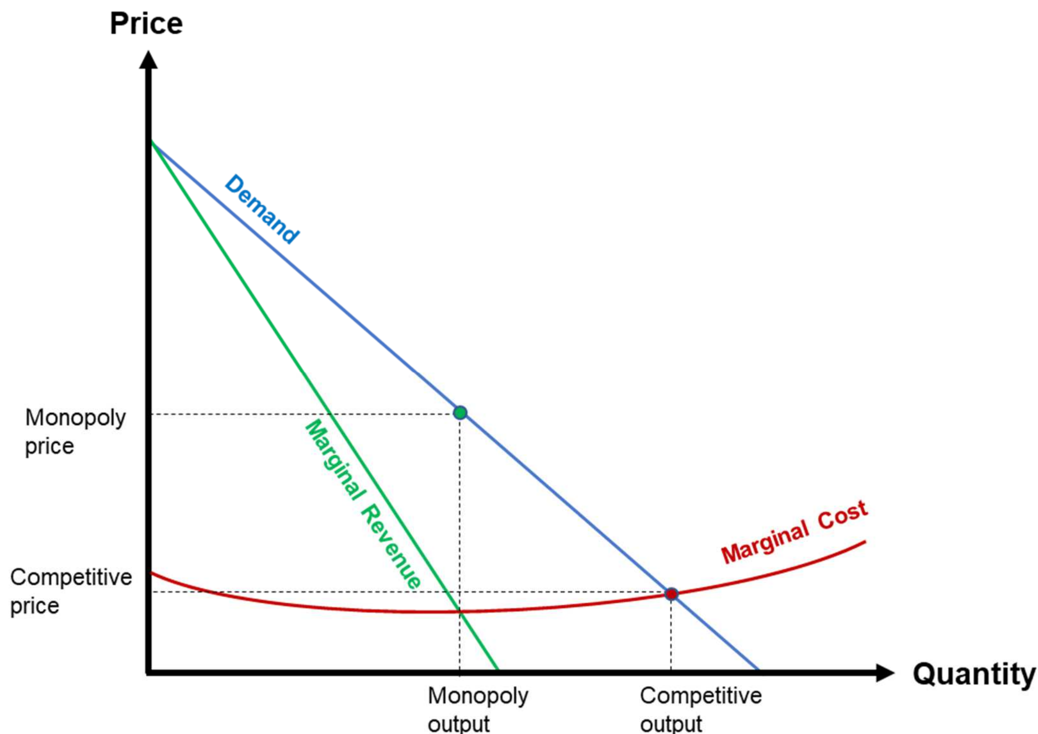
It can be argued that this characteristic lead less to markets dominated by a single firm than to several concentrated markets contested by the same firms. Hence the discussion about whether antitrust policy should or should not foster more diversity. What is the structure that maximizes output and aggregate welfare?

II. Does it make sense to apply the traditional concept of a "monopoly" to digital markets?

Petit (2019) argues that the model of monopoly used for traditional markets cannot be transposed to digital markets. The basic decision-making process used by a traditional monopolist to establish the level of production and prices is typically described by a marginalist model: when demand for its product trends down, the expected marginal revenue curve falls more steeply as quantity rises. Because the monopolist's profit is maximized when marginal

revenue is equal to marginal cost, the equilibrium output is that for which the monopoly price exceeds marginal cost, a situation intrinsically worse than that seen in a competitive market.

Figure 1. Basic monopoly model



Source: LCA

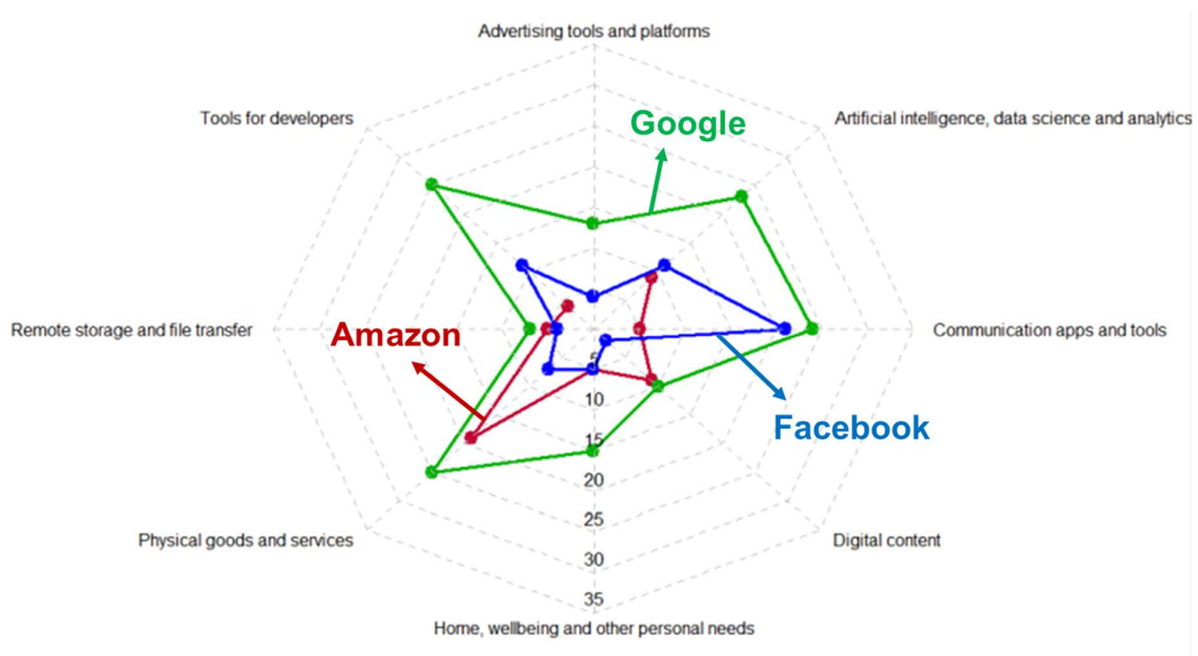
Based on data for Amazon, Netflix, Google and Facebook, however, Petit argues that digital platforms do not follow the same decision model as traditional monopolists. In these markets, he says, the marginal revenue curve rises continuously. This result is consistent with the characteristics described for digital markets. More specifically, positive scale returns and near-zero marginal costs have significant implications for the decision-making process in this type of market. In contrast with traditional markets, consumers are willing to pay more, rather than less, as output increases.

The goal is therefore to maximize output, at least in the short term. Because marginal cost is close to zero, it ceases to be a constraint on the choice of strategy. In other words, horizontal growth with low prices and rising output is the optimal choice for firms in this sector. This behaviour tends to enhance social welfare when the incumbent is unable to exercise market power by reducing innovation or quality. In Petit's words, the firms in question *"do not do the bad things we normally expect monopolists to do"* (Petit, 2019, p. 12).

III. Mergers in the digital world

The argument that concentration in digital markets does not have a negative impact on welfare is not intended to suggest leniency with regard to horizontal mergers between actors, and indeed this practice is not recommendable in traditional markets with opportunities for significant scale and scope economies. In any event, horizontal mergers are infrequent in digital markets. According to a survey[4] of transactions involving three large digital firms (Amazon, Facebook and Google) commissioned by the UK Competition and Markets Authority (CMA), most targeted firms had a complementary rather than a horizontal relationship to the buyer. The next figure shows a breakdown of firms bought by the trio between 2008 and 2018 by type of activity.

Figure 2. Acquisitions between 2008 and 2018 by activity cluster



Source: Lear, *Ex-Post Assessment of Merger Control Decisions in Digital Markets* (May, 2019), based on data from Crunchbase.

This characteristic underscore the complexity of digital markets and the special difficulty of analysing mergers and acquisitions in the sector. Competition and the definition of relevant markets are dynamic. Firms that are complementary today could become competitors in future.

[4] Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets*, May 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf. Access: march, 30, 2020.

In the absence of major horizontal deals, the main aim is to prevent acquisitions of potential competitors as a market closing strategy. As noted earlier, definitions of markets are not always able to identify potential competition in digital markets. There are also acquisition-related concerns about possible restriction of rivals' access, portability and multihoming. The Stigler Committee's report argued that market contestability is the most important factor disciplining incumbents' behaviour and that it should be protected by antitrust authorities:

> *"In the view of this Committee, protecting entry for existing and potential competitors is the most important way to protect or improve consumer welfare in digital platforms."* (Stigler Committee, *Final Report*, p. 12)

According to the Lear report the trio's acquisitions tended to target startups: almost 60% were firms with less than four years of operations. The prevalence of new entrants may suggest that takeovers of potential rivals do indeed reflect a strategy pursued by incumbents in digital markets. This is the view expressed by the Furman Report,[5] according to which acquisitions in the sector are insufficiently monitored and this could be facilitating "killer acquisitions".

The concept of "killer acquisitions" is applicable to all kinds of markets but particularly relevant in the case of digital markets. Market "tipping",[6] which is typical of digital markets, makes mergers between firms of similar importance a rare phenomenon, while at the same time creating incentives for players with market power to buy up innovative new entrants that are potential rivals as a means to block competition preventively.

However, it is no trivial task to distinguish between a "killer acquisition" and a transaction inspired by a reasonable economic rationale and promising positive effects on welfare. There is a real possibility that being bought out by a large firm is the best way for an entrant's innovative product or service to achieve scale and benefit consumers. As noted, the prevalent relationship between buyers and targets, at least on the basis of strict market definitions, is not one of frontal competition. Even when the target already has a strong market position, the acquisition may still have merits. A possible example is Google's acquisition of YouTube in 2006. The platform faced several problems relating to the licensing of songs and videos, and the acquisition was seen to have saved the firm,[7] assuring its success as the leading

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[5] *Report of the Digital Competition Expert Panel: Unlocking Digital Competition* (Furman Report). March 2019.
[6] Market concentration in one or a few players that earn high monopoly profits and are almost invulnerable to competition.
[7] CNBC, "Google saved YouTube, so Big Tech isn't always harmful to start-ups, argues top Silicon Valley investor", Feb. 12, 2020. Available at: https://www.cnbc.com/2020/02/12/sequoia-vc-says-google-was-the-savior-for-youtube-at-antitrust-forum.html. Access: march, 30, 2020.

platform for free streaming and, depending on the market definition, a real competitor against other major players, such as Netflix and Amazon Prime.

The difficulty of foreseeing how the market will evolve and how consumers will interact with the various dynamic alternatives available affords scope for errors. Restrictive definitions of the relevant market have the effect of creating false positives and false negatives in merger scrutiny, making antitrust authorities blind to the elimination of potential rivals in the future market after the platform matures. Even Facebook's acquisition of Instagram, which the Furman Report considered an example of the authorities' failure to foresee Instagram's growth, is not a clear case and remains controversial: while the takeover was under way Instagram could be seen as a complementary service to Facebook rather than a frontal competitor.

The recommendations made by the Stigler Committee's report to reduce the number of problematical deals that avoid proper antitrust scrutiny include notification by firms that occupy strategic market positions (regardless of the target's size), and inverting the burden of proof regarding efficiencies in vertical mergers to the parties, which are interested in having the transaction approved and hold the information needed to demonstrate its economic rationality, so that they should be responsible for convincing antitrust authorities that the deal will have a positive effect on welfare. The suggestion that a review should be initiated on the assumption that a transaction will have negative effects is common to many critical analyses of the current state of enforcement.

Even if recommendations such as these are implemented, it will still be hard to weigh efficiencies against potential market harm, which is difficult to measure. In any event, it should be noted that the discussion appears to be based on the assumption that most deals are anticompetitive, or that the harm done by incorrect approvals far outweighs the efficiencies due to transactions justified by a sound economic rationale. These are presuppositions that require convincing proof, and apparently this is not the case so far.[8]

Petit (2019) argues that introducing a principle contrary to the acquisition of startups would be a radical change:

> *"A more incremental evolution of existing competition law and policy seems instead to formulate a standard of review that tests: (i) whether the target is a competitive force of disruption in a relevant market or in adjacent, neighbouring, or complementary*

[8] According to a recent article on the pharmaceutical industry, for example, about 6% of the transactions analyzed could be considered killer acquisitions (Cunningham, Colleen and Ederer, Florian and Ma, Song, Killer Acquisitions (March 22, 2019). Available at SSRN: https://ssrn.com/abstract=3241707 or http://dx.doi.org/10.2139/ssrn.3241707). Access: march, 30, 2020.

> *markets; and (ii) whether the acquiring firm's incentives are to discard the product or service."* (Petit, 2019)

This second analysis in particular has more to do with welfare effects, and enables both the parties and the antitrust authority to define more careful parameters with which to weigh the potential gains from the transaction against the potential reduction in competition in the market concerned or in neighbouring markets. This evaluation does not depend on conjectures about potential competition or future effects, and appraises the impact of the acquisition or merger on output, as advocated by Hovenkamp in his definition of consumer welfare.

In general, enhancing merger scrutiny in digital markets by making incremental adjustments appears to be preferable to drastic changes, not least in light of the importance of legal certainty and predictability to the formulation of public policy. Concern about antitrust regulation of digital markets is right and proper, but it is also only fair to acknowledge the intense activity in these markets, with frequent innovation, new entrants, and new products and services – all very far from the unproductive stability typical of monopolies.

DIGITAL MARKETS AND RELEVANT MARKET DEFINITION: CHALLENGES BROUGHT UP IN CADE'S RECENT DECISIONS

Bruno Salgado Cremonese, Felipe Cardoso Pereira

Summary: This article provides an overview of CADE's merger precedents relating to digital markets, with the purpose of identifying the approaches adopted by the authority to tackle relevant market definition.

I. Introduction

The present article ("**Article**") aims at identifying the approaches adopted up to now by the Brazilian Competition Commission ("**CADE**") to tackle relevant market definitions in cases involving digital markets, and to what extent they could impact CADE's future decisions.

Preliminarily, though, it is important to understand how digital markets differ from the traditional ones, upon which the classical antitrust policy has been developed. This is detailed in the ***second section.***

The ***third section*** provides a quick overview of the traditional methodology adopted by CADE for relevant market definition, as set forth by its Guidelines for Horizontal Merger Control Cases ("**Merger Guidelines**")[1].

Then, the ***fourth section*** consolidates the core remarks made by Brazilian enforcers as they faced transactions relating to these new structures, based on a thorough assessment of all decisions issued by CADE (either by the lower body, the Superintendence-General, or by CADE's Tribunal) in the last two years in merger control cases involving digital markets.

Finally, the ***fifth section*** brings the takeaways for future cases.

II. Digital markets

For the purposes of this Article, digital markets concern digital platform-based models/solutions, often characterized by multi-sided features, network effects, non-price competition and economies of scale[2].

As noted in the OECD's report "*Rethinking Antitrust Tools for Multi-Sided Platforms 2018",* market digitalization is an ongoing staggered process – it started with the marketing of

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[1] Available at:http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf.. Access on: March 31, 2020.

[2] Available at: https://www.oecd.org/competition/digital-economy-innovation-and-competition.htm. Access on: March 31, 2020.

physical products and services via on-line stores that was enabled by internet popularization; then, it evolved to the development of platforms that match users' (consumers' and suppliers'/providers') needs in such transactions; finally, it is now reaching a level in which products and services will be fully rendered on-line (i.e., digital in nature)[3].

When it comes to these structures, the OECD indicates that competition tends to be "for the market" rather than "in the market"[4]: the platforms introduced during the second wave of market digitalization rely heavily on network effects to succeed (i.e., the more consumers and providers it reunites, the more valuable it is for these consumers and providers). As a result, market players invest significantly in technology and innovation in order to either disrupt existing structures or introduce new products, aiming at rapidly securing a significant scale to leverage their business.

Given this fast-moving dynamics, the traditional mechanisms adopted for relevant market definition may not be perfectly suitable. Indeed, CADE already acknowledged this in its Merger Guidelines: "*The application of traditional tests for the definition of the relevant market (based on tests such as critical loss) may not capture the effect of this type of transaction, which requires its disruption at any stage of the analysis*".

The question at stake is whether Brazilian competition enforcers are already adopting alternative approaches in these cases. To properly ascertain this, it is important to remember the methodology traditionally used by CADE to define relevant markets, as detailed in the next section.

III. Traditional methodology adopted by CADE

The definition of the relevant market(s) involved in a transaction is the first step of any merger control case subjected to the Brazilian Competition Law ("**BCL**"). In summary, a relevant market is the framework within which the authority will determine the level of competition between firms. The **Merger Guidelines** provides that "[t]*he delimitation of the relevant market is the process of identifying the set of economic agents (costumers and manufacturers) that effectively react and limit the decisions regarding price strategies, quantities, quality (among others) of the company resulting from the transaction*". Similarly, the European Commission's Notice on the definition of relevant market ("**EU Notice**")

[3] Available at: https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf. Access on: March 31, 2020.
[4] Available at: https://www.oecd.org/daf/competition/mergers/2492253.pdf. Access on: March 31, 2020.

indicates[5]: "[m]*arket definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission*".

The goal is to define – under the product and geographic scopes – the most limited space in which products cannot be replaceable, either because there are no substitutes available or because it is not possible to obtain a substitute product. EU Notice provides that *"The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure*."

The product scope considers the customers' perspective on the product substitutability based on a number of factors (*i.e.*, features, price and application). In turn, the geographic scope is the area where the companies are able to supply their products or in which customers look for the product.

The main tool to define the relevant product and geographic markets is the hypothetical monopolist' test ("**HMT**"), which ascertains the ability and the incentives a supplier has to impose a small but significant and non-transitory increase in price ("**SSNIP**"). This instrument aims to identify the customer reaction to the hypothetical increase in price and from this point to determine the substitutability level of the products and define the relevant market.

Bearing this methodology in mind, one may evaluate if CADE has been adopting alternative strategies when evaluating mergers related to digital markets. This is the assessment featured in the following section.

IV. CADE's merger precedents relating to digital markets

a. Research methodology

The cases presented in this section were selected pursuant to the following methodology: (i) all merger decisions issued by CADE from 2018 to 2019 were retrieved using the search tools on CADE's website; (ii) results were then screened in order to identify merger cases concerning digital markets, and; (iii) decisions selected in stage (ii) above were further

[5] Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29. Access on: March 31, 2020.

reviewed, and those that contain any consideration as regard relevant market definition were ultimately selected for the analysis in this article.

b. Selected decisions

Despite the non-negligible number of merger cases involving digital markets, only in a few decisions CADE has expressly addressed the methodology for relevant market definition. The table below consolidates the findings of the research:

CASE	ANALYSIS
Naspers/Rocket and Delivery Hero[6]	The transaction concerned an acquisition of shares that reinforced an existing horizontal overlap between providers of on-line platforms for food deliveries. When defining the relevant product market, the SG disregarded offline channels (e.g., takeaway and phone delivery); however, despite the differences between the several on-line delivery channels (dedicated platforms, food marketplaces and providers of specialized logistics deliveries), it ultimately considered them as a single market for on-line food orders[7]. The same approach was adopted in *Multiplan/Delivery Center*[8].
Itaú/XP[9]	This case concerned the acquisition of shareholding in XP (a Brazilian on-line broker) by Banco Itau. The leading opinion that approved the transaction indicates that the creation of financial products platforms[10] (marketplaces) changed the market supply structure: prior to that, suppliers (banks) only offered their own products to consumers, and now these platforms enable sales of products from different institutions by a single player. As a result, the authority segmented the market of third-party funds management into ***(i)*** the distribution of investment products, on one side, and ***(ii)*** the issuance/supply of investment products, on another.

[6] Merger Review Proceeding No. 08700.007262/2017-76. Applicants: Naspers, Rocket and Delivery Hero. Approved on March 9, 2018.

[7] In this sense, the SG remarked: "*It should be noted that the nature of the markets involved comes with complexities for the traditional antitrust analysis. That is why, in this case, the markets in question are new markets (especially in Brazil) with fast development. In this context, the boundaries of the relevant markets involved may be fluid, and the analysis of the competitive dynamics, market trends, rivalry conditions or even consumer behavior is especially challenging.*"

[8] Merger Review Proceeding No. 08700.001962/2019-19. Applicants: Multiplan Empreendimentos Imobiliários S.A. and Delivery Center Holding S.A. Approved on June 11, 2019.

[9] Merger Review Proceeding No. 08700.004431/2017-16. Applicants: Itaú Unibanco S.A. and XP Investimentos S.A. Reporting Commissioner: Paulo Burnier da Silveira. Approved subjected to certain conditions on March 20, 2018.

[10] The digital platform was considered by CADE as a benefit to customers, since it *(i) enables competition among different suppliers on the same platform (competition on the platform); (ii) promotes the competition among emerging platforms and traditional banks; and (iii) reduces entry barriers for investment products suppliers considering they do not need to create a large and costly customer service network.*

CASE	ANALYSIS
	This would be a deviation from the traditional approach for relevant market definition based on the demand side perspective, as noted in Section II above. Another relevant aspect is that CADE found that XP works as a two-sided platform, offering services to both investors and suppliers of investments products – both of whom could benefit from the digital platform. However, there would be a substantial difference between these two groups: while there would be substitutability between marketplaces and banks from the investors' perspective, there would be no substitutability from the suppliers' (banks) perspective, as they do not distribute third parties' products. In view of this, CADE considered two different scenarios to ascertain the merger applicants' market power: one covering both banks and marketplaces, and another one covering only marketplaces.
Essilor/Luxottica[11]	This case encompassed the acquisition of Luxottica by Essilor. Despite affirming that relevant market definitions could cover either an aggregate of on-line/in store sales or in store sales only, the SG ultimately adopted the former because ***(i)*** one of the merger applicants was active only in on-line sales, ***(ii)*** the on-line segment was non-negligible in terms of size when compared to the in store channel, and ***(iii)*** the relationships raised by the transaction would not require a different approach.
Allied Tecnologia/Arte Telecom[12]	The transaction concerned the acquisition of Arte Telecom by Allied Tecnologia. In its decision, the SG considered that it would be possible to further segment retail based on the resale channel (i.e., physical stores or e-commerce). According to the authority, the following factors differentiate both channels from the demand perspective: "*the certainty of the product type and of its other features, as well as the higher convenience to exchange the device in case of defects, make virtual commerce not a perfect substitute for commerce in stores*". Notwithstanding this, the SG asserted that e-commerce rivals to a certain extent with physical stores. However, it ultimately did not elaborate on this because such discussion would not be relevant to the transaction at stake.
Votorantim/Tigre/Gerdau[13]	This merger filing related to the creation of a JV to develop a loyalty program for the clients of the merger applicants. The SG defined databases of wholesale/retail of construction materials as a separate

[11] Merger Review Proceeding No. 08700.004446/2017-84. Applicants: Essilor and Luxottica. Reporting Commissioner: Paulo Burnier da Silveira. Approved on April 3, 2018.
[12] Merger Review Proceeding No. 08700.002809/2018-28. Applicants: Allied Tecnologia S.A. and Arte Telecom Ltda.. Approved on May 16, 2018.
[13] Merger Review Proceeding No. 08700.002327/2018-78. Applicants: Votorantim, Tigre and Gerdau. Approved on August 29, 2018.

CASE	ANALYSIS
	relevant market, that would be upstream to the provision of a loyalty program.
STC/CESVI Brasil[14]	This case concerned the acquisition of CESVI Brasil by STC. The SG considered that one of the relevant markets affected by the transaction was the market for electronic quotations for repair services of crashed vehicles – as confirmed by the market test, electronic quotations could not be replaced by manual quotations, since the latter were not often used by car insurers to estimate repair expenses.
Disney/Fox[15]	The transaction concerned the acquisition of Fox by The Walt Disney Company. One of the relevant markets at stake was the market for distribution of home entertainment. On that occasion, Cade opted not to further segment it into digital and physical distribution, and ultimately left the relevant product market open as competition would be very fragmented irrespective of the scenario under consideration.
Bayer/Bravium[16]	This case concerned the creation of a JV which, among other activities, would offer an on-line marketplace for agricultural inputs and products. Notwithstanding the existence of precedents in which on-line marketplaces were considered as a separate relevant market, in this case the SG decided to consider a broader definition encompassing on-line and physical sales given the low participation of the on-line channel in overall sales.
Drogasil/Onofre[17]	The merger notification concerned the acquisition of Onofre by Drogasil (two Brazilian pharmacy chains). After the market test, the SG found that even though there were differences between on-line and in store channels, there was no need to further segment the market for retail of drugs, medicines, perfume and personal hygiene products.
Magazine Luiza/NS2[18]	This case concerned the acquisition of NS2 (a group mainly focused on on-line sales of sporting goods) by Magazine Luiza. The applicants argued that marketplaces could not be segregated from e-commerce sales. Also, they submitted that the segmentation adopted for offline sales between specialized and general retail would apply to e-commerce as well. As a result, according to them, their activities would not overlap (either if on-line and offline sales were regarded as a single or separate markets), because Magazine Luiza focuses on durable goods, while NS2 focuses on sporting goods. The SG did not

[14] Merger Review Proceeding No. 08700.004852/2018-28. Applicants: STC and CESVI Brasil. Approved on October 24, 2018.
[15] Merger Review Proceeding No. 08700.004494/2018-53. Applicants: The Walt Disney Company (Brasil) Ltda. and Twenty-First Century Fox, Inc. Reporting Commissioner: Paulo Burnier da Silveira. Approved subjected to certain conditions on February 28, 2019.
[16] Merger Review Proceeding No. 08700.001574/2019-38. Applicants: Bayer S/A and Bravium Comércio Ltda. Approved on April 11, 2019.
[17] Merger Review Proceeding No. 08700.001620/2019-07. Applicants: Raia Drogasil S.A and Drogaria Onofre Ltda. Approved on May 20, 2019.
[18] Merger Review Proceeding No. 08700.002377/2019-36. Applicants: Magazine Luiza S.A. and NS2.com Internet S.A. Approved on May 23, 2019.

CASE	ANALYSIS
	challenge the definition proposed by the applicants and ultimately approved the transaction.
Mosaico/Buscapé[19]	This case encompassed the acquisition of Buscapé by Mosaico. The SG found that the transaction resulted in the horizontal overlap between two owners of price comparison platforms. As a two-sided platform, enforcers adopted two relevant product market definitions for the antitrust assessment: ***(i)*** on-line advertisement market (from the perspective of advertisers) and ***(ii)*** on-line price comparison tools (from consumers' perspective). However, given the fast-moving dynamics of these segments, the SG remarked that such definitions may be reviewed in future cases.
Interbelle/Beleza.com[20]	This case concerned the acquisition of Beleza.com (an online retailer of cosmetic goods) by Interbelle (a company of the Boticario Group, which is active in the production and sales of cosmetic goods). The SG analyzed the transaction considering on-line and offline sales both as a single and separate relevant product markets.
Natura/Avon[21]	This case concerned the acquisition of Avon by Natura (both companies supply and market cosmetic products). The SG noted that sales of cosmetics could take place in a number of channels: ***(i)*** company stores, ***(ii)*** e-commerce, ***(iii)*** marketplaces, ***(iv)*** retail stores, and ***(v)*** direct sales. However, it ultimately considered them as a single market in the antitrust assessment of the transaction.
Magazine Luiza/Estante Virtual[22]	The transaction concerned the acquisition of Estante Virtual (an on-line platform for sale of used books) by Magazine Luiza (a large Brazilian retailer active both on and offline). The merger applicants submitted that there would be no segmentation between online and offline sales channels of books. The SG ultimately did not define the relevant market, though, as the applicants presented information for all the potential market scenarios.

V. Conclusion

Among the 52 decisions identified during the research described in Section IV.b above, only in 14 CADE has explicitly addressed the relevant market definition, at least for the period under consideration in this article (i.e., 2018 and 2019). Even in these few cases, though, there

[19] Merger Review Proceeding No. 08700.002703/2019-13. Applicants: Mosaico Negócios de Internet S.A. and Buscapé Company Informação de Tecnologia Ltda. Approved on August 16, 2019.
[20] Merger Review Proceeding No. 08700.004216/2019-87. Applicants: Interbelle Comércio de Produtos de Beleza Ltda., Beleza.com Comércio de Produtos de Beleza e Serviços de Cabeleireiros S.A. and Lugspe Empreendimentos e Participações Ltda. Approved on September 12, 2019.
[21] Merger Review Proceeding No. 08700.004028/2019-59. Applicants: Natura Cosméticos S.A. and Avon Products, Inc. Approved on November 7, 2019.
[22] Merger Review Proceeding No. 08700.005946/2019-03. Applicants: Magazine Luiza S.A. and EstanteVirtual.com.br Serviços de Busca Na Internet Ltda. Approved on December 20, 2019.

was not a consistent approach towards the alternative relevant market definitions that may appear in view of the changes introduced by digital markets.

In general, these cases suggest that, in such situations, CADE has been more concerned with ensuring the transaction will not raise competition concerns under all potential scenarios in spite of simply conducting an analysis based on disruptive market definitions – which may be a suitable strategy as digitalization is still at an early stage.

However, as this process intensifies, the development of more robust steps of evaluation of digital markets may be required in order to accurately capture the competitive dynamics – this is yet to be seen in future decisions.

KILLER ACQUISITIONS IN INNOVATIVE MARKETS: SHOULD THE ACQUISITION OF STARTUPS BE SUBJECT TO GREATER ANTITRUST SCRUTINY?

Paula Camara, Pedro Anitelle, Renata Zuccolo

Abstract: The recent acquisitions of startups by incumbent companies have raised the question on whether such acquisitions should be seen as "killer acquisitions" and whether the traditional antitrust framework (including the current revenues thresholds for merger control) are sufficient to deal with such transactions and their potential effects in innovative markets.

I. Introduction

The digital economy is characterized by a strong drive towards innovation and rapidly evolving markets. In this context, smaller and innovating firms ("startups") are often acquired by established market players ("incumbents") that aim to incorporate an innovative technology or realize synergies, promoting an increase in overall welfare. However, the acquisition of such up-and-coming firms could also have the intention to eliminate a potential future competitor. In this case, these deals could be seen as the so-called "killer acquisitions"[1].

The term "killer acquisition" was originally used to describe an acquisition by a pharmaceutical company of another pharmaceutical company, with the main goal to prevent competing drugs of the target company from being launched to the market; it would therefore preemptively "kill" potential competition before it became a marketable product[2]. However, even though this is not a new concept and this type of practice has been observed in multiple markets throughout history, killer acquisitions have recently regained the attention of antitrust practitioners in the context of innovative markets, especially in view of the emergence of innovation-driven startups that are often acquired by incumbent companies.

In this article we aim to give a general overview on the theoretical problem of killer acquisitions in the context of innovative markets and assess the Brazilian antitrust authority (CADE)'s history and signaling towards future tendencies in relation to this matter.

II. The theoretical issues of killer acquisitions

Along with the debate involving killer acquisitions came the question of whether antitrust authorities should indeed be worried about the acquisitions of startups by incumbent companies

[1] CUNNINGHAM, Colleen; EDERER, Florian; MA, Song. Killer Acquisitions. August 28, 2018.
[2] FAYNE, Kelly; FOREMAN, Kate; To Catch a Killer: Could Enhanced Premerger Screening for "Killer Acquisitions" Hurt Competition? 2020.

and, if yes, whether the current antitrust framework, originally designed to deal with traditional markets, would be adequate to analyze such transactions (in particular the jurisdictional revenues thresholds for mandatory filing, which often fail to catch these deals).

Issue# 1: Can the acquisition of startups by incumbents pose a threat to competition?

As startups are a fundamental drive of the fast-paced dynamics of the digital economy, established players might have incentives to acquire startups in order to bury its innovative technologies and artificially maintain its current market power, thus lessening competition. This phenomenon is well documented in industries such as the pharmaceutical[3] and oil[4] sectors, and may be even more evident in the digital economy, as innovative startups increasingly become meaningful competitors to so-called 'big tech' firms.

In this context, some characteristics of technology markets, such as the fact that such markets are innovation-driven and fast-changing means that even small companies could present an effective threat to incumbents and, consequently, even small transactions could be sufficient to neutralize potential competition.

Antitrust authorities around the globe have been demonstrating concerns over this type of transaction – especially considering that they often do not meet the traditional jurisdictional thresholds, based on the companies' revenues, which means that they would likely not be subject to mandatory merger review and clearance by such authorities.

For instance, in a recent speech, the US Department of Justice ("DOJ")'s Assistant Attorney General Makan Delrahim noted that the acquisition of a nascent competitor could have a "potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality"[5]. Subsequently, the DOJ challenged an acquisition in the market for technology solutions to airlines (Sabre/Farelogix), alleging it was "a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out." In fact, the UK Competition and Markets Authority ("CMA") later blocked this deal under similar grounds. The CMA found that both companies were "investing heavily in developing airline ancillary services for distribution to

[3] CUNNINGHAM, Colleen; EDERER, Florian; MA, Song. Killer Acquisitions. August 28, 2018.
[4] Standard Oil famously maintained its dominance by acquiring and eliminating competitors, see: McNeese, Tim. The Robber Barons and the Sherman Antitrust Act: Reshaping American Business.
[5] Antitrust Enforcement and Digital Gatekeepers' (June 11, 2019), available at: www.justice.gov/opa/speech/file/1171341/download. Access: March 11, 2020.

travel agencies, and Sabre would be unlikely to continue to develop its own solutions" in case the transaction went through[6].

In Brazil, CADE has also begun to express similar concerns, although the discussion in the context of actual cases is still incipient. One example was the Naspers/Delivery Hero, in which CADE's General Superintendence (GS) unconditionally approved the transaction, but highlighted that CADE should watch out for future acquisitions. As stated by the GS in its clearance decision, if all startups are acquired by the incumbent it is unlikely that any will fully develop in order to be able to offer some rivalry in the market [7].

The main point of the concerns raised by the antitrust authorities is precisely the risk that acquisitions of innovation-driven startups would result in a potential competitor being shut down and, as such, have negative effects in the market in the long term. However, it is important to bear in mind that not all acquisitions of startups by incumbents are harmful or motivated by a will to kill competition.

First, the acquisition of startups by incumbents can often result in several significant efficiencies. Specifically, in the context of tech startups, this type of acquisition can integrate innovative technologies into the acquirer's platform, combine expertise and even boost innovation due to the financial robustness and established consumer base of the larger firm enhancing the development of the startup's technology. These are efficiencies which promote consumer welfare, as seen recently in Apple's acquisition of Siri and Google's acquisition of Android[8].

Furthermore, acquisition by incumbents is a very prominent exit strategy for startups and, therefore, creates incentives for new startups to be undertaken[9]. In fact, several tech startups are undertaken with the sole purpose of being integrated and sold to big incumbents, generating fast and significant profits to its original shareholders/investors. This was the case of half of over a thousand startup companies that responded to the most recent survey published by

[6] Available at: https://skift.com/2020/04/09/uk-blocks-sabre-acquisition-of-farelogix-as-anticompetitive/. Access: March 11, 2020.
[7] Merger Case n° 08700.007262/2017-76 (Parties: Naspers Ventures B. V., Rocket Internet SE and Delivery Hero AG).
[8] O´Connor, D. (2013) An Antitrust Analysis of Google's Waze Acquisition: Disruptive Competition and Antitrust Merger Review. *Disruptiva Competition Project*.
[9] Shelters, D. Start-Up Guide for the Technopreneur, + Website: Financial Planning, Decision Making and Negotiating from Incubation to Exit.

SVB's US Startup Outlook 2019[10], which declared "being acquired" as their long-term goal. In this sense, the prospect of being bought is an important incentive for the emergence of new startups and, consequently, for innovation.

Additionally, even if an acquired startup is indeed shut down, the reasons may have been legitimate – i.e., low synergies, change in market conditions, or the target company has simply not developed as expected in its business plan; therefore, it is hard to determine whether the transaction was a killer acquisition, or whether it was simply an acquisition that failed to achieve its purpose[11].

Therefore, whereas killer acquisitions may indeed pose a real threat to competition in innovative markets, nascent businesses acquisitions may also be procompetitive. Antitrust authorities should therefore evaluate all of these possibilities in order not to risk blocking a merger that would otherwise be beneficial do the market.

Issue# 2: Are the traditional antitrust framework (in particular the jurisdictional revenues thresholds) sufficient to deal with acquisitions of innovation-driven startups?

From an antitrust enforcement perspective, killer acquisitions in digital markets pose several challenges – including whether they are being caught and reviewed by antitrust authorities (or should be caught and reviewed). This is because digital startups often offer zero-priced services, and usually attempt to build a successful product and attract a large user base while sacrificing short-term profits, which means that revenue-based merger thresholds often do not detect acquisitions of these businesses by incumbents, as they do not yet generate sufficient revenues to meet jurisdictional thresholds at the time of the acquisition[12]. Nonetheless, this does not mean that such transactions would not be competitively relevant, as the value of up-and-coming startups might not be reflected on their turnover in early stages of development.

For this reason, there has been a debate, among antitrust practitioners, of whether there should be a change in the merger review jurisdictional thresholds that would allow such acquisitions to be caught by the antitrust authorities.

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[10] Available at: svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/us/svb-suo-us-report-2019.pdf. Access: March 11, 2020.

[11] Bostoen, Friso. Venture capital and antitrust: on exit strategies, killer acquisitions, and innovation harms (2020).

[12] European Commission: Competition Policy for the digital era (2019). Available at: https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en. Access: April 08, 2020.

Brazil is one of the revenue-based jurisdictions and the debate has been ongoing on whether the current law should be amended to include an alternative threshold (for instance, by adding a threshold connected to the value of the transaction, e.g., the purchase price), which would catch the acquisition of valuable business even when they have not yet achieved significant revenues). This debate is based on discussion also held in other jurisdictions, taking as an example WhatsApp acquisition by Facebook, which did not meet the mandatory thresholds in some jurisdictions, including Brazil.

However, once again, whereas alternative jurisdictional thresholds would result in a higher number of transactions being filed with the antitrust authority (and, as such, may give the impression of being more successful in the goal of preventing anticompetitive deals), undesired consequences may come along. Not only may it result in an inefficient use of public resources (as such strategy may considerably increase the number of notified transactions, many of which would likely be completely irrelevant from an antitrust perspective), but it could also result in high costs (and high risks) for the target company, which would then drive off venture capital funding and/or threaten their exit strategy. Therefore, "while this could mean fewer startups are acquired (potentially reducing the number of killer acquisitions), it also means the expected rewards of starting, working at, and funding a startup are reduced"[13].

Therefore, while new jurisdictional thresholds would likely achieve the desired result of preventing killer acquisitions, they could also end up imposing a high burden on startups and, as a consequence, decrease incentives to invest in innovation. As such, in terms of public policy, if the main goal is to preserve innovation and competition, care must be taken not to achieve an opposite result. Such careful approach seemed to be the one currently adopted by CADE in Brazil, as it can be seen by the fact that no actual change has been proposed to the law at this point and also by official statements, for instance the information provided by CADE in context of preparing the First Report by BRICs Competition Authorities, named as "BRICS in the digital economy"[14].

In addition to the debate above, digital markets pose unique challenges to antitrust analyses. New business models, such as innovation-driven startups, may shift the analyses from a product-driven, price-and-quantity-based scenario to a service-driven and often zero-priced one. For instance, whereas the entry in traditional markets is usually considered effective when

[13] See note 2 above.

[14] Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf. Access: April 08, 2020.

done in a period of two years, startups active in digital markets marked by low entry costs and high network effects may become a strong competitor in a much shorter period of time.

In this sense, it is particularly challenging to develop an effective theory of harm applicable to the acquisition of startups that would allow antitrust authorities to determine whether nascent acquisitions were indeed intended (or at least have the potential) to be "killer".

III. Killer acquisitions in Brazil

As recognized by CADE's Superintendent[15], CADE has already dealt with the issue of elimination of potential competitors (or smaller competitors) in other, traditional markets. As an example, CADE identified that a series of acquisitions of small plants by JBS consisted of an intentional movement to mitigate competition, resulting in extremely significant concentration. Thus, CADE imposed restrictions on JBS' purchases of new productive units and compelled the company not to close the newly acquired units[16].

Although this is not an entirely new subject, as mentioned above, CADE has begun to demonstrate concern over the effects of a potential strategy of acquiring innovation-intensive startups to shut down competition[17]. However, CADE has also acknowledged the efficiencies that may come along this type of transaction. In the report recently launched by the BRICS on competition and the digital economy mentioned above, CADE indicated that the acquisition of entrants by incumbents can lead to "know-how and technology transfer from the traditional company to the newcomer, which could have positive impacts to innovation and competition" [18]. Further, it pointed out that restrictive policies regarding M&A "might discourage innovation, since many new companies perceive the acquisition by a significant player as an important exit strategy"[19]. This was also the understanding expressed by CADE's General Superintendent Alexandre Cordeiro in a recent speech. According to Cordeiro, many startups are launched with the purpose of being acquired, and care should be taken not to discourage the emergence of new startups[20].

[15] See CADE's General Superintendent speech in "Killer acquisitions: startups, disruptive innovation and antitrust intervention – Where are we and where are we heading to?" at IBRAC's 25th International Seminar on Competition Policy.
[16] Merger Case n° 08700.010688/2013-83 (Parties: JBS S. A. and Rodopa Indústria e Comércio de Alimentos).
[17] See CADE's General Superintendence's opinion on Merger Case n° 08700.007262/2017-76 (Parties: Naspers Ventures B. V., Rocket Internet SE and Delivery Hero AG).
[18] "BRICS in the Digital Economy: Competition Policy in Practice" (2020).
[19] Idem.
[20] See "Killer acquisitions: startups, disruptive innovation and antitrust intervention – Where are we and where are we heading to?" at IBRAC's 25th International Seminar on Competition Policy.

In this sense, CADE does not seem to be willing to adopt alternative revenues thresholds at this point. Such approach in relation to changing the revenues threshold is also based on the fact that CADE already has the possibility of reviewing any acquisition, regardless of the parties' gross revenues[21]. Indeed, Brazilian antitrust law authorizes CADE to review any merger and/or acquisition that does not trigger mandatory filing requirements, as long as the request is made by CADE within one year from closing. In CADE's view, this would give the authority the opportunity to review potential killer acquisitions and it was acknowledged by CADE on different occasions – including on the above-mentioned speech, during which the General Superintendent expressed skepticism towards major changes in legislation regarding notification thresholds. In his understanding, no recent transactions in digital markets that did not trigger a mandatory filing seemed to pose an anticompetitive threat and, in his experience, the most effective market inspector in such cases are competitors, which often signal the authority in case of any oversight. The General Superintendent also questioned the net benefits of adding new jurisdictional thresholds, which would likely capture a higher number of mergers which would be unconditionally cleared by CADE after a basic assessment[22].

In terms of substance, however, the General Superintendent acknowledges that digital markets pose unique challenges to CADE's analyses of such movements, as it is difficult to determine whether up-and-coming startups are indeed potential competitors to incumbents or whether they were undertaken with the intention of being acquired.

This is corroborated by CADE's case law regarding digital markets. For instance, in the Naspers/Delivery Hero merger case[23], the GS mentioned that traditional stages of antitrust analysis were not necessarily applicable in the assessment of an innovative market such as online food delivery. In this sense, CADE stated that new and rapidly transforming markets are usually heavily rivalrous, and innovation plays an essential role in driving competition. Therefore, competition authorities are faced with a tension between the necessity to safeguard innovation and the applicability of antitrust measures. With this in mind, CADE cleared the proposed transaction unconditionally, due to, among other reasons, the high growth potential and low barriers to entry of this digital market.

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[21] As per Article 88, paragraph 7 of Law No. 12,529/2011 ("Brazilian antitrust law"), although this provision has been rarely used since the law came into effect in May 2012.
[22] Idem.
[23] Merger Case n° 08700.007262/2017-76 (Parties: Naspers Ventures B. V., Rocket Internet SE and Delivery Hero AG).

In Itaú/XP Investimentos[24], both the GS and CADE's Tribunal displayed acute awareness of the importance of carefully analyzing transactions between incumbents (Itaú) and nascent mavericks (XP), even though the traditional HHI-based analysis did not raise any concern. Reporting Commissioner Paulo Burnier stated that the possibility of the transaction mitigating the competitive pressure exerted by XP was indeed a competitive concern. Commissioner Cristiane Alkmin, in a dissident vote to block the merger, claimed that disruptive technology was giving rise to considerable rivalry in the banking business and clearing the transaction would endorse a movement of acquisitions which would end up neutralizing the emergence of fintechs and eliminating nascent competitive pressure. In the end, the parties to that deal committed to behavioral remedies and the merger was cleared by CADE upon certain conditions.

IV. Conclusion

The prospect of killer acquisitions poses several different challenges to antitrust enforcement around the globe. In this sense, perhaps the main challenge is ascertaining the limits of antitrust intervention in the acquisition of nascent firms in digital markets not to undermine the dynamic processes of innovation in these industries. The discussion involving a potential revision of jurisdictional thresholds touches this issue directly.

Although antitrust authorities around the globe have shown different levels of concern on this topic, there seems to be a general acknowledgement that acquisition of nascent companies by incumbents are not always "killer acquisitions" and may lead to important efficiencies – including boosting innovation through the combination of the incumbent's know how and financial robustness, and the entrant's technology. In this sense, care must be taken by antitrust authorities not to block transactions that would actually be procompetitive. This task is particularly challenging in view of the characteristics of the fast-changing, innovation-driven markets of tech startups.

In Brazil, whereas it is early to make definitive statements on what the future holds for both the development of business practices in the digital economy and antitrust policy, CADE's practice (albeit still incipient) has shown that – at least for the time being – the traditional framework in terms of revenues thresholds seemed to have been sufficient to address the challenges presented to CADE to date; as such, we would not expect major changes in the near

[24] Merger Case n° 08700.004431/2017-16 (Parties: Itaú Unibanco S.A. and XP Investimentos S.A.).

future on this. However, in terms of substance, we would expect a lot of discussions going forward (and consequently greater scrutiny), always trying to balance the tension between the necessity to safeguard innovation and the applicability of antitrust measures

MERGER CONTROL IN THE HEALTHCARE SECTOR: ANTITRUST CHALLENGES IN VIEW OF THE RECENT CADE CASE LAW

Clara Ji Hyun Lim, Danilo Mininel, Fernanda Dalla Valle Martino

I. Introduction

The healthcare sector in a broad sense – including hospitals, laboratories for clinical analysis, health plans and pharmaceuticals – is a traditional market that has always been at the spotlight of the Administrative Council for Economic Defence ("CADE") in merger control and conduct enforcement under different perspectives.

There have been a considerable number of merger reviews submitted in the latest years involving those sectors and health plans are among the four sectors that have more notifications to CADE in 2019, according to the CADE Annual Report[1]. Also in 2019, CADE and the Brazilian Supplementary Health Agency ("ANS") have signed a Technical Cooperation Agreement for sharing information and developing joint projects.

In relation to merger reviews in general, nowadays only a few are approved by CADE Tribunal, provided that most of the transactions are already cleared by CADE's General Superintendence ("GS"). In this regard, it is worth noting the development of CADE in the negotiation of remedies.

According to the CADE Remedies Guidelines, released in 2018, CADE can adopt structural, behavioural or a combination of both remedies. In general, CADE, in line with other international authorities, has a preference for structural remedies considering that the divestment is strategically more efficient and requires fewer monitoring costs[2].

However, in case there is no sufficient and proportional remedy available, CADE Remedies Guidelines recommends the adoption of behavioural remedies. This guidelines inclusively highlights that those remedies are in general applicable to concerns on vertical integration.

[1] CADE Annual Report 2019. Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/anuario-cade-2019.pdf> Accessed 11 March 2020.
[2] CADE Remedies Guidelines. Available at <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_GuiaRemdios.pdf.> Accessed 12 March 2020.

This paper aims at bringing a brief overview of CADE approach on the sector, divided between supplementary healthcare and pharmaceutical sector. To illustrate, each section will discuss the main merger review approved by CADE Tribunal in 2019, with has different characteristics and outcomes. The first case involves a domestic transaction and the markets of hospitals services and health plans (Mediplan / Notredame). The second one refers to an international transactional in the pharmaceutical sector (Pfizer / GSK).

II. The Supplementary Health Sector in Brazil

In 2018, CADE has released a study on merger review on the markets of hospital service, diagnostic medicine support service (i.e. image and laboratory tests) and health plans[3] ("CADE Handbook") consolidating their best practices. This sector is very important considering that in Brazil the private health system is of great importance.

According to the CADE Handbook, since the last decade, the sector is characterized by the presence of big economic groups with national scope, but with market power in regional markets.

It is worth mentioning that some steps of the analysis, such as the definition of the relevant market, is already consolidated by CADE case law. The medical health plan market is divided between individual/family plans and collective plan and analysed in a municipal scope or as a group of city in which 75% of the patients of certain city is attended. Health plans exclusively for odontology is considered as a separate market.

The hospital services market is divided between medical center, general hospital and specialized hospital. As a rule, for general hospitals the geographic market is considered as an area of 10 kilometres (or 20 minutes far by car). In the other two cases, CADE may adopt this criteria, the municipal scope, or both, as the case may be.

The diagnostic medicine support is divided between services to the public sector, services to other laboratories, internal services to the hospital, and services provided directly to the

[3] CADE Handbook on Concentration Acts on the markets of hospitals, diagnostic medicine support service and health insurance. Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/cadernos-do-cade-atos-de-concentracao-nos-mercados-de-planos-de-saude-hospitais-e-medicina-diagnostica.pdf>. Accessed 10 March 2020. In 2015, CADE had released a handbook focused on anticompetitive conducts on the supplementary health sector. Available at: < http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/copy_of_cadernos-do-cade-2013-mercado-de-saude-suplementar-condutas-2013-2015.pdf>. Accessed 10 March 2020.

patient which is subdivided by the type of exam required. Most of CADE case law are related to the latter, in which the geographic scope is municipal.

The CADE Handbook highlights that the main issues analysed by CADE are related to acquisition of share in rivals and vertical integration. The first refers to several transactions between groups Amil, Rede D'or and Dasa that occurred mostly before 2012.

The potential vertical integration may be between health plans, hospitals and medicine support clinics. In 2012, the acquisition of control by the American group United Health of Amil Participações S.A ("Amil") was a very well know case, considering that Amil, a health plan provide, was also owner of hospitals[4].

On the one hand, CADE considers that the supplementary healthcare market – health plans, hospitals and diagnostic medicine support service – has high barriers to entry and low rivalry. However, the transactions may also result in efficiencies for the market, such as reduction of transaction costs and asymmetry of information – especially for health plans. In general, transaction has not brought big concerns and only two cases were blocked to date[5].

In relation to the restrictions applicable, especially under the former Brazilian Antitrust Law (before 2012), most of them were related to an adjustment to the non-compete clause, which should be limited to a time period (as a general rule of 5 years) and to a specific territory (according to the relevant market definition as explained above).

Apart from that, behavioural remedies have been more used than structural remedies. Examples of behavioural remedies are the obligation of non-discrimination, the prohibition of been involved in new acquisitions and the obligation of submitting a non-mandatory transaction to CADE analysis.

In recent cases, antitrust discussions involve the effects in the health plans markets and a potential vertical integration between hospitals and health plans may be raised. The case exposed below illustrates this relationship.

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[4] This transaction was not submitted to CADE once it did not meet the minimum thresholds.

[5] Concentration Act n. 08700.003978/2012-90. Vote of Commissioner Elvino de Carvalho Mendonça (Applicants: Unimed Franca – Sociedade Cooperativa de Serviços Médicos e Hospitalares and Hospital Regional de Franca S.A.); Concentration Act n. 08012.008853/2008-28. Vote of Commissioner Fernando de Magalhães Furlan (Applicants: Hospital de Caridade Dr. Astrogildo de Azevedo and Unimed Santa Maria – Sociedade Cooperativa de Serviços Médicos Ltda.)

a. Merger review highlight of 2019: the acquisition of Mediplan by Notredame Intermédica

One important case in 2019 was the acquisition of Mediplan Assistencial Ltda., Hospital Samaritano Ltda. and Hospital e Maternidade Samaritano Ltda. ("Mediplan") by Notredame Intermédica Saúde Ltda. ("Notredame Intermédica")[6]. While Notredame Intermédica is a leading health plan company with national scope and operates some hospitals in the State of São Paulo, Mediplan is a health plan provider and has two hospitals with regional scope (city of Sorocaba, State of São Paulo).

The GS highlighted the existence of horizontal overlaps in the markets of health plans (individual and collective plans) and hospitals (general hospitals) and vertical integration between the health plan offered by Notredame Intermédica and the hospitals of Mediplan. The GS concluded that the market of collective health plan would raise antitrust concerns, but that there was no reason for concerns in relation to vertical integration, especially considering the idle capacity of the Hospital Samaritano. At the end, the GS challenged the transaction to the Tribunal for assessment of structure or behavioural remedies in relation to the collective health insurance market.

The vote of the Reporting Commissioner agreed with the GS that there are some structural characteristics of the health insurance market, such as the verticalization of the sector, that make difficult the entry of new competitors to the market. For this reason, even the existence of new entrants is not sufficient to remove the antitrust concerns.

At first, the GS suggested the divestment of the portfolio of clients of health plan. However, the Reporting Commissioner highlighted that a structural remedy would not be reasonable, proportional or efficient to the present case. In addition, it also stressed that blocking the transaction would not be reasonable as well, considering that there would not be other parties interested in acquiring such assets[7].

At the end, the Reporting Commissioner voted for the adoption of only behavioural remedies. Note that two other Commissioners disagreed from the Reporting Commissioner and

[6] Concentration Act n. 08700.005705/2018-75 (Applicants: Notre Dame Intermédica Saúde S.A., Mediplan Assistencial Ltda, Hospital Samaritano Ltda. and Hospital e Maternidade Samaritano Ltda.). Reporting Commissioner Polyanna Ferreira Silva Vilanova.

[7] This argument would be similar to the "failing firm defence" which was not accepted as a justification for the acquisition of Hospital Unimed by Unimed Franca. This transaction was blocked by CADE in 2013 due to the high levels of concentration (more than 80%) in the markets of hospital services and health insurance (individual and collective plans) in the city Franca, State of São Paulo (Concentration Act n. 08700.003978/2012-90).

voted for blocking the transaction. One of them highlighted that the transaction should be blocked, considering that the concern on this transaction is a horizontal overlap and structural remedies should be adopted in such circumstances, as behavioural remedies are insufficient[8].

The transaction was approved by CADE subject to the execution of a Merger Control Agreement (ACC) that stipulates behavioural remedies exclusively. The ACC established five main obligations, including the non-discrimination of competitors health plan on their relationships with the hospitals involved in the transaction (including the obligation of keeping the already accredited hospitals).

III. The pharmaceutical sector in Brazil

The pharmaceutical sector has drawn attention from the antitrust authorities in conducts enforcement considering the intersection with abuse of rights (patents) and prevalence of right to life (access to medicines). In relation to merger control, most of the transactions have been cleared by GS and no one has been blocked so far.

The first step of the analysis, i.e. the definition of the relevant market definition, is already consolidated. As a starting point, CADE has adopted the Anatomical Therapeutic Classification Level 4 (ATC 4), developed by the *European Pharmaceutical Marketing Research Association* ("EphMRA"), maintained by EphMRA and IMS Health. In some circumstances, CADE has also adopted the ATC 3 level and the therapeutic use as well. The geographic market is national.

In addition to the mergers and acquisitions, the sector has a considerable number of "associative agreements". However, since the enactment of the CADE Resolution 17/2016, which amended the former CADE Resolution 10/2014, several usual agreements in the pharmaceutical sector, such as distribution and supply agreements between non competitors, became of non-mandatory notification. The requirements under the current legislation are the follow: (i) duration of 2 years; (ii) competitors parties in the market of the transaction; (iii) establishment of a joint undertaking for developing an economic activity; and (iv) sharing of risks and results.

A particularity of the pharmaceutical sector is that GS has already decided that an agreement between potential competitors is sufficient to meet the requirement[9]. In addition,

[8] Concentration Act n. 08700.005705/2018-75. Vote of Commissioner Paula Farani de Azevedo Silveira and Commissioner Paulo Burnier da Silveira.
[9] Concentration Act n. 08700.003575/2017-55 (Applicants: Ares Trading and Pfizer Inc.).

even in agreements between competitors in the market, GS has already decided that a case was of non-mandatory submission because it was not characterized the requirements of joint undertaking for developing an economic activity and sharing of risks and results[10]. Therefore, the analysis of CADE case law on associative agreement is very important to assess the obligation of submission.

In general, considering the characteristics of the market – and consequently the relevant market definition – transactions involving pharmaceuticals have a broader scope – national market – and many times involves multinational companies – requiring sometimes a coordinated action among international antitrust agencies. Most of the relevant cases discussed at CADE Tribunal are related to international transactions, as the one mentioned on the next topic.

a. Merger review highlight of 2019: the joint venture between Pfizer and GlaxoSmithkline

A cross border transaction analysed by several authorities including CADE was the acquisition by GlaxoSmithKline PLC. ("GSK") of the consumer healthcare business of Pfizer Inc. ("Pfizer")[11]. The transaction will result in a joint venture between GSK and Pfizer controlled by GSK. This is one more example of a deal between multinational companies involving Brazil and several other jurisdictions.

The antitrust concern was specifically related to one horizontal overlap in one ATC class – the simple antacid (ATC4 A2A1).

The remedy proposed by the parties and accepted by the Tribunal was the divestment of this business of the only product of this market offered by Pfizer in Brazil (*Magnésia Bisurada*). Then, the transaction was approved by CADE subject to the execution of a Merger Control Agreement based exclusively on structural remedies.

The vote of the Reporting Commissioner highlights that this proposal is in line with the CADE Remedies Guidelines and CADE case law when assessing concerns derived from horizontal overlaps. In addition, it is stressed that the set of assets to be divested is sufficient to constitute an independent business able to operate in the market.

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[10] Concentration Act n. 08700.008484/2016-25 (Applicants: Aurobindo Pharma Limited and Medley Farmacêutica Ltda.).
[11] Concentration Act n. 08700.001206/2019-90 (Applicants: GlaxoSmithKline PLC, Pfizer Inc.).

Another point is that the buyer was already defined and its name is already explicitly mentioned on the ACC. The agreements also nominated a monitoring and a divestiture trustee. All those procedures are in line with CADE Remedies Guidelines and the recent practice of the authority on negotiation of ACCs.

IV. Final remarks

The paper demonstrated that the healthcare sector, as an essential sector for the society, has been analyzed by CADE for a long time.

Therefore, there are some concepts that nowadays are already consolidated such as the relevant market and the scope of the non-compete clause. The understanding on the requirements of the "associative agreement" applicable to the sector has also substantially evolved. There is just a few transactions decided by CADE Tribunal, but on those cases the definition of remedies may still be a challenge especially in relation to the possibility of vertical restraints, even if it is not the main concern (i.e. acquisitions involving hospitals and health plans).

It is important to highlight that a careful analysis on merger review involving the healthcare sector is advisable especially considering that the sector has historically been target of several anticompetitive investigations, including coordinated conducts - cartels[12] - and unilateral practices – sham litigation[13] and refusal to deal[14], for example.

As a last point, it is worth mentioning that considering the unprecedented health crisis of COVID-19 faced by the world in 2020, it is expected that antitrust authorities focus their attention on the sector with the objective of speeding merger reviews related to the sector and, at the same time, avoiding anticompetitive practices[15]. Therefore, this force majeure circumstance is an additional issue that may be taken into consideration by authorities when evaluating merger reviews in the healthcare sector.

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[12] See the cartel of generics medicines condemned by CADE in 2005 (Administrative Process n. 08012.005928/2003-12). Subsequently, the fine was annulled by the Courts.

[13] The pharmaceutical company Eli Lilly was fined of R$ 36,6 million for sham litigation (Administrative Process n. 08012.011508/2007-91).

[14] Preliminary Investigation n. 08700.006003/2017-28 (Ministério Público do Estado do Rio Grande do Norte and Thiago Carlos Gonçalves Rêgo vs. Unimed Natal – Cooperativa de Trabalho Médico Ltda.); Preliminary Investigation n. 08700.004427/2018-39 (Serviços de Radiologia São Judas Tadeu Ltda. vs. Unimed Vale do Aço – Cooperativa de Trabalho Médico Ltda. and Fundação São Francisco).

[15] CADE has already opened a preliminary proceeding to investigate an alleged anticompetitive conduct by companies in the medical and pharmaceutical sector by selling products and offering services related to COVID-19 (Preliminary Proceeding n. 08700.001354/2020-48).

COMPLEXITY DECLARATION IN MERGER CONTROL: CADE'S RECENT CASE LAW

João Ricardo Munhoz, Renan Cruvinel, Victor Rufino

I. Introduction

In 2019, the Administrative Council of Economic Defense ("Cade") – the Brazilian antitrust authority – assessed 433 merger notifications ("AC" in the Brazilian acronym), with different complexities and potential risks to competition environment.

Brazilian Competition Law (Law No. 12,529/2011) provides Cade with different tools to deal with merger cases. The complex ones, which usually require longer and in-depth analysis, must be notified under non-fast track proceeding regarding Brazilian antitrust provisions. They must be tried within 240 days, according to articles No. 54 and 88, §2, of Law 12,520/2011.

On the other hand, fast track proceedings, as provided by Cade's Resolution n. 2/2012, have a 30 days deadline and may be approved or rejected by Cade's General-Superintendence ("SG/Cade"). This procedure is used in specific occasions, such as (i) classic joint ventures; (ii) economic agent substitution; (iii) final market share under 20% in horizontal mergers or 30% in vertical mergers; (iv) HHI variation under 200 points; (v) another situations found simple by SG/Cade. About 84% of the ACs were analyzed under the summary procedure in 2019.

Regarding complex cases and analysis deadlines, as set forth in the article 56 of the Antitrust Law, when the authority found that a complementary instruction is required due to case intricacy, SG/Cade may declare a merger case as "complex". It allows to carry out additional diligences to obtain more information about the involved markets or the merger effects and risks. It also gives the authority the possibility to extend the time to assess the AC.

> *Law n. 12,529/2011*
> *Art. 56. The General Superintendence may, by means of a reasoned decision, declare the operation as complex and require new complementary fact-finding, specifying the measures to be taken.*
> *Sole paragraph. Once the operation is declared as complex, the General Superintendence may require that the Tribunal extends the term referred to in § of Art. 88 of this Law.*

Cade's merger guidelines recommend that the complexity shall be declared up to ninety days after the transaction notification. According to the Guidelines, there are three major facts to be considered to determine if a notification should be declared complex[1].

The first one is if the case demands a deepened antitrust analysis; the second is if the transaction may require the imposition of antitrust remedies; the third situation is if the analysis exceeds ninety days.

Also, according to the guideline's recommendations, acts of economic concentration should not be declared complex when the applicants have already proposed antitrust remedies that solve the competitive concerns.

The necessity to declare a transaction complex is assessed by an Antitrust General Coordination, a Cade's internal subdivision under the supervision of General Superintendence. Therefore, the complexity declaration is justified by a technical opinion issued and signed by the Coordination, and then also signed by the General-Superintendent if approved.

Beyond the legal issues regarding the complexity declaration, it is important to assess how Cade is using this tool. This paper intends to present an overview of Cade's practices regarding complex cases between 2015 and 2019. A total of 51 AC were analyzed, especially the following criteria: (i) the date of the complexity declaration, which allows calculate the average time spent by SG/Cade to declare it complex; (ii) the final decision, in order to verify if there is a link between case's result and the complexity declaration; and (iii) the Technical Opinion that recommends the complexity declaration, and the justification it uses to do it such as competition concerns identified, further investigation needed and requests to applicants.

II. Moment of complexity declaration

According to SG/Cade guidelines for non-fast track mergers, when the analysis of a transaction exceeds ninety days, the declaration of complexity shall be considered.

The present research considered the period (i) between AC notification and the complexity declaration; and (ii) between complexity declaration and Cade's final decision. The data regarding the complexity declaration moment is summarized on the chart below.

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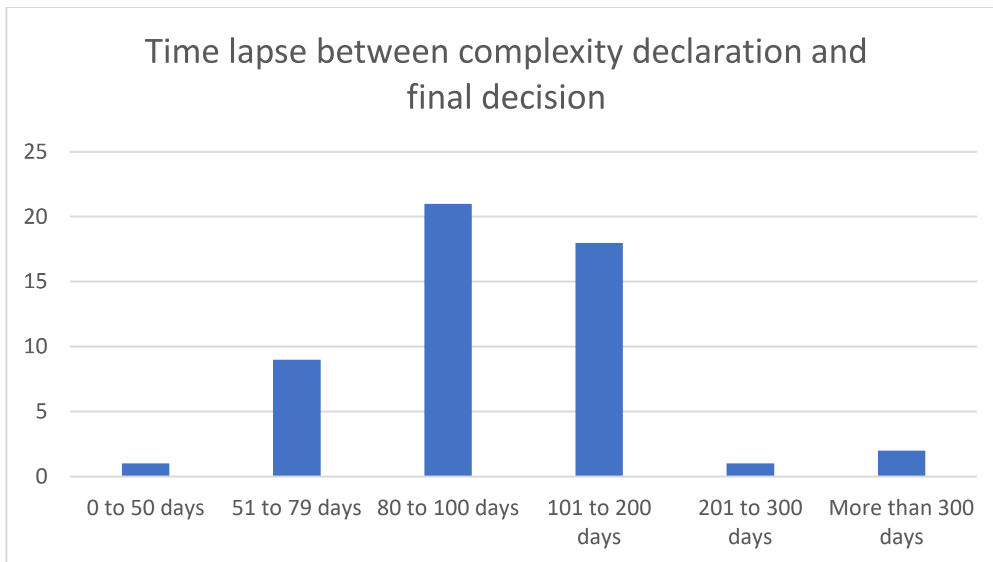
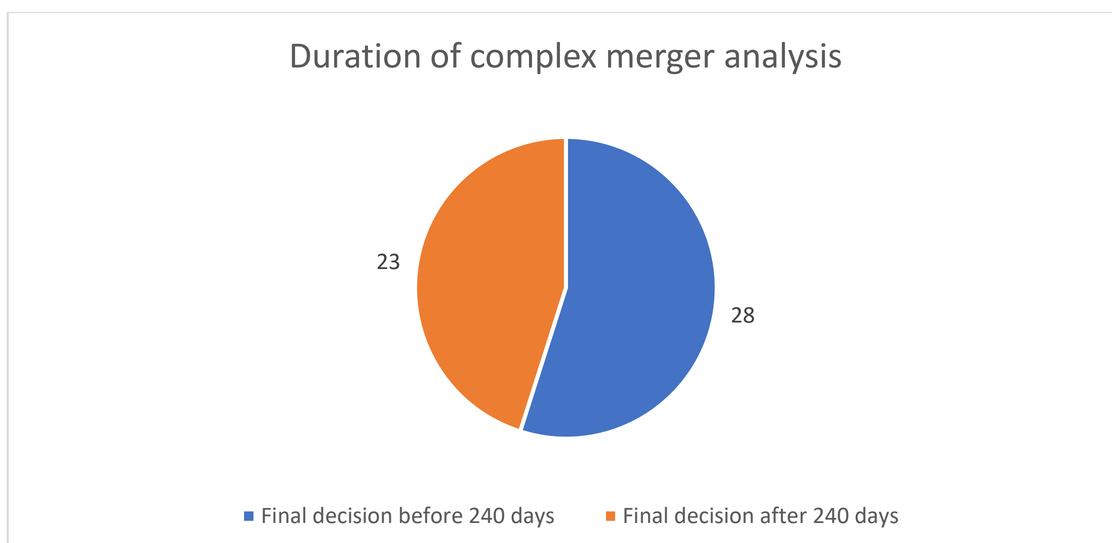
[1] CADE. *Manual Interno da Superintendência-Geral para atos de concentração apresentados sob o rito ordinário*. Brasília, 2017. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias-e-manuais-administrativos-e-procedimentais/manual-interno-da-sg-para-casos-ordinarios.pdf (Accessed: 30 may 2020).



The chart shows that most of the complexity declaration occurs around ninety days after the notification, since 21 of 51 cases where declared complex between eighty and a hundred days after notification. The declaration after ninety days is more common than before this period, which is expressed in case's average time taken to complexity declaration of 114 days.

The average time SG took for the analysis of complex mergers was 246 days, only six days more than the period provided by law for non-fast track notifications. Despite that, the chart below shows that most of the complex cases takes less than the 240 days. In other words, great part of the cases doesn't require deadline extent.



III. Merit of the complexity declaration decision

As seen before, the Technical Opinion exposes the reasons for the complexity declaration. Regarding the cases assessed by this paper, the most common justification was the

rise of concentration in the relevant markets under analysis. In at least 36 of 51 of the observed ACs, the market share increase was mentioned as one of the reasons – usually the foremost – to the complexity declaration. Beyond those 36, other cases involved antitrust risks derived from the concentration after transaction, although it is not expressly stated.

In different opportunities, SG/Cade adopted a relevant market definition distinct from the one presented by the applicants. In some of these cases, Brazilian authorities understood that the merger should be declared complex, since deeper evaluation of the appropriate market definition for the transaction was needed.

An example is the AC No. 08700.5959/2016-21, between Guerbet S.A. and Malinckrodt Group S.a.r.l., in which SG/Cade understood that the relevant market was more segmented than the applicants understood, resulting in a higher market share than previously stated by them:

> *"The transaction notification by the applicants already showed high concentration levels, with the statement that, among other things, there was enough rivalry to inhibit the anticompetitive market power. Although, this General-Superintendence, regarding the market segmentation possibility above indicated, detected even higher concentration levels."* (Free translation)

Similarly, in the AC between Vale Fertilizantes and The Mosaic Company (AC No. 08700.001145/2017-07), SG/Cade identified divergences concerning the geographic relevant market definition, which affected the analysis of rivalry and concentration in certain regions. In order to clear these doubts, the AC was declared complex.

Other reasons related to the rise of market concentration are reduction of rivalry and entry barriers increase, mainly in regulated markets, whose rules may be an obstacle to new players entry.

A motivation often mentioned in the Technical Opinion issued to declare complex a merger is portfolio power increment. Considering that it generates risk to competition – especially in the imposition of entry barriers and in the incentive to dominant position abuse – the intensification of portfolio power cause antitrust concerns to SG/Cade.

In at least seven cases, portfolio power was one of the reasons that led to complexity declaration. The Bayer-Monsanto transaction (AC No. 08700.001097/2017-49) is an example:

> *"At last, the applicants would take part in several links in the agricultural chain in which they have a relevant operation, as trangenetics, seeds, seeds treatment and pesticides. Also, they will increase their portfolios in these markets, which may hamper*

> *the entry and consolidation of competitors, as well as their access to distribution channels."* (Free translation)

Vertical restriction related concerns were also common and expressly mentioned in at least thirteen cases. Regarding risks of coordinated market power exercise, at least nine complexity declarations were motivated by such criteria. Among them, stands out the AC No. 08700.007629/2016-71, between Mataboi Alimentos Ltda. and JBJ Agropecuária Ltda. The risks of coordination between applicant's shareholders – since they belong to the same family – not only was one of the reasons to declare complexity, but also a central argument used to block the transaction.

One shall emphasize that many times SG/Cade uses information obtained from market agents to support the complexity declaration. In several cases, after enquiring competitors, consumers, suppliers and customers, SG/Cade identified antitrust problems that could not be noticed only by the analysis of the data provided by the filing form.

In at least 13 of 51 cases, the information provided by stakeholders were crucial to promote the complexity declaration, among them the AC No. 08700.005972/2018-42, between SM Empreendimentos Farmacêuticos (Fagron Group) and Chemistry do Brasil Ltda. The transaction was declared complex because enquired customers claimed that Fagron Group was acquiring several smaller companies in the past years, increasing its market share:

> *"The fact-finding made until now by General-Superintendence found, among other factors, that the transaction results in high concentration in the national market of pharmaceutical input distribution. Also, other parties consulted by SG/Cade presented concerns related to a successive acquisition of competitors by Fagron Group, through transactions that didn't fit in Cade's compulsory notification criteria. This movement, as stated by some of the enquired companies, may provoke deleterious effects on the national market of pharmaceutical input distribution."* (Free translation)

Relevant third parties also may contribute to SG/Cade's complexity declaration. According to art. 50 of Brazilian Competition Law, those who holds rights that may be affected by the transaction can be enabled as a relevant third party. They might intervene and make statements on the case records. For instance, in the transaction between Dow Chemical Co. and Exxon Chemical Co. (AC n. 08700.0100224/2014-58), Brasken S.A. – a relevant third party – pointed the risks of the acquisition for the downstream market. Brasken's claims contributed to SG/Cade decision to declare complexity.

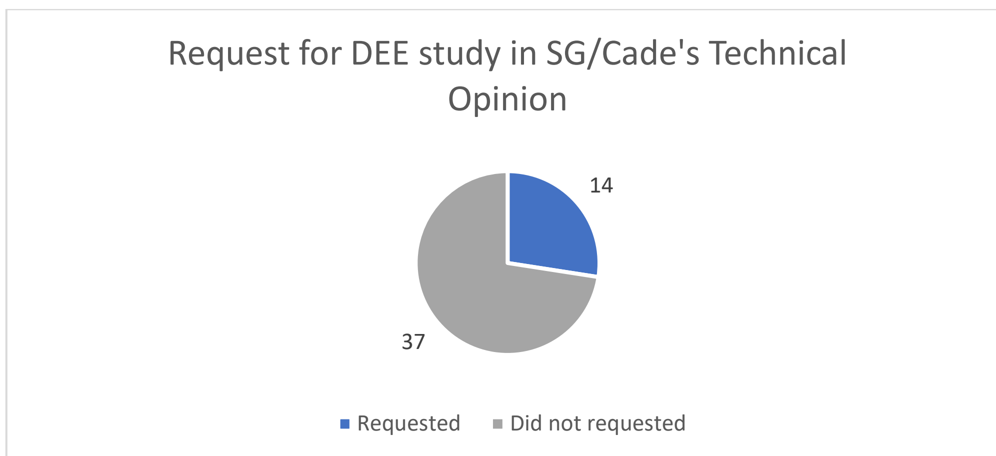
IV. Measures imposed by SG/Cade's complexity declaration

Beyond pointing competition issues that led to the complexity declaration, the main objective of the Technical Opinions is to recommend which measures should be taken by Cade and the applicants, to collect information needed to a deepened fact finding.

The most common measure is offer to the applicants the opportunity to demonstrate merger's efficiencies, so that SG/Cade may evaluate if the AC benefits consumers despite of the risks to the competitive environment. In only 4 of 51 merger assessed by this research SG/Cade didn't request efficiency evidence.

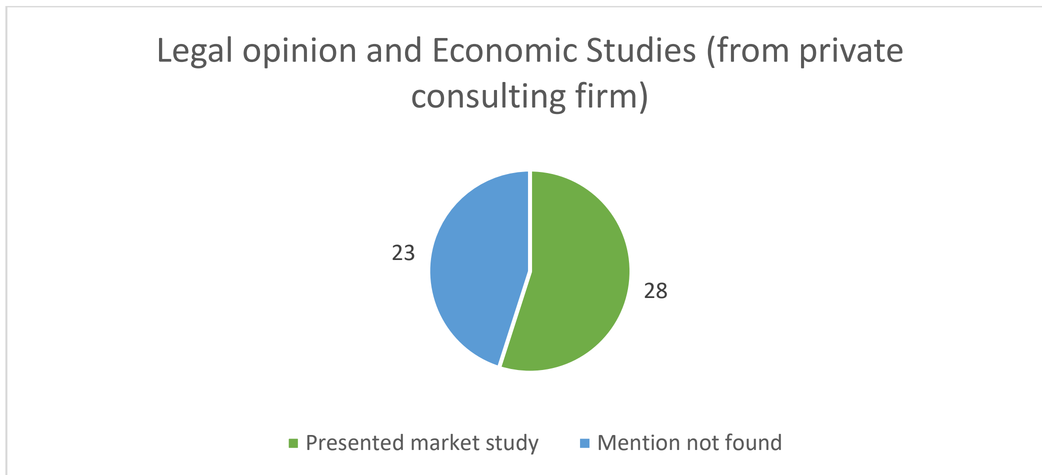
Another kind of requested measure was the presentation of market studies and additional data by the applicants, further rivalry and entry conditions analysis by SG/Cade or sending of official letters to competitors, customers and consumers to obtain more information about the market.

An often-adopted diligence in complexity declaration is to request Cade's Economic Studies Department ("DEE") to prepare economic studies regarding merger's impact on competition. In 14 of 51 ACs were made such requests. DEE has played an important role in the assessment of complex AC's competition risks, thanks to its expertise and technical knowledge background.



Apart from DEE, the applicants itself – willingly or by requisition – may present legal opinions and economic studies, in order to demonstrate merger efficiencies and contest antitrust

problems pointed by SG/Cade. In at least 28 of 51 cases the applicants submit such documents[2], as seen in the chart below:



V. Final decisions in complex cases

A merger declared complex usually presents more competitive concerns than simple ones, therefore, they are more likely to suffer restrictions by Cade or even be blocked.

Seven of the 51 filings assessed were closed because applicants gave up on the transaction. Thus, in this section, will be considered only the 44 remaining cases, since they were object of a merit decision by Brazilian authority.

Eighteen of these 44 mergers, last than half, were approved without restrictions, a low figure compared to the average rate of approval in the past few years. Between 2015 and 2019, the approval rate was more than 90%[3].

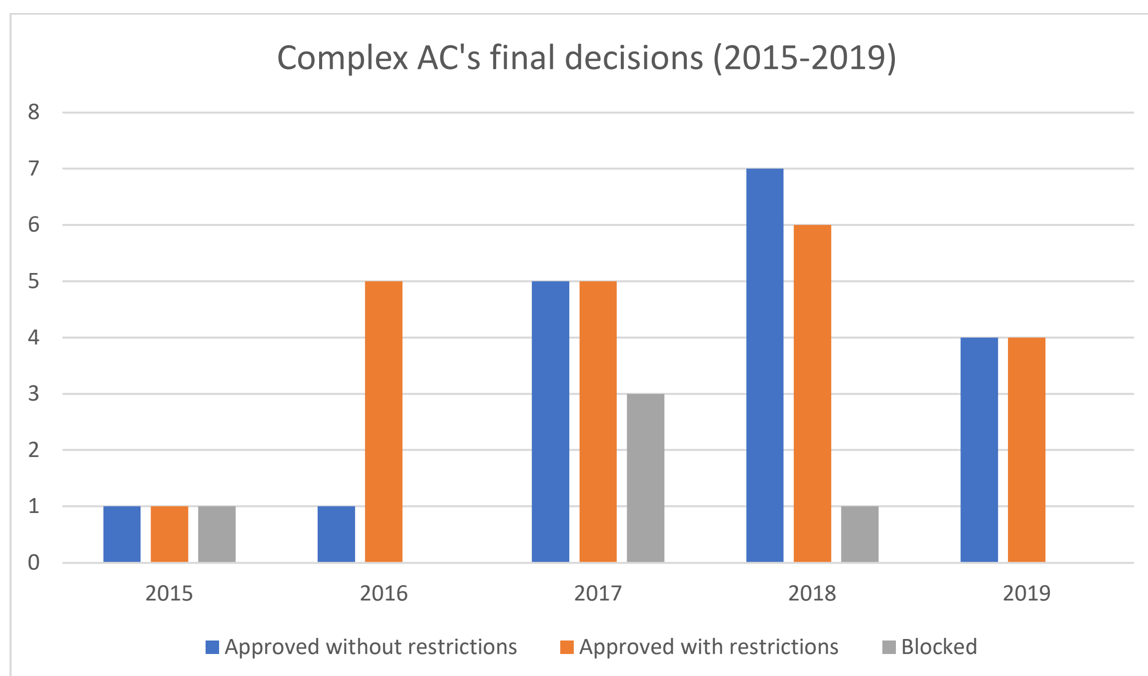
From the cases assessed by this research, 47.7% were approved with restrictions, 21 of 44 mergers. The percentage is significantly higher than the average of Cade's decisions for the same period. Between 2015 and 2019 in only 1,3% of the cases were imposed restrictions. This is due to the fact that the complexity declaration is frequently a step of the assessment of the adequacy of the imposition of antitrust remedies. [4]

[2] These numbers are based in the public access version of the ACs. Therefore, they may not reflect accurately the real situation, since market studies may be submitted in the confidential case records.

[3] These percentages are based in the data found at Cade's website, available at: http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true (Accessed: 30 may 2020).

[4] The sample of this research considers the ACs whose complexity declaration was issued between 2015 and 20. Complex ACs judged in this period but declared complex in former years are not in the scope of this paper.

Only five transactions were blocked between 2015 and 2019 and all of them were declared complex by SG/Cade. The following chart summarizes the final decisions taken by SG/Cade in the past few years regarding complex cases.



It is clear, especially when compared to Cade's general merger control numbers, as shown in the schedule below, that SG/Cade tended to be more restrictive with cases declared complex, which is expected.

Year	Total cases	Approved without restrictions	Approved with restrictions	Blocked	Non acknowledge
2015	409	376	7	1	25
2016	391	360	5	0	25
2017	378	355	5	3	15
2018	404	385	5	1	12
2019	433	405	5	0	23

Naturally, more complex cases are submitted to Cade's tribunal assessment, since it need to be contested by SG/Cade, pursuant to art. 57 of Brazilian Competition Law. The article provides that the merger must be contested when it should be rejected, approved with restrictions or when its effects on the market are not clear.

Also, 31 of the 44 researched cases (71.5%) were decided by Cade's tribunal, which five were approved without restrictions, five rejected and the remaining approved with restrictions. Only thirteen (29.5%) of the declared complex cases were directly approved by SG/Cade.

VI. Conclusions

Cade's case law regarding complexity declaration shows that was not frequently used in merger notifications between 2015 and 2019. Only 2.5% percent were declared complex.

The declaration allows SG/Cade to gather information from competitors, clients, suppliers and applicants. Consequently, SG/Cade was able to issue more in-depth – and eventually longer – assessments and provide a background for more appropriate decisions, considering consumer's welfare and the improvement of competition environment.

The research also showed that SG/Cade follow Cade's merger procedure guidelines and complies with deadlines stablished by Brazilian Antitrust Law. Usually the transactions were declared complex around ninety days after notification, as suggested by the guidelines, and SG/Cade concluded its analysis on time.

Also, the prevalence of mergers approved with restrictions among the ACs assessed in this paper shows that complexity declaration is an important instrument to evaluate with caution the imposition of antitrust remedies, regarding its necessity and adequacy.

THE FUTURE OF MERGER REVIEW: NEW PERSPECTIVES FOR "ASSOCIATIVE AGREEMENTS"

Caroline Tie Tanaka Battisti Archer, Denise Junqueira, Maíra Isabel Saldanha Rodrigues

I. Introduction

It has been over three years since Cade's Resolution No. 17/2016 entered into force providing for new criteria on the definition of "associative agreement" ("the New Resolution"). Particularly in the past year, we have witnessed a remarkable increase in the number of associative agreements submitted before Cade, which ended up prompting a rich discussion on what delimitates an associative agreement under such resolution, and evidenced the uncertainty faced, to some extent, by competition agents.

As the precise delimitation of the "associative agreement" criteria continue to evolve in Cade´s case law, it is important for competition agents to stay up to date with Cade´s interpretation of the Resolution. In fact, this is particularly important, given the worldwide tendency for contractual relations to become more and more diverse and innovative, which may result in increasingly complex assessment of the notification criteria of associative agreements. Furthermore, this is also relevant because Cade's assessment is closely linked to confidential clauses that are analyzed on a case-by-case basis, and that are kept confidential in the authority's decision, which increases the difficulties in anticipating Cade's judgment to non-enforcers.

This article aims to contribute on that end. In this sense, the following sections will present a round-up of Cade's recent decisions on associative agreements, and on each condition that must be fulfilled for an agreement to be subject to mandatory notification under the New Resolution. In the conclusion, we will pinpoint some tendencies.

II. Definition of "Associative Agreement" as per the New Resolution

CADE's New Resolution establishes that:

> ***Art. 2***. *An associative agreement is any agreement with a term of two (2) or more years that establishes a joint enterprise to pursue an economic activity, provided that, cumulatively:*
> *I – the agreement establishes sharing of risks and results of the underlying economic activity; and*
> *II – the contracting parties are competitors in the relevant market that is the object of the agreement.*

Therefore, there are five criteria that must be cumulatively met for an agreement to fall under the New Resolution:

(i) A term of two or more years;

(ii) A joint enterprise between the contracting parties;

(iii) The pursuance of an economic activity;

(iv) Sharing of risks and results of the underlying economic activity; and

(v) The contracting parties must be competitors in the involved relevant market.

That is to say, the definition of what constitutes an "associative agreement" combines both "objective" (item "i" above) and "subjective" (items "ii" to "iv" above) criteria, being that the latter is subject to further interpretation and the former should not raise further doubts on its applicability.

Indeed, with respect to the "objective" criterion, the New Resolution foresees that agreements establishing a fixed term of two or more years may be subject to mandatory review as associative agreements. As per the New Resolution, the two-year term criterion also embraces (a) agreements with term of less than two years that foresee postponement possibility, and (b) indeterminate term agreements, if they eventually reach a two-year period, counted from the signature date. In both hypotheses, the agreement must be submitted for Cade's review before reaching the two-year term, and the extension beyond two years is conditioned upon Cade's previous approval.

On the other hand, the interpretation of the "subjective" criteria has been motive for continuous discussions at Cade, indicating, to a certain extent, an uncertainty. More than that, this interpretation is particularly difficult for non-enforcers, because the authority's decisions are closely linked to contractual clauses that are usually kept confidential, which increases the difficulties in anticipating Cade's precise judgment.

Nonetheless, the analysis of Cade's case-law can provide relevant insights and guidance on the type of contractual elements that are to be considered when assessing whether an agreement is "associative", and thus whether it is subject to Cade's mandatory pre-merger review.

Aiming to shed some light on Cade´s most recent understanding and potential tendencies on the “subjective” criteria, we will explore, in the following paragraphs, Cade’s recent insights on each of these four items.

III. Cade’s analysis of the “subjective” criteria

a. A joint enterprise between the contracting parties

In general terms, Cade considers that the *joint enterprise* requirement is met when the contracting parties agree to act jointly, with a high degree of interdependence among them or interference by one party in the activities of another, and when such interdependent performance affects the offering of their products in the market[1].

Indeed, Cade has, in more than one occasion, stated that the *joint enterprise* element is verified when the parties, through their agreement, organize their factors of production seeking a common goal[2]. The authority has also understood that a joint enterprise between the contracting parties can be perceived when the agreement includes provisions for instances of joint coordination or joint governance, such as sharing facilities or personnel[3].

On the other hand, in several instances Cade has also indicated which type of agreements or contractual provisions would not constitute a *joint enterprise*. Firstly, Cade has stated that if the agreement establishes that the parties would remain independent from each other, and that they would keep commercializing their products autonomously, with separate governance instances for their respective activities, then the agreement would not meet the *joint enterprise* criterion, and thus would not fall under the New Resolution[4]. Secondly, an agreement with obligations that are typical of a supply or distribution contract, and that limits each party’s

[1] *See* Merger Review Proceeding No. 08700.002873/2019-90. Applicants: Mondelez Brasil Ltda., Danone Ltda.; and Merger Review Proceeding No. 08700.001572/2019-49. Applicants: International Paper and Bignardi Indústria e Comércio de Papéis e Artefatos Ltda.

[2] *See* Merger Review Proceeding No. 08700.001572/2019-49. Applicants: International Paper and Bignardi Indústria e Comércio de Papéis e Artefatos Ltda; Merger Review Proceeding No. 08700.002704/2019-50 Applicants: Basf S/A, Bayer S.A., FMC Química do Brasil Ltda, Syngenta Proteção de Cultivos Ltda and Corteva Agriscience; and Merger Review Proceeding No. 08700.002276/2018-84. Applicants: Tim Celular S.A. and Oi Móvel S/A.

[3] *See* Merger Review Proceeding No. 08700.004121/2019-63. Applicants: Astrazeneca do Brasil Ltda, Bayer S.A., Bristol-Myers Squibb Farmacêutica Ltda., Produtos Roche Químicos e Farmacêuticos S.A, Wyeth indústria Farmacêutica Ltda.; and Merger Review Proceeding No. 08700.002276/2018-84. Applicants: Tim Celular S.A. and Oi Móvel S/A.

[4] *See* Merger Review Proceeding No. 08700.001572/2019-49. Applicants: International Paper and Bignardi Indústria e Comércio de Papéis e Artefatos Ltda.; and Consultation No. 08700.006858/2016-78. Requesting party: Hamburg Südamerikanische Dampschifffahrts-Gesellschaft KG.; and Merger Review Proceeding No. 08700.004121/2019-63. Applicants: Astrazeneca do Brasil Ltda, Bayer S.A., Bristol-Myers Squibb Farmacêutica Ltda., Produtos Roche Químicos e Farmacêuticos S.A, Wyeth indústria Farmacêutica Ltda.

interference in the other's activities to the subjects related to the supply or distribution matters, would also not constitute a joint enterprise[5].

As shown by these cases, Cade's case law has indicated that the *joint enterprise* element is directly linked with the level of interdependency among the contracting parties – i.e. considering an "autonomy ruler" that has, in one end, the parties performing their activities completely independently and, on the other, the parties acting with total interdependence, the more autonomously the parties perform their activities, the less their agreement may result into a *joint enterprise.* Moreover, when assessing the interdependency level resulting from the agreement, the authority also considers whether the relational aspect of the agreement prevails over its organizational aspect – in other words, if the cooperation between the contracting parties exceeds mere organizational elements of the transaction.

b. The pursuance of an economic activity

The *joint enterprise* test mentioned above is coupled with the criterion "ii", the *pursuance of an economic activity*. Different from the other "subjective" criteria, this criterion has not been subject to intense discussions in Cade's case law so far, and this may be because the New Resolution provides further details on what is to be considered as *economic activity*: "*economic activity is considered as the acquisition or offering of goods and services in the market, even on a non-profit basis, provided that, in this case, the activity can be, at least in theory, developed by private company with lucrative purposes*[6]*"*.

In fact, such detailed definition generally bases Cade's decisions when analyzing associative agreements. In this regard, Cade has generally stated that the *joint enterprise* resulting from the agreement must be oriented towards an economic activity – i.e. it must be related to the acquisition or offer of products in the market[7].

For instance, Cade has determined that an agreement establishing a non-profit private association with institutional purposes is not an associative agreement, as it merely establishes a representation of the parties before the government, academia and society, and does not

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[5] *See* Merger Review Proceeding No. 08700.001572/2019-49. Applicants: International Paper and Bignardi Indústria e Comércio de Papéis e Artefatos Ltda.; Merger Review Proceeding No. 08700.004835/2019-71. Applicants: Johnson & Johnson Do Brasil Indústria E Comércio De Produtos Para Saúde Ltda. and Cellera Farmacêutica S.A.; and Merger Review Proceeding No. 08700.002194/2019-11. Applicants: Novelis do Brasil Ltda., Latasa Indústria e Comércio Ltda.; Latasa Metais Ltda.

[6] *See* Resolution No. 17/2016, Article 2, §1º.

[7] *See* Merger Review Proceeding No. 08700.004121/2019-63. Applicants: Astrazeneca do Brasil Ltda, Bayer S.A., Bristol-Myers Squibb Farmacêutica Ltda., Produtos Roche Químicos e Farmacêuticos S.A, Wyeth indústria Farmacêutica Ltda.

include any economic activity nor joint enterprise in their object; thus, it should not be submitted to the authority's analysis[8].

i. Sharing of risks and results of the underlying economic activity

As per the authority's case law, Cade has found that meeting this criterion goes beyond profit or cost sharing: in order to result in *sharing of risks and results*, the agreement must establish more than the mere existence of joint income, revenues, and losses from an accounting point of view. These agreements need a "plus factor" to fulfill this criterion.

So far, Cade has stated that the required plus factor can be identified in agreements that:

(i) decrease the risks associated to the essence of the parties' businesses, including through sharing of costs[9];

(ii) comprehend clauses that showcase a common enterprise between the contracting parties, indicating more than just a simple check of revenues, income and losses for accountability purposes[10];

(iii) ultimately, allow the contracting parties to jointly determine all aspects of the offer in a certain market, both in qualitative and quantitative terms[11]; and

(iv) necessarily result in sharing of risks and results, even if these conditions have not been explicitly foreseen in the agreement[12].

On the other hand, Cade has also indicated that *sharing of risks and results* is not present in agreements:

(i) that provide for the sharing of costs between the parties (and consequently the costs reduction), without the sharing of the parties' respective aimed result increase [13];

[8] *See* Merger Review Proceeding No. 08700.002704/2019-50 Applicants: Basf S/A, Bayer S.A., FMC Química do Brasil Ltda, Syngenta Proteção de Cultivos Ltda and Corteva Agriscience.
[9] *See* Merger Review Proceeding No. 08700.002873/2019-90. Applicants: Mondelez Brasil Ltda., Danone Ltda.; and Merger Review Proceeding No. 08700.002276/2018-84. Applicants: Tim Celular S.A. and Oi Móvel S/A.
[10] *See* Merger Review Proceeding No. 08700.002873/2019-90. Applicants: Mondelez Brasil Ltda., Danone Ltda.
[11] *See* Consultation No. 08700.006858/2016-78. Requesting party: Hamburg Südamerikanische Dampschifffahrts-Gesellschaft KG.; and Merger Review Proceeding No. 08700.001433/2017-53. Applicants: Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines, Ltd., Kawasaki Kisen Kaisha, Ltd.
[12] *See* Merger Review Proceeding No. 08700.002276/2018-84. Applicants: Tim Celular S.A. and Oi Móvel S/A.
[13] *See* Merger Review Proceeding No. 08700.004121/2019-63. Applicants: Astrazeneca do Brasil Ltda, Bayer S.A., Bristol-Myers Squibb Farmacêutica Ltda., Produtos Roche Químicos e Farmacêuticos S.A, Wyeth indústria

(ii) in which the parties do not share sensitive information nor exchange assets, or make any kind of changes to their corporate equity structure[14];

(iii) that comprehend commitments between the contracting parties to reduce costs, if these commitments allow each party to establish their costs independently, according to the development of their respective corporate activities[15]; and

(iv) that institute a fixed-price or a set method for the calculation of these prices[16].

ii. The contracting parties must be competitors in the involved relevant market

Finally, the New Resolution establishes that, in associative agreements, the contracting parties must be *competitors in the relevant market subject to the agreement*. As Cade's case law has shown, this element is directly linked to the traditional starting points for framing an analysis of the competitive effects of a merger or an agreement: (i) to define the relevant market that might be affected by the transaction; and (ii) to identify how the parties will interact with one another in such market, as a result of the transaction.

As regards the first point, the relevant market definition, Cade has been understanding that, in cases in which it is not possible to define the relevant market related to the agreement at the time of the notification, as, for example, agreements regarding the development of a new and previously nonexistent product, the parties cannot be considered as competitors[17]. However, if an agreement regarding a previously nonexistent product is eventually extended or renewed and, by that time, it is already possible to define the relevant market and whether the parties are competitors in the said market, such agreement may be subject to Cade's pre-merger control.

Farmacêutica Ltda.; and Merger Review Proceeding No. 08700.006533/2017-76. Applicants: Boa Vista Serviços S.A., and Serasa S.A.

[14] *See* Merger Review Proceeding No. 08700.001433/2017-53. Applicants: Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines, Ltd., Kawasaki Kisen Kaisha, Ltd.; and Merger Review Proceeding No. 08700.002704/2019-50 Applicants: Basf S/A, Bayer S.A., FMC Química do Brasil Ltda, Syngenta Proteção de Cultivos Ltda and Corteva Agriscience.

[15] *See* Merger Review Proceeding No. 08700.002194/2019-11. Applicants: Novelis do Brasil Ltda., Latasa Indústria e Comércio Ltda.; Latasa Metais Ltda.

[16] *See* Merger Review Proceeding No. 08700.001572/2019-49. Applicants: International Paper and Bignardi Indústria e Comércio de Papéis e Artefatos Ltda; and Merger Review Proceeding No. 08700.002194/2019-11. Applicants: Novelis do Brasil Ltda., Latasa Indústria e Comércio Ltda.; Latasa Metais Ltda.

[17] *See* Merger Review Proceeding No. 08700.000831/2019-14. Applicants: GlaxoSmithKline PLC., Ares Trading S.A.

On the second point, it is worth mentioning Commissioner João Paulo de Resende's winning vote on the analysis of the Tim/Oi merger[18], according to which the relationship between the contracting parties is to be analyzed in light of their pre-existent relationship vis-à-vis the relationship resulting from the agreement:

> *"In some cases, when the parties file their transaction with CADE, they try to portray this type of relation as a vertical relation, that is, as if one party was supplying to the other the necessary input for the provision of the services, as an exchange or a swap. This was the case, for instance, in the SCA and VSA cases in the sea cargo transportation sector. Moreover, this was also my understanding in Consultation No. 08700.007192/2015-94 (SEI 0097130), regarding the sharing of tag-reading antennas by companies in the electronic gates sector.*
> *Now I understand that my interpretation was wrong, and that all the types of contracts listed in the table above result, in fact, in horizontal overlaps in the market subject to the agreement, considering that it is not possible to separate the object of the agreement from the provision of the service that constitutes the main activity of the company. The overlap would be vertical if one of the parties manufactured an asset necessary to the provision of the service and supplied it to a competitor through an agreement. (…)*
> *This is not the case when considering the sharing of assets that are used for the provision of network infrastructure services, that is, the sharing of the network itself. The networks that are planned and built by each company are not an additional stage in the economic activity, between the manufacture of a necessary asset to provide the service and the own provision of the service. They are the provision of the service itself."*[19]

Therefore, when assessing the fulfillment of the "relevant market" criterion, one must consider: (i) the relation between the contracting parties as resulting from that specific agreement among them vis-à-vis their pre-existent relationship; and (ii) the product subject to the agreement, as a previously nonexistent product may not characterize the contracting parties as competitors.

[18] *See* Merger Review Proceeding No. 08700.002276/2018-84. Applicants: Tim Celular S.A. and Oi Móvel S/A.
[19] Translated from the original Portuguese excerpt: "*27. Em alguns casos as partes, quando da notificação da operação ao CADE, têm tentado caracterizar esse tipo de relação como vertical, ou seja, como se uma parte estivesse fornecendo à outra um insumo necessário à prestação de serviço na forma de uma troca ou permuta. Foi, por exemplo, o que ocorreu nos casos de SCA e VSA do setor de transporte marítimo de cargas. Além disso, este foi também o meu entendimento no caso da Consulta nº 08700.007192/2015-94 (SEI 0097130), referente ao compartilhamento de antenas de leitura de tags por empresas no setor de cancela eletrônica. 28. Hoje entendo que esta minha leitura estava equivocada, e que os tipos de contrato listados na tabela acima são todos, na realidade, relações horizontais no mercado objeto do contrato, posto que não é possível separar o objeto do contrato da prestação do serviço que constitui a atividade fim da empresa. A relação seria vertical se uma das partes produzisse um bem necessário à prestação do serviço e o fornecesse a uma concorrente via algum contrato. Por exemplo se, no setor de aviação, uma companhia aérea integrada produzisse aeronaves e as arrendasse ou afretasse para uma outra companhia aérea. 29. Não é o caso no compartilhamento de ativos usados para a prestação de serviços de infraestrutura de rede, ou seja, o compartilhamento da própria rede. As redes que cada empresa planeja e constrói não constituem uma etapa adicional de atividade econômica entre a produção de um bem necessário à prestação do serviço e a prestação do serviço em si. Elas constituem a própria prestação do serviço*."

III. Conclusion

The assessment of whether a contract constitutes an "associative agreement", and thus is subject to Cade´s pre-merger control, is among the most complex topics of Brazilian antitrust law. Particularly, there are three main factors that contribute to such complexity.

First, the New Resolution does not establish bright-line tests that allow parties to readily determine whether a transaction is an "associative agreement", and thus subject to mandatory notification. Second, Cade's assessment is closely linked to confidential clauses that are analyzed on a case-by-case basis, and that are kept confidential in the authority's decision, which increases the difficulties in anticipating Cade's judgment to non-enforcers. Finally, there has been a major worldwide tendency for increasingly diversified and innovative contractual relations in the past few years, which poses further challenge on their interpretation based on past precedents.

The combination of these factors evidences a level of uncertainty faced by competition agents on the analysis of the formation of associative agreements, particularly considering that the New Resolution mostly provides for "subjective" criteria on the matter. Thus, it is important for competition agents to stay up to date with Cade´s interpretation of each criterion comprising the definition of "associative agreement".

As such, this article aimed to shed some light on the interpretation of "associative agreement" based on a quick analysis of Cade's case-law, and, in general terms, this analysis has shown that the general notion of associative agreements is close to a "contractual joint venture", as recognized by Cade itself. That is because those agreements present characteristics such as (i) stable cooperation and (ii) engagement to reach a common economic goal, but (iii) do not result in a loss of legal autonomy between the contracting parties. [20]

Moreover, the analysis presented in this article shows that recent cases pinpoint some key factors on Cade's understanding regarding the effects of different contractual elements on the associative agreements' formation criteria. Some of those are presented below:

- The "autonomy ruler": the possibility of a contract being understood as an associative agreement increases as the level of interdependency, communication and exchange of sensitive information among the contracting parties increase. Factors

[20] *See* Merger Review Proceeding No. 08700.002873/2019-90. Applicants: Mondelez Brasil Ltda., Danone Ltda.

such as joint coordination or joint governance commonly indicate the lack of autonomy among the parties with respect to the agreement's goal.

- Competition in innovative/new markets: Cade has stated that there is no competition among the contracting parties when it is not possible to define the relevant market subject to the agreement at the time of the notification, such as contracts regarding the development of a new and previously nonexistent product.

- Cade's assessment is not based solely on the clauses content, but also on the effects. For instance, agreements that necessarily result in sharing of risks and results, even if such element has not been explicitly foreseen in the provisions, are to be considered as meeting the sharing of risks and results element.

In this sense, the above key-factors may be considered as empirical elements of the main characteristics of an associative agreement, which may help the competition agents in the day-to-day assessment of what comprises an agreement subject to Resolution No. 17/2016.

As the case-law shows that the authority's understanding on the associative agreements' submission criteria is still evolving, it is important to keep monitoring trends and assessing evolving patterns in the future.

BLACK SWANS, BANKRUPTCY, AND COMPETITION: A SCREENING TEST TO IDENTIFY FAILING FIRMS[1]

Luiz Alberto Esteves, Marcio de Oliveira Junior

I. Introduction

The Covid-19 pandemic has resulted in a serious economic crisis. There has been an adverse and exogenous economic shock of great magnitude that can provide results far worse than those initially projected by economic agents. Such events are known in the specialized literature as black swans.

Given the economic crisis ahead, many companies are likely to be in dire straits. In this sense, being acquired by competitors may be an alternative for them to exit the market. Consequently, the number of M&A transactions filings based on the failing firm defense is forecast to rise. As there is legal uncertainty regarding the failing firm defense use, this article uses the Brazilian example to propose a screening test for competition authorities to identify failing firms during the upcoming crisis.

Negative effects of the crisis on companies and markets are expected. Most likely, idle capacity will increase and margins will fall dramatically, compromising investments and even firms' survival. Due to the crisis, the number of corporate restructuring and bankruptcy filings will tend to increase over the next months. The latest public figures for corporate restructuring and bankruptcy filings in Brazil[2] are taken from April. When compared to March, the number of corporate restructuring filings in April rose almost 50%. As the social distancing policies were adopted in March, these figures still do not fully reflect the effects of the economic crisis on companies.

Nevertheless, it is possible to forecast that these filings will continue to rise based on the 2015/16 severe recession (Brazilian GDP fell 3.8% in 2015 and 3.6% in 2016). Corporate restructuring filings in Brazil rose from 828 in 2014 to 1,863 in 2016. Bankruptcy filing figures are similar: 671 in 2014 and 1,514 in 2016 (a growth of approximately 125%)[3]. Therefore, by

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[1] The views and opinions expressed in this chapter are those of the authors and do not necessarily reflect the official position of any other agency, organization, employer or company.

[2] The data is made public by Serasa Experian, a Brazilian credit rating bureau. The data is available at https://www.serasaexperian.com.br/amplie-seus-conhecimentos/indicadores-economicos. Viewed on May 27th, 2020.

[3] See footnote 2.

taking 2015/16 as a parameter, one can expect that the number of corporate restructuring and bankruptcy filings to increase significantly.

II. The failing firm defense

When struggling to survive, either an entire company or a division can be put up for sale. A probable buyer may be a competitor who has an opportunity to pursue an acquisition with low probability of clearance, should the target company not be failing.

However, the Brazilian competition law does not contain specific provisions to address M&A transactions when companies face financial difficulties. To deal with this problem, companies will most probably rely on the failing firm defense requirements, which can be found in CADE's[4] horizontal merger guidelines.

The guidelines establish three jointly observed requirements for applying the failing firm defense: 1) the target company will exit the market if the transaction is blocked; 2) its assets will no longer remain in the market, leading to a reduction in supply and to a higher level of concentration, with a consequent drop in social welfare; 3) the target company must demonstrate that it has looked for alternative buyers with less harm to competition and that it will not remain in the market should the transaction be blocked.

A difficult point to prove is that the seller has endeavored to obtain alternative buyers. Especially during an economic downturn, a competitor may be the only potential buyer for a failing firm. Consequently, the requirement to search for a different buyer to lessen the competitive impact is almost impossible to achieve, making the application of failing firm defense unfeasible.

The failing firm requirements are strict, and the burden of proof is high, because they are meant to be applied to extraordinary situations, such as the current one. Therefore, one can expect M&A parties to increasingly rely on the failing firm defense during the deep recession ahead, as being acquired by a competitor may be the only way to avoid bankruptcy. As the Brazilian competition law does not have provisions to address this issue and as the guidelines' requirements are difficult to fulfill, companies could rely on the jurisprudence to find guidance on whether they can apply for the failing firm defense.

[4] CADE is the acronym for Conselho Administrativo de Defesa Econômica, the Brazilian competition authority. The guidelines are available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf

Although the number of failing firm cases in Brazil is low (no more than fifteen cases), three examples are useful in understanding how the Brazilian competition authority deals with the failing firm defense.

In the acquisition of PSUAPE and CITEPE (subsidiaries of Petrobras) by the Petrotemex Group[5], one of the CADE's commissioners recognized the financial difficulty of the companies that were being acquired but rejected the application of the failing firm defense. He questioned the argument that there was only one buyer. According to him, the design of a sale process affects the number of bidders. As a competitor's valuation of the companies which were put up for sale is higher, its bids will be higher, discouraging entrants from bidding. Based on this argument, the commissioner proposed that the evidence presented by the seller that there were not several potential buyers should be dismissed.

Another example that illustrates the restrictiveness of the failing firm requirements is the acquisition of Mataboi by JBJ[6]. CADE's economic unit (DEE/CADE) issued an opinion according to which the failing firm defense should not be applied. The opinion states that, although Mataboi is undergoing corporate restructuring and despite its financial difficulties, there was no evidence that the restructuring was unfeasible and that it would leave the market should it not be acquired by JBJ.

Regarding alternative buyers, DEE/CADE stated that the seller must prove (by means of credible public or private proposals, for example) that there were no other bidders. In addition to listing all potential bidders, the seller should also justify why it did not accept alternative proposals with less harm to competition. As such a step was not carried out, CADE considered that the criterion of no alternative buyers was not fulfilled. CADE's Tribunal, which is responsible for the agency's final decision, corroborated the economic unit's conclusion that the failing firm defense did not apply to Mataboi's acquisition.

The third example worth mentioning is the acquisition of control of Neobus by Marcopolo[7], which held 45% of the target company's capital and acquired the remaining 55%. The parties informed CADE that the transaction would enable Neobus to remain in the market, as the company was failing. Although emphasizing that it was not applying the failing firm

[5] Merging filing n. 08700.004163/2017-32. PSUAPE and CITEPE are Brazilian petrochemical companies which used to be controlled by Petrobras. The transaction was cleared upon remedies by CADE.
[6] Merging filing n. 08700.007553/2016-83. Mataboi and JBJ are Brazilian meat processing companies. The transaction was blocked by CADE.
[7] Merging filing n. 08700.002084/2016-14. Neobus and Marcopolo are Brazilian manufacturers of bus bodies. The transaction was cleared by CADE.

defense and that Neobus's corporate restructuring had not been analyzed, CADE stated that it could not disregard Neobus's financial situation when assessing the transaction.

The precedents confirm that the burden of proof lies with the merging parties, which makes it difficult for them to infer the standard of proof expected by the authority. This is especially true regarding the endeavor to find alternative buyers and the evidence that the firm is failing.

According to the case-law, a firm does not fit into the failing firm defense unless it proves that the probability of its bankruptcy is high. However, for a company to prove that it is failing, it must present evidence that it has been having cash flow problems for a long period before the transaction. Yet, a shock like the current one is a structural break, in the sense that a company's finances can quickly deteriorate. Therefore, the informational content of the past is not a good forecast for the future. Consequently, relying on a company's good recent performance to not characterize it as a failing firm is not appropriate.

In order to circumvent this issue, this article proposes a screening test to be used by competition authorities to identify failing firms. With such a test, merging companies have a guideline to know whether it is feasible to use the failing firm defense. Of course, the parties will not know in advance whether the defense will be accepted, as it depends on the assessment to be made by the competition authority.

III. A screening test proposal

Consider the following premises: firms make investment decisions under conditions of risk and uncertainty. Therefore, they design different risk scenarios regarding cash flows, such as the internal rate of return (IRR) and the net present value (NPV). Such a behavior is explained by the fact that many of the variables that make up cash flows are random, such as future income and expenses. A firm also builds stress test scenarios, as well as contingency plans to mitigate its risks. Nonetheless, significant exogenous adverse shocks (black swans) can lead to much worse results than those initially expected.

During a crisis such as the current one, a firm may incur a loss due to adverse shocks far superior to that normally expected in a stressed investment analysis. Consequently, it will probably exit the market in a non-strategic way, that is, without earning the expected profits. In a black swan situation, non-strategic exits become common. The question is how to identify them through a screening test. This is what is proposed below.

The aim is to present a proposal for companies that have (i) suffered negative impacts from Covid-19; (ii) that want to sell their assets in a non-strategic way; (iii) and that have to file the transaction before an antitrust authority. The screening test proposal consists of five sequential steps:

1- The competition authority determines the initial date of the adverse shock. For example, in the case of Covid-19, it can set it as of January 1, 2020.

2- Collecting data about the target company for a period before the shock's initial date. For example, the authority can use result variables, such as gross margins or monthly gross revenues for at least the last five years.

3- Computing negative extreme values of the selected variables' probability distributions ($V_{extreme}$, thresholds distant from the average) that could be considered in a stress test scenario for investment analysis. There are alternative methods for obtaining these thresholds from a statistical distribution.

4- Collecting information about the target company for the period following the adverse shock's initial date. These are the same variables selected in step 2. Calculating the average values of the result variables for the period after the event's initial date ($V_{observed}$).

5- Subtracting the average value obtained in step 4 from the stressed value (threshold) obtained in step 3 ($Variable\ of\ interest = V_{observed} - V_{extreme}$)..

A negative result for the Variable of interest in step 5 means that the average value after the event is inferior than the extreme negative value of the distribution before the event. Therefore, due to the event, a company is in a worse situation than the negative extreme it planned when it invested. In this case, its sale fits into a non-strategic exit, meaning that staying in the market is unfeasible. Consequently, should a target company find itself in such a situation, there is robust evidence that it is not exiting the market for strategic reasons and that it is a failing firm.

In addition to these five steps, a competition authority should consider additional evidence, such as the Herfindahl-Hirschman Index (HHI) analysis. If the difference between steps 3 and 4 above is negative and if the HHI analysis indicates moderately concentrated markets, an enforcer should consider analyzing the transaction based on failing firm defense.

IV. Conclusion

A screening test is mutually beneficial to the companies and competition authorities for several reasons, such as the reduction in legal uncertainty concerning the failing firm issue. Besides, the screening test can be applied to all industries, and not just to those which suffer most from the recession. Using the same criterion, the authority would rule out any argument that it favors specific industries or companies. Moreover, the same test can be used in future downturns.

Additionally, in case a competition authority accepts the proposed screening test, the burden of proof will remain with the parties. They will be responsible for proving that the target company fits in an authority's criteria for applying the failing firm defense.

Last, it is important to emphasize that the proposed screening test is to be used in extraordinary situations, such as the current severe economic crisis. It could not be otherwise, as the probability associated with an interval below an extreme negative value in a statistical distribution is extremely low. Therefore, a negative result for the variable of interest in step 5 will most probably occur only in exceptional situations.

BOEING-EMBRAER TIE-UP APPROVAL

Roberto Chacon de Albuquerque

I. Towards a Joint Venture

China-Russia Commercial Aircraft International Co. Ltd. (CRAIC), a joint venture set up by Commercial Aircraft Corporation of China, Ltd. (Comac) and Russia's United Aircraft Corporation (UAC), both state-owned, was established on May 22, 2017 for the development of wide-body commercial jets. Comac's two first jets, ARJ21 and C919, were produced to compete in a world market controlled by Airbus A320 and Boeing 737. Following the footsteps of Ilyushin Aviation Complex, JSC Irkut Corporation, Russian Aircraft Corporation "MiG", JSC Sukhoi Company, Tupolev, and A.S. Yakovlev Design Bureau**,** UAC builds civil and military aircrafts. Challenging Boeing and Airbus, CRAIC has attracted interest from airlines across the world.

Table 1. Comac's Two First Jets

ARJ21
C919

As early as 2017, Boeing was considering taking over Embraer. Worth US$ 3.7 billion, employing 18.000 workers in Brazil and abroad, Embraer was the third largest civil aircraft producer, after United States' Boeing and European Union's Airbus. A direct reaction to the Comac-UAC joint venture and the Airbus-Bombardier deal on the CSeries, Boeing-Embraer tie-up project had a long way to go. Approval not only from Boeing's and Embraer's stakeholders and Board of Directors, but also from the Brazilian government and competition authorities across the world had to be received. It demanded time. Boeing needed Embraer's commitment, as well as Embraer needed Boeing's.

A Memorandum of Understanding announcing a strategic partnership between Boeing and Embraer was rendered public on July 5, 2018. Paying US$ 3.8 billion, Boeing would have 80% of a joint venture for Embraer civil aircraft production, valued at US$ 4.75 billion. The remaining 20% would be owned by Embraer. By 2020, this strategic partnership should be profitable for Boeing. The new company, headed by Boeing, would be managed from Brazil. A defense joint venture, marketing the KC-390, renamed Embraer C-390 Millennium, a jet-

powered military transport aircraft, would also come into being. Boeing would own 49% of this joint venture, and Embraer 51%. Stakeholders' approval from Boeing and Embraer was expected by late 2019. This assessment did not prove misleading. The project thrived, the Stakeholders' approval was obtained, but several hurdles had to be overcome in due time as shall be explained hereunder.

Further specifications of the Memorandum of Understanding were meant to conclude the transaction. Boeing's payment would be received by Embraer before the joint venture would distribute 50% of its profits to shareholders. Boeing and Embraer would not be allowed to sell their shares for 10 years. While the defense joint venture, Boeing Embraer-Defense, was meant to produce the Embraer C-390 Millennium, the civil joint venture, Boeing Brasil-Commercial, Embraer's name removed, would design, manufacture and sale ERJs, E-Jets and E-Jets E2. Embraer would retain the executive business jet business, rather consolidated and promising, not only in Brazil.

Table 2. Boeing Brasil-Commercial Jets

ERJs
E-Jets
E-Jets E2

II. Joint Venture Challenged

On December 6, 2018 a Brazilian federal judge, stating that the joint venture would remove Embraer from the Brazilian Government control and that Embraer was profitable, jewel in the crown of Brazilian state-owned enterprises, tried to forbid Embraer's Board of Director to endorse the tie-up Memorandum of Understanding, considered as controversial and detrimental to national interests. As Boeing-Embraer joint venture project came to a halt, doubts came up regarding the tie-up feasibility between these two leading Western aircraft makers. This Brazilian federal judge's injunction temporarily prevented the Brazilian aviation company's Board of Directors from handing over its commercial jet unit to its American counterpart. According to the injunction's rationale, it was advisable to avoid a fait accompli intrinsically characterized by the difficulty or impossibility of reversal by appellate justices. Once the Boeing-Embraer joint venture was set up, there would be no legal relieves capable of unsettling it. Reacting to this Brazilian federal judge's injunction, Embraer made sound and

clear that it would challenge this decision. The market reacted to the uncertainty. Embraer's shares fell 2.57%.

Contrary to the market's fears and experts' analysis, this injunction did not impose hurdles to the incoming tie-up deal between Embraer and Boeing. After months of negotiations, they ended up as foreseen by the Memorandum of Understanding with a well-balanced agreement, a joint venture reaching not despicable US$ 4.75 billion. As expected, 80% of Embraer's commercial jet operation was handed over to its American counterpart. Enhanced by technology transfer, the joint venture is expected to be able to compete with Airbus in the regional jets' world market. Embraer's E 175-E2, considered to be too heavy, did not sell as expected. The Brazilian federal judge's injunction was promptly reversed by an Appeals Court.

The strategic partnership between Embraer and Boeing was officially announced with pomp and circumstance on December 17, but stakeholders had not yet given their greenlighting to the transaction that was expected to boost profits. On December 20, the same Brazilian federal judge blocked once more the proposed tie-up deal. National interests would be harmed by stakeholders' asymmetry, as stated by this injunction's rationale. On December 22, this ruling was also reversed by an Appeals Court, as had happened before. The longed-for joint venture was allowed to proceed. Focused on the regional jets market, Embraer's aircraft expertise, based mostly on the current E-Jet and E-Jet E2 series, would have to prove itself valuable globally.

The strategic partnership between Embraer and Boeing was properly established de jure on January 10, 2019. On February 26, 2019, the tie-up was at last greenlighted by Embraer's stakeholders. However, until worldwide anticompetition authorities authorize this agreement, Boeing and Embraer have to continue to function independently, as two different legal entities. Antitrust reviews followed in Brazil, United States, European Union, China. The strategic partnership between Embraer and Boeing should have US$ 3.5 billion assets against US 1.4 billion liabilities, for a US$ 2.1 billion equity value. Compared to the amount disbursed by Airbus for the Bombardier CSeries, the price paid out by Boeing to Embraer is considered high.

The projected joint venture nonetheless still had a long way to go. As Embraer is a public company, the Boeing-Embraer tie-up had to wait for the Brazilian government's approval. Holding a special share, it had the power to veto key decisions taken by Embraer's Board of Directors.

The Brazilian government supported the Boeing-Embraer tie-up, but locally the joint venture between the American and the Brazilian aircraft makers still depended on the approval of Brazil's competition authority, the Administrative Council for Economic Defense (CADE).

III. Joint Venture Clearance

The merger deal between Embraer and Boeing ended up been unrestrictedly cleared on January 27, 2020 by CADE. According to Brazil's competition law, CADE's General Superintendence decisions that unlimitedly clear tie-up deals may be reconsidered by CADE's tribunal or subject to appeal by interested third parties. The Federal Public Prosecutor's Office (MPF), as an interested third party, tried to reverse CADE decision to acquiesce Boeing-Embraer joint venture. MPF required CADE not to allow Boeing to own 80% of Boeing-Brasil Commercial, thereby taking hold of Embraer's commercial jet operation facilities. Embraer's technological and commercial autonomy, in accordance with MPF's thinking, would be undesirably impaired.

MPF appeal demanded CADE to consider furthermore two specific aspects directly related to the Boeing-Embraer tie-up deal:

> A) First, it would negatively impact the 100 seats aircraft market.
>
> B) Second, Boeing would have too much say in the market after owning 80% of Boeing-Brasil Commercial.

Both standpoints were disconsidered by CADE.

At first MPF was considered as lacking legal competence to appeal against CADE tie-up decisions according to Brazil's Federal Constitution (Article 129: The following are institutional functions of the Public Prosecution: (...) Section 9: to exercise other functions which may be conferred upon it, provided that they are compatible with its purpose, with judicial representation and judicial consultation for public entities being forbidden). As Brazil's competition law limits MPF's intervention role in tie-up clearances, MPF appeal against CADE decision was dismissed. The merger deal was predicted to be enforced without further legal remedies. The decision was final in 15 days, except if CADE commissioners had requested a review.

CADE as a matter of fact came to the conclusion that Boeing-Embraer merger did not pose any risk to competition both on a national and an international level. On the contrary,

Boeing and Embraer have faced continuing competition from Airbus, Comac and UAC, affecting profits and jobs in the United States and Brazil. Furthermore the tie-up deal split Embraer into two different companies that do not compete in the same markets at all. One is responsible for manufacturing civil aircrafts, Boeing-Brasil Commercial, the other, Boeing-Embraer Defense, for producing military aircrafts. Boeing-Embraer fusion deal did not in addition merge these two companies' military production facilities.

Embraer retained a 20% stake in the Boeing-Embraer partnership responsible for manufacturing civil aircrafts. Boeing-Brasil Commercial. Aircrafts are to be branded as Boeing models. Civil aircraft production will remain at the São José dos Campos factory, run by the aforementioned Boeing Brasil-Commercial. Production of the Legacy 450/500 and Praetor 500/600 mid-size executive jets is to be moved by Embraer to Gavião Peixoto factory. Traditionally home to Embraer military aircrafts production, Boeing-Embraer Defense is to be located there.

Table 3. Embraer Executive Jets

Legacy 450/500
Praetor 500/600

MPF appeal against the tie-up clearance did not succeed by asking CADE to consider the merger deal's impact in regional flight operations that use fewer than 100 seats aircrafts. CADE decision sets forth that the Boeing-Embraer deal albeit Boeing's market power in this aircraft sector was not bound to restrict such regional flight operations. Market tests showed that Boeing Brasil-Commercial would not harm aircraft competition in Brazil as a whole. CADE's greenlighting of Boeing-Embraer deal was based on the assessment that this tie-up was competitive friendly. Not only customers would be benefited, but also Embraer and the Brazilian air industry as a whole.

Brazil's 100 to 150 seats commercial aircraft market was not either regarded by CADE to be competitively harmed by Boeing-Embraer tie-up. Contrary to Airbus acquisition of Bombardier Aviation stakes, Boeing-Embraer merger would not result in getting the Brazilian aircraft maker out of the commercial jet industry, as occurred with Canada's Bombardier. On the contrary, Embraer retained indeed the executive jets production. Boeing Brasil-Commercial is expected to become a leading competitor to Airbus, as well as, hopefully, to Comac, UAC

and CRAIC, whose aircrafts are planned in Moscow and assembled in Shanghai, not to mention India's raising state-owned Hindustan Aeronautics Limited (HAL).

Table 4. Boeing Brasil-Commercial Competitors

Airbus
Comac
UAC
CRAIC
HAL

IV. Joint Venture Pending Consent

Since the Boeing-Embraer tie-up has been cleared in most countries, including Brazil, China, Japan, South Africa, United States, the European Commission, home to the frontrunner Airbus, is the last key competition authority to greenlight the deal. The Commission has begun to analyze whether Boeing Brasil-Commercial may impair competition in the commercial aircraft market, crippled by the raising epidemics that came out from Wuhan. The European Commission's main concern is related to the fact that the Boeing-Embraer merger would have removed the third-largest global aircraft maker, Embraer, from existence. The commercial aircraft market, already highly concentrated, would have become more exclusive. As a result, less choice and higher prices.

If Boeing Brasil-Commercial is to contribute to the concentration of the commercial aircraft market, so did the Airbus-Bombardier deal, as well as China-Russia Commercial Aircraft International Co. Ltd. (CRAIC), the aforesaid joint venture formed by Commercial Aircraft Corporation of China, Ltd. (Comac) and Russia's United Aircraft Corporation (UAC). European Commission's clearance would be the final approval of the Boeing-Embraer partnership. More jobs, better prices and greater competition are expected to come out thereof in the commercial aircraft market.

Boeing and Embraer have been in touch with the European Commission since 2018 in order to show the partnership's competitive friendly feature, so as to conclude the evaluation of the tie-up. Given the approval of several other competition authorities, Boeing and Embraer expect unconditional clearance from the Commission for the joint venture. The European Commission extended the decision deadline to April 30, 2020, but, due to the Covid-19 pandemic, this target date may be postponed.

Table 5. European Commission Decision Deadline

April 30, 2020

Having obtained contentment of the planned partnership from the European Commission, Boeing Brasil-Commercial and Boeing Embraer-Defense are expected to be the lasting results of the Boeing-Embraer strategic partnership. As established by the Memorandum of Understanding, Boeing will hold 80% and Embraer 20% of Boeing Brasil-Commercial, the joint ventured vowed to commercial aircraft production, specialized in building 70 to 150-seat jets. As regards Boeing Embraer-Defense, aimed at promoting and developing markets for the multi-mission airlift Embraer C-390 Millennium, Boeing will own 49%, and Embraer 51%.

Table 6. Joint Venture Agreement

Boeing Brasil-Commercial	Boeing: 80%
	Embraer: 20%
Boeing Embraer-Defense	Boeing: 49%
	Embraer: 51%

V. Selected References

AFP. Brazil judge freezes Boeing-Embraer deal, again. Source: https://today.rtl.lu/news/business-and-tech/a/1283250.html. Access: March 8, 2020.

Bloomberg. Boeing Faces Deeper Antitrust Probe of Embraer Deal in Europe. Source: https://www.industryweek.com/leadership/article/22028351/boeing-faces-deeper-antitrust-probe-of-embraer-deal-in-europe. Access: March 12, 2020.

Boeing.____Boeing and Embraer Welcome Brazilian Approval. Source: https://investors.boeing.com/investors/investor-news/press-release-details/2020/Boeing-and-Embraer-Welcome-Brazilian-Approval/default.aspx. Access: March 4, 2020.

CADE. Cade does not recognize MPF appeal and the acquisition of Embraer by Boeing is approved. Source: http://en.cade.gov.br/cade-does-not-recognize-mpf-appeal-and-the-acquisition-of-embraer-by-boeing-is-approved. Access: March 1, 2020.

Embraer. Boeing-Embraer partnership receives shareholder approval. Source: https://embraer.com/global/en/news?slug=1206540-boeing-embraer-partnership-receives-shareholder-approval. Access: March 10, 2020.

Embraer. Embraer announces the resolution of case with the US and Brazilian authorities. Source: https://embraer.com/global/en/news?slug=2129-embraer-announces-the-resolution-of-case-with-the-us-and-brazilian-authorities. Access: March 10, 2020.

Greg Waldron. Boeing, Embraer partnership cleared by Brasilia. Source: https://www.flightglobal.com/airframers/boeing-embraer-partnership-cleared-by-brasilia/136390.article. Access: March 4, 2020.

MercoPress. Brazilian federal judge freezes proposed tie-up of Embraer with Boeing. Source: https://en.mercopress.com/2018/12/07/brazilian-federal-judge-freezes-proposed-tie-up-of-embraer-with-boeing. Access: March 2, 2020.

Michael Tyrrell. Boeing and Embraer partnership wins approval in Brazil. Source: https://www.aero-mag.com/boeing-embraer-partnership-cade-approval-brazil-280120. Access: March 2, 2020.

Reuters. Brazil judge overturns injunction that blocked Embraer-Boeing deal. Source: https://www.reuters.com/article/us-embraer-m-a-boeing/brazil-judge-overturns-injunction-that-blocked-embraer-boeing-deal-idUSKCN1OL0EW. Access: March 2, 2020.

Section 3

Behavior control

Subsection 3.1
General Aspects

WHAT ARE WE ACCUSED OF?

The future of antitrust: two important procedural flaws in Brazilian Antitrust System and how to correct them

Lívia de Melo, Mauro Grinberg

I. Introduction

For the future of antitrust, the authors have two recommendations to adjust important procedural aspects regarding investigations of alleged anticompetitive practices conducted by Administrative Council for Economic Defense (CADE), the Brazilian antitrust agency. Both aim to ensure that the due process and legal certainty are faithfully enforced by CADE's administrative proceeding, given, above all, its sanctioning character. It is important to remind at this point that this is the opinion of the authors and not of the office of which they are members or of the organizations to which they cooperate.

The first recommendation concerns the need for relevant market and market power definitions, even in cases of horizontal restraints. As it will be detailed in Section II, the authors disagree with CADE recent case law, which consolidated that any horizontal restraint is illegal *per se*, and that the definition of relevant market is unnecessary, given that the mere demonstration of conduct's materiality is sufficient for conviction of the companies allegedly involved. The absence of market analysis restricts the right of full defense, since economic players without market power are unable to generate negative effects to the market. At the very least, the measurement of market power must be weighed for dosimetry of penalties.

In turn, the second recommendation is intrinsically linked to the first one. In the previous paragraph, the authors explain that the relevant market should be delimited so that the defendant can fully exercise the right for defense; now the authors highlight the relevance of the procedural moment for delimiting the object. According to the rule of process stabilization, after a given procedural moment the litigious object needs to stabilize and it is no longer possible to change it. As it will explain in Section III, to provide an effective due process, it is essential that the object of the investigation is previously set, in order to guarantee the defendant full knowledge of the object of the process and the legal effects resulting from the decision.[1]

[1] TUCCI, José Rogério Cruz e. A *causa petendi* no Processo Civil, 2ª ed., São Paulo, Revista dos Tribunais, 2001, p. 192.

In the next Sections, the authors present their understanding and their best recommendations for adapting these procedural aspects to the due legal process.

II. The need for relevant market and market power definitions to guarantee the right of defense

In a hypothetical market in which there are three competitors, an arrangement between two of the competitors, each one having 10% of the market, may be considered neutral from the point of view of antitrust effects, even if only potential; the conduct may be even procompetitive in order to better face the third competitor having 80% of the same market. Although it is a horizontal agreement, this conduct is unable to generate anti-competitive impacts and may even generate efficiencies for the market, as lower prices and greater innovation or products. Unlike hard core cartels, an alleged collusion such as this cannot result in the elimination of competition, in the market domain or in an arbitrary increase in profits, excluding the application of article 36, I, of Law 12,529 / 2011 (hereinafter called "Antitrust Law" or "LDC") and, more importantly, of paragraph 4 of article 173 of Brazilian Federal Constitution. Thus, how could such conduct be deemed anticompetitive?

For CADE, it may be and it may lead to high fines, mainly because CADE has created a tradition of defining the relevant market based on the participants of the horizontal restraints, independently of their market shares and regardless of how many competitors can be found outside of the alleged conduct. Or even worse. CADE´s Tribunal has already decided that it is not necessary to define the relevant market or measure the market power because the sheer demonstration of such conduct is enough to prove the potential damages of the unlawful activity[2]. This is the first flaw the authors want to forward in this article.

CADE understands that cartels do not require a more detailed economic analysis, since the net social cost is inherent in such conduct. However, what this article intends to demonstrate is that the definition of the relevant market is a necessary condition for the effectiveness of the right to a fair hearing, in any and all analysis of anticompetitive conduct, not only in cases that investigate unilateral practices. Furthermore, without defining the relevant market, no

[2] Administrative Proceeding No. 08012.004472/2000-12, vote of Reporting Commissioner Frazão, on October, 2014; Administrative Proceeding No. 08012.004039/2001-68, vote of Reporting Commissioner Frazão, on May, 2013; Administrative Proceeding No. 0801.006923/2002-18, vote of Reporting Commissioner Veríssimo, on February, 2013; Administrative Proceeding No. 08012.002127/02-14, vote of Reporting Commissioner Prado, on July, 2005; Administrative Proceeding No. 08700.004617/2013-41, vote of Reporting Commissioner Resende, on July 2019; Administrative Proceeding No. 08012.006043/2008-37, opinion of CADE's General Attorney, on March, 2020.

accusation of violation of free competition is supported. This procedural flaw must be corrected because judicial reviews are starting to pop up, annulling CADE's decisions that failed to fulfill the due process.

We have seen, in the recent past, convictions in horizontal restraints without any scrutiny of the relevant market. For instance, in Brazil, gas stations are obliged by the regulatory authority to publicize their prices in huge billboards, which can lead to tacit parallelism between players, accommodating prices to the same level. However, the parallelism is not necessarily related to an anticompetitive contact between competitors to set prices or to the exchange of competitively sensitive information with the intention of dividing the market.

But what can be done about it, besides showing that this is a flaw? The Brazilian Civil Procedure Code (CPC), which can be used in the administrative proceedings in CADE in given circumstances – except for direct law specifications – provides some clues that can easily be followed.

In fact, article 319, III of CPC establishes, as a condition of the initial petition, the exposition of "*the fact and the legal reasons of the case*". Additionally, article 36, I, of LDC says that a legal violation, to be considered as that, must, among others, "*limit, distort or in any way damage free competition or free initiative*". Combining the two, we can conclude that the final technical note of administrative inquiry – perfectly equivalent to the initial petition, according to article 69 of LDC[3] – must clearly demonstrate how a specific conduct can cause any harm to competition.

At this point it must be remembered that Brazil is a civil law country and, at that, heir of Iberian tradition, which is very formal. This means, to our purpose here, that we are guided by laws that go to (as much as possible) many details. We do not have some abstractions that are very used in common law. Also, the jurisprudence, although important, has its limits, and a Judge can always go against some former decision, even knowing that it may be overruled by a Superior Court. Taking the example of Supremo Tribunal Federal (STF) (the Brazilian equivalent to the Supreme Court), Justices usually issue interim measures that may last for years and they do it individually. An important point is that, although strange to Brazilian law, the concepts of rule of reason and per ser rule are largely used by CADE, although the Judiciary

[3] Art. 69. The administrative proceeding, a contradictory procedure, aims to guarantee the right of a full defense regarding the conclusions of the administrative inquiry, the final technical note of which, in accordance with CADE's rules, constitutes the opening petition.

is very skeptic about it. Such rules are not found either in our laws or in our legal tradition. As a consequence, we cannot just say that a cartel always harms the market, independently of a thorough analysis; we must demonstrate that such harm exists.

So, one point to start correcting such procedural flaw is to establish the need to prove not only that there was a collusion but also that it harmed (even if only potentially) competition in some way. So, in the 80/10/10 hypothetical above mentioned, a collusion may have happened but with no harm to competition. In fact, what kind of harm to competition has this 80-10-10 example can cause? What competition are we talking about? This means that we must define, as narrowly as possible and/or feasible, the relevant market. The result of the definition will lead to the market and the competition we are talking about. Some questions must be answered, mainly: who are the participants of the collusion? These participants of the collusion can impose prices and conditions to the competitors? What are the market shares? Are there other influences of one over the others? What is the regional outreach of every competitor?

The answers to these questions are different from market to market. But it is very important to know if a certain collusion really harms the competition or has no effect. According to Brazilian law, a violation to the Antitrust Law must bear some kind of harm to competition, even if only potential; otherwise it is a harmless collusion and, having no effect on competition, has no relevance to the antitrust discussion.

So, it is possible to correct the first flaw by defining the relevant market, even if this correction may sound (and maybe it is) somewhat childish.

III. Delimitation of the object and stabilization of the procedure: applicability to CADE's punitive administrative proceedings

The correction of the second flaw is connected to article 357, II and IV, of CPC: *"(…) the Judge must adopt measures to organize the file": "limit the factual questions about which the evidence can be produced (…)*" and "*limit the legal issues which are relevant for the decision on the merits*". Translating this article into Antitrust Law, we must only change "Judge" for "General-Superintendence (SG)" – which is CADE´s investigative body – and it is possible to see how the obligation arises. As we can see, this flaw is the lack of a definitive accusation against the defendant.

Here it is clear that, when the SG has to limit the legal issues that are to be under discussion in the case, CADE is fixing the terms in which the defendants are allowed to present

arguments and evidence. No changes are supposed to happen from this moment on, even if and when the SG understands that there are other arguments. These new arguments may be used in a new case but not in the same case in which the SG, acting according to the law, has already made clear what are the points to be considered in the file and no other point is allowed anymore. If these news arguments are included in the same case, the SG should reopen the deadline to submit a new defense, so that the defendants can amend their arguments and evidence.

It is the rule of stabilization of the procedure that is based on the public interest, "*which must respond in a certain and definite manner to the provocation in the author's request. A legislative system that would freely allow the alteration of the elements of the action would generate instability in the jurisdictional provision and, consequently, in the legal relations in general*"[4]. In this way, the stability of the procedure is rooted in the legal certainty itself. Pure civil law!

In addition to the public interest, the stability of the object of the process is also closely related to the right to a fair trial, ensured by article 5, LV, of Brazilian Federal Constitution, which provides that "*plaintiffs, in judicial or administrative proceedings, and defendants in general are guaranteed the right of defense and to a fair trial, with the means inherent to it*". So that there is an effective right of defense, it is essential that the object of the claim is previously set, in order to guarantee the defendant full knowledge of the object of the process and the legal effects resulting from the decision.

This non-allowance of new points for discussion on the merits is valid not only for the defendant but also for CADE, although CADE seldom understand it this way. CADE here has two roles, which may seem – and in a way they are – opposite: as a public attorney (opening the case and following it), who basically accuses the defendant of some antitrust misconduct and as a Judge of first instance deciding that there is or there is not such misconduct. It is fair to say that LDC allows CADE, either through SG or via its Tribunal, to use two hats.

The rule of process stability is consolidated in the Brazilian civil procedural system, which provides that once the lawsuit has been filed and the defendant is notified, there is a stabilization of the contested object, which can no longer be changed by the plaintiff without

[4] GRECO FILHO, Vicente. **Direito processual civil brasileiro**, II, São Paulo, Saraiva, 1984, p. 57.

the defendant's consent (article 329 of CPC).[5] This rule is also present in the Brazilian criminal procedure that, although it grants the Judge the possibility to modify the legal definition of the facts presented by the plaintiff, does not allow the amendment of the description of the fact contained in the complaint, under the terms of article 383 of the Criminal Procedure Code (CPP). If at the end of the probative phase there is a new 'legal definition of the fact' due to new facts or other elements not contained in the initial claim, there must be a new complaint and, of course, a new possibility of submitting a defense. As stated by BADARÓ, "*the object of the claim [...] must remain unchanged throughout the process [...]. If the process serves to verify the claim, the sentence [...] must confirm or refute the claim [...] and cannot be based on or take into account something different, which is not part of the complaint*".[6]Again, pure civil law!

Naturally, the rule of process stabilization is also applicable to CADE's punitive administrative proceedings. Since legal certainty and right of defense and right to a fair hearing are equally valid and applicable to the administrative proceedings, it is imperative that the object of the process – delimited in the technical note for the initiation of the administrative proceeding – remains stable; and, if it does not remain, then another technical note must be issued to ensure the opportunity to present a defense and to provide that evidence production is reopened.

So, the correction of the second flaw is easy: SG must just follow the law and limit, in the beginning of the investigation, what are the issues at discussion and follow such definition without allowing exceptions. This means that not only the accusation cannot be changed but also the arguments for discussions.

IV. Conclusion

The authors used these two flaws because they have easy corrections under the existing laws and there is no need, in order to correct them, to create something new because the legal system already gives us the solutions. The authors hope to have addressed the future of antitrust by correcting these flaws.

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[5] THEODORO JR., Humberto. Estabilização da demanda no novo Código de Processo Civil, *in*: **Revista de Processo**, 2017, p. 195–204.

[6] BADARÓ, Gustavo Henrique, **Correlação entre acusação e sentença**, 3ª ed., São Paulo, Revista dos Tribunais, 2013, p. 81.

In short, the initiation of the administrative proceeding delimits the charges – including the relevant market definition – that are levied on the defendants and, consequently, the burden of allegation and evidence. Therefore, admitting the simple fact that the prosecuting authority may bring new facts to the proceeding, after the presentation of defenses and the analysis of evidence, disregards the Brazilian procedural system and violates the constitutional right of defense.

V. Bibliography

BADARÓ, Gustavo Henrique, Correlação entre acusação e sentença, 3ª ed., São Paulo, in: Revista dos Tribunais, 2013.

GRECO FILHO, Vicente. Direito processual civil brasileiro, II, São Paulo, Saraiva, 1984.

THEODORO JR., Humberto. Estabilização da demanda no novo Código de Processo Civil, in: Revista de Processo, 2017.

TUCCI, José Rogério Cruz e. A *causa petendi* no Processo Civil, 2ª ed., São Paulo, in: Revista dos Tribunais, 2001.

TECHNOLOGY AND DIGITAL MARKETS: WHAT CHANGES IN THE ANTITRUST CONDUCTS ANALYSIS?

Flávia Chiquito dos Santos[1]

Among the main targets of that taunt was Big Tech, the group of companies led by Amazon, Apple, Google, and Facebook that's at the center of Warren's proposed plan to level the playing field in the US economy by unwinding some of the power these giants have amassed. "They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation," Warren alleged last year.[2, 3]

News like that are constantly appearing in the communications vehicles all over the world. Antitrust authorities are aware and debating the matter in international events, especially the effects of the Big Techs[4] strategies in the competition, considering the market power they own.

The challenge of the authorities is to avoid Errors Type I (or false positives) in decisions against potentially antitrust strategies of companies that perform in digital markets. The lack of knowledge of the decision-making authorities about the special features of this dynamic and innovative market puts to a test the traditional antitrust analysis. Therefore, the dilemma of many countries regarding regulation/intervention is this: it can reduce the abuses but it might have a negative impact on innovation.

Considering this, this article attempted to answer the following questions: Has any jurisdiction altered its antitrust regulations to adapt to conducts in the digital market? Which step of the antitrust analysis has been object of concern of the authorities? How Brazil has been dealing with antitrust conducts in the digital market? Some thoughts about these questions are

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[1] This article was made with the valuable collaboration of Nicole Kataviras e Roberta Helena Ramires Chiminazzo (lawyers of the office Manesco Ramires Perez Azevedo Marques Sociedade de Advogados) and researches were made with the help of my team, Catharina Araújo de Sá and Thaís Pereira dos Santos Lucon.

[2] Declaration made by Elizabeth Warren, precandidate in 2020 to the presidency of the United States (WARREN, Elizabeth. Here's how we can break up Big Tech. **Medium**, March 8, 2019. Available at: https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c).

[3] DEL REY, Jason. Why Congress's antitrust investigation should make Big Tech nervous. **Vox**, 6 fev. 2020. Available at: https://www.vox.com/recode/2020/2/6/21125026/big-tech-congress-antitrust-investigation-amazon-apple-google-facebook.

[4] Big Techs are the big technology companies. The best known are Google, Facebook, Amazon and Apple.

presented in this article, without the aspiration to make a complete analysis of this complex theme.

I. Has any jurisdiction altered its antitrust regulations to adapt to conducts in the digital market?

Considering a non-exhaustive research, it was not found any changes in the legislation regarding the rules to analyse antitrust conducts in digital markets. The main jurisdictions consulted were the American[5], European[6], Canadian[7] and Israeli[8], as well as the legislation from emerging markets in BRICS (Brazil, Russia, India, China and South Africa) [9].

In general, the international debates converge about the caution to avoid overdeterrence *versus* the variables that need to be enhanced when it comes to digital markets. Searching for new approaches, some guidelines were presented by these countries concerning steps on the analysis that should be made according to the case.

II. Which step of the antitrust analysis has been object of concern of the authorities?

According to the jurisdictions researched, it was found that the antitrust authorities agree that the traditional investigation of conducts, especially considering "relevant market" and "power market" should be reconsidered. However, due to the dynamism of digital markets, the analysis of the effects of conducts should be considered case-by-case. Other concerns were identified, but those are not subject to this article.

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[5] UNITED STATES OF AMERICA. Department of Justice. **Division tackles digital markets**: Division uptade. 2019. Available at: https://www.justice.gov/atr/division-operations/division-update-spring-2019/division-tackles-digital-markets.

[6] CRÉMER, Jacques; MONTJOYE, Yves-Alexandre de; SCHWEITZER, Heike. **Competition policy for the digital era**. European Commission, 2019. Available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[7] CANADA. Competition Bureau. **Big data and Innovation**: Implications for Competition Policy in Canada. 2017. Available in: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html.

[8] ISRAEL. Israel Antitrust Authority. **The Israel Antitrust Authority invites interested members of the public to submit their comments, towards an inquiry into competition issues in the digital economy**. Available at: https://www.gov.il/BlobFolder/reports/marketresearch-digitaleconomy/he/marketresearch_%D7%A7%D7%95%D7%9C %D7%A7%D7%95%D7%A8%D7%90 %D7%91%D7%A2%D7%A0%D7%99%D7%99%D7%9F %D7%9B%D7%9C%D7%9B%D7%9C%D7%94 %D7%93%D7%99%D7%92%D7%99%D7%98%D7%9C%D7%99%D7%AA.pdf.

[9] RESEARCH ON THE COMPETITION ISSUES IN THE DIGITAL MARKETS. **BRICS in the digital economy**: Competition Policy in practice: 1st Report by the Competition Authorities Working Group on Digital Economy. Moscou, 17 set. 2019. Available at: http://www.cade.gov.br/noticias/cade-lanca-relatorio-sobre-economia-digital-em-reuniao-do-brics.

- Relevant Market

Considering the definition of relevant market, the main difficulty of the antitrust authority is that the Hypothetical Monopolist Test, the first step of traditional analysis, is usually not enough for big data[10] cases, that concern multi-sided platforms. This tool is more easily applied to cases in which the product or service is sold by a determined price. However, companies that have big data as main asset do not always sell data to a previously stipulated price. One example is the multi-sided platforms that collect consumer's data offering products that are namely free (for instance, research mechanism, social media platforms, and mobile apps) and use this data for other services, such as advertising sale. Is this scenario is hard to measure how interchangeable are the priced and free products, because it is clear that multi-sided companies have competitive advantages that are hard to measure when compared to one market companies. In this case, it is necessary to resort to alternative methods to define relevant market and the focus should be in direct evidence and in competitive effects of a conduct to the well-being of the market and its final consumers.

The Department of Justice of USA[11] has already stated that American laws and politics allow flexibility to make case-by-case analysis. These analyses should consider the prices usually charged in the market; the innovations stablished and if these innovations are an obstacle to new companies; and the restrictions imposed to the consumer's choice should be evaluated as well.

The European Commission[12] highlighted that in cases related to digital markets, the definition of relevant market is less applicable and the Theory of Antitrust Damages and the identification of antitrust strategies should be preferred. The European Commission also suggests shifting the burden of proof, in order to make the investigated company to prove that the strategy does not harm the competition.

[10] Large and complex data, usually created in real time and with exponential growth. (Big Data. In WIKIPEDIA. Available at: https://pt.wikipedia.org/wiki/Big_data).
[11] UNITED STATES OF AMERICA. Department of Justice. **Division tackles digital markets**: Division uptade. 2019. Available at: https://www.justice.gov/atr/division-operations/division-update-spring-2019/division-tackles-digital-markets.
[12] CRÉMER, Jacques; MONTJOYE, Yves-Alexandre de; SCHWEITZER, Heike. **Competition policy for the digital era**. European Commission, 2019. P. 46. Available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

The Israel Antitrust Authority (IAA)[13] also listed the definition of relevant market as a challenge to the authorities. A consolidation between a bread supplier and a software supplier would not demand a thorough analysis, because it would be identified a horizontal or vertical relation between the two businesses. Nonetheless, the use of big data to maintain all commercial activities leads to the question if the concept of "*conglomerate effect*" really exists in the digital economy. For example, the consolidation of an e-commerce platform and a supermarket chain can seem simply as a conglomeration, experience shows that an entity with unified data to consumers online and offline can represent a barrier to entry to new players that do not have access to the same amount of data.

According to the Competition Bureau[14], normally the antitrust analysis use the Hypothetical Monopolist Test, but in digital market cases, this test may not be adequate. The first issue is how to measure "free" products. The Competition Bureau's report stated that in order to measure de substitutability not only price should be taken into account, but also other variables, considering quality. For instance, the Hypothetical Monopolist Test could be useful if the quality is considered instead of the price of the product. In addition, even if a price is charged in all sides of the market, it is not always clear how to apply the Hypothetical Monopolist Test. Although one side of a platform can constitute a defined market using the Hypothetical Monopolist Test, it is necessary to have a clear notion of the interaction of the sides of the market to define the markets that relate to the platform.

Finally, the BRICS Report[15] informs that the antitrust authority of the countries indicate that the definition of relevant market and the evaluation of power market is more subtle when related to digital markets. That happens because the boarders of the market are unclear, as the companies constantly create new products and services. The platforms demand a definition of relevant market in both sides (or multi sides) and raise the question if the platforms in each side compete or should be included in the same market. Moreover, the prices in one side are usually null, making the definition of market more challenging.

[13] ISRAEL. Israel Antitrust Authority. **The Israel Antitrust Authority invites interested members of the public to submit their comments, towards an inquiry into competition issues in the digital economy**. P. 7 Available at: https://www.gov.il/BlobFolder/reports/marketresearch-digitaleconomy/he/marketresearch_%D7%A7%D7%95%D7%9C %D7%A7%D7%95%D7%A8%D7%90 %D7%91%D7%A2%D7%A0%D7%99%D7%99%D7%9F %D7%9B%D7%9C%D7%9B%D7%9C%D7%94 %D7%93%D7%99%D7%92%D7%99%D7%98%D7%9C%D7%99%D7%AA.pdf.
[14] CANADA. Competition Bureau. **Big data and Innovation**: Implications for Competition Policy in Canada. 2017. P. 12-13. Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html.
[15] RESEARCH ON THE COMPETITION ISSUES IN THE DIGITAL MARKETS. Op. cit., p. 11-12.

- Market Power

The assessment of market power in digital markets is harder. The non-tariff nature of some markets, especially in two sided platforms, shows that the authorities will have to find a new method to define market power and understand how these companies use their power to harm competition. In general, the antitrust agencies support a case-by-case analysis and an evaluation of the multi-markets connectivity.

The Competition Bureau mentioned the forms to identify indicators of market power[16]: (a) study of prices; (b) barriers to entry and (c) market share.

a. The study of process should consider all sides of the platforms, isolated and jointly, to verify cross subsidization.

b. Barriers to entry: when data is an essential asset in a market, it can become a barrier to entry. The exchange costs related to data can also be a barrier to entry. For example, the consumers could consider costly to transfer their data from a platform to another. In some cases, dominant companies can take actions to increase the costs of change, by imposing restrictive contracts, for instance. This measure can give the agent even more market power. Data could also represent barrier to entry due to network effects: the more users and advertisers use a research mechanism, the more data could improve the products and consequently, attract more users and advertisers. However, it is important to weight that, in one hand, these data could improve the products and services available, on the other hand, this data can make it harder to new players to entry the market and to the competitors to grow.

c. Market share can over or underestimate the market power of a company. This is especially relevant when related to bid data, as the markets are dynamic and difficult to measure and the current position a company could not reflect the competitive future. When assessing an acquisition of a company with low market share, but with valuable data, the agencies should measure the incentives pro acquisition and the importance of the data being acquired, since these factors can affect barriers to entry and cause competitive effects.

Those variables – for instance relevant market and market power – influence the analysis of unilateral conducts. In the coordinated conducts between competitors, it is possible to verify

[16] CANADA. Op. cit., p. 14-16.

that data works as an enabler to anti-competitive arrangements, that are still a condition to characterize colluding. That means the technological evolution does not dismiss the need of an arrangement between the participants. Big data can introduce other forms more efficient and powerful to implement and manage a cartel, but it does not introduce a new type of activity. Even though the tools have become more sophisticated due to technology, the misconduct is still the contact between competitors.

It is more frequent that cartels take advantage of technological innovations to facilitate operations, either sharing sensitive information or using a more sophisticated method. For example, adjusting algorithms to adjust price instantly can be a powerful took for those seeking to manipulate the market. Although algorithms cause a distortion, it has not been found a specific legislation to this aspect. According to the antitrust authority in Russia (FAS), this aspect will be addressed by an amendment to the current legislation[17].

III. How Brazil has been dealing with antitrust conducts in the digital market?

The Administrative Council for Economic Defence (namely CADE), the Brazilian antitrust authority, did not made any changes in its current regulation to address technological markets cases. As listed in the BRICS Report, the rules and policies, as well as the tools and methods to analyse competition in digital market are adequate:

> *"Brazil, India and South Africa hold that the respective legal framework leaves enough room to adapt the existing concepts and tools, so that the current toolkit has been suitable to analyze the cases involving digital markets. In the words of the CCI, the existing principles and provisions of the competition law are flexible and holistic enough for antitrust assessment of practices emerging in the digital space."*[18]

Naturally, CADE is a part in internationals debate to reflect on the best way to analyse cases related to digital markets. As an example, in 2019, Brazil hosted the event "Cartel Workshop", promoted by International Competition Network (ICN) aiming to debate with antitrust authorities of many jurisdictions the paradox brought by digital markets in facing cartels. In one hand, access to data could be an important tool to authorities to detect colluding conducts[19], but on the other hand, the access to data could facilitate the coordinate behaviour between competitors. Moreover, CADE has been participating in several workshops related to

[17] RESEARCH ON THE COMPETITION ISSUES IN THE DIGITAL MARKETS. Op. cit., p. 20.
[18] Ibidem, p. 41.
[19] CADE has developed a software called "Project Brain", namely "Projeto Cérebro". This program recognizes possible collusions between companies in public bids considering the information obtained by a database related to public purchases.

the theme, especially for participating in BRICS, which has an agenda of debates and shares the best practices between countries.

Looking into the digital market cases CADE has already investigated, it is possible to note that the analysis of cartel conducts remain the same, as cartel in considered an infraction *per se.* However, CADE considered technological tools used for colluding for its potential effect on the success of the conduct. According to the BRICS Report, there are five cases related to anticompetitive strategies implemented by some digital tool currently being analysed by CADE.[20]

In relation to unilateral conducts, CADE has also been investigating cases related to abuse of dominant position in digital platforms. CADE does not have a static view over market power, considering several aspects to define relevant market, especially when there are multi-sided markets. In procedure concerning Google, CADE emphasizes the importance of the effects. According to the BRICS Report, there are five cases of unilateral conducts in digital markets being analysed by CADE[21].

IV. Considerations about the digital market and its close relationship with data

Much has been discussed about the importance to regulate data – which are the most valuable assets in the digital market. As stated by Clive Humby "data is the new oil". As pointed by the European Commission, a more rigorous regime of data portability should be stablished in cases related to companies that hold dominant position. Grouping same type data or complementary data resources could allow companies to develop better or new products and

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[20] The administrative procedures n. 08012.00 2028/200 2-24 and n. 08012.00 3572/200 4-55, both related to airlines companies, the companies used software to help arrangements of prices between competitors. The administrative process n. 08012.011 791/2010 -56, related to driving schools, an IT company was hired to monitor and make prices deals. The administrative process n. 08012.00 5660/201 0-30 is about a cartel in vehicle registration plates and the electronic system created to manage the cartel was considered an aggravating factor. The administrative procedure n. 08700.008318/2016-29, investigating Uber was filed because the cartel was not identified. The motives were: (i) Uber does not act to incentive communication between the drives; (ii) the fact that the drives agree to the terms stablished by Uber does not make an agreement between them and (iii) there is no goal related to collusion in centralizing in Uber. The consistency of prices is related to Uber's business model. The administrative process n. 08012.002812/2010-42 is about the distribution of recharges in pre-paid telephones.

[21] The administrative procedure n. 08012.010 483/2011- 94 investigate Google in the search market and prices comparator. The investigation was filed because it was not able to prove infraction. The administrative procedure n. 08700.00 5679/2016-13 investigates Expedia, Decolar, Booking, and Fórum de Operadores Hoteleiros do Brasil, regarding imposition of most favoured nation clause, restricting the possibility of hotels to offer in competitors platforms. The case ended with an agreement to cease the conduct. The administrative procedure n. 08700.004314/2016-71 investigates Claro S/A, Tim Celular S/A, Oi Móvel S/A and Telefonica Brasil S/A for discriminating access to certain applications. The investigation was filed because it was unable to prove the infraction. The administrative procedure n. 08700.00 6964/2015-71 investigated the conduct of taxi drives to prevent the entry of Uber. The procedure was also filed for lack of evidence.

services. However, these arrangement could become anti-competitive in some situations, such as (i) competitors who do not have access (or have access under less favourable conditions) could be excluded from the market, (ii) agreements to share data could represent an exchange of anti-competition information, when it includes competition information.

Considering this, transparency in the data management and the need to stablish a data protection authority that regulates digital platforms to favour consumers are indispensable. Seeking these objectives, the European Union approved the General Data Protection Regulation (GDPR), which started being effective on 25.05.2018. In Brazil, the General Law for Data Protection (namely Lei Geral de Proteção de Dados) was approved on 14.08.2018 (Law N. 13,709/2018 – LGPD). The Brazilian law regulates the treatment of personal data aiming to protect fundamental rights of freedom and privacy. At the time, the president vetoed the creation of a Nation Authority to Protect Data (Autoridade Nacional de Proteção de Dados – ANPD). However, on 08.07.2019 another law was approves (Law N. 13,852) creating the ANPD, agency linked to the Presidency, responsible for protecting personal data, elaborating rules and procedures on the subject and issuing opinions related to the interpretation of LGPD, as well as other functions. The same law also created the National Council of Personal Data Protection and Privacy that is able to suggest strategic guidelines and provide assistance to help elaborate the National Policy of Protection of Personal Data and Privacy. The National Council should also assist the operation of ANPD and suggesting actions, among other activities.

The core concept is that the property of personal data is of its owners, which have the power to accept or not the collection, transference, use and sharing of the data. Considering this, data can only be treated with previous and explicit acceptance of its owners. LGPD also stablishes that the data can only be used according to the use authorised. The use of the data should also be related to the activity of the authorised holder of the data. The principles of necessity and adequacy should be attended.

The importance of effective ruling in personal data has been growing as the technology and digital markets develop and some cases of inappropriate use of data occurred. The case of manipulation of data collected through Facebook by Cambridge Analytica, for instance, has shown the economic power of the agents that possess data in the current global economic scenario and how data management could influence the decisions of consumers.

In February of 2019, the German authority prohibited Facebook to use personal data collected by other social media, such as WhatsApp, Instagram and other sites without the

approval of the owner. For the antitrust agency, this type of data collection made by Facebook constitutes abuse of dominant position, considering Facebook is the dominant company in social media and the users have no choice to switch to competitors.

The terms of service presented by Facebook gave the user no choice but to accept the treatment of data imposed or to refrain from using the social network owned by Facebook. This allows the conclusion that the authorization was involuntary.

Considering this, it is clear that CADE will have to cooperate with the ANPD when approaching digital market cases. Article 55 K from LGPD explicitly stablished that ANPD should articulate with other agencies that have competences related to personal data protection.

V. Reference List

BIG data. In: WIKIPÉDIA: the free encyclopedia. Available at: https://pt.wikipedia.org/wiki/Big_data.

CANADA. Competition Bureau. **Big data and Innovation**: Implications for Competition Policy in Canada. 2017. Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html.

CRÉMER, Jacques; MONTJOYE, Yves-Alexandre de; SCHWEITZER, Heike. **Competition policy for the digital era**. European Commission, 2019. Available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

DEL REY, Jason. Why Congress's antitrust investigation should make Big Tech nervous. **Vox**, February 6, 2020. Available at: https://www.vox.com/recode/2020/2/6/21125026/big-tech-congress-antitrust-investigation-amazon-apple-google-facebook.

ESTADOS UNIDOS. Department of Justice. **Division tackles digital markets**: Division uptade. 2019. Available at: https://www.justice.gov/atr/division-operations/division-update-spring-2019/division-tackles-digital-markets.

ISRAEL. Israel Antitrust Authority. **The Israel Antitrust Authority invites interested members of the public to submit their comments, towards an inquiry into competition issues in the digital economy**. Available at: https://www.gov.il/BlobFolder/reports/marketresearch-digitaleconomy/he/marketresearch_%D7%A7%D7%95%D7%9C%D7%A7%D7%95%D7%A8%D7%90%D7%91%D7%A2%D7%A0%D7%99%D7%99%D7%9F%D7%9B%D7%9C%D7%9B%D7%9C%D7%94%D7%93%D7%99%D7%92%D7%99%D7%98%D7%9C%D7%99%D7%AA.pdf.

RESEARCH ON THE COMPETITION ISSUES IN THE DIGITAL MARKETS. **BRICS in the digital economy**: Competition Policy in practice: 1st Report by the Competition Authorities Woking Group on Digital Economy. Moscou, September 17, 2019. Available at: http://www.cade.gov.br/noticias/cade-lanca-relatorio-sobre-economia-digital-em-reuniao-do-brics.

WARREN, Elizabeth. Here's how we can break up Big Tech. **Medium**, March 8, 2019.

Available at: https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

CADE ENFORCEMENT TRENDS BASED ON INVESTIGATIONS OPENED IN 2019

Lígia Melo, Matheus Nasaret, Renata Arcoverde

I. Introduction

This article is a review of the public investigations[1] opened by CADE's Superintendence-General ("SG") in 2019, which amounted to 38 investigations, – 16 preliminary investigations[2] and 26 administrative proceedings[34].

The review of these cases allowed the identification of certain enforcement trends, such as the types of conducts and economic sectors CADE has targeted, the circumstances in which it has cooperated with other governmental agencies and the investigative steps the SG has taken when conducting antitrust investigations, which will be presented in this article.

II. Enforcement trends identified through the review

a. Types of conducts targeted by CADE

At first, the review of cases suggested there was some sort of balance among cases involving coordinated behavior and unilateral conducts in 2019 – out of the 38 investigations analyzed, 21 (55%) targeted coordinated behavior whereas 17 (44%) targeted unilateral conducts.

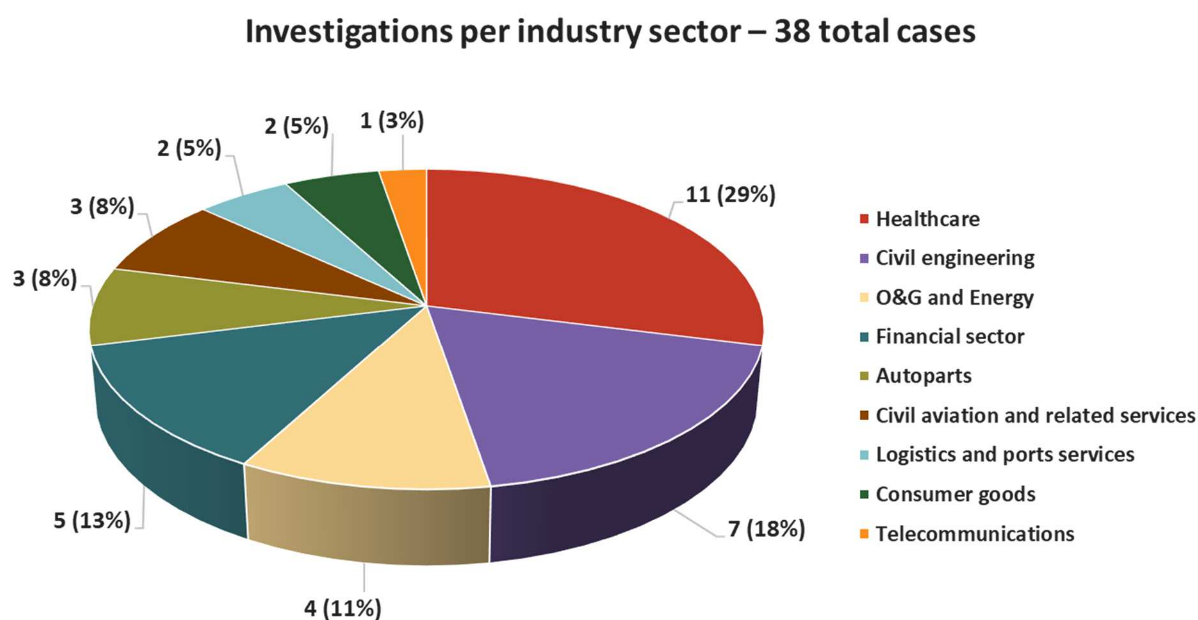
However, this balance is not uniform across economic sectors, as will be further detailed in ***Section 2.2*** below. In the civil engineering sector, for instance, all investigations opened in 2019 relate to cartel conduct, in particular, bid rigging schemes. Concerted practices were also

[1] In order to carry out this assessment, we identified all cases that ***(i)*** were opened by means of decisions issued from 1 January 2019 to 31 December 2019; ***(ii)*** under the form of either a preliminary investigation (regulated by Chapter III of Law No. 12529/2011) or a formal administrative proceeding (Regulated by Chapter IV of Law No. 12529/2011); and ***(iii)*** had at least one case file publicly available at CADE's official database – the Electronic Information System ("SEI"). By carrying out a research based on the abovementioned criteria, we identified 42 cases, three of which are spin-offs of investigations opened in previous years and, as such, were not considered "new investigations" for the purposes of this assessment.
[2] From the original "*Inquérito Administrativo*" in Portuguese.
[3] The assessment did not cover preparatory proceedings (unless they resulted in a preliminary investigation or a formal administrative proceeding in the course of 2019), as those are only destined to a preliminary analysis of whether a conduct falls within the scope of CADE's jurisdiction and could be investigated by it (pursuant to article 66, § 2º of Law No. 12.529/2011).
[4] There is a gap between the number of cases we identified and the 89 investigations CADE reported to have opened in its 2019 Yearbook. This gap may be attributed to the fact that this assessment did not cover preparatory proceedings and some investigations conducted by CADE are entirely confidential. This is typically the case of preliminary investigations involving leniency agreements and dawn raids, for instance, among other cases.

the focus of all auto parts investigations initiated by the SG. In the financial sector, on the other hand, virtually all of the investigations target unilateral conducts associated with the verticalization of this sector.

b. Economic sectors scrutinized by CADE

The public investigations opened in 2019 covered the following economic sectors:



Healthcare sector. The SG opened 11 investigations in the healthcare sector in 2019 – almost 1/3 of the total of investigations, which suggests a concentration of enforcement efforts in this industry. Three out of the four proceedings that started and ended in 2019[5] at the SG level were in the healthcare sector, which may also suggest a certain priority with respect to this segment. The healthcare sector investigations covered mainly two types of anticompetitive conduct: *(i)* refusal to deal (three cases, all of which involving health insurance companies) and *(ii)* restrictive practices undertaken by cooperatives of physicians, such as the establishment of minimum fees for medical services charged from health insurance companies (five cases)[6]. The investigations were mostly triggered by complaints filed by *(i)* State and Federal Prosecutor's

[5] Administrative Proceeding No. 08700.005969/2018-29, Preliminary Investigation No. 08700.004427/2018-39 and Preliminary Investigation No. 08700.006003/2017-28.

[6] The remainder of the cases were ***(i)*** an exclusivity case involving a health insurance company (Preliminary Investigation No. 08700.000537/2019-11), ***(ii)*** a case involving the prohibition, by entities responsible for regulating the medical profession, of the acceptance of discount cards by clinics and physicians (Administrative Proceeding No. 08700.005969/2018-29); and ***(iii)*** a case involving the publication of tables containing reference prices of drugs and medical equipment (Administrative Proceeding No. 08700.001180/2015-56).

Office (three cases) and *(ii)* victims of the alleged antitrust violations (four cases). The healthcare sector may continue in the spotlight in 2020 – especially in view of the crisis sparked by the new coronavirus outbreak. Indeed, CADE has already opened a major preparatory proceeding to investigate potential abusive practices in connection with the provision of healthcare products and services[7].

Civil engineering. All the seven investigations opened by the SG to look into the civil engineering segment target bid rigging schemes. Most of them started from leniency agreements – at least five out of the seven cases[8]. Apart from leniency, one of the cases was triggered by a report received from a criminal court assigned to judge a criminal lawsuit apparently covering the same facts[9]. High profile cases connected to the Car Wash Operation opened by the SG in 2019 include investigations into the following bidding procedures: (i) Belo Monte's hydro power plant[10]; (ii) Petrobras' buildings construction (Sede de Vitória, Novo Cenpes and CIPD)[11] and (iii) 2014 World Cup stadiums renovation[12].

Oil and Gas and energy. The SG opened four investigations into this sector in 2019, three of targeting unilateral conducts and the other probing a concerted practice. At CADE's Tribunal request[13], the SG started looking into Petrobras dominant position in the refinery segment[14], which resulted in a settlement agreement between CADE and the state-owned company to divest its refinery around the country. In the ethanol distribution market, the SG is looking into whether failing to pay taxes could be considered an anticompetitive behavior, as it would represent an unfair competitive advantage[15]. The SG also started looking into whether a group active in both power distribution and fuel supply could be forcing power generation companies to acquire fuel from its affiliate to the detriment of other fuel suppliers in the market[16]. In the concerted practice front, the SG is investigating whether the formation of a consortia between Raízen, Petrobras and Ipiranga hindered the competition in public auctions of port areas.

[7] Preparatory Proceeding No. 08700.001354/2020-48.
[8] See Administrative Proceeding No. 08700.004248/2019-82; 08700.006377/2016-62; 08700.007777/2016-95; 08700.006630/2016-88; 08700.005992/2019-02.
[9] See Administrative Proceeding No. 08700.000269/2018-48.
[10] See Administrative Procedure No. 08700.006377/2016-62.
[11]See Administrative Procedure No. 08700.007777/2016-95.
[12] See Administrative Proceeding No. 08700.006630/2016-88.
[13] The request was based on a technical note prepared by the DEE in the context of a working group formed with the National Agency of Petroleum, Natural Gas and Biofuels ("ANP").
[14] See Administrative Proceeding No. 08700.006955/2018-22.
[15] See Administrative Proceeding No. 08700.002532/2018-33.
[16] See Administrative Proceeding No. 08700.004019/2019-68.

Financial Sector and payment methods. The verticalization of the financial sector is being scrutinized by CADE as a whole since the CADE President determined the opening of an investigation on "*anticompetitive practices in the financial market and the segment concerning electronic payment methods, with special attention to the effects of verticalization in the financial sector*" in December 2018[17]. The order was based on a report produced by Senate's Commission for Economic Affairs, which raised concerns about the high concentration and verticalization of the sector and suggested measures to address these issues[18]. Following this, CADE's Economic Studies Department published a study on the payment services market in 2019, in which it also addressed the problems deriving from this phenomenon, combined with the high concentration of the market[19]. In this context, CADE opened three additional investigations on vertical practices undertaken by banks throughout 2019. While two of them also concern practices allowed by the verticalization of financial institutions offering both banking and payment services (such as the imposition of obstacles to the use of bank services by *fintechs* offering credit cards, for instance)[20], the other concerns the imposition of obstacles to the access of customers' banking data by GuiaBolso, a personal finance app[21]. Finally, a proceeding not related to the abovementioned concerns was opened to investigate non-compliance with a decision issued by CADE in 2015 by two companies that provide automatic payment of parking lots and tolls via radiofrequency identification[22].

Auto parts. The SG opened three investigations in the auto parts segment, all of which targeting concerted practices. One investigation was opened as a result of conducts uncovered in the context of a previous CADE investigation[23]. The origin of the other two is not disclosed in publicly available documents, but confidential excerpts in their respective opening decisions suggest that they were triggered by leniency agreements and/or dawn raids[24].

Civil Aviation. Concerns expressed by the Senate – and also by the Attorney-General before CADE – resulted in the opening of a broad investigation into the civil aviation sector as well. CADE had a very active participation in recent discussions concerning the civil aviation sector, such as those surrounding the end of checked baggage allowance in Brazil and the

[17] Presidency Order No. 279/2018 (SEI 055582) issued in the context of Communication No. 08700.006891/2018-60, which resulted in the Administrative Proceeding No. 08700.000022/2019-11.
[18] See Report (SEI 0555584) attached to the case files of the Communication No. 08700.006891/2018-60.
[19] *Cadernos do CADE: Mercado de Instrumentos de Pagamento*, published and updated on 27 Nov. 2019.
[20] See Administrative Proceedings No. 08700.003187/2017-74 and 08700.002066/2019-77.
[21] See Administrative Proceeding No. 08700.004201/2018-38.
[22] See Administrative Proceeding No. 08700.006268/2018-15.
[23] See Administrative Proceeding No. 08700.006005/2019-89.
[24] See Administrative Proceedings No. 08700.000881/2019-00 and 08700.002290/2019-69.

dispute for the slots originally owned by Avianca, which filed for bankruptcy in May 2019[25]. The impact of these two events in ticket prices will now be assessed in an investigation that aggregates conducts perpetrated in multiple Brazilian States[26] and which focuses on the reasons behind the price increase in flight tickets and aviation fuel in Brazil during the past two years[27]. Civil aviation is likely to continue receiving attention from CADE, as the authority disclosed in its 2019 yearbook that it has prepared a work plan to implement the cooperation agreement it has in place with the National Agency for Civil Aviation.

Logistics and port services. The SG opened two investigations in this sector in 2019, both into unilateral conducts. One of the cases involved the allegedly abusive charge of the so-called THC2 fee by a port operator from an inland customs warehouse for the provision of port handling services[28]. The other case concerned an alleged refusal to deal by an integrated company active in both upstream logistics services and downstream port elevation services, in relation to a competitor in the upstream market that relied on elevation services[29]. Both investigations started after the victims of the alleged antitrust violations filed complaints with CADE.

Consumer goods**.** In 2019 the SG opened two investigations into the sale of consumer goods in the context of public tender proceedings. One of them concerned possible coordinated conduct in a tender held by the Brazilian Company of Airport Infrastructure for the right to explore commercial spaces such as restaurants, coffee shops and others in multiple airports throughout the country. The other investigation, in turn, concerned the lack of competition for the sale of food and beverage in popular events promoted by town halls due to exclusivity rights granted to tender winners, an investigation the SG has already closed.

Telecommunications[30]. CADE opened one preliminary investigation targeting clauses included in agreements executed between content programmers and pay-TV operators as a result of an investigation terminated without the imposition of any sanctions in 2019[31].

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[25] In this context, CADE's Economic Studies Department also published two Technical Opinions on matters concerning the aviation sector in 2019 (See Technical Opinions nº 11/2019/DEE/CADE and 12/2019/DEE/CADE, SEI 0608586 and 0611619).
[26] Although there were originally multiple investigations targeting specific States of Brazil, they were later concentrated in a single proceeding.
[27] See Preliminary Investigation No. 08700.001653/2019-49. The proceeding also comprises a price fixing allegation involving the airlines Latam and Gol, although this does seem to be the focus of the investigation.
[28] Administrative Proceeding No. 08700.000351/2019-53.
[29] Administrative Proceeding No. 08700.005778/2016-03.
[30] See Preliminary Investigation No. 08700.001323/2019-53.
[31] See Preparatory Proceeding No. 08700.000721/2016-18.

c. Collaboration between CADE and other authorities

Collaboration between CADE and other public authorities has been on the rise lately, and the investigations analyzed in this article show several examples of this.

In investigations involving cartel behavior, cooperation with criminal courts and prosecutors is very common. The most emblematic example of such cooperation comes from the Car Wash Operation, in which CADE requested access to the evidence obtained by criminal courts[32] and state prosecutors[33], and also cooperated with federal prosecutors to enter into leniency agreements with the companies and its employees – many of which executed plea bargains with federal prosecutors in parallel[34].

In investigations involving bid rigging schemes, the SG seems particularly interested in obtaining information from the public entities affected by the conduct. In the Belo Monte power plant case, the SG conducted oral hearings with several of Eletrobrás employees, in addition to requesting documents and internal audits conducted by the state-owned company and its subsidiary in charge of the enterprise. The same happened in Petrobras' buildings construction case and in the 2014 World cup stadium case, in which CADE requested information from Petrobras with respect to the bids investigated.

In cases involving regulated markets, cooperation between CADE and regulatory agencies is a rule[35]. In the probe into Petrobras abuse of dominant position in the refinery market[36], CADE and ANP discussed the structure of the refinery market in the context of a working group formed by both agencies to discuss the fuel market, and ANP suggested to CADE that measures should be taken in view of Petrobras monopoly in the segment. ANP had an active role in the investigation, which resulted in a settlement agreement between CADE and the state-owned company to divest its refineries around the country.

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[32] See, for instance, Administrative Proceeding Nos. 08700.006377/2016-62 and 08700.007777/2016-95.
[33] See, for instance, Administrative Proceeding No. 08700.006630/2016-88.
[34] See, for instance, Nos. 08700.006377/2016-62, 08700.007777/2016-95 and 08700.006630/2016-88.
[35] In Preliminary Investigation No. 08700.001323/2019-53, CADE relied on reports produced by the *National Cinema Agency ("ANCINE") in* 2017 and 2018 on the regulatory framework behind this industry and the potential concerns deriving from its current dynamics in order to determine the opening of an investigation into agreements executed between content programmers and pay-TV operators. Also, in Administrative Proceeding No. 08700.001180/2015-56, *National Health Insurance Agency ("ANS")* contributed with a technical opinion on an alleged antitrust violation consisting in the publication of reference price tables of drugs and medical equipment by two specialized medical publications.
[36] Administrative Procedure No. 08700.006955/2018-22.

d. Precautionary measures

CADE Tribunal imposed four precautionary measures in the context of the following investigations:

CFM case[37]. In February 2019, the SG imposed precautionary measures in order to force the Federal Medicine Council ("**CFM**") to withdraw its regulation that prohibited the acceptance of discount cards and to prohibit the Regional Medicine Council of the Sao Paulo State ("**CREMESP**") from enforcing such regulation. The SG justified the measure on the grounds that the plaintiff's conduct was causing irreparable harm to competition.

Embraport case[38]. Also in February, the SG also imposed an injunction to suspend the charges by Embraport of allegedly abusive fees relating to the provision of port handling services until the issuance of a final decision by the Tribunal, highlighting that CADE's case-law was consistent with the prohibition of port operators charging inland customs warehouses the so-called "TCH2" fee in view of its anticompetitive effects.

Sem Parar and Conectcar case[39]. In March 2019, the CADE Tribunal imposed a precautionary measure on Sem Parar and Conectcar, both providers of automatic payment of tolls and parking lots via radiofrequency identification. This happened in the context of a preliminary investigation on their failure to comply with a decision issued by CADE in a query proceeding filed by the parties in 2015. At first, the measure had been rejected by the SG, but this decision was later overturned by the Tribunal. When analyzing the case, the Tribunal concluded that the parties' non-compliance was clear from SG's findings and granted the measure, pursuant to which the parties should (a) offer radiofrequency identification services to third parties at the same price originally practiced between them; and (b) cease any exclusivity agreements they have in place with parking lots[40].

Itaú and Rede case[41]. Finally, at the end of the year, the SG imposed a precautionary measure on Itaú (a bank) and Rede (a merchant acquirer owned by Itaú) in the context of an administrative proceeding that investigates a campaign launched by Rede to pay credit card receivables to small retailers within two days free of charge, provided that they had a bank account at Itaú. The measure was imposed by the SG in October and confirmed by the Tribunal

[37] Administrative Proceeding No. 08700.005969/2018-29.
[38] Administrative Proceeding No. 08700.000351/2019-53.
[39] Preliminary Investigation No. 08700006268/2018-15 and Appeal No. 08700.000989/2019-94.

[41] Administrative Proceeding No. 08700.002066/2019-77 and Appeal No. 08700.005308/2019-84.

in December 2019. When reviewing the case, the Reporting Commissioner (who was followed by the majority of the Tribunal) highlighted that the campaign had the effect of binding Rede's clients to Itaú, generated no efficiencies to the market and could not be replicated by non-verticalized financial institutions.

As one can note from the cases described above, most precautionary measures were adopted in cases involving unilateral conducts. Moreover, the review of cases also showed that the SG has adopted a strict approach towards requests of precautionary measures. For instance, there were at least four other cases in which precautionary measures were requested, but either rejected or overlooked by the SG[42].

e. Cases already closed by the SG

Finally, it is worth noting that the SG has already reached its final conclusion with respect to four of the investigations opened in 2019, showing a faster pace when dealing with those cases. This can be explained either by the lack of strong *prima facie* evidence against defendants or by the fact that substantive evidentiary efforts had already been conducted in either preparatory or preliminary proceedings previously opened.

One example is the probe on exclusivity rights to sell food and beverage in events held by public authorities[43], which was triggered by a report from Secretariat for Productivity Promotion and Competition Advocacy ("**SEPRAC**"). Its short duration may be attributed to the fact that, according to CADE, (i) SEPRAC did not present any concrete evidence that the exclusivity had negative effects on competition, and (ii) town halls presented reasonable justifications for granting it. In its decision to close the investigation, CADE highlighted that exclusivity is not anticompetitive *per se*, and that even though SEPRAC wanted to promote best practices for town hall's public policies, there was no anticompetitive behavior to be punished by the antitrust authority.

In addition, two of the cases swiftly closed concerned alleged refusals to deal undertaken by health insurance companies, both ultimately acquitted by the SG. In the *Unimed Vale do Aço* case[44], the SG concluded that there was no grounds to proceed with the investigation on the basis that there was no evidence indicating a risk of market foreclosure. It took only six months from the beginning of the preliminary proceeding to the acquittal decision. The

[42] See Administrative Proceedings No. 08700.003187/2017-74, 08700.004019/2019-68, 08700.002532/2018-33 and 08700.001653/2019-49.
[43] Preliminary Investigation No. 08700.006795/2018-11.
[44] Preliminary Investigation No. 08700.004427/2018-39.

evidentiary phase comprised relatively simple investigatory steps, consisting mainly in the issuance of a few requests for information to both the defendant and to the complainant. In the *Unimed Natal* case[45], the preliminary investigation spanned only nine months until the defendant's acquittal. The reason for the short duration is likely the fact that the SG conducted most of the investigatory steps in the course of the preparatory proceeding previously opened, while only one request for information was issued during the preliminary investigation.

Finally, in the *Medical discount card* case[46], it took the SG less than seven months to conclude the proceeding and suggest the conviction of CFM and CREMESP to the Tribunal. Prior to the opening of the administrative proceeding, the SG had already concluded a preliminary investigation, in which several undertakings allegedly affected by the investigated behavior had been asked to provide their view on CFM's and CREMESP's conduct. As a result, the SG did not conduct further evidentiary steps in the course of the administrative proceeding, which explains its short duration.

III. Conclusions

Based on the assessment above, the main conclusions of this article are:

I. CADE has made efforts to address unilateral conducts, especially in sectors such as Aviation, Financial sector and payment services, Oil&Gas and Energy. On the other hand, it continues to focus on investigations into bid rigging schemes, which particularly affect the civil engineering sector;

II. CADE has been taking a more proactive and intervening approach in certain economic sectors, as exemplified by the probes opened to broadly investigate the banking and civil aviation segments, as well as by the settlement agreement entered with Petrobras ordering the divestiture of its refineries. It is worth noting that despite being implemented by the SG, most of these industry-wide investigation efforts were prompted by CADE's Presidency;

III. CADE's enforcement is increasingly aligned with regulatory agencies, particularly with respect to Oil & Gas, where CADE and ANP, in addition to cooperating, are taking coordinated enforcement actions. On the other hand, it has also continued to

[45] Administrative Proceeding No. 08700.006003/2017-28.
[46] Administrative Proceeding No. 08700.005969/2018-29.

cooperate with criminal courts and prosecutors in investigations involving cartel behaviour;

IV. Throughout 2019, four precautionary measures were imposed by CADE – three by the SG and one by the Tribunal, all addressing unilateral behaviours facts that did not demand robust investigatory measures. This combined with the fact that there were at least other four requests for precautionary measures that were either rejected or overlooked by the SG suggest that CADE is adopting a strict approach towards these requests and only feels comfortable to grant them in cases that meet a high standard of proof;

V. Finally, when analysing the pace of investigations at the SG level, the reviews of cases showed that only four investigations opened in 2019 (out of 38) reached a conclusion in the same year, three of which resulted in acquittals, and only one in recommendation of conviction. It seems that these proceedings' fast pace can be explained by either the lack of strong *prima facie* to merit further investigation or the fact that substantive evidentiary efforts had already been conducted at preliminary stages. Moreover, all four cases concerned unilateral behavior, which could be seen as an indication that concerted practices typically take more time to be investigated, even if resulting in acquittals.

Subsection 3.2
Agreements among competitors/ horizontal behavior

USE OF PRICING ALGORITHMS AND ANTITRUST ENFORCEMENT IN BRAZIL

Cristianne Saccab Zarzur, Leonardo Rocha e Silva, Marina de Souza e Silva Chakmati

I. Introduction

In 1999, Coca-Cola producers began testing vending machines that could automatically raise prices for its drinks in hot weather.[1] By observing consumer behavior, the company developed a pricing algorithm to gather data on outdoor temperature and reflect it on interactive price setting. On that occasion, people had some kind of visibility regarding the mechanics of this specific algorithm, as it was based exclusively on temperature factors. Over the years, artificial intelligence (AI) has created even more ingenious pricing methods, which in turn have contributed to the development of algorithms that function in ways that people may not even yet understand, ultimately potentially being able to remove decision-making from human hands,[2] and thus decreasing visibility regarding the outcome of the implementation of algorithms mechanisms.

Sophisticated pricing algorithms may enable companies to respond more efficiently to time-varying demand, assisting firms in adjusting prices based on consumer behavior, and using these techniques in a given way – aiming at more efficiency as regards productive systems – might not pose any threat to competition. However, it is also undeniable that pricing algorithms create opportunities for coordination between firms, which thus translates into an important antitrust enforcement issue.

Discussions over the use of pricing algorithms involve the challenge between encouraging innovation and protecting competition, a paradox that antitrust enforcement agencies around the globe, such as the Administrative Council for Economic Defense ("CADE") in Brazil, have been facing over the years, more particularly in the digital era.

Through mechanisms that allow firms to monitor prices, react extremely fast to market signals and implement common policies, algorithms can facilitate collusion. This scenario is aggravated by the fact that, depending on the circumstances and the industries involved,

[1] HAYS, Constance L. Variable-Price Coke Machine Being Tested. 1999. Available at: https://www.nytimes.com/1999/10/28/business/variable-price-coke-machine-being-tested.html. Access: March 1, 2020.

[2] BAKER, Jonathan B. Chapter Six. Inferring Agreement and Algorithmic Coordination. The Antitrust Paradigm: Restoring a Competitive Economy. 2019. P. 101.

algorithms could be capable of achieving results similar to those reached by hardcore cartels through tacit collusion, with few or almost none human interference, as firms will be able to sustain profits above the competitive level without necessarily having to reach an agreement to that end. Concerns of coordination between different firms' algorithms have been greater when competing firms hire the same IT companies and programmers to develop their algorithms.[3]

It is clear, then, that one of the main risks posed by the use of algorithms is that they "expand the grey area between unlawful explicit collusion and lawful tacit collusion,"[4] enabling firms to reach supracompetitive prices in the market without having to enter into an agreement. Considering that pricing algorithms can create parallel but uncoordinated pricing methods adopted simultaneously by firms in the same market, it is hard for antitrust enforcers, including CADE, to identify in which occasions the adoption of pricing algorithms could be classified as being anticompetitive or not.

Therefore, the practice of automatically setting the price for products and services with a view to maximizing the seller's profits, i.e. the use of pricing algorithms, may be subject to antitrust investigation and even sanctioning in Brazil (and elsewhere). The Brazilian Antitrust Law broadly establishes that the following acts may be considered an antitrust violation ("violation of the economic order"), regardless of fault and even if not achieved: (i) limiting, restraining or in any way injuring free competition or free initiative; (ii) controlling the relevant market of goods or services; (iii) increasing profits arbitrarily; and (iv) exercising a dominant position abusively.

In 2019, in the report "BRICS in the Digital Economy"[5] (the BRICS Report), CADE clarified that *"[a]t the moment, there are no specific provisions regulating the use of algorithmic pricing in Brazil"* and that *"[t]he use of algorithms is legal [in Brazil] as long as it does not lead to any form of anticompetitive behaviour (e.g. the cartel organized through algorithms described above)."*

Some foreign antitrust authorities have already issued reports/studies on pricing algorithms willing to assist companies in their efforts to implement effective compliance

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[3] TOUNTOPOULOS, Vassilios; RUDIGER, Veil. Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives. Hart Publishing. 2019.
[4] Ibid.
[5] 1st Report by the Competition Authorities Working Group on Digital Economy: BRICS in the digital economy: competition policy in practice. 2019. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf/view. P. 86. Access: March 1, 2020.

programmes. According to the Portuguese Antitrust Authority,[6] for instance, *"[p]ricing algorithms can be instrumental in collusive agreements between firms, and assist in the implementation of the terms of coordination, as cases investigated in the UK and the USA illustrate.* (...) *Additionally, simple pricing algorithms may generate pattern decisions that can be deciphered by competitors, thereby promoting tacit collusion equilibria via the increase of market transparency and the implicit commitment to a given pricing strategy. Finally, algorithms based on sophisticated techniques of reinforcement learning may, by interacting with one another, converge to collusive equilibria."* CADE has not yet issued any report/guidelines devoted to the use of pricing algorithms.

In view of the expectation of CADE being more active in the *ex post* intervention against anticompetitive pricing algorithms in the future, this article aims at shedding light on CADE's current approach to the use of IT tools, as well as on some measures that companies may take to mitigate risks when using pricing algorithms in their Brazilian operations.

II. CADE's current approach to the use of IT tools

CADE has not yet faced the challenge of ruling a case that specifically addressed the lawfulness of the use of pricing algorithms. Nevertheless, CADE has already investigated companies for cartel behavior associated with the use of IT tools and has consistently applied the Brazilian Antitrust Law in those cases. To that end, CADE has looked into whether the companies using tailor-made software engines managed to agree, manipulate or adjust with competitors the prices for goods or services individually offered, which is prohibited by the Brazilian Antitrust Law.

CADE has fined driving schools and brokers that, through a trade association, *"hired an IT company to develop a software that would register and verify if services were rendered according to a centrally pre-determined range of prices."* According to CADE, *"the software allowed the implementations and monitoring of price fixing agreements."*[7]

CADE has also fined AFACE, a trade association, and ITV, a software company, for using an ITV electronic system to fix the prices for vehicle license plates made by AFACE associates. CADE understood that the *"software centralized orders made by the public as the*

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[6] Autoridade da Concorrência. Issues Paper on Digital Econsystems, Big Data and Algorithms. Available at: http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf. P.5. Access: March 4, 2020.

[7] CADE. Administrative proceeding N. 08012.011791/2010 -56.

single source for license plates, distributed the orders across associates, and imposed a commonly agreed price for the license plate services to each associate."[8]

Further, in the *ATPCO case,*[9] CADE investigated ATPCO for designing a software that would facilitate price agreements between airlines. In the BRICS Report, CADE points out that it closed the case due to a settlement agreement entered into with ATPCO, *"in which the company agreed to implement changes in its system in order to prevent price fixing."*[10]

Still in the BRICS Report, CADE made it clear that *"[a]t the moment, no formal changes in the legislation are being considered in order to specifically address the digital economy."* Therefore, it seems fair to state that CADE believes it currently has the necessary tools to deal with investigations involving the legality of pricing algorithms. At the same time, CADE seems to agree with the European Commission's Executive Vice-President for Europe Fit for the Digital Age and Competition, Margrethe Vestager, who stated that "*companies can't escape responsibility by hiding behind a computer program*."[11]

III. What companies using or willing to use pricing algorithms should do or avoid?

Considering that CADE has already investigated companies for cartel behavior associated to the use of IT tools and is well aware of the concerns raised by such AI-powered tools, it seems that the adoption of precautionary measures is desirable (and available) to safeguard companies that are willing to implement pricing algorithms in their businesses in Brazil. Some of these measures are highlighted below:

- Companies should refrain from providing information on the structure of their pricing algorithm publicly or to competitors. By sharing information on the mechanics of their pricing algorithms, firms allow competitors to draw conclusions about how prices are defined and risk being investigated. Thus, to avoid investigations into collusive behavior, in which the algorithm's design serves as a vehicle for the exchange of competitively sensitive information, companies should avoid (even unintentional) leakages in this regard, deeming this type of information as commercially sensitive.

[8] CADE. Administrative proceeding N. 08012.005660/2010-30.
[9] CADE. Administrative proceedings N. 08012.002028/2002-24 and 08012.003572/2004-55.
[10] 1st Report by the Competition Authorities Working Group on Digital Economy: BRICS in the digital economy: competition policy in practice. 2019. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf/view.P. 49. Access: March 1, 2020.
[11] VESTAGER, Margrethe. European Union. Berlin Conference. March, 2017.

- Companies should refrain from implementing the same pricing algorithm of their competitors. Presumably, collusion concerns increase when competitors hire the same source to develop their algorithms. It seems preferable to use pricing algorithms developed internally, should that be the case. Intentionally using algorithms to implement the same price scheme as that of competitors increase the chances that the algorithm will be interpreted as being a mere digital tool for a price fixing cartel.

- When using a third-party pricing algorithm, companies should assure that they understand and agree to the mechanics of such tool. Considering that some sophisticated algorithms are designed in ways that the reasoning behind their decisions are unknown even to their developers, it is crucial to understand the mechanics of a third-party pricing algorithm before implementing it.

- Companies should design algorithms that create audit trails, as the authorities (e.g., CADE) may want to trace back the rationale behind the price changing mechanism.[12] It is advisable to make transparent the factors leading algorithms to change prices, as it deters pricing coordination by permitting surveillance. Margrethe Vestager, who is certainly closely followed by CADE's officials, has already warned that "*what businesses can – and must – do is ensure antitrust compliance by design. That means pricing algorithms need to be built in a way that doesn't allow them to collude.*"[13]

- Companies should develop mechanisms to test the pricing algorithm on a routine basis, as self-learning can enable algorithms to start coordination without being originally programmed to do so. To avoid a situation in which humans who have programmed the algorithm are not aware whether, how or for how long the collusion has been ongoing, it is advisable that some sort of constant inspection takes place.

The measures outlined above may help companies doing business in Brazil to defend themselves in a potential challenge by CADE, if they decide to take advantage of pricing algorithms to reach competitive prices.

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[12] BAKER, Jonathan B. The Antitrust Paradigm: Restoring a Competitive Economy. 2019. P. 100.
[13] WIGGERS, Marc; STRUIJLAART, Robin; DIBBITS, Johannes. Digital Competition Law in Europe: A Concise Guide. Kluwer Law International B.V.

IV. Final Remarks - What can we expect from CADE in this area?

The growing use of AI, machine learning, and algorithmic decision-making creates opportunities and economic efficiencies, but may well generate additional regulatory risks for companies doing business in Brazil.

A discussion on whether there should be *ex ante* regulation for pricing algorithms – instead of interfering when the anticompetitive conduct has already been identified – surfaces. Deciding on whether to adopt *ex ante* or *ex post* regulatory solutions to curb the use of anticompetitive pricing algorithms seems to be important, but there is no indication that this debate is mature enough in Brazil.

Whilst *ex ante* regulation allows for an – arguably – more conservative approach, as it is designed to capture potential problems beforehand and, by so doing, make it possible to adopt adequate solutions before the object of the regulation develops to an anticompetitive conduct, a central issue that emerges from this policy choice is legal certainty.

Specifically in terms of pricing algorithms, the likelihood of pricing coordination may be uncertain, as the dynamics of the algorithm may require some time to make it functional and adaptable to consumer behavior. Thus, as it usually happens with *ex ante* proposals, the risks posed by this tool may be unknown,[14] which might favor *ex post* regulation/intervention.

Ex ante regulation calls for proper allocation of resources, which are not available to CADE at this point in time. Depending on the terms of the regulation (i.e., choosing for example to review all algorithms developed by firms holding more than a 20% market share in a given relevant market), a considerable amount of screening would be required from the regulatory authority, which could in turn increase the amount of resources to be allocated to this activity.

Establishing for instance that all algorithms falling into a mandatory review criterion should obtain prior approval could significantly delay their usage by the firm and, by extension, discourage their development, ultimately deterring innovation.

CADE is arguably concerned that *ex ante* regulation may translate into excessive government intervention, especially in relation to the digital economy. As CADE's President

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[14] GALLE, Brian. In Praise of Ex Ante Regulation. 68 Vand. L. Rev. 2015. Available at: https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2015/11/28001226/In-Praise-of-Ex-Ante-Regulation.pdf. Access: March 3, 2020. P. 1755.

has recently stated, "*improper intervention can bring disincentive to innovation. This is a principle we are aware of, that CADE must intervene to the extent necessary to protect the good that we are responsible for protecting, which is competition.*"[15]

Therefore, the current expectation is that CADE will screen *ex post* the use of pricing algorithms, under an anticompetitive conduct allegation approach. As CADE seems unwilling to advocate an *ex ante* analysis of pricing algorithms, companies should remain careful and take precautionary measures such as the ones suggested in this article to better defend themselves against allegations of anticompetitive behavior in Brazil based on the use of pricing algorithms.

[15] See Fines on Big Tech companies for abusing dominant position must follow proven market harm, CADE president says - MLex Insight. Access: March 6, 2020.

LABOR PRACTICES AS ANTITRUST VIOLATIONS: TRENDS IN BRAZIL AND WORLDWILDE

Natan Maximiano Munhoz, Patrícia Bandouk Carvalho, Tatiana Lins Cruz

I. Overview and Initial Remarks About Labor Related Conduct

Competition authorities around the world seem to have chosen a new target for antitrust investigations: the so-called no-poaching agreements and wage-fixing agreements, and the tendency is for the Administrative Council for Economic Defense ("CADE") to start examining the antitrust impacts of these agreements in Brazil.[1]

The most notably pioneering work was done by the US authorities, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), which in October 2016 issued an Antitrust Guidance for Human Resource Professionals (the "US HR Guidance"), whose main objective is to warn about possible antitrust violations in the human resources area, especially agreements among human resources ("HR") professionals, business executives or other employees that could reduce competition for compensation, terms of employment or hiring new employees.[2] According to the US HR Guidance, an agreement among competing employers may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities.

The analysis on labor practice as possible antitrust violations shall take into consideration the employment marketplace as the competitive environment in which companies compete to hire and retain labor force (i.e., the idea of the employment marketplace as the relevant market affected by a potential infringement). In this regard, according to the US HR Guidance, from an antitrust perspective, "*firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete*

[1] In fact, agreements among employers aiming at limiting the recruitment/hiring or fixing the terms/values of wages and/or other benefits and elements that compose the compensation of their employees have increasingly gained space on the agenda of competition authorities. See, for instance, the discussions among the antitrust international community held during the Antitrust Spring Meeting of the American Bar Association ("ABA') and the GCR Live Annual Cartels, both in March 2019; the paper prepared by the Organization for Economic Co-operation and Development ("OECD") entitled "Competition Concerns in Labour Markets – Background Note"; and, more recently, the ABA International Cartel Workshop, in February 2020 (to name a few).

[2] Similar guidelines for labor-related practices have also been published, for example, by competition authorities from Japan ("Study Group on Human Resource and Competition Policy", February 2018) and Hong Kong ("Competition Commission Advisory Bulletin", April 2018).

to provide the same services". Moreover, just as the competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, the free competition among employers in the employment marketplace helps actual and potential employees through higher compensation, better benefits, or other terms of employment. Ultimately, end-consumers can also gain from the free competition among employers, considering that a more competitive workforce/workplace may motivate the creation and production of more and better goods/services.

But what are the labor practices that may come to be considered antitrust violations? As anticipated above, naked restrained agreements among employers for the purpose of (i) limiting and/or fixing salary or other terms/elements of compensation, either at a specific level or within a range (the so-called wage-fixing agreements) and/or (ii) refusing to solicit or hire employees from another company (the so-called no-poaching agreements) are the labor practices that may raise greater competitive concerns. In fact, the US HR Guidance establishes that naked wage-fixing and no-poaching agreements are considered *per se* illegal (i.e., unlawful by object) under the US antitrust laws and, therefore, subject to criminal prosecution in that country. On the other hand, according to the US HR Guidance, no-poaching agreements that are ancillary to corporate transactions (*e.g.*, the creation of joint ventures) or arising from vertical relationships (*e.g.*, franchises) may be analyzed by the so-called rule of reason, so that the potential unlawfulness of the practice will depend on the balance between the economic rationale of the practice and its actual or potential anticompetitive effects on the employment market.

In recent years, as it will be presented hereinafter, several companies have been investigated in the US for alleged no-poaching agreements, notably investigations involving tech-companies (Adobe, Apple, Google, Intel Intuit and Pixar), auto parts markers (Knorr-Bremse and Wabtec) and fast-food chains (Dunkin', Arby's, Five Guys and Little Caesars) - in such cases, the companies have entered into agreements with the authorities to cease the alleged misconduct.

Among other labor practices that can lead to antitrust exposure is the exchange of competitively sensitive information about terms and conditions of employment. In this regard, according to the US HR Guidance, "*[e]ven if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement*". Nevertheless, differently from the

naked wage-fixing and no-poaching agreements, according to the US Guidance, the exchange of sensitive information about terms and conditions of employment are not *per se* illegal under the US antitrust laws and not subject to criminal prosecution in that country. Thus, it should be analyzed by the so-called rule of reason, depending on the specificities of each case.[3]

Still in relation to the US, it is worth mentioning that, on April 13, 2020, the DOJ and the FTC jointly released a statement[4] affirming that the antitrust agencies are vigilant for possible collusions or other anticompetitive conducts in the employment marketplace, even during the COVID-19 pandemic situation. This approach reinforces the seriousness and the importance given by the US authorities to the subject, even during exceptional periods. In this regard, the joint statement affirmed: "(…) *although there are many permissible ways that firms can engage in procompetitive collaboration, COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis*". The DOJ's Assistant Attorney General, Makan Delrahim, also mentioned: "*Even in times of crisis, we choose a policy of competition over collusion*".

In Brazil, there is still no formal guidelines/determination from CADE about no-poaching and/or wage-fixing agreements and, likewise, there are no specific provisions on the matter in the Brazilian Antitrust Law (Law No. 12.529/2011). Nevertheless, such labor related conduct can be object of antitrust scrutiny by CADE considering the overall anticartel framework in Brazil. In this sense, one may note that the Brazilian Antitrust Law broadly considers as antitrust violation any act that have as an object or may give rise to the following effects (even if not achieved in practice): (i) to limit, restrain or, in any way, injure free competition or the free market; (ii) to control the relevant market of goods or services; (iii) to arbitrarily increase profits; and (iv) to exercise a dominant position abusively.

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[3] In this sense, the US HR Guidance provides that information exchange may be appropriate if: (i) a neutral third party manages the exchange; (ii) the exchange involves information that is relatively old; (iii) the information is aggregated to shield the identities of the underlying sources; and (iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source – which is similar to the approach/understand adopted by CADE on the matter involving information exchange, as presented in the final remarks of this brief.
[4] More information at: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and.

In a broader sense, it is worth mentioning that in its Guidelines for Antitrust Remedies (October 2018), CADE recognized the importance of "key-personnel"[5] as one of the assets necessary for the effectiveness of antitrust remedies. Furthermore, CADE's Guidelines for Antitrust Remedies also indicated that, when designing antitrust remedies, "*it is important to have references to the transfer of key-personnel or essential contracts with third parties, factors that may be crucial for the success of a new player in certain relevant markets*" (free translation into English).[6]

Although there is still no decision from CADE in cases involving cartel behavior exclusively based on labor matters, there are some investigations that dealt (or that are currently dealing) with some labor aspects (even if in a subsidiary manner), as it will be presented hereinafter. Moreover, given that CADE also takes into consideration the best practices adopted by foreign antitrust authorities, it is certain that this issue is already on the radar.[7]

Considering the relevance and novelty of such topic, below it will be presented some additional information about each practice (i.e., no-poaching agreements; wage-fixing agreements; and other labor related conducts) in light of the experience noted from antitrust authorities in Brazil, US and Europe on the matter (whenever applicable). Finally, it will be presented the conclusion and final remarks of this brief, especially in relation to Brazil.

II. No-Poaching Agreements

As explained above, no-poaching agreements (also referred as non-soliciting or cold-calling agreements) are understood as agreements among employers for the purpose of not accepting and/or not allowing the hiring of employees from another company. This type of agreement has been attracting great interest from public authorities from a while, especially in the US, and even before the release of the US HR Guidance in 2016. Below, this brief will

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[5] According to CADE's Guidelines for Antitrust Remedies, key-personnel is defined as the "*staff and managers, who are part or are permanently and independently requested in the operation of the divested business, and who holds key customers and suppliers contacts or have specific skills and know-how pertaining to R&D, IT, production, logistics, which are essential for the competitiveness of the business being divested*" (free translation into English).

[6] Additionally, in its Guidelines for Gun-Jumping Analysis (May 2015), CADE indicated employees' salaries as an example of potentially sensitive information (among others), in the context of information sharing among undertakings of a certain merger review.

[7] In this regard, in June 2019, Brazil submitted a paper to OECD, with the subject "Competition Issues in Labor Market – Note by Brazil", in which it expressly stated that "*unduly restriction of the salaries and mobility by a powerful employer (or a group of employers holding economic power) can be antitrust violations*". The paper is available at: https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm.

provide an overview of the main cases related to no-poaching agreements, especially identified in Brazil, and complemented with the US experience.

In May 2010, CADE launched the Administrative Proceeding No. 08012.002812/2010-42 aiming at investigating alleged cartel behavior in the market of electronic recharge distribution for prepaid cell phones. The technical note that launched the investigation posed that, among other collusive practices (especially related to commercial rebates), the members of the alleged cartel would have entered into no-poaching agreements in relation to each other employees. The document indicated that such type of practice could artificially restrict professional opportunities for the individuals who provided services to the investigated companies and ultimately reduce wages and job mobility. During the fact-finding phase, there was no evidence (including witnesses) corroborating such initial suspicions regarding the no-poaching agreement. In view of this lack of evidence, no conviction resulted from this no-poaching allegation. However, the fact that the alleged no-poaching agreement was also included/mentioned under the initial scope of the public investigation (among other cartel practices) is a clear indication that CADE is inclined to consider such conduct as a potential competition concern.

In July 2015, CADE formally launched the Administrative Proceeding No. 08012.003021/2005-72 aiming at investigating alleged cartel behavior among IT companies in public and private bids for the provision of IT services. The technical note that launched the investigation posed that, among other collusive practices, the defendants would have entered into no-poaching agreements and agreed not to hire employees from each other. The document also indicated that such practice could create artificial conditions in the employment marketplace, which could potentially aim at or result in keeping wages below average when compared to an environment with effective competition. This Administrative Proceeding is still under the scrutiny of CADE's investigative unit. Despite the lack of final decision to date, it is interest to note that, even in 2005, CADE was already attentive to such practice and considered it as a potential competition concern in its decision to start the public investigation.

More recently, in March 2018, CADE launched the Administrative Inquiry No. 08700.003187/2017-74 aiming at investigating alleged discriminatory practices and abuse of dominance position from certain banks against a Brazilian fintech named Nubank.[8] Among

[8] The Administrative Inquiry, which is a facultative investigative phase prior to the official Administrative Proceeding, was initiated by CADE after a complaint from Nubank.

other practices, Nubank claimed that one of the banks “professionally harassed/prospected” several Nubank employees in a short period of time (practice identified as “solicitation”, i.e., what would be the opposite of no-poaching), being the majority of these professionals systems developers with significant know-how about certain technologies developed by Nubank. According to Nubank, the harassment/prospecting of these employees would aim to weaken an essential area from Nubank, to impair its activities in the credit card issuing market. During the Administrative Inquiry phase, CADE investigative unit concluded that the arguments and documents presented in the case records indicated that the “solicitation claim” brought by Nubank reflects a natural part of the professional framework in terms of prospecting different professionals in the employment marketplace. Therefore, CADE investigative unit dismissed such claim and, in April 2019, when formally opening the Administrative Proceeding against the banks to further investigate the other alleged discriminatory practices, the authority did not include the “solicitation practice” in the object of the Administrative Proceeding. Such case illustrates how CADE considers desirable the competition in the employment marketplace, reinforcing that no-poaching agreements could be considered a violation under the Brazilian competition framework.

In the US, federal antitrust agencies have filed several actions alleging that certain companies illegally agreed into no-poaching agreements. Notably, since 2010, the federal antitrust agencies have filed at least four (4) civil enforcement complaints against two or more companies under the allegation of anticompetitive no-poaching agreements, such as: (i) Knorr-Bremse and Wabtec (case 1:18-cv-00747); (ii) eBay and Intuit (case 12-CV-58690); (iii) Lucasfilm and Pixar (case 1:10-cv-02220); (iv) and Adobe Systems, Apple, Google, Intel, Inuit and Pixar (case 1:10-cv-01629). In these cases, the companies entered into agreements with the federal agencies to cease the alleged misconduct. On the state-level, US state enforcement agencies have been actively investigating and litigating potential no-poaching agreements, especially on the use of no-poach provisions in franchise agreements (which would prevent employees from seeking job opportunities at different franchises within the same chain). In this regard, several fast food chains have recently announced that they would agree to cease the use of no-poach provisions and amend their franchise agreements, including seven (7) chains in

July 2018[9], eight (8) chains in August 2018[10], and, more recently, four (4) chains in March 2019[11]. The companies also entered into agreements with the authorities to amend their respective franchise contracts, removing clauses that would prevent franchisees from hiring employees from other stores in the same franchise. Lastly, in addition to these initiatives, there were reported several civil class actions against such investigated companies, especially filed by employees who allegedly felt harmed by such no-poaching agreements/constraints.

During ABA 13th International Cartel Workshop[12], it was mentioned that, on the European community level, the European Commission ("EC") and the Federal Cartel Office ("FCO") apparently have not handled cases specifically regarding no-poaching agreements yet and, thus, no fines for such arrangements have been imposed. Nevertheless, it was pointed out that National Competition Authorities around the European community may have dealt with no-poaching agreements related issues on their respective member States level (notably, Germany, Croatia, France, Netherlands and Turkey).

In view of the peculiarities of such labor practice and the enforcement actions adopted in the US, it will be interesting to monitor how CADE will deal with the matter, mainly related to possible vertical restraints (*e.g.*, per se vs. rule of reason).

III. Wage-Fixing Agreements

As mentioned above, wage-fixing agreements are those anticompetitive collusions/arrangements among employers that aims at limiting and/or fixing salary or other terms/elements of compensation, either at a specific level or within a range. According to the US HR Guidance, "*[e]ven if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances – such as evidence of discussions and parallel behavior – may lead to an inference that the individual has agreed to do so*". Some cases involving wage-fixing agreements were reported in the US HR Guidance. The summary of

[9] Including Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, Jimmy John's and McDonald's. More information available at: https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.
[10] Including Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera Bread and Sonic. More information available at: https://www.atg.wa.gov/news/news-releases/ag-ferguson-eight-more-restaurant-chains-will-end-no-poach-practices-nationwide.
[11] Including Arby's, Dunkin', Five Guys, and Little Caesars. More information at: https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-multistate-settlements-targeting-%E2%80%9Cno-poach%E2%80%9D.
[12] The conference was held between February 19-21, 2020, in San Francisco, California, USA.

those cases is presented below, demonstrating that such topic has been subject of analysis by the US authorities since the 90's, although the recent antitrust guidelines on the matter.[13]

In 1992, the FTC sued managers of nursing homes in the city of Rockford, Illinois, who colluded to prevent a temporary employment agency from raising the price of the services of outsourced nurses (case *U.S. v. Debes Corp*). The collusion among such nursing homes eliminated the natural competition in the procurement of nurses' services, creating a type of price control in relation to such specialized labor-force. At the end of the process, the parties settled with the FTC, without the admission of guilt, and the nursing homes agreed in ceasing the investigated conduct. The parties were also prohibited from exchanging any type of information about the use of temporary nursing services with the other investigated companies.

In 1994, the DOJ investigated the Utah hospitals trade association and the Utah hospitals' HR directors association (in addition to the affiliated hospitals of these associations) for alleged agreements aiming at stabilizing the compensation paid to nurses in that region (case *US v. Utah Society for Healthcare Human Resources*). The conduct, which allegedly took place between 1984 and 1992, mainly consisted in the exchange of confidential information about the general budget of hospitals, the budget dedicated to the payment of nurses and the initial salary of newly graduated nurses. According to the DOJ, during the period of the conduct, the state of Utah faced a severe decrease in the offer of nurses' labor-force, which was not naturally accompanied by the promotion of the salaries paid to the professionals in the field (i.e., offer vs demand). At the end of the process, the parties settled with the DOJ and agreed not to enter into agreements about fixing current or future nurses' salaries, and not to exchange information regarding compensation with competitors.

In 1995, the FTC investigated an alleged wage-fixing agreement that aimed to reduce the fees paid to models at certain fashion shows (case *US v. Council of Fashion Designers of America*). At the time, some designers joined together to produce 2 (two) fashion shows per year and, in this context, agreed on sharing costs and making collective purchase of services. The FTC questioned the legitimacy of the designers' agreement to fix the remuneration of the models. The claim was based on the fact that such agreement did not have any relationship with the management of the fashion shows, in addition to the fact that the hiring of models used to be done individually by each designer (and not by all together). At the end of the process,

[13] Additional information on the following cases (including other relevant information) can also be found in the article "*O Improvável Encontro do Direito Trabalhista com o Direito Antitruste*" (Amanda Athayde, Juliana Domingues and Nayara Mendonça), published in IBRAC's magazine (vol. 24, 2018).

the parties settled with the FTC, in which the Council of Fashion Designers of America committed to prevent its members from fixing the models' fees and to advocate in relation to the designers in the sense that agreements on price/wage-fixing raise serious competitive concerns.

There are still no specific public cases in Brazil related to wage-fixing agreements, but based on the exposed herein it is possible that CADE will adopt a similar position in relation to horizontal wage-fixing agreements in the sense to be perceived as a cartel behavior.

IV. Other Labor Related Conduct (the Brazilian Experience)

Further to the more defined labor practices that could raise competition concerns (*i.e.*, no-poaching and wage-fixing agreements), there are other practices connected with labor matters that are also calling the attention of the antitrust authorities. This is the case of the exchange of sensitive information related to labor matters and employment marketplace, for instance. That is, even in the absence of formal agreements among employers related to labor aspects of the employment, certain practices still have the potential to give rise to competitive concerns.

In this sense, in September 2016, CADE launched the Administrative Proceeding No. 08700.006386/2016-53 to investigate the exchange of sensitive information, including, among several others, information about commercial structure (such as the number of employees and their wages and benefits) in the auto parts aftermarket. The case is still under the scrutiny of CADE's investigative unit and it will be interesting to see whether CADE will take a specific position on the labor aspect.

Another labor practice that is calling the attention from CADE is related to the possible use of Collective Labor Convention[14] to restrain competition. More recently, in February 2020, CADE launched the Administrative Inquiry No. 08700.005683/2019-24, to investigate the gyms trade union from the State of Rio de Janeiro (SINDACAD/RJ) on alleged conduct that created artificial barriers for regular activities of gyms that operate in the business model known as "low costs/low fare"[15]. Specifically, SINCAD/RJ would have included in the

[14] Collective Labor Convention is a way of pacifying collective labor disputes that may have economic (e.g., claiming new working conditions or better wages) and/or legal (e.g., declaration of the existence or the non-existence of a controversial legal relationship) natures. The terms established in the Collective Labor Convention will be applied to all undertakings linked to a certain professional category (art. 611 of the Brazilian Labor Law).
[15] CADE initiated the investigation following a complaint from a chain of gyms named SmartFit, which operates in Brazil by means such business model of "low cost/lost fare".

2019/2020 Collective Labor Convention a clause that limits the number of students/clients that each teacher/physical education professional can supervise (i.e., in practice, establishing a minimum number of professionals per student).

It is worth noting that, in 2013, CADE already had convicted SINCAD/RJ for a similar practice (Administrative Proceeding No. 08012.005524/2010-40), in which CADE concluded that SINDACAD/RJ could not use its trade union prerogatives to influence whether or not a particular business model could prosper. Furthermore, at that time, CADE understood that the insertion of a regulatory clause in a Collective Labor Convention was an attempt to undermine the regular activities of gyms that adopt the "low cost/low fare" business model, also seeking to protect private interests and other enterprises. The new Administrative Inquiry is still under the scrutiny of CADE's investigative unit, although an injunctive relief was already granted to suspend the effects of the controversial clause in the 2019/2020 Collective Labor Convention. Such case reinforces the links between antitrust and labor matters.

V. Conclusion and Final Remarks

As seen above, labor practices that have the potential to impair and limit the competition in the employment marketplace (especially horizontal agreements among employers) have increasingly gained space on the agenda of competition authorities. Naked no-poaching and wage-fixing agreements (in the sense of cartel behavior) seem to be the labor practices that shall give rise to greater competitive concerns (without prejudice to other related practices/issues).

In Brazil, there is still no formal guidelines nor ruling from CADE about no-poaching and/or wage-fixing conduct, but the cases initiated involving such matter (even partially) demonstrate that the authority is attentive to such practices. Also, in the recent contributions from Brazil to OECD in relation to competitive issues in labor markets, the Brazilian committee already acknowledged that special guidelines related to labor practices (targeting merger reviews and behavioral conduct) seem to be effective both for antitrust and social purposes.

In this regard, the following topics presented by the Brazilian committee to OECD can be seen as the most recent and formal guidance on labor-antitrust related aspects in respect to Brazil:

(1) employers should inform and train employees with HR responsibilities to understand the fundamentals of the antitrust framework;

(2) employers shall not enter into written or verbal agreements on (a) remuneration (or other employment-related terms) or (b) recruitment of employees with professionals from competing enterprises;

(3) when sharing confidential employee information, in the context of merger reviews, companies should consider (a) using a third party (neutral agent) to manage data exchange, (b) anonymize data (by presenting them by position or aggregate), and (c) limit access to such data or information; and

(4) companies should ensure that the non-competition provisions in the transaction documents are business fit and reasonable in duration and scope.

In view of such discussions, it will be interesting to observe how antitrust authorities around the world, especially CADE, will enforce the law in relation to the labor practices and how this will impact the structure and operation of HR departments/professionals and employers in their businesses.

HUB-AND-SPOKE INFRINGEMENTS AND POSSIBLE UNFOLDING TO CARTEL ENFORCEMENT IN BRAZIL

Anna Binotto, Eduardo Frade Rodrigues, Vitor Jardim Barbosa

I. Introduction

Hub-and-spoke infringements are commonly regarded as an untraditional form of cartels. Much has been discussed lately regarding such practice and the boundaries set between legitimate business practices and anticompetitive behaviors. Brazil's *Conselho Administrativo de Defesa Econômica* ("CADE") has started investigations involving possible hub-and-spoke infringements, but there still remains much controversy surrounding this kind of hybrid vertical-horizontal conspiracy, which demands further clarification. To address this debate, this paper presents a brief outline of the hub-and-spoke infringement (Part II), followed by a review of CADE's recent activities regarding hub-and-spoke charges (Part III). Part IV is dedicated to discussing how the current discussions in antitrust law unfold into the shaping of hub-and-spoke infringements and other conducts that seem wedged between typical vertical restraints and horizontal collusion. Part V brings some concluding remarks.

II. Hub-and-spoke infringements: an outline

It is notorious that collusive behavior between competitors is considered the most pervasive anticompetitive conduct, due to its undeniable harming effects to competition in general, and to consumer and overall welfare. Cartels, as they are defined, are therefore given a priority in most of the competition authorities' enforcement activities around the globe, which unfolds into a general policy agenda of deterring, identifying and sanctioning such practices.

But under a worldwide quest against cartelists of strict enforcement and outstandingly high fines, cartelistic behavior became increasingly more complex and sophisticated than the typical hard-core price-fixing or the standard "hand-shaking" bid-rigging agreements that were once targeted by investigators. As such, they became harder to identify and harder to catch and it is safe to say that "cartel enforcement has been undergoing a new wave of enforcement, as authorities widen the range of conduct falling within their radar screens", which includes a

wider range of coordinated behavior in the enforcement agenda of competition authorities. Brazil's CADE seems to be following that trend.[1]

Hub-and-spoke infringements can be viewed as one of these "new" forms of collusive behavior. Unlike "traditional" cartels, the so-called hub-and-spoke cartels are structured around vertical (i.e., not horizontal) relations. Generally, a common client or supplier – a "hub" - establishes the exchange of commercially and competitively sensitive information between competitors situated in a downstream or upstream market – the "spokes". This infringement can be regarded as a cartel since, through vertical relationships, a horizontal coordination of competitive variables (e.g., price, output etc.) is established. A definition of hub-and-spoke can be found in a recent Background note published by the Secretariat of the OECD: "*Hub-and-spoke arrangements are cartels that are not co-ordinated through direct exchanges between the horizontal competitors, but through indirect exchanges via a vertically related supplier or retailer.*"[2]

The challenges of reviewing this kind of hybrid vertical-horizontal conspiracy are not trivial. Hub-and-spoke infringements can have relevant implications to antitrust policy in general, since they involve the relevant distinction between "*unlawful conspiracy facilitated through vertical relationships from lawful vertical behavior that firms use in their relationships with multiple upstream or downstream trading partners*"[3]. Indeed, hub-and-spoke cartels are usually segregated from unilateral vertical restraints by the identification of the so-called "rim requirement" under US antitrust practice, i.e., "plus factor" consistent of findings that indicate

[1] Eduardo Frade and Vinicius Marques de Carvalho. *New Approaches to Cartel Enforcement and Spillover Effects in Brazil*: Exchange of Information, Hub-and-spoke Agreements, Algorithms, and Anti-Poaching Agreements. Competition Policy International. November 26, 2019. Available at: https://www.competitionpolicyinternational.com/new-approaches-to-cartel-enforcement-and-spillover-effects-in-brazil-exchange-of-information-hub-and-spoke-agreements-algorithms-and-anti-poaching-agreements/. Access on Mar. 13, 2020.

[2] Antonio Capobianco. Roundtable on Hub-and-Spoke Arrangements – Background Note by the Secretariat. Available at https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf. Access on Mar. 12, 2020.

[3] Daniel Douek, Felipe Pelussi and Ricardo Pastore. What are the criteria for the characterization of hub-and-spoke conspiracies in Brazil? Ibrac, Conducts Enforcement in Brazil: Frequently Asked Question, 2019, p. 313.

the existence of a (eventually contactless) horizontal agreement.[4] In the UK and EU there are similar proxies.[5]

In a recent review of US case law intending to outline the main features of hub-and-spoke cartels, Joseph Harrington Jr. concludes that those conspiracies were essentially intended to restrict competition in retail markets, either through (i) "*the coordinated exclusion by upstream suppliers (spokes) against a rival or class of rivals to a downstream retailer (hub)*"[6]; or (ii) *through "collusive price setting among downstream retailers (spokes), often through the imposition of a recommended price by the upstream supplier (hub)*"[7]. In the majority of cases, the company acting as the hub was responsible for initiating the coordination that led to the collusive conspiracy, largely by structuring monitoring instruments and collecting information with the spokes, as well as performing sanctioning actions towards non-compliant spokes.[8]

As such, one of the many possible interesting discussions regarding hub-and-spoke is precisely pointing out the differences, if any, between such conduct and classical resale price maintenance (RPM) and other vertical restraints through which the upstream player may provoke, lead to or facilitate a downstream alignment or coordination between retailers or distributors. One may question whether these conducts are differentiated merely on the subjective evaluation of each agent's intentions, and, as such, what seems to be the core of enlightening such a segregation is the ultimate standard of proof that will be employed by the authorities in order to support charges and prosecute cases.

III. Recent developments in CADE's enforcement

Despite the fact that CADE has not yet convicted any agents for hub-and-spoke infringements, allegations of collusive behavior stemming from vertical exchanges of

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[4] Barak Orbach. Hub-and-Spoke Conspiracies. Arizona Legal Studies. Discussion Paper No. 16-11, 2016: "*Arrangements of vertical relationships that result in parallel conduct among competitors are a common phenomenon that often promotes efficiency but may also facilitate cartels. What distinguishes a potentially efficient and permissible arrangement from unlawful conspiracy is a conscious horizontal agreement; such horizontal agreement may be facilitated and find expression in vertical relationships. The "rim requirement" reflects this economic insight: proof of a hub-and-spoke conspiracy requires evidence of a horizontal agreement. At least since the late 1930s, courts have been willing to infer a horizontal agreement from vertical arrangements and the circumstances under which those arrangements come into existence. Courts can and should expressly acknowledge this inference standard; they not only have been using it for eight decades, but it best fits with modern economic theory as to the actual character of hub-and-spoke cartels*".

[5] Daniel Douek, Felipe Pelussi and Ricardo Pastore. What are the criteria for the characterization of hub-and-spoke conspiracies in Brazil? Ibrac, Conducts Enforcement in Brazil: Frequently Asked Question, 2019.

[6] Joseph E. Harrington, Jr. How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies (August 24, 2018). Available at SSRN: https://ssrn.com/abstract=3238244. Access on Mar. 12, 2020.

[7] Id., p. 3.

[8] Id.

competitively sensitive information amongst the authority's recent enforcement activities can be found. In most cases, the hub operated in the upstream market, (i.e., as distributor), while the spokes operated in the downstream market (i.e., as retailers), and the firms acting as hubs were also active in the downstream market as direct competitors to spoke/retailers.[9]

As examples, CADE's General Superintendence ("GS") is currently investigating a possible hub-and-spoke cartel in the IT material and equipment market,[10] in the interactive projectors and whiteboards market,[11] in the distribution and resale of LPG market,[12] and has concluded investigations of similar practices in the distribution and resale of fuels market.[13] It has also recently closed investigations against Uber which involved charges of hub-and-spoke cartelization.[14]

In the latter case, CADE's GS highlighted the requisites for a hub-and-spoke cartel to be structured, indicating the need to prove (i) that *all* interactions between the hub and the spoke/competitors should aim at directly coordinating the market activities of direct rivals; (ii) those competitors should *actively demonstrate* interest in the coordinated action (*i.e.,* there are indicia of tacit collusion); and (iii) the exchange of commercially sensitive information of direct rivals is implemented through or facilitated by the hub. In regard to Uber's case and the GS's decision to dismiss the charges, CADE's General Superintendent wrote that

> "*it was not possible to envisage the practice of hub-and-spoke cartelization by Uber, because there is not company action that allows communication between partner drives. There is no action between Uber, as a cartel facilitator, and the competing agents, with the intent of coordinated operation. Additionally, each driver's acceptance of the conditions established by Uber constitutes a relationship with a merely contractual purpose and not of a collusion or agreement between them. There is no perception of the willingness of fixing prices or manipulating the market, nor with the purpose of centralized conduction of Uber. The possible uniformity of conduct, relative to prices, originates from the Uber business model. […] Thus, the fundamental requirement for any type of cartelization is not established, because there is no*

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[9] Daniel Douek, Felipe Pelussi and Ricardo Pastore. What are the criteria for the characterization of hub-and-spoke conspiracies in Brazil? Ibrac, Conducts Enforcement in Brazil: Frequently Asked Question, 2019, p. 313.

[10] Administrative Proceeding No. 08700.008098/2014-71 (Defendants: Positivo S.A. and others)

[11] Administrative Proceeding No 08012.007043/2010-79 (Defendant: Scheiner Solutions Comércio e Serviços Ltda. and others).

[12] Administrative Proceeding No 08700.003067/2009-67 (Defendant: Liquigás Distribuidora S/A and others) and Administrative Proceeding No 08012.006043/2008-37 (Defandant: Federal District's LPG Transporters and Retailers Trade Union (Sindvargas/DF) and others).

[13] Administrative Proceeding No 08700.010769/2014-64 (Plaintiff: Agência Nacional de Petróleo, Gás Natural e Biocombustíveis – ANP. Defendants: AleSat Combustíveis S.A., Ipiranga Produtos de Petróleo S.A., Petrobras Distribuidora S.A., Raízen Combustíveis S.A., Sindicato do Comércio Varejista de Derivados de Petróleo do Estado de Minas Gerais – Minaspetro, and others).

[14] Preparatory Proceeding No 08700.008318/2016-29.

> *agreement to fix prices, to control supply, split up the market, or defraud public bidding".*[15]

CADE's case law also reflects the potentially blurred line between hub-and-spoke cartels and similar practices, such as resale price maintenance and the influence to adopt coordinated commercial conditions.[16] In a case recently trialed by CADE's Tribunal former Commissioner João Paulo Resende underlined the distinct configurations of a potential hub-and-spoke cartel, and highlighted the potential overlaps between such conducts and the other possible framing under the Brazilian law:

> *"I believe that in the present case it is not necessary to discuss whether the dynamics of structuring the cartel took place or not in the form of a hub-and-spoke cartel. This is because, at least from a theoretical point of view, some argue that this discussion could make it necessary to analyze the relevance or essentiality of the interaction between dealer A and distributor B so that the cartel between A and C could be structured, for example, since a cartel in the hub-and-spoke format would be fundamentally structured by indirectly exchanging information."*[17]

As such, the only case reviewed by CADE's Tribunal led to an inconclusive definition regarding the hub-and-spoke charges, as the other cases remain under investigation by the GS.

IV. Possible developments in face of current debates

The indication that a hub-and-spoke cartel may be regarded as a new form of cartelization does not mean that such a conduct did not exist in previous times.[18] It has to do with the fact that recently, and in light of the development of new technologies and the digitalization of the economy, the nature of economic activities and organizations brings new contours to anticompetitive conducts in general,[19] and that is especially true for cartels[20] and hub-and-

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[15] Alexandre Cordeiro Macedo. Uber: Collusion or Unilateral Conduct? Mlex Ab Extra. December 19, 2018. Available at iiede.com.br/index.php/2018/12/30/alexandre-cordeiro-macedo-uber-collusion-or-unilateral-conduct/. Access on Mar. 12, 2020.

[16] Under the Brazilian Competition Law (Law no. 12,529/2011), art. 36, §3, IX and II, respectively.

[17] Administrative Proceeding No. 08700.010769/2014-64 (Defendants: Sindicato do Comércio Varejista de Derivados de Petróleo do Estado de Minas Gerais – Minaspetro, Ipiranga Produtos de Petróleo S.A., AleSat Combustíveis S.A., Raízen Combustíveis S.A. (sucessora da Shell Brasil Ltda.) e Petrobras Distribuidora S.A and others).

[18] Investigations on hub-and-spoke cartels are not, however, essentially new, as investigation draw back to at least 1939, when the US Supreme Court reviewed the well-known *Interstate case*. For details, see Judgement of the US Supreme Court in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), paras 222, 226-227.

[19] See, e.g., Competition and Markets Authority, 2019. "Unlocking digital competition: Report from the Digital Competition Expert Panel"; Australian Competition and Consumer Commission "Digital platforms inquiry", 2019; European Commission Directorate-General for Competition. "Competition Policy for the Digital Era", 202019.

[20] Eduardo Frade and Vinicius Marques de Carvalho. *New Approaches to Cartel Enforcement and Spillover Effects in Brazil*: Exchange of Information, Hub-and-spoke Agreements, Algorithms, and Anti-Poaching Agreements. Competition Policy International. November 26, 2019. Available at:

spoke cartels specifically. In such a novel context, the adjustment of prices follows new dynamics, e.g., through pricing algorithms, across platform parity agreements,[21] most favored nation clauses[22], digital comparison tools[23] etc. – which can facilitate indirect exchange of information and amount to RPM and hub-and-spoke cartelization.[24]

Under such context, the boundaries between a vertical and unilateral restraint and a horizontal collusion structured through vertical relationships is a thin one. Conversely, there are relevant policy implications since in most jurisdictions – which is the case of Brazil – cartels are prosecuted under a *per se* rule. Indeed the "*distinction between vertical and horizontal restrictions on competition is increasingly blurred in the online context – particularly for platforms, due to their cross-market activities*"[25]-[26].

The case of the across platform parity agreements (APPAs) is an interesting one. Once a retailer imposes such parity clauses in the contracts with its suppliers – generally, providing the obligation not to offer better prices or improved commercial conditions in distinct rival

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https://www.competitionpolicyinternational.com/new-approaches-to-cartel-enforcement-and-spillover-effects-in-brazil-exchange-of-information-hub-and-spoke-agreements-algorithms-and-anti-poaching-agreements/.Access on Mar. 13, 2020.

[21] OCDE, Summary Report: Competition and cross platform parity agreements, 2015.

[22] LONG, Sarah. Retail MFNs and Online Platforms Under EU Competition Law: A Practical Primer. Competition Policy International. Antitrust Chronicle September 2019, p. 32: "*With the significant increase in e-commerce and the dramatic rise in the use of online platforms by consumers, it is not unexpected that competition authorities have demonstrated a new-found interest in retail MFN clauses. Wholesale MFNs are arguably not as problematic as retail MFNs because retailers retain their freedom to vary their retail prices across all channels. In contrast, in retail MFNs, suppliers determine the final retail price (rather than retailers), and the online platforms then require suppliers not to offer lower final retail prices through any other online channels. Retail MFNs have therefore been shown to result in higher prices, whereas the same effect has not been seen in MFNs within a wholesale model*".

[23] CMA, Final Report: Digital comparison tools market study, 2017, p.8: "*we have strong concerns about some types of contract between suppliers and DCTs, which prevent suppliers from offering better prices on one DCT than on another (so-called wide price parity/Most Favoured Nation clauses) and can reduce competition between DCTs. As explained below, we are opening an investigation into this. There are several other practices which we are keeping under review (such as non-brand-bidding, negative matching and non-resolicitation agreements), because they might either limit competition between DCTs or make it more difficult for DCTs to operate effectively*".

[24] Antonio Capobianco. Roundtable on Hub-and-Spoke Arrangements – Background Note by the Secretariat. Available at https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf, p. 32. Access on Mar. 12, 2020.

[25] World Economic Forum. Competition Policy in a Globalized, Digitalized Economy: Platform for Shaping the Future of Trade and Global Economic Interdependence. December 2019.

[26] We see, therefore, that even in more complex cases involving digital markets arouse interesting discussions regarding the differences between such conduct and classical RPM. In RPM cases, as known, the upstream player ends up provoking a downstream cartel between retailers or distributors, which is similar with the hub and spoke cases. The theory, however, may indicate differences in the hub and spoke cases and RPM cases. In hub and spoke cases, the cartel is intended by the retailers, that use the upstream agent as a hub to execute the scheme. On the other hand, in the RPM case, the conduct is imposed by the upstream agent itself. This theoretical difference by itself is still somewhat unclear. If this is the case, however, would the difference between these conducts be the subjective analysis of who created the agreement? But is the harm not the same?

sales platforms – that could result not just in the alignment of prices among retailers, but also in the coordination of suppliers' and platform's general business models. The OECD assessed this issue, pointing out that such clauses have particularly questionable effects, because, in the perspective of consumers, unlike what is normally seen in traditional vertical restraints (e.g., MFNs, exclusivity clauses and RPM agreements), purchasers of the products/services (i.e., the resellers and distributors) are not directly part to the agreement in which such restrictions are negotiated and provided. The multisided aspect of most marketplaces and other platform-structured businesses adds further complexities, and multi-layered exchange of information (even in the ordinary course of business) which can result in facilitating hub-and-spoke infringements.[27]-[28].

Other potential challenges are related to pricing algorithms or arrangements through which platforms can actively interfere in pricing conditions displayed by retailers, aiming, for example, at maximizing the applicable commission and therefore the platforms' remuneration and profit. Marketplaces, for example, through their individual contracts and terms of use with sellers can induce them to structure horizontal coordination, e.g., through promoting the exchange of information between them or acting as an intermediary that provides similar pricing algorithms or strategies to rival sellers. That is especially relevant since "*behaviours that help to implement hub-and-spoke arrangements in the brick and mortar world, like exchange of up-to-date retail pricing information and monitoring of retail prices, can be greatly facilitated and exacerbated with the help of price monitoring and tracking software*".[29] The distinction between pure collusive behaviors and legitimate business practices (as "*intelligent adaptation to observed market behaviours of competitors and normal market interdependence*"[30]) will most likely rely on the identification of additional indicia, as is the case, for example, of the "plus factors" required to frame tacit collusion.

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[27] OCDE, Summary Report: Competition and cross platform parity agreements, 2015, p. 3.
[28] A relevant example of this discussion is the Apple e-books cases, prosecuted by both the DOJ (Apple Inc. v. United States, No. 15-565. For further information, see, e.g., "Supreme Court Declines to Hear Apple's Appeal in E-Book Pricing Case". The New York Times. March 7, 2016. Available at: nytimes.com/2016/03/08/technology/apple-supreme-court-ebook-prices.htm) and European Commission, and led, especially in the US, to the recognition, by authorities of a hub-and-spoke-type of conspiracy. Antonio Capobianco. Roundtable on Hub-and-Spoke Arrangements – Background Note.
by the Secretariat. Available at https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf, p. 36. Access on Mar. 12, 2020.
[29] Antonio Capobianco. Roundtable on Hub-and-Spoke Arrangements – Background Note
by the Secretariat. Available at https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf,, p. 38. Access on Mar. 12, 2020.
[30] Id., p. 34.

As highlighted in the OECD's Background Note Roundtable on Hub-and-Spoke Arrangements,[31] "e-*commerce and online sales do not change the legal or economic nature of hub and-spoke exchanges or RPM, but they facilitate them to a certain extent, as increased market transparency facilitates monitoring and instantaneous reactions to deviations*." Consequently, fewer explicit exchanges between suppliers and retailers may be required to keep the scheme going, which will make it harder for authorities to find the required evidence.

CADE will have to face this challenge, since proving this type of arrangement is not trivial, considering the indirect nature of the horizontal conspiracy. The lack of direct evidence for exchanges between competitors can make CADE rely on indirect and circumstantial evidence and there are high legal standards that must be met to prevent the prosecution of this conduct, or of actors unaware of their role in the scheme.[32]

The future perspective indicates that to prosecute a hub-and-spoke case, CADE will be probably facing the challenge of providing a consistent and credible theory of harm. As highlighted by OECD, "enforcement should not chill and deter legitimate business conduct between vertically related players." Developed authorities, as CADE, can offer additional guidance, based on insights from enforcement experience. This development would create further research into market structures, conducts and incentives and facilitate the screening of the agencies. The evolution of the discussion will facilitate the distinction between illegal and legal exchanges of information in vertical contexts.

All these themes are hot topics that attract further clarification in the world and in Brazil. Future cases of the Brazilian antitrust authority may contribute to the worldwide discussion setting out the differences between this conducts and other classic conducts. On the one hand, digital markets increase the grey area regarding the precise definition of these conducts, based on, for example, the difficulty of defining the subjective component of the conducts. Digital markets, in contrast, increase the level of incidence and create the necessary environment so that developed authorities, such as the Brazilian, have the opportunity to deepen the debate and make the definition more precise.

V. Conclusions

As CADE and other authorities in the world identify innovative manners of coordinated or collusive behavior, there is a growing concern of authorities around the globe with new

[31] https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf. Access on Mar. 12, 2020.
[32] https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf. Access on Mar. 12, 2020.

forms of cartels. Thus, the perspective in Brazil indicates a shift of focus in cartel enforcement policy. If that trend is real, Brazil and others will definitely follow on and hub-and-spoke cartel cases will be one of the focus. As developed in this article, the tricky question is figuring out exactly how to proceed, since several issues this conduct first need to be better understood and clarified by academics and enforcers, as CADE.

Specifically, regarding hub-and-spoke cartel in Brazil, CADE has been evolving in the characterization of such practices over the last years and this indicates positive future perspectives. Until now, the authority considered these cases as an exchange of competitively sensitive information through a hub or an agreement between hub and spokes with the purpose of negatively influencing market conditions. For the next years, with the analysis of more cases, there is space for more predictability and clarification.

In the context of digital markets and more complex and sophisticated cartelistic behavior, as a future perspective, CADE will likely have to face cases harder to identify and to catch. The differentiation of RPM and hub-and-spoke, fewer explicit exchanges of information, the increase of use of indirect evidences and the need to meet high legal standards and the obligation of providing a consistent and credible theory of harm are part of the issues that the authority will inevitably have to address. Hub-and-spoke cases are part of this new wave of enforcement, which includes a wider range of coordinated behavior in the enforcement agenda of authorities and CADE will likely follow this trend.

THE USE OF ECONOMIC SCREENING IN BID-RIGGING CARTEL INVESTIGATIONS

Fabiana Tito, Luisa Portilho

I. Introduction

The use of empirical and screening methods to detect cartels has been increasing among antitrust authorities all over the world. The answer to how the analysis of economic data—prices, quantities, market shares, demand shifters, cost shifters, and the like—can allow us to discriminate between collusion and competition so we can identify cartel operations provides our theoretical background.

Our purpose is not to pinpoint industries with high price-cost margins, but rather to uncover prosecutorial cases of collusion and try to answer questions such as: *Is this behavior inconsistent with competition?* Or *Does the behavior of firms suspected of colluding differ from that of competitive firms?* Moreover, our objective is to show how economic analysis can help to identify industries that are worthy of close inspection.

Empirical screening methods for detecting cartels can assist in that task. Against this backdrop, this article shows the importance of using these methods and offers an example of behavioral-approach screening methodology, adopted by the Administrative Council for Economic Defense (CADE) in a public procurement case in the Brazilian market.

The remainder of the paper is organized as follows. Section II presents some theoretical motivation as to why screening and empirical behavior methods were employed as opposed to a structural approach. In section III, CADE's strategy to tackle bid-rigging cartels is described. Section IV takes a brief look into a supposed bid-rigging cartel case that was investigated by CADE and to which the screening method was applied. Section V shows the statistical screening results, whereas Section VI presents our final remarks.

II. Behavioral screening approach

There are two different ways in which antitrust authorities can detect a cartel: the reactive way and the proactive way. In the former method, the investigation begins with an anonymous complaint or the testimony of a former cartel member given as part of a leniency program. Efficient as it may be, this method is limited to identifying cartels in which not all participants

are active anymore. In addition, authorities rely on external information to initiate their probe into the scheme.

For this reason, CADE and other international antitrust authorities have grown increasingly interested in adopting proactive strategies to investigate and detect this type of enterprise, including screening methods that use statistical algorithms to examine the behavior of economic variables in an alleged cartel.

The detection process involves screening, verification, and prosecution, as stated by Harrington (2005). In antitrust cases, **screening** generally occurs through avenues such as buyer complaints, charges by upset competitors, and corporate leniency programs. However, economic analysis can serve a screening function as well, and may entail studying price patterns with caution. **Verification** is then necessary to systematically exclude competition as an explanation for the observed behavior and to gather evidence of collusion, which requires controlling for demand and cost shifters, as well as any other variable necessary to distinguish between collusion and competition. This may involve identifying a competitive benchmark and contrasting it with the behavior of suspected colluders. The final task of **prosecution** is then performed when sufficient economic evidence has been gathered to persuade an administrative body that the suspected parties have engaged in anticompetitive behavior.

According to Harrington (2006), methods of cartel detection that use economic analysis can be divided into those that are structural and those that are behavioral. A **structural approach** identifies markets with traits conducive to cartel formation—that is, where cartels likely **will form**. For example, it has been shown that collusion is more likely with fewer firms, more homogeneous products, no large buyers, excess capacity, and more stable demand, among other factors[1]. Therefore, in industries that score high on these relevant traits, one can expect to find evidence of a cartel. However, although this may be a useful screening method, Harrington (2006) points out that there is a high chance of false positives—when indicators suggest collusion is likely, but in fact there is no active cartel.

The **behavioral approach**, in turn, uses as supporting data the very evidence that a cartel **has formed** and focuses on the impact of that coordination on the market. The precipitating suspicions may emanate from the firms' price or quantity patterns or some other aspect of market behavior, such as a parallel movement in prices or an inexplicable increase in prices.

[1] See Symeonedis (2003), Motta (2004), and Grout and Sonderegger (2005).

Below, we discuss an empirical example of behavioral approach, which is that adopted by the Administrative Council for Economic Defense (CADE).

III. CADE's approach to bid-rigging cartels

Lately, the Administrative Council for Economic Defense (CADE) has been expanding the use of economic screenings in its investigations into bid-rigging cartels[2]. This method is characterized by statistical tests that seek to identify anomalous patterns that resemble non-competitive behavior in the distribution of economic variables.

Non-competitive behavior, or any type of cartelization, tends to inhibit the entry of new, potentially more efficient competitors and reduce incentives for innovations (measured by investment in R&D), as evidenced by Günster et al. (2011). For these reasons, detecting and fighting bid-rigging cartels has become a high priority for antitrust authorities and anti-corruption agencies around the world.

The related empirical literature on the use of different types of economic screening to detect cartel behavior in public procurement processes is extensive. One tool that is traditionally employed is the variance screen. That is because variance is expected be lower in the bids' distribution when bid-rigging cartels are involved.

Aware of CADE's growing interest in using statistical algorithms in its bid-rigging cartel investigations, in December 2019, Guilherme Mendes Resende, Chief Economist, and Ricardo Carvalho de Andrade Lima, Economic Analyst at the Brazilian Prosecutor's Office published Working Paper nº 005/2019, "Using the Moran's I to Detect Bid Rigging in Brazilian Procurement Auctions."[3]

The study used a statistical algorithm to detect an alleged bid-rigging cartel that operated in the Brazilian market for Implantable Cardiac Devices (ICD)[4] and which was under investigation by CADE. More specifically, the approach followed the methodology proposed

[2] Bid-rigging occurs when a group of companies participating in a public procurement process establish cooperative agreements with one another to raise prices, divide the market or reduce the quality of the goods and services being purchased by the public administration.

[3] Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/Documentodetrabalho_Bidd_Rigging_Final.pdf. Last accessed 02 June 2020.

[4] The market covers the sector of implantable cardiac devices, which includes resynchronizers, pacemakers, and accessory items such as electrodes and catheters. According to the investigative process, the cartel operated nationwide between 2004 and 2015 and comprised a group of four companies, twenty-nine individuals, and two industrial associations.

by Lundberg (2017), in which the Moran's I statistic[5] is applied to the residuals of a bid regression to detect complementary bidding on a public contract.

The purpose of that working paper was to identify whether a systematic correlation could be found among the investigated companies' bids in the procurement auctions (which would suggest the existence of a bid-rigging cartel) using Moran's I statistic.

The main statistical resource used to detect fraudulent coordination among competitors in a specific market is bid variance analysis. In the presence of a bid-rigging cartel, the range of bid values in an auction is expected to be narrower due to coordinated bidding.

Another statistical parameter widely used in public procurement bid-rigging investigations is the autocorrelation of bids. If there is no coordination among the participating firms, no individual bid is expected to be conditioned on another competing bid, which is to say no autocorrelation should be found among bids.

What is innovative about CADE's study is that it used economic screening and a public database to analyze the behavior of an investigated bid-rigging cartel that operated in the Brazilian market. Before that, screens had been applied mostly to identifying price-fixing cartels in the gas station industry.

IV. Case study

The case addressed in the working paper is the investigation of a supposed bid-rigging scheme operated by the four largest companies in the Brazilian market for implantable cardiac devices (ICD). According to CADE's inquiry, the scheme ran between 2004 and 2015.

The anticompetitive practices being investigated by CADE and the Federal Prosecutor's Office (MPF) were: (i) the exchange of price information, (ii) supply agreements, (iii) customer allocation among competitors, and (iv) collusion in the sealed bidding phase.

Bids were thought to have been coordinated in an electronic auction for government purchases. This type of public procurement auction is held in two different stages. In stage one, each competitor presents a sealed envelope containing their bid value. In stage two, the acquisition process begins with a live auction, starting with the prices submitted by bidders in

[5] Moran's I statistic measures spatial autocorrelation from the product of deviations from the mean. This is a global measure of spatial autocorrelation that indicates the degree of spatial association in the data set. The value of Moran's I statistic ranges from -1 to +1. Negative values indicate a negative autocorrelation whereas positive values indicate a positive autocorrelation.

stage one. The study sets out to identify whether bids were coordinated in the first stage of an electronic procurement auction.

To that end, the authors turned to a public database containing information on all competitive bidding processes for the procurement of implantable cardiac devices, focusing on the processes in which at least one of the firms under scrutiny participated between 2005 and 2017.

In order to uncover the bid-rigging cartel, an economic screening method was used to test the conditional independence hypothesis. This hypothesis considers that, in non-rigged competitive procurement auctions—where no coordinated bidding occurs—individual bids are expected to be independent (as opposed to correlated), which the information observed should confirm.

The test was conducted using Moran's I statistic[6], which helped to identify whether bids by the companies accused of cartelizing showed any systematic correlation. To reduce the possibility of flagging autocorrelations that were caused by factors unrelated to coordinating behavior, the coefficient was calculated using residuals of the bid regression estimation, controlling for specific variables from the IDC market, the participating companies, and the procurement system that may have affected any one company's bid. These variables included, for example, the firms' capacity rates and employee numbers, the number of bidding competitors, and the number of ICD items being procured by the public administration in each auction.

V. Results of CADE's study

In the tests presented in CADE's study, Moran's I statistic was positive and statistically significant for the autocorrelation of bids[7] during the period when the supposed bid-rigging cartel was operative, a result that was not found in the post-cartel period (by which time the supposed bid-rigging cartel probably no longer existed). This demonstrates that Moran's I

[6] Moran's I statistic was applied to the residuals of a regression to control for other factors that may lead to bid correlations but have no bearing on cartel behavior. The controlled variables relate to characteristics of the participating companies and the procurement auctions.
Residues, in this case, are all factors that were not controlled for in the regression (such as bid coordination) and which can affect the value of a bid.

[7] Autocorrelation means the correlation of values of the same variable sorted by time (using time series data) or space (using spatial data). In this case, the autocorrelation of bids indicates whether any one company's bid price influences those of its competitors.

statistic can be effectively used to identify suspected bid-rigging cartel behavior. Even so, other robustness tests may corroborate this conclusion.

The Moran's I statistic tests offered positive and statistically significant results for three different bid equation specifications with data for the period between 2005 and 2017. The controls adopted in each of the three models is what distinguishes them from one another.

The same test was calculated for two different periods: January 2005 through October 2015, for when there is documented evidence of the investigated cartel's activity, and November 2015 through December 2017, when the cartel would have been inactive. These time spans were determined based on information obtained through the leniency agreement made between CADE and one of the companies.

The results reinforce CADE's previous conclusions. Positive and statistically significant Moran's I statistics were produced only for the time span during which the cartel was active, suggesting that competing bids were conditioned on one another. In the post-cartel period, however, no systematic correlation of bids could be identified.

Other robustness tests performed for the working paper also confirmed the good effectiveness of Moran's I statistic to detect bid-rigging cartels.

VI. Final Remarks

This essay was designed to reinforce the importance of using economic screening methods to identify cartels. Screening is a cost-effective way to zero in on industries whose behavior is so suggestive of collusion as to warrant scrutiny. Once they have been pinpointed, a careful investigation must be conducted, contrasting collusion with competition as contending explanations of market behavior[8].

To be practical, screening must then rely on easily available data, which in many cases will mean price data exclusively. In some cases, however, quantity and some cost or demand shifters may also be accessible at a low cost. Furnished with these figures, the empirical exercise should be simple enough to be largely automated.

[8] For a review on some of the methods to compare competition and collusion as alternative explanations of data correlation, see Harrington (2006a). We also recommend reading Porter (2005).

When analyzing the results, one possibility is to look for specific collusion markers, such as low price variance, low market-share variance, high bid correlation, negative market-share correlation, and negative price-and-quantity correlation.

An example of how this screening technique can be used was CADE's application of a new statistical method to identify cartel behavior in procurement auctions—something other antitrust authorities can replicate in their investigations.

In the study we have discussed, CADE proposed using an economic screen that identifies systematic correlations among bids to examine the behavior of an alleged bid-rigging cartel that operated in the Brazilian market for implantable cardiac devices.

The application of Moran's I statistic to the residuals of bid regressions showed that competing bids were systematically correlated in the procurement auctions that were held when the cartel was believed to have been in operation (2005-2015).

Low data requirements and computational and statistical simplicity are some of the main advantages of this method. The screen can also be applied to any type of market where sealed auctions are used for public procurement.

Although statistical methods can be of great help in detecting cartels, it should be emphasized that screening is only the first in a multi-stage process that may or may not end with prosecution. Therefore, it cannot be used as an isolated and definitive method to prove the existence of a bid-rigging scheme, which is why collecting further documental evidence is a necessary additional step.

VII. References

Abrantes-Metz RM, Bajari P (2012) Screens for conspiracies and their multiple applications. Compet Policy Int 8:177–193.

CADE (2017) CADE’s General Superintendence initiates administrative proceeding to investigate a cartel in the market of orthoses, prostheses and special medical supplies. In: Assessor. Comun. Soc.

Günster A, Carree M, Dijk M van (2011) Do Cartels Undermine Economic Efficiency? In: The American Economic Association.

Grout, P. A., and S. Sonderegger. 2005. Predicting cartels. Economic discussion paper. O‰ce of Fair Trading.

Harrington J. (2006a): "Detecting Cartels," in Buccirossi P., ed., Handbook in Antitrust Economics, MIT Press, Massachussets.

Lima, R. e Resende, G. (2019): Using the Moran's I to Detect Bid Rigging in Brazilian Procurement Auctions – CADE Working Paper N 005/2019. http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/Documentodetrabalho_Bidd_Rigging_Final.pdf

Moran PA (1948) The interpretation of statistical maps. J R Stat Soc Ser B 10:243–251.

Motta M. (2004): Competition Policy: Theory and Practice, Cambridge University Press, Cambridge.

Porter R. (2005): "Detecting Collusion", 26 Review of Industrial Organization 147.

Symeonidis G. (2003): "In Which Industries is Collusion More Likely? Evidence from the UK", 48 Journal of Industrial Economics 1.

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DIGITAL ECONOMY AND THE SHARING OF COMPETITIVELY-SENSITIVE INFORMATION: NOTES ON THE BRAZILIAN ANTITRUST FRAMEWORK AND EXPERIENCE AND THE CHALLENGES AHEAD

Daniel Tinoco Douek, Felipe Zolezi Pelussi, Gabriel de Carvalho Fernandes

Abstract: Antitrust authorities typically understand that sharing of commercially competitively-sensitive information may give rise to ambiguous effects from an antitrust standpoint. However, while sharing of this kind of information may, under specific circumstances, allow competitors to monitor each other, collude, or attempt to monopolize a given market, it may also enable consumers to make better-informed purchase decisions. This article argues that, in a context where recent technological developments (open banking, virtual marketplaces, data-aggregation providers, among others) are increasingly making markets more transparent, this discussion is likely to draw more attention from antitrust authorities in the coming years.

I. Introduction

The sharing of competitively-sensitive information ("SCSI") is by no means a foreign or novel challenge for antitrust authorities, much less a simple one. As Jorge Padilla remarks in his contribution for the Organization for Economic Cooperation and Development ("OECD") Policy Roundtable on Information Exchanges Between Competitors Under Competition Law, *"competitive assessment of information sharing among competitors is one of the more complex issues, if not the most difficult issue, in competition economics and law"*[1]. The emergence of new business models that are based on the collection, treatment and sharing of data (e.g., open banking, digital platforms, data-aggregation providers) is increasingly raising questions on whether current analytical frameworks adopted by antitrust authorities are fit for the purpose of assessing SCSI in the digital economy.

This article argues that, in a context where recent technological developments are creating more transparent markets, this discussion is likely to draw more attention from antitrust authorities in the coming years. To that end, following this introduction, Section II briefly overviews the discussion on the ambiguous effects arising from SCSI and how such practice is most recently being assessed under the Brazilian Competition Defense System ("SBDC", in the Portuguese acronym). Section III underscores challenges that new technologies may impose to the SCSI assessment criteria. Finally, Section IV summarizes our conclusions on the matter.

[1] Padilla, 2010: p. 434.

II. Competitive assessment of SCSI

Discussions related to SCSI frequently surface in two main contexts. First, when merging firms exchange competitively-sensitive information prior to merger review by antitrust authorities, thereby breaching standstill obligations and incurring in gun jumping. Second, when competitors engage in reciprocal or unilateral disclosure of sensitive information, either in the context of collusive agreements or as stand-alone practice. In this article, we are concerned with this latter case: SCSI that is not related to mergers or to collusive agreements.

Antitrust authorities typically understand that SCSI may give rise to ambiguous effects. On one hand, SCSI can undermine competition either through coordinated or unilateral effects[2]. Coordinated effects may be observed when information sharing eliminates "surprise effects" of competitive strategies between rival firms, thereby allowing them to harmonize their commercial behaviour. In addition, information sharing may have unilateral effects when it has at least the potential to foreclosure competition in a given market. For instance, this may happen when entrants at a given market do not participate in an information exchange scheme set up by incumbent firms.

On the other hand, information transparency is often welcomed by regulators in Brazil and abroad as a way of increasing consumer awareness, as it reduces information asymmetries and allows for an optimal allocation of resources[3]. In addition, consolidation and dissemination of data between firms operating in a same market may, under appropriate circumstances and with competition law safeguards, enable them to make efficient investments and usage of their own infrastructure, with indirect positive effects for consumers in terms of prices, quality, and availability.

According to the OECD, as SCSI may lead to both positive and negative effects over competition, antitrust agencies take into consideration three factors when assessing whether such practice is anticompetitive, namely, (i) structure of the affected market, (ii) characteristics

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[2] See OECD, 2010: p. 10-11. "As regards coordinated effects, the exchange of information can facilitate collusion among competitors by allowing them to establish coordination, monitor adherence to coordinated behaviour and effectively punish any deviations. With respect to theories of harm based on non-coordinated effects, information exchanges may lead to market foreclosure. Theoretically, potential new entrants may be placed at a significant disadvantage in comparison to the present competitors involved in an information exchange scheme. However, it was generally felt that this risk is not particularly high and no problematic cases of this type were reported."

[3] See OECD, 2010: p. 8-9. "In economic literature, market transparency is traditionally considered pro-competitive as it eliminates information asymmetries, enhances informed choice on the part of market participants and in some instances even allows for certain markets to function (as is the case, for example, of insurance markets). Whether the information is shared among all the market participants or remains limited only to those on the supply side determines much of the benefits that will be derived from the information exchange."

of the information exchanged and (iii) situations in which the information exchange takes place. Based on this criteria, antitrust authorities typically examine SCSI under a rule of reason approach, balancing the anticompetitive effects resulting from the sharing or exchange of information with their potential procompetitive benefits – except if it is clearly shared with the purpose of restricting competition (restriction by object).

The Brazilian Antitrust System is aligned with this analytical framework to a certain extent. Law 12,529/2011 (the Brazilian Antitrust Law, or "LDC") does not provide a definition for competitively-sensitive information or have specific provisions prohibiting SCSI as an antitrust infringement. Nevertheless, the Brazilian Antitrust Authority (*Conselho Administrativo de Defesa da Concorrência,* or "CADE") not only provides a definition for SCSI in its Gun Jumping Guidelines and Guidelines on Cartel Enforcement Unions and Trade Associations[4], but has also indicated in recent investigations that improper disclosure of competitively-sensitive information may amount to an antitrust infringement within the meaning of the LDC.

CADE's Gun Jumping Guidelines recommend that parties to a merger avoid unnecessarily exchanging any competitively-sensitive information, as this could amount to a premature closing of the transaction before CADE's approval. Under these guidelines, competitively-sensitive information comprise any information that is specific (i.e., non-aggregated) and directly related to the business activity of an economic agent, such as (i) costs of the companies involved; (ii) capacity level and plans for expansion; (iii) marketing strategies; (iv) product pricing (prices and deductions); (v) main customers and deductions ensured; (vi) employees' wages; (vii) main suppliers and the terms of the contracts signed with them; (viii) non-public information on marks and patents and Research and Development (R&D); (ix) plans for future acquisitions; and (x) competition strategies.

In addition, CADE's Guidelines on Cartel Enforcement in Unions and Trade Associations orientate labour unions and class associations on certain precautions when collecting and sharing competitively-sensitive information such as current and future prices, market shares, costs, output levels, growth and marketing strategies, and discount policies. These guidelines also recommend that unions and class associations collect competitively-sensitive information through a black box, preferably an accountable and independent third

[4] An English version of the Gun Jumping Guidelines can be found at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf>.

party that is able to ensure confidentiality of and provide treatment to the collected data –, and do not coerce their members to provide their information under any circumstance.

CADE also has recently started to investigate SCSI as a stand-alone conduct. These probes either concerned unilateral[5] (where a company discloses competitively-sensitive information of its own to competitors only) or bilateral (where competitors trade competitively-sensitive information with each other) cases of SCSI[6]. Some of these cases are still ongoing[7] and have yet to been ruled on by CADE's Tribunal[8]. To this date, CADE has not yet thoroughly assessed potentially pro-competitive arguments on sharing information among competitors.

These guidelines and cases are, however, mostly focused on a brick-and-mortar economy and do not provide a clear guidance on how CADE would assess SCSI in the case of business models that are essentially based on the collection of data and widespread availability of all sorts of commercial information. This, in turn, raises important questions about how CADE (and other antitrust agencies) should assess sharing and exchanging of competitively-sensitive information in the digital economy, as we discuss in section III below.

III. Digital economy and the assessment of SCSI

As is well known, the development of the digital economy has prompted the emergence of new business models that are based on the fast and voluminous collection of data and the

[5] In Brazil as well as in other jurisdictions, regulators often request companies to make public announcements to market agents. For instance, listed companies must comply with the Brazilian Securities Exchange Commission (CVM, in the Portuguese acronym) regulations demanding periodic and detailed disclosure of aspects of their businesses. In this regard, the OECD notes that "it is generally accepted that 'private' announcements, which are directed to competitors only, do not have efficiency benefits and can only be motivated by the intention to help rivals to co-ordinate on a particular collusive price. Conversely, public announcements, which are directed to both rival firms and consumers, may provide significant benefits to customers. This positive effect is generally considered stronger than the collusive effects of the announcements". (OECD, 2012: p. 12).

[6] See CADE's General Superintendence Opinion No 13/2019/CGAA3/SGA1/SG/CADE (Administrative Process No 08700.000351/2019-53; Defendants: Marimex - Despachos, Transportes e Serviços Ltda. and Empresa Brasileira de Terminais Portuários S.A); CADE's General Superintendence Opinion No 20/2019/CGAA3/SGA1/SG/CADE (Administrative Process No 08700.006268/2018-15, Defendants: Companhia Brasileira de Soluções e Serviços and others); and CADE's General Superintendence Opinion No 7/2015/CGAA6/SGA2/SG/CADE (Administrative Process No 08700.003017/2015-28, Defendants: Copagaz Distribuidora de Gás S.A).

[7] Examples include investigations in the international airline assurance and reassurance brokerage market (see CADE's General Superintendence Opinion No 13/2019, Administrative Process nº 08700.000171/2019-71; Defendants: American International Group; Amlin and others) and in the independent aftermarket for automotive parts (see CADE's General Superintendence Opinion No 10/2016 in the Administrative Process nº 08700.006386/2016-53; Defendants: Affinia Automotiva Ltda. and others).

[8] This being said, it is worth noting that, his in the vote for optic disk drives (ODD) cartel investigation case, former Commissioner João Paulo de Resende confirmed indicated his understanding that SCSI may amount to a stand-alone infringement, when assessing whether the investigation had been time-barred for one of the defendants. See Administrative Process No 08012.001395/2011-00, Defendants: Philips & Lite-on Digital Solutions Corp. and others, ruled on 02/28/2019.

widespread availability of all sorts of commercial information. Under this new economic environment, data has famously been regarded as the world's most valuable resource (rather than oil), a key asset that companies may collect, exchange, mine, map and sell, thereby allowing for the change of supply chains and customer expectations.

As new business models are making markets increasingly more complex, CADE should rethink how it assesses SCSI in the digital economy. CADE's guidelines and case law are still trapped under a brick-and-mortar paradigm that does not capture the distinctive aspects of competition in the digital markets, such as zero-pricing strategies, targeted offerings, price transparency, among others.

In particular, two sorts of practices in the digital economy are likely to deserve more attention from CADE in the coming years. The first practice concerns the ability of firms to gather highly detailed and up-to-date information from commercial offerings by other firms through online data scraping and other monitoring strategies. The other practice regards the ability of digital platforms to gather information provided by participants and use this information to change the dynamics of competition in the relevant markets in which these participants offer their products and services.

As for the first sort of practice above, the idea of sharing or accessing competitively-sensitive information is likely to be re-evaluated by CADE and other antitrust authorities, as this activity increasingly takes place in a gray zone between public and private areas. Indeed, the question of whether disclosure of this kind information is public has always been relevant, with CADE defining publicly available information as any information readily observable and available to everyone and at no cost. In the digital economy, however, this discussion tends to become more complex as the distinction between sharing information with a competitor and obtaining access to publicly available information from a competitor is blurred.

This can be observed, for example, in algorithm-based techniques that allow a company to obtain highly detailed and fast-tracking information of different types of data, such as online data scraping[9]. This is generally an automated process that firms use to collect a large volume of publicly available data existent in different websites to sell to other firms. Although this information is already available to public access, data scraping may certainly raise questions from data protection and intellectual property standpoint. Moreover, from an antitrust

[9] See Ezrachi & Stucke, 2016. See also Crémer, et al. (2019).

standpoint, data scraping may lead to discussions not only in terms of data ownership and exclusionary conduct, as recently seen in the *hiQ Labs, Inc v. Linkedin Corp*[10] case ruled by United States courts, but also with regard to SCSI in the future.

Indeed, once online data scraping starts to become part of a contractual agreement between firms that compete in the same market, there may be some discussion on whether such a practice may prevent competitors from differentiating their products or services, or allow for quick price adjustments that can minimize competitors surprise marketing strategies, that is, potential negative effects that are associated with SCSI. In this case, the parties involved in a data scraping agreement would probably be required to present an efficiency defense of such practice.

In Brazil, so far the only online data scraping case assessed by CADE was ultimately dismissed[11]. This case concerned a complaint filed by E-Commerce Media Group Informação e Tecnologia Ltda. ("E-Commerce Media Group"), the owner of online price comparison websites Buscapé and Bondfaro, against Google Shopping for allegedly scraping practices of Buscapé and Bondfaro customers' reviews of products and shops. According to E-Commerce Media Group, by resorting to online data scraping, Google would have supposedly benefitted from what would be E-Commerce's competitive distinction in the market. CADE's Tribunal dismissed this case as it understood that there was no evidence that Google had engaged in review-scraping, meaning that it did not actually evaluate the likely effects of such practice in the market.

In the context of data-aggregation providers[12], a similar discussion involving SCSI was recently raised in a case concerning supposed hub-and-spoke practices by Uber. The investigation dismissed such allegations and found that Uber's business model did not involve SCSI between drivers or between drivers and the data-aggregator[13].

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[10] hiQ Labs v. Linkedin, No. 17-CV-03301-EMC, 2017 WL 3473663 (N.D. Cal. Aug. 14, 2017).

[11] See Administrative Process No 08700.009082/2013-03, Defendants: E-commerce Media Group Informação e Tecnologia Ltda., Google Inc. and Google Brasil Internet Ltda., ruled on 03/07/2019).

[12] Aggregators are not the same as platforms. While platforms generally allow for the development of entire business systems (e.g., Apple's provision of an operating system for mobile phones, APIs for application developers, and a user interface for end users), aggregators connects end-users and suppliers (e.g., Google Search or ride-hailing applications like Uber). For further reference see Thompson, 2019.

[13] In the context of data-aggregation providers a similar discussion involving SCSI was recently raised in a case concerning supposed hub-and-spoke practices by Uber. In such investigation, CADE assessed whether Uber was influencing competition conditions by gathering information from riders to establish algorithm-based prices to be charged by independent drivers. Several stand-alone harm theories were considered, including allegations of a hub-and-spoke collusion and SCSI. Although this is not the subject of this article, it is worth noting that in, in this

Nevertheless, it is still unclear whether, from CADE and other antitrust authorities' standpoint, there would be a difference between a firm sending its organized competitively-sensitive information to competitors (as is the traditional situations of SCSI) and publicly disclosing information scattered on the internet that competitors may be able to gather and use for competitive purposes[14]. As noted, platforms and aggregators act in a gray zone between public and private areas, and whether the collection of data available on such spaces will be considered as public information will deeply affect how such business models will be assessed by antitrust authorities. Additionally, further concerns might arise as dynamic pricing algorithms might theoretically be able to engage in tacit coordinated practices (which brings the discussion regarding antitrust compliance by design)[15].

Another practice concerns the ability of digital platforms to perform a so-called dual role. In Brazil as well as elsewhere, it is increasingly common that digital platforms sells its own products on its website as a retailer and, at the same time, provide a marketplace for independent competing sellers to sell products directly to consumers. In this context, independent sellers may be required to disclose competitively-sensitive information to the platform. As some legal commentators note, such practice may raise antitrust concerns to the extent that platform owners analyse and use this information to distort competition, especially if this information provides the platform owner with an artificial competitive advantage[16].

In fact, such phenomenon may not be restricted to retail platforms. In the banking and payments sectors, for example, a similar discussion may arise depending on the extent to which operators of certain platforms can have access to competitively-sensitive information from independent third parties and intend to join the relevant markets in which these parties offer their products and services. This could happen, for instance, in the case of platforms performing open banking activities or even registration activities, such as credit card receivables registries.

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case, CADE regarded SCSI as a relevant factor for establishing the potential existence of a spoke-and-hub conspiracy. In this sense, by concluding that Uber and its drivers were not engaging in any sort of SCSI, CADE dismissed the hub-and-spoke harm theory. See Administrative Process No 08700.008318/2016-29 (Defendant: Uber do Brasil Tecnologia Ltda. ruled on 03/10/2018).

[14] In fact, when discussing tacit collusion, Ezrachi & Stucke (2016, p. 231) indicate that "it may be impractical to require computers to ignore information that is available to everyone online".

[15] See Schwalbe, 2019.

[16] See Khan (2017) for an analysis of Amazon's market practices, quoting news reports that affirm that "Amazon uses sales data from outside merchants to make purchasing decisions in order to undercut them on price" and give its own items "featured placement under a given search" (p. 781). In July 2019, the European Commission launched a formal investigation into Amazon's dual role as a platform (Case AT.40462).

This discussion also brings to attention how collective entities (unions and trade associations) and digital platforms treat the competitively-sensitive information they gather from their members and independent users, respectively. While unions and trade associations typically release this information for statistical purposes by consolidating it in a way that extracts its specificity and sensitivity; digital platforms retain this information for other purposes. The question at the end, for digital platforms, is whether these are legitimate purposes or not.

IV. Conclusion

This article aimed to briefly discuss the criteria that CADE has been using to define competitively-sensitive information and to assess the legality of the sharing and exchange of such information in the digital age. As was noted, CADE's guidelines and case law indicate that it is increasingly looking into SCSI as a stand-alone conduct, rather than an ancillary conduct related to cartel formation. However, CADE's recent experience in this regard has been mostly focused on brick-and-mortar economy and does not provide a clear guidance on how CADE would assess the sharing and exchange of competitively-sensitive in the case of business models developed under the digital economy.

In this sense, it remains to be seen how CADE will evaluate commercial practices that are essentially based on the collection of data and widespread availability of all sorts of commercial information. While it is clear that CADE is increasingly likely to adopt a rule of reason approach for SCSI, balancing the anticompetitive effects resulting from the sharing or exchange of information with their potential pro-competitive benefits, it is still not clear whether it would consider certain aspects of the digital economy – such as zero-pricing strategies, targeted offerings, price transparency, among others – as a potential example of SCSI. This uncertainty applies, in particular, to online data scraping and the dual role of platforms, which involve a relevant amount of sharing and exchange of potentially sensitive information between firms, with relevant implications for competition in the market.

V. References

CRÉMER, Jacques; MONTJOYE, Yves-Alexandre; SCHWEITZER, Heike. Competition policy for the digital era: final report. European Commission, 2019. Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

EZRACHI, Ariel; STUCKE, Maurice. How Pricing Bots Could Form Cartels and Make Things More Expensive. Harvard Bussiness Review, Oct./2016.

EZRACHI, Ariel; STUCKE, Maurice. Virtual Competition: the promise and perils of the algorithm-driven economy. Cambridge: Harvard University Press, 2016.

KHAN, Lina. Amazon's Antitrust Paradox. In: Yale Law Journal, vol. 126, n. 3, january 2017: p. 710-805.

PADILLA, Jorge. Note by Professor Jorge Padilla: The elusive challenge of assessing information sharing among competitors under the competition laws. In: Organization for Economic Co-operation and Development – OECD. OECD Policy Roundtables: Information exchanges between competitors under competition law. OCDE, Competition Committee, 2010. Available at: <http://www.oecd.org/competition/cartels/48379006.pdf>.

OECD - Organization for Economic Co-operation and Development. OECD Policy Roundtables: Information exchanges between competitors under competition law. OCDE, Competition Committee, 2010. Available at: <http://www.oecd.org/competition/cartels/48379006.pdf>.

OECD - Organization for Economic Co-operation and Development. OECD Policy Roundtables: Unilateral Disclosure of Information with Anticompetitive Effects. OCDE, Competition Committee, 2012. Available at: < http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf>.

SCHWALBE, Ulrich. Algorithms, Machine Learning, and Collusion. In: Journal of Competition Law & Economics, Volume 14, Issue 4, 2018. , Pages 568–607.

THOMPSON, Ben. A Framework for Regulating Competition on the Internet. Stratechery, december 2019. Available at: <https://stratechery.com/2019/a-framework-for-regulating-competition-on-the-internet/>.

VIVES, Xavier. Information Sharing Among Firms. In: Occasional Paper nº 07/3, 2006. Available at: <https://media.iese.edu/research/pdfs/OP-07-03-E.pdf>.

WHAT IF THE LENIENCY AGREEMENT GETS KNOCKED OUT?

Camila Pires da Rocha, Renata Gonsalez de Souza

The inclusion of the Leniency Program in the Brazilian Antitrust Law[1] in 2000 was the result of the worldwide trend of implementation triggered by the United States to strengthen the fight against cartels[2].

The first dawn raid in cartel investigations was conducted in 2002 within the scope of the administrative proceeding best known as Crushed Rock Cartel (*Cartel das Britas*[3]). In its turn, the first leniency agreement was executed within the case well known as Security Services Cartel (*Cartel dos Vigilantes*)[4].

[1] The leniency agreement was first inserted in Brazilian Legal System by the Provisional Measure No. 2,055/2000, that was converted into Law No. 10,149/2000, which modified Law No. 8,884/1994, establishing the Leniency Program in the antitrust field in Brazil.

[2] "The last ten years have witnessed what one could call, with no exaggeration, a revolution in competition policy and antitrust enforcement, 'the leniency revolution'. Since the DOJ's new leniency policies where introduced in 1993 (the Corporate Leniency Policies) and 1994 (the Individual Leniency Policy), and they began displaying their effects, antitrust authorities' 'normal way' to detect and hopefully deter cartels has radically changed, from buyers' complaints, audits and down raids, to well-designed leniency policies and self-reporting cartel participants. The achievements of the US leniency policies are described in a number of public speeches by the DoJ staff (available at http://www.usdoj.gov/atr/public/criminal.htm) and in several international reports (e.g. OECD 2002, 2003). Since their introduction, an unprecedented number of cartels has been detected and successfully prosecuted, enormous fines have been levied against participants, and several top executives from different countries have served jail sentences in the US. This led Australia, Canada, the European Union, France, Germany, New Zealand, the UK, Sweden and other countries to introduce analogous programs". Available at: http://www.learlab.com/conference2005/documents/spagnolo.pdf. Access on March 29, 2020.

[3] In 2002, the Secretariat of Economic Law (former public agency pertaining to Brazil´s Ministry of Justice which competition law functions were later transferred to the Administrative Council for Economic Defense) was tipped that a cartel of crushed rock existed in the metropolitan region of São Paulo. The involved companies cooperated to fix prices, allocate customers, limit the output and defraud public bids, organizing its actions with a sophisticated software. They learned that the cartel existed since 1999. The dawn raid was conducted in the association of such industry, Sindipedras. The investigations were enabled by a strong cooperation between SDE and the Public Prosecution. The Administrative Proceeding No 08012.002127/2002-14 (Defendants: Embu S/A Engenharia e Comércio, Geocal Mineração Ltda., Holcim S/A, among others; Reporting Commissioner Luiz Carlos Delorme Prado, ruling on July 13, 2005) was initiated in 2003 and concluded in 2004. In 2005, CADE fined the companies in a total amount of R$ 120.000.000,00 (SDE/CADE. **Combate a cartéis e programa de leniência**. pp. 11-12, 2009. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_leniencia.pdf. Access on March 28, 2020).

[4] In 2003, one of the participants of the *Cartel dos Vigilantes* reached out to SDE and uncovered the existent scheme put together by companies in Rio Grande do Sul State to defraud bids of surveillance service. As well as happened in *Cartel das Britas*, the Public Prosecution strongly cooperated with SDE. Dawn raids were conducted, simultaneously, in 4 companies and 2 associations involved in the cartel. CADE's final decision was issued in 2007. The total amount of fines surpassed R$ 40 million and some of the defendants were also prohibited of participating in bids for a period of 5 years (SDE/CADE. **Combate a cartéis e programa de leniência**. p. 19, 2009. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_leniencia.pdf. Access on March 28, 2020).

It is understood that the investigative efforts undertaken by the extinct Secretariat of Economic Law (SDE), in cooperation with criminal authorities (judicial authorization to the use of wiretapping, for instance), led to cases with direct and strong evidence, what encouraged companies to opt for leniency agreements despite the uncertainties of the newly established Program[5], what gave credibility to it before the market and the public.

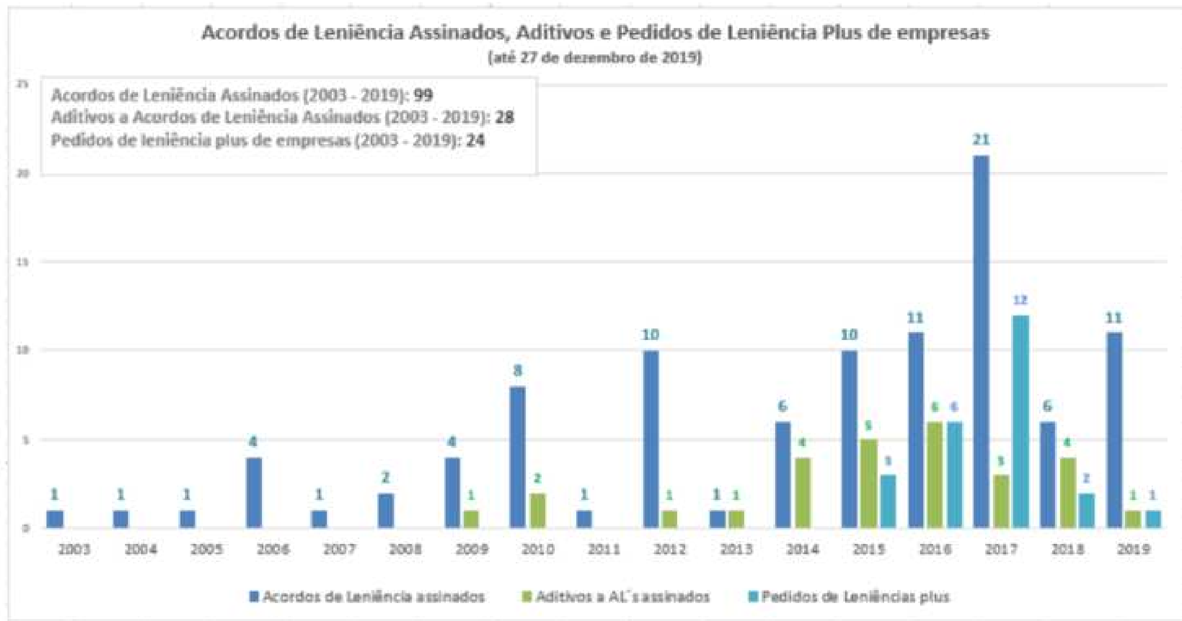
The provisions regarding the leniency agreement were replicated in Articles 86 and 87 of the Law No. 12.529/2011 ("Brazilian Antitrust Law"), enacted in 2012 and in force until this day[6].

To assure the stability and effectiveness of the Leniency Program and enhance the confidence of the market, the Administrative Council for Economic Defense ("CADE") has been working hard on the procedural aspects of the negotiations by elaborating thorough guidelines of best practices[7]. The efforts have paid off. A quick glance in the yearly reports issued by CADE shows that, since the creation of the Antitrust Leniency Program in Brazil, 99 leniency agreements have been executed:

[5] "The success of SDE's first dawn raid in 2003 which resulted in strong evidence of a hard-core cartel violation (Crushed Rock case) and SDE's use of other investigative tools (e.g. wiretapping) in co-operation with the criminal authorities led to two leniency applications that year. Investigations were based on direct evidence of the anti-competitive agreements rather than circumstantial evidence, and as a result the cases were more solid and the fines imposed on companies and individuals were increasingly high. This is probably one of the reasons that encouraged companies to make use of the Leniency Program, despite initial doubts". (OECD. **Peer Reviews of Competition Law and Policy Brazil**. p. 24, 2019). Available at: https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf. Access on April 15, 2020.

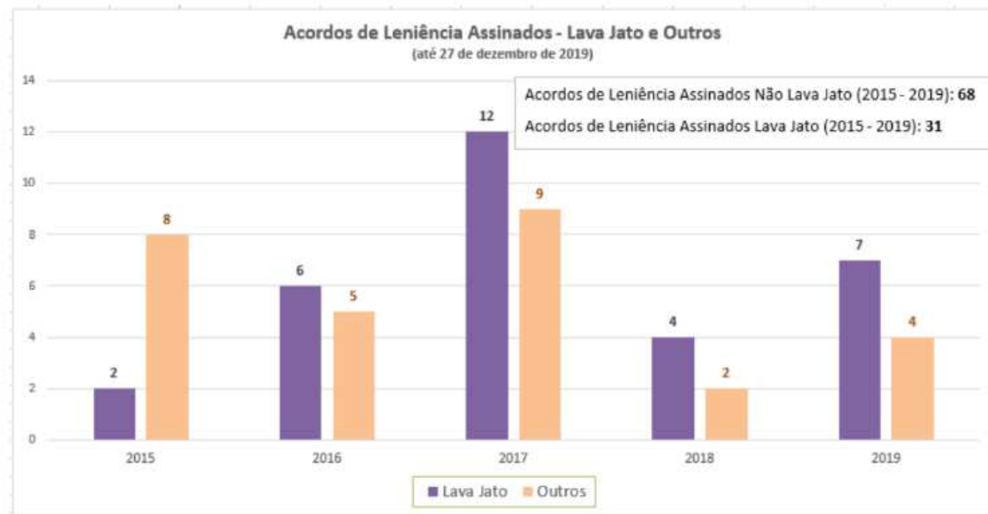
[6] The most important changes under Law No. 12,529/2011 are the possibility that the leader reaches out for a leniency with CADE and that "new Law extends the granting of leniency to criminal liability – not only under the Federal Economic Crimes Act, but also to other possible crimes under other criminal statutes, such as fraud in public procurement". OECD. **Peer Reviews of Competition Law and Policy Brazil**. 2019, p. 62. Available at: https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf. Access on April 15, 2020.

[7] CADE. **Guidelines CADE´s Antitrust Leniency Program**, 2016. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/GuidelinesCADEsAntitrustLeniencyProgram.pdf. Access on March 29, 2020.



Source: CADE

Also, such institution was remarkably important within the scope of the Car Wash Operation. CADE has already executed 31 agreements in connection to cases unfolded with the investigations, which peaked in 2017:



Source: CADE

CADE deems the Leniency Program as its main tool in the fight against cartels[8], since it is an easier and less costly way of unfolding conducts hardly detectable. In the same sense, OECD has recognized that

[8] CADE's representatives have praised several times the Brazilian Leniency Program. See more at: http://www.cade.gov.br/noticias/cade-e-mpf-sp-debatem-em-seminario-evolucao-e-relevancia-de-acordo-de-leniencia; http://www.cade.gov.br/noticias/cade-lanca-cursos-on-line-sobre-leniencia-antitruste-e-deteccao-de-

> *"The Leniency Program has clearly matured over the years and is now considered a central aspect of the Brazilian competition policy, attracting interest from both domestic and international applicants. Over the course of the years several new investigations have been launched as a direct consequence of the success of the Program*"[9].

In the aftermath of the Car Wash Operation a significant decrease in the number of agreements is noted, coinciding with a moment in which CADE is facing and dealing with important challenges to the continuity of the Leniency Program[10], as well as other authorities around the world[11].

In order to keep the Leniency Program as an effective tool CADE has to keep the fine balance between the benefits resulting from the agreement and its respective risks, while preserving the (i) threat of severe sanctions; (ii) fear of detection; and (iii) transparency in enforcement policies[12].

Regarding the equilibrium, with the maturing of Antitrust in Brazil, private enforcement has become a more present reality each day. Following the steps of jurisdictions that have been dealing with it for many years, CADE has been trying to find the balance between fostering private lawsuits and preserving the Leniency Program, which is not a trivial job. In September 2018, CADE issued Resolution No. 21, that provides for the rules regarding the disclosure of certain documents and information of administrative proceedings, that was preceded by a

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carteis-em-licitacoes; http://www.cade.gov.br/noticias/cade-publica-balanco-de-suas-atividades-em-2015; http://www.cade.gov.br/noticias/antigas/cade-e-sde-lancam-joint-brochure-on-brazils-leniency-program. Access on March 29, 2020. Recently, CADE's President Alexandre Barreto has emphasized the relevance of such institution: "Focusing on the Leniency Program, it is the main tool available for antitrust authorities for the detection and punishment of collusive conducts, especially cartel behavior" (free translation). Excerpt extracted from vote issued in the Administrative Proceeding No. 08012.003970/2010-10, CADE *ex officio*, Defendants: ABB Cable, Exsm Corporation, Hitachi Cable Ltda., J Power Systems, among others; Reporting Commissioner Paulo Burnier, ruling on April 15, 2020.

[9] Available at https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf (OECD, **Peer Reviews of Competition Law and Policy**, Brazil, 2019, p. 24). Access on April 15, 2020.

[10] Some of CADE's representatives understand that the Leniency Program is not at stake and that there was no decline in the numbers. They reckon that the Car Wash Operation provoked a distortion in the statistics and after that the numbers are just returning to the normal levels. Available at: https://www.jota.info/paywall?redirect_to=//www.jota.info/tributos-e-empresas/concorrencia/leniencias-cade-pre-lava-jato-05092018. Access on March 28, 2020.

[11] "According to Global Competition Review's Rating Enforcement Reports, the number of leniency applications (including immunity applications) [in Europe] has reduced by almost 50% over the last few years". Ysewyn, Johan and Kahmann, Siobhan. **The decline and fall of the leniency programme in Europe**. February 2018, Concurrences Review n. 1-2018, Art. n° 86060, pp. 44-59. Available at: https://ssrn.com/abstract=3126172. Access on March 28, 2020.

[12] Hammond, Scott. **Cornerstones of an Effective Leniency Program**, 2004. Available at https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program. Access on March 29, 2020.

comprehensive research of best practices and previously submitted to the public opinion discussion[13].

Concerning the *threat of severe sanctions*, in the past years, the Tribunal, especially the former Commissioners Cristiane Alkmin and João Paulo de Resende[14], has been trying to modify the method of calculation of the fines in order to better reflect the advantage obtained by the convicted company. CADE still has work to do on this arena in order to guarantee transparency for the calculations and assure that the potential penalties really consist in a deterrence factor[15].

To assure *the fear of detection* and avoid being completely dependent on leniency agreements to undercover collusive schemes, CADE has been investing in cooperative

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[13] The Court of Justice decision in Special Appeal No. 1.554.986/SP stated that the confidentiality of the documents obtained in leniency agreements is justified to safeguard the interests of investigations. Nevertheless, the Court asseverated that once the interests of the investigation are overcome, the documents should be disclosed, preserving the confidentiality of personal data and of information regarding the business which disclosure could harm competition (Superior Court of Justice, Special Appeal No. 1.554.986/SP, Reporting Commissioner Marco Aurélio Bellizze, issued on August 03, 2016). This decision grounded the formulation of CADES´s resolution No. 21. In the same sense, there is a bill which is currently being processed by the House of Representatives (PL 11,275/2018). The purpose of this bill is to establish solid parameters and rules for the proposition of suits for damages in order to guarantee a proper balance between public and private enforcement.

[14] *See* Administrative Proceeding No. 08012.001029/2007-66, Defendants: Evonik Degussa Gmbh, Solvay S.A., Heinz Von Zur Muehlen; Reporting Commissioner João Paulo de Resende, ruling on February 24, 2016. Also, it is worth mentioning an analysis of the matter written by former Commissioner Cristiane Alkmin: "Regarding, the first aspect, currently, the pecuniary sanctions are disconnected not only from the advantage obtained by the offender, but also from the damage caused to the society, then, the fines do not have economic rationality. Hence, it is not possible to assert that CADE fines in a dissuasive and proportionate manner. The heart of the matter is that the fines should be calculated according to the period of the conduct, the relevant market, the type of behavior, the difference between the total revenues obtained by the offender with the conduct and the amount he would have obtained if he had not committed the illegal act. Besides that, it would be advisable to establish solid parameters for the calculation of fines to be adopted by CADE in order to guarantee transparency" (free translation). (Alkmin, Cristiane. **Discutindo a Concorrência**. JOTA, February 28, 2018. Available at: https://www.jota.info/opiniao-e-analise/colunas/coluna-da-cristiane-alkmin/discutindo-concorrencia-28022018. Access on March 29, 2020).

[15] For a more detailed and interesting analysis of such discussions within CADE, please refer to the assessment conducted by OECD. OECD. **Peer Reviews of Competition Law and Policy Brazil**, 2019. Available at: http://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf. Access on March 28, 2020.

agreements with authorities throughout Brazil and worldwide[16] and in screening tools, such as *Projeto Cérebro*[17].

Finally, concerning the *transparency issue*, CADE has been fiercely working to establish clearer parameters by addressing important aspects in its decisions and by elaborating comprehensive guidelines. Despite all the efforts, CADE still has some major procedural issues that should be discussed.

Until the present day, CADE has never declared a leniency agreement as breached. There have been cases which started with leniency that did not result in any conviction, because CADE's Tribunal did not conclude for the existence of an antitrust offense in Brazil[18]. In all cases so, far, Beneficiaries were granted all the perks set forth by the Antitrust Law, that means to say that the authority has not already dealt with the consequences of a breach or annulment of an agreement.

The recent discussions regarding the possibility of the termination of the leniency agreement executed between the Public Prosecution and J&F Investimentos S.A. (holding company of the JBJ Group), requested by the Government Attorney's Office to the Supreme Court[19], in consequence of a possible non-compliance of the correlated plea-bargaining

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[16] CADE. **Cade celebra três novos acordos de cooperação internacional,** May 28, 2014. Available at: http://www.cade.gov.br/noticias/cade-celebra-tres-novos-acordos-de-cooperacao-internacional. Access on March 29, 2020; CADE. **Autoridades de defesa da concorrência do Brasil e da Itália, Cade e AGCM assinam convênio interinstitucional**, February 11, 2020. Available at: http://www.cade.gov.br/noticias/autoridades-de-defesa-da-concorrencia-do-brasil-e-da-italia-cade-e-agcm-assinam-convenio-interinstitucional. Access on March 29, 2020; CADE. **Programa de Cooperação entre o Conselho Administrativo de Defesa Econômica - Cade e o Federal Antimonopoly Service da Federação Russa para 2016-2017**, July 21, 2017. Available at: http://www.cade.gov.br/assuntos/internacional/cooperacao-bilateral-1/program-on-cooperation-brazil-russia.pdf/view. Access on: March 29, 2020.

[17] This project allows CADE to screen a huge database of public bids to identify suspect patterns that may indicate anticompetitive behaviors. For further details, please refer to: CADE, Organização de centro de dados: Projeto Cérebro, 2018. Available at https://www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/eventos/2018/organizacao-de-centro-de-dados-cade/organizacaocentrodados-projeto-cerebro-cade.pdf.

[18] For example, Administrative Proceeding No. 08012.000773/2011-20, Defendants: Chi Mei Corporation, En Chuan Chemical Industries Co. Ltd., Korea Kumho Petrochemical Co. Ltd., Lee Chang Yung Chemical Industry Corporation, LG Chem Ltd., among others; Reporting Commissioner João Paulo de Resende, ruling on August 31, 2016. Regarding that matter, CADE has expressly stated that: "In general, it is not considered a breach of the Leniency Agreement if Cade's Tribunal does not condemn all the companies and/or individuals identified as co-authors of the reported violation by the leniency recipient". CADE. **Guidelines CADE's Antitrust Leniency Program**. 2016, p. 55.

[19] The Supreme Court now will have to decide if the executives violated the duties of collaboration and good faith and the consequences that will outcome from this situation. According to an order issued by the Public Prosecution, there are three possibilities for the Court (i) decides that the agreement was fully accomplished and that the leniency is valid; (ii) consider that the agreement was partially fulfilled or (iii) consider that the agreement was not accomplished and the leniency should be terminated. Available at: http://www.mpf.mp.br/df/sala-de-imprensa/docs/despacho-leniencia-1. Access on March 29, 2020.

agreements executed with executives of the company, may be a good opportunity to bring such reflection to the antitrust sphere in Brazil.

The decision to be taken on this case may point out some solutions to be adopted by CADE in case it faces similar challenges; nevertheless, due to the particularities of the antitrust leniency agreement it is probable that it will not be enough to solve all the problems that CADE would have to deal with in case of a non-compliance of a leniency agreement or the annulment of it by the courts. Therefore, it would be advisable to take advantage of this context to put some thought on that matter.

Considering that scenario, why CADE has not declared the breach of any leniency agreements negotiated by CADE's General Superintendence yet? Is this because non-compliance issues have not come to CADE's attention or is there another reason for that?

The first explanation that comes to mind is that CADE tries to protect, at all costs, the credibility of the Leniency Program. In a recent decision, CADE's President, commenting the Leniency Program, has stated that[20]:

> "*The credibility of the institute is fundamental. More specifically, for it to be effective, it is necessary that the market agents really trust that the agreement with the antitrust authority will be fully complied with. Any doubts in that sense may make more rational to cooperate with other perpetrators instead of reaching out for the authority. Therefore, CADE, since the introduction of the institute in Brazilian Law in 2000, has taking all measures to avoid doubts that the agreement, that is executed with CADE's General Superintendence (before, with SDE), will be declared as complied with by CADE's Tribunal. Even though CADE performs all its attributes with excellence, it is the Leniency Program that demands more diligence to guarantee that everything runs without mistakes. Any failure that tarnishes the reputation of the Leniency Program, albeit it is not CADE's fault, tends to harm the fight against cartels in Brazil.*"

It seems unlikely that none of the multiple parties that have, until now, executed leniency agreements with CADE failed to comply with all the obligations set forth in their compromise and, yet more remote, that it will never happen.

What if the recipient is not compliant with the obligations of the leniency agreement? What if CADE learns, after the leniency agreement is already dully executed and the investigation has already been initiated against other parties that the beneficiary had not ceased

[20] Excerpt extracted from the vote issued in the Administrative Proceeding No. 08012.003970/2010-10, CADE ex officio, Defendants: ABB Cable, Exsm Corporation, Hitachi Cable Ltda., J Power Systems, among others; Reporting Commissioner Paulo Burnier, ruling on April 15, 2020.

the wrongdoing by the time it reached out for CADE? Or what if CADE finds out that the leniency applicant omitted part of the behavior or some of the perpetrators?

The first thing that comes to mind is: what really constitutes a breach that would justify a decision from the Tribunal to not grant the benefits? The Brazilian Antitrust Law and CADE´s Internal Regulations appoint that the appreciation of the compliance of the leniency agreement is CADE's Tribunal attribution, the Guidelines *CADE's Antitrust Leniency Program* and the usual wording of leniency agreements adopted afford the Tribunal wide latitude in interpreting what configures a breach that should prevent the party from receiving the administrative and criminal immunities[21].

Giving the Tribunal the possibility of analyzing what types of non-compliance would cause the parties to not receive the benefits provided by the Antitrust Law in a case by case basis is important, but it seems that the broad terminology adopted harms the necessary transparency of an adequate Leniency Program. Without more rigorous provisions and precedents to be based upon, it is impossible to comprehend in which extent the non-compliance of the regular obligations resulting from a leniency agreement could be considered serious enough to eliminate the possibility of receiving full immunity.

Imagine a situation in which the party has fulfilled all other commitments but has failed to attend to one of a series of requests to appear before CADE. Would that be considered a serious violation to the collaboration obligation? Would that be enough for the party to be stripped from the benefits by the end of the administrative proceeding?

Since the outcome of a decision from the Tribunal is very onerous (do not receive immunity when one has self-incriminated and has agreed with the suspension of the statute of

[21] "When the analysis of the General-Superintendence is concluded, the SG-Cade verifies whether the leniency recipient met all the legal requirements set forth in the Leniency Agreement and refers the administrative proceeding to Cade's Tribunal with a non-binding opinion on the case. The final decision issued by Cade's Tribunal analyses if the terms and conditions stipulated in the Leniency Agreement (see question 72) are fulfilled. If not, the leniency recipient responsible for the noncompliance will lose his respective benefits and be submitted to the fines and other applicable penalties (article 206, paragraph 1, IX, RiCade). This will happen, for example, if the leniency recipient ceases to cooperate with Cade or submits false information. In general, it is not considered a breach of the Leniency Agreement if Cade's Tribunal does not condemn all the companies and/or individuals identified as co-authors of the reported violation by the leniency recipient". CADE. **Guidelines CADE's Antitrust Leniency Program**. 2016, p. 55. In the same sense: "Nonetheless, except for an evident breach by the beneficiary, the Tribunal declares the complete compliance with the agreement, granting the immunity. Such is the practice for the past 20 years. Because of that, nowadays any company that is interested in a leniency agreement tends to be advised by its attorneys to execute it, since CADE is trustworthy". Excerpt extracted from vote issued in the Administrative Proceeding No.08012.003970/2010-10, CADE *ex officio*, Defendants: ABB Cable, Exsm Corporation, Hitachi Cable Ltda., J Power Systems, among others; Reporting Commissioner Paulo Burnier, ruling on April 15, 2020.

limitations for the duration of the administrative proceeding and also being prohibited of executing another leniency agreement for the next three years), the parameters should be clearer.

Another important aspect that is exhaustively addressed is that the appreciation of the compliance or not with the leniency agreement occurs by the assigned Reporting Commissioner (although CADE's General Superintendence issues a non-binding opinion regarding this aspect when it concludes its analyses regarding the administrative proceeding), what means to say that it only happens in the final decision of the administrative proceeding by the Tribunal. And what if CADE has learned about the violation a long time before the ruling? Would it not be more appropriate to resolve the matter beforehand in an incidental proceeding? This kind of reflection gets even more important when considering that, usually, administrative proceedings take years to be concluded.

Bearing in mind that the declaration of the non-compliance with the agreement may have severe consequences, a proceeding should be opened for the party to appropriately discuss such understanding. The parameters used for the opening and processing of an incidental proceeding could be applied in this situation[22]. Guaranteeing the right of full defense seems to be the most appropriate approach in a situation like this.

If an incidental proceeding were to be opened, what would happen to the main administrative proceeding? Should it be suspended? Moreover, what should happen to the recipient in relation to the recognition of a breach of the obligations of the leniency agreement? Should the former beneficiary be given the opportunity to defend himself regarding the facts and procedural aspects that are being discussed in the administrative proceeding? Or should the party be directly convicted based on the confession? Would it not be a direct offense to the adversary principle and to the right to a full defense?

If the fix for that circumstance is to grant an opportunity of defense to the applicant, how would that be handled? It seems that the solution would depend on the timing of the recognition of the non-compliance. If that happens while it is a preliminary inquiry, it would be feasible to include the party as a regular defendant from the beginning of the administrative proceeding. But what if such a thing happened when the administrative proceeding had already been

[22] CADE's Internal Regulations, art. 162 to 172. Also, the standard wording of Settlement Agreements includes a provision that the non-compliance of the obligations shall be appreciate in a proper proceeding preserving the right to a full defense.

opened? Again, it seems that it would depend on the stage and the solution to be adopted should be the one that caused less damage to the utility and celerity of the administrative proceeding. If it were at an advanced stage, maybe the best solution would be to open a dismembered proceeding.

A similar solution seems fit if the non-compliance is acknowledged by the Tribunal only when appreciating the administrative proceeding as a whole.

Another aspect to be taken into consideration is that, in agreements with multiple parties, this kind of appreciation should be done individually, in order to preserve the rights of each one of the beneficiaries. Such necessity seems to be already covered by CADE's Internal Regulations[23].

Surely, the provisions of law cannot encompass all the possibilities, but is seems advisable to minimally predict general guidelines to address the situations referred above, especially if we consider the previous background of diminishing of leniency agreements. It is important to have a solid system that provides legal certainty in the interest of maintaining a strong Leniency Program.

Another scenario that is brought by the discussions regarding the agreement executed by JBS is the assessment of a leniency agreement by the Courts. What if a judge declares the nullity of an antitrust leniency agreement? What happens next?

In cases in which CADE itself declares that the obligations of a leniency agreement were not met by the beneficiaries, it seems clear that, despite the questions posed above regarding the treatment that should be given to the party, the agreement would remain intact, therefore the administrative proceeding and all its outcomes would prevail, causing no harm to what was achieved through the evidences obtained from it in the first place[24].

This solution does not seem applicable to a situation in which a Court declares an antitrust leniency agreement null. In a context like that, the court would have to properly modulate the

[23] CADE's Internal Regulation, art. 210, §1º § 1º In an assessment of the fulfillment of the foreseen obligations from the leniency agreement by CADE's General Superintendence, it will be considered the individual cooperation of each of the beneficiaries in order to certify, when applicable, the fulfillment of the obligations for the purposes of granting the benefit from the article 209 of this Internal Regulation in the administrative proceeding regarding the original leniency agreement.

[24] The standard wording of leniency agreements executed with CADE includes that: "[The Beneficiaries] are aware that, in case of withdrawal from the agreement or non-compliance with the obligations, the evidence presented can be used in proceedings by CADE's General Superintendence or by the Public Prosecution" (free translation).

effects of such decision. This would take several considerations since the execution of a leniency agreement has numerous effects.

First of all, regarding the investigation, what would be the consequences to the administrative proceeding built upon it? Should it be completely disregarded, or the administrative proceeding should continue to be conducted as if no leniency agreement had ever existed?

If the solution were to be the last one, how to justify the use of the documents handed in by the former beneficiaries? And what about the documents and information obtained through dawn raid operations authorized by judicial warrants that were based on the leniency agreement? Should they be maintained as the basis for the administrative proceeding? What about the adhesions to this instrument?

If the decision is not to use the documents from the leniency agreement could it resort to the documents obtained by the beneficiaries of settlement agreements to sustain the administrative proceeding? And what about the settlement agreements executed with CADE's General-Superintendence that simply corroborate the information contained in the leniency agreement without presenting further data and documents?

And what to do with the former beneficiaries? Should them be simply included as defendants in the proceeding? Should a brand-new proceeding be initiated (at the expenses of the State) to permit such parties to defend themselves properly or should the self-incrimination resulting from the null leniency agreement be sufficient for a direct conviction? Would it not be a direct offense to the adversary and full defense principles (especially because the confession was realized by means of a *null* agreement)?

As seen, many questions arise from the possibility of the annulment of a leniency agreement, especially because there is no Brazilian precedent, not only in antitrust but in any other sphere, to follow as model.

It was not the purpose of this article to answer any of them, but rather to shed light to a discussion that is important and necessary. It would be interesting to cope with these challenges beforehand, assuring that when any of these things happens, the most appropriate way to modulate the effects had already been meticulously discussed causing less harm to the Leniency Program and to the society as possible.

Subsection 3.3
Unilateral behavior

RECENT TRENDS IN UNILATERAL CONDUCTS IN THE DIGITAL MARKETS AND CADE'S APPROACH TO THIS TYPE OF CONDUCT

Joyce Midori Honda, Raquel Garcia Gripp Novaes, Victor Cavalcanti Couto

I. Overview of the antitrust concerns arising from digital markets and multisided platforms

Debates concerning digital markets are at rise on a worldwide level. From the antitrust perspective, although some issues have already been through a lot of discussion and important cases have been under the authorities' attention, there are yet many unanswered questions on how to deploy competition policies in the digital era.

For that matter, in order to better draw some conclusions on this subject and on which direction antitrust authorities are going, it is of the utmost importance that the recent trends around the world involving digital markets are further verified.

Digital markets are at the center of the antitrust debate because of the ongoing role played by the tech giants in today's economy and their influence on competition[1]. This market has features that are particularly challenging from an antitrust perspective and involves new features that require a deep understanding in order to set a precise conclusion that will guide other cases in the future.

The most important particularity is that it is a market that mainly revolves around data. Data is playing an increasingly important role in how companies compete. As stated by the OECD, "big data represents a core economic asset, that can create significant competitive advantage"[2]. This advantage corresponds to the companies' ability to collect, process and use data to better predict consumer's behavior and target products and services. It also involves what is frequently characterized as four V's: volume, velocity, variety and value. A company's big data advantage revolves around its ability to process a bigger volume of data, with a higher velocity, obtaining more valuable and diversified data.

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[1] CALVANO, Emilio and POLO, Michele, *Market Power, Competition and Innovation in Digital Markets: A Survey* (December 1st, 2019). Available at SSRN: https://ssrn.com/abstract=3523611 or http://dx.doi.org/10.2139/ssrn.3523611.

[2] See OECD, Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report 10 (2014), available at http://www.oecd.org/sti/inno/data-driven-innovation-interim-syn thesis.pdf.

Along the lines of data-driven markets, there has been a prominent increase in companies that structure their business models through multisided platforms, which have also been at the forefront of the antitrust debate. Multisided platform markets are especially important and challenging for competition policy because they involve a complex market in which a firm acts as a platform and sells different products to different groups of consumers, while recognizing that the demand from one group of customer depends on the demand from the other groups[3].

Thus, digital markets and multisided platforms are new figures that challenge the traditional antitrust analysis and raise many antitrust issues, which are still in the process of being fully understood by competition academics and policy makers. There is a clear difficulty involving how to define the relevant markets in a way that better reflects the competition scenario. Reaching a precise relevant market definition is an important antitrust tool for establishing firms' market shares, and consequently, determining a strong proxy for market power[4]. If a relevant market is defined too broadly, the market share will be misleadingly small and if the relevant market is defined too narrowly, then the market share will be misleadingly large. Ultimately, such fallacies might have serious adverse effects on competition.

As a matter of fact, the main purpose of defining a relevant market is to identify the competitive constrains that undertakings face[5], establishing a static perspective of the market, which for traditional markets is not a problem, considering traditional goods and services take a long time to change. However, when involving markets in the digital economy, this is certainly a problem. Digital goods and services are usually characterized by their constant and rapid change and improvement, so a static approach to dynamic markets can result in inconsistent outcomes. The European Commission has explicitly recognized this problem, stating that in a sector characterized by constant innovation and rapid technological convergence, it is clear that any current market definition runs the risk of becoming inaccurate or irrelevant in the near future[6].

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[3] LAFONTAINE, Francine and SLADE, Margaret. *"Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy"*, in P. Buccirossi, Ed, Handbook of Antitrust Economics, MIT Press, pp. 391 – 414, 2008.

[4] KÖKÇAM, Ahmet. *How to Assess Market Power in the Digital Economy?* Radboud University Nijmegen. February 23, 2017. Available at SSRN: https://ssrn.com/abstract=2922494.

[5] *Guidelines on the assessment of horizontal mergers under the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2004/C 31/03).* (n 56) para 10. European Commission.

[6] "*Communication from the Commission: guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services"*. European Commission. April, 2018.

In addition, the definition of the relevant market in digital economies can also be particularly difficult for multisided platforms, such as social networks, online marketplaces and advertisers. These platforms differ from traditional markets because they offer multiple products and/or services for different customers, and so the main challenge is determining the number of markets that the undertaking provides its services/products and understanding if they should belong to separate or to the same relevant market, which may not be a simple task. The interconnected nature of multisided platforms turns traditional antitrust tools ineffective for market definition and assessment of competitive constrains and the analysis of indirect network effects becomes a more efficient instrument. As stated by Caio Mario da Silva Neto and Filippo Maria Lancieri:

> *"When the effects run only one way, markets may be deemed single-sided for the purposes of antitrust analysis, at least in relation to the side not impacted by network effects (in this case, traditional market definition tools normally apply). (…) the side exerting some pressure on the other must be analyzed as an interrelated market (e.g. changes in readership of newspapers affects pricing to advertisers, constraining pricing decisions at the readers' side and requiring an integrated analysis). When the indirect network effects are strong and run both ways, then platforms are indeed balancing both sides of the market in a given interaction. In this case, market definition should account for both sides of the platform at once. (…)"*[7]

There are many other concerns involving digital markets, such as possible barriers to entry, the probability of abuse of market power from technology based companies, the unreliability of price based indicators with the rise of companies that provide zero-price products and services in digital markets, and yet, many doubts regarding the possible antitrust remedies that will assure the maintenance of consumers' welfare.

Finally, and as this article will further discuss, the abovementioned antitrust specificities can all converge to the assessment of whether companies with market power in the digital economy will use that power to engage in anticompetitive conducts. Firms may exploit their market power unilaterally and use it to harm its competitors. In digital markets, antitrust authorities have been particularly active in enforcing unilateral conduct prohibitions, but there have been many different outcomes for similar cases in different jurisdictions. This can be mainly attributed to the different proxies and antitrust tools used to determine a market definition and estimate companies' market share, as well as the lack of consensus as to which

[7] PEREIRA NETO, Caio Mario da Silva and FILIPPO, Maria Lancieri. *Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms*. January 28, 2020. Forthcoming, Antitrust Law Journal; FGV Direito SP Research Paper Series n. Forthcoming. Available at SSRN: https://ssrn.com/abstract=3408221 or http://dx.doi.org/10.2139/ssrn.3408221.

features of digital markets conducts make them anticompetitive. The cases involving the subject – that will be herein reviewed – have addressed conducts such as discrimination, tying and bundling, predatory pricing, among others.

II. Unilateral conducts in the digital markets: a global trend in the authorities' agenda

As previously mentioned, antitrust authorities have been very active in investigating unilateral conduct cases in digital markets. They are particularly interested in how the big technology firms operate, such as Google, Facebook, Apple, Amazon and others. In addition, there are often distinct approaches by the more influential and structured jurisdictions, which decisions exert great influence in other antitrust agencies.

For that matter, there has been a conflict on the approach taken so far by the authorities in the EU and the US on the assessment of unilateral conducts. This divergence predates the upcoming of digital markets debates, yet, it has taken particular significance in digital markets as the EU has pursued most of its investigations on the matter targeting non-European technology companies, adding a political dimension to the controversy.[8]

The EU has adopted three infringement decisions against Google (regarding search and comparison shopping, Android and AdSense) since 2017. In these cases, the EU established fines levied on Google that add up to 9.5 billion dollars. One of the cases involved Google and its parent company Alphabet, in which the Commission found that Google abused its dominant position in the online search advertising intermediation market, through Google's Adsense platform. The Commission found that Google breached EU competition rules by establishing exclusivity with third-party websites, prohibiting them from sourcing search advertisements from third companies other than Google. In addition, Google also required that websites submit any changes to the display of advertisements sourced from Google's rivals to its prior approval and required that advertisements sourced from Google were to be displayed in the most prominent space of the website, establishing a minimum number of Google sourced advertisements[9].

These decisions were critical in establishing EU's thoughts on cases involving unilateral conducts. The Commission has taken a strong approach against antitrust violations and has

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[8] *Competition Policy in a Globalized, Digitalized Economy, December 2019.* World Economic Forum.
[9] *Google Adsense: the EC's 3rd Infringement Decision against Google*. Hausfeld. Available at: https://www.hausfeld.com/perspectives/google-adsense-the-ecs-3rd-infringement-decision.

been establishing heavy fines and obligations for tech companies to make changes in their business practices. This position was reinforced by the EU commissioner Margrethe Vestager statement on the Google case: "*there was no reason for Google to include these restrictive clauses in its contracts except to keep rivals out of the market,*", and added "*it prevented its rivals from having a chance to innovate and to compete in the market on their merits*"[10].

Other companies have also been targeted by the EU commission for anticompetitive practices in digital related markets. Facebook, Amazon and Apple have all faced investigations related to commercial practices that involve abuse of market power.

On the other hand, the US has adopted a different approach to unilateral conducts in digital markets. For example, the practices that were considered exploitative use of market power to extract advantages from trading partners/customers, and charging unfair prices, were prohibited in the EU[11], but the US authorities, on the contrary, have not considered this as an anticompetitive conduct. Many US practitioners and scholars have followed the so-called "new Brandeis School", which argues that antitrust law and competition policy should promote not welfare but competitive markets. By refocusing attention back on process and structure, this approach focuses on promoting more competition.

This point of view was defended by Lina Khan, a former FTC advisor, in her influential article called "Amazon's Antitrust Paradox"[12], which argues that the present antitrust focus is too narrow and that policy and regulators should be focused on broader measures of competition. This movement has also been referred to as *"Hipster Antitrust"*[13] and may bring changes to the US competition policy and decisions involving big techs, by ultimately defending a more pro-competitive view of the market, focusing less on consumer welfare.

This approach could somehow be observed on the example of Microsoft cases on tying and bundling conducts. The European Commission considered the network effects as an

[10] LOMAS, Natasha. *Google fined €1.49BN in Europe for antitrust violations in search ad brokering*. Available at: https://techcrunch.com/2019/03/20/google-fined-1-49bn-in-europe-for-antitrust-violations-in-search-ad-brokering/.
[11] PINAR, Akman. *The Concept of Abuse in EU Competition Law: Law and Economics Approaches*. Hart Publishing, 2012, pp. 6, 94 for the definitions.
[12] KHAN, Lina M. *Amazon's Antitrust Paradox*. Available at: https://www.yalelawjournal.org/note/amazons-antitrust-paradox.
[13] O'SULLIVAN, Andrea. *What is 'Hipster Antitrust?*. Available at https://www.mercatus.org/bridge/commentary/what-hipster-antitrust.

instrument to extend a dominant position[14], while the US solutions on Microsoft policies expressed softer attitude to network effects, imposing only behavioral remedies.

Finally, other jurisdictions have also engaged in the digital market debate. Based on the Report drafted by the Competition Authorities Working Group on Digital Economy[15], the BRICS have acted on several cases involving the matter. Russia, for example, has ruled on cases involving Google and Microsoft and India has investigated over 10 cases of unilateral conduct. This reinforces the understanding that digital related companies have been targeted by authorities all over the world, sanctioning firms that take advantage of their dominant position in the market to engage in anticompetitive behavior.

III. CADE's approach to unilateral conducts in general

Brazilian Antitrust Law forbids unilateral practices by companies that have market power and as a result are capable of distorting competition unilaterally. In such cases, the law defines as an infringement of the economic order those conducts that may lead to dominance of relevant markets or that may be characterized as an abuse of a dominant position. Such conducts may take the most varied forms and generally cause some concern when it has some exclusionary effect on the market, preventing or distorting competition.

With regard to the abuse of dominant position, the Brazilian legislation restricts such practice, which is defined as the situation in which a company is capable of, unilaterally or in a coordinated manner, changing market conditions and ultimately harming competition. In other words, is the capacity to distort the market competition by a single company, acting with independence and indifference in relation to its competitors. In this context, the legislation establishes the relative presumption that any player with a market share of more than 20% of the relevant market holds a dominant position.

In addition, there are also unilateral conducts relating to vertical restraints by dominant companies. These vertical conducts should not be analyzed through the *per se* rule or simply by the object of the conduct, so that the analysis of such conduct by CADE should focus on the effects of the investigated practices in the market and use the standard of the competitor equally efficient to the investigated company. In addition, consumer harm should be fundamentally

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[14] ECONOMIDES, Nicholas and LIANOS, Ioannis. *A critical appraisal of remedies in the EU Microsoft cases*. Columbia Business Law Review. 2018. No. 2. P. 346-419.

[15] *Brics in the Digital Economy: Competition Policy in Practice.* 1st Report by The Competition Authorities Working Group on Digital Economy. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

demonstrated to the extent that the anti-competitive effects of the restrictions are not objectively justified or offset by efficiencies. Among the most common vertical restraints are exclusivity, tying and resale price fixing.

Therefore, unilateral conducts in Brazil and elsewhere may take the most diverse forms, and it is important to carefully evaluate its effects on competition in order to characterize the legality or illegality of the practices. CADE's Guidelines on Compliance[16] highlights that unilateral conduct alone is not considered illegal. As a rule, it will be considered anticompetitive once associated with the potential effect of exclusion of competitors and without any identified benefits to the consumer.

CADE has had the opportunity to assess a relevant number of cases of unilateral conducts over the past few years. Different relevant markets and situations were under CADE's scrutiny, including (i) the cease and desist agreements signed with Petrobras related to investigations on alleged anticompetitive conducts in the natural gas market in Brazil, including abuse of dominant position and discrimination of competitors through differentiated pricing[17]; (ii) the condemnation of important Brazilian ports operators for abusing their dominant position by charging inappropriate fees at some of the major Brazilian ports[18]; and (iii) the cease and desist agreements signed with some of the major financial institutions, through which the companies committed to cease a series of abusive contractual practices - together, the companies agreed to pay more than BRL 50 million by means of pecuniary contribution[19].

IV. CADE's case law in unilateral conducts in the digital markets and challenges ahead

The Brazilian antitrust authority has also taken a step forward in the digital market topic. As stated by CADE's head of the General Superintendence Alexandre Cordeiro on a recent

[16] *Guidelines for Competition Compliance Programs*. Administrative Council for Economic Defense, Brazil. January, 2016. Available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf.

[17] See Administrative Proceeding No 08700.002600/2014-30 (Companhia de Gás de São Paulo and Petróleo Brasileiro S.A.) and Administrative Inquiry No 08700.007130/2015-82 (Associação Brasileira das Empresas Distribuidoras de Gás Canalizado – ABEGÁS and Petróleo Brasileiro S.A.).

[18] See Administrative Proceeding No 08700.008464/2014-92 (Multi Armazéns Ltda, Transportadora Simas Ltda and Tecon Rio Grande S.A.) and Administrative Proceeding No 08012.001518/2006-37 (Marimex - Despachos, Transportes e Serviços Ltda and Rodrimar S/A Transportes, Equipamentos Industriais e Armazéns Gerais).

[19] See Administrative Proceeding No 08700.001860/2016-51 (Banco Bradesco, Banco do Brasil and Itaú-Unibanco).

interview, "*unilateral conduct remains a priority for the next two years, and the digital economy will remain a concern for us*" [20].

The most recent case concerning unilateral conducts under CADE's radar involves the giant Google[21], for alleged anticompetitive practices involving the use of the Android Operating System. The investigation is still in a preliminary stage, but demonstrates the agency's interest in investigating, locally, cases that have been under the scrutiny of jurisdictions abroad[22]. CADE's investigation has focused on verifying if the company's actions had anticompetitive consequences in Brazil. According to the EU ruling on the case[23], Google had obligated manufactures to pre-install Google Search and Google Chrome browser along with Google Play app store on Android devices. It also included paying manufacturers to pre-install only the Google Search browser, preventing them from using competing systems. CADE has already investigated other three cases against Google's conducts, but they were closed by the Tribunal without condemnation.

The dismissed cases and the case in progress involving digital markets are important to follow the agency's developments on the matter. Older cases show that CADE was probably facing some difficulties to investigate digital companies, but it has been acting over the past years to improve its work in this direction, promoting debates, studies, and developing tools capable of better verifying anticompetitive conduct in this field.

As CADE has taken action in the search engines market, it has also analyzed unilateral conducts in other relevant markets such as ride-hailing online platforms and online travel agencies. CADE investigated cases involving the company Uber[24], and although the cases were closed due to lack of evidence, they brought important discussions regarding digital markets. It is fair to say that the more the agency investigates the more they learn about the specificities such as the dynamic pricing tool of such platforms and how artificial intelligence is used and how they impact commercial conditions applied in the market.

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[20] *Unilateral conduct in digital markets a priority for CADE Superintendent Cordeiro*. MLex. Available at: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?CID=1160331&Alert=True&uid=61161.

[21] See Preliminary Proceeding No 08700.002940/2019-76 (Google Inc. and Google Brasil Ltda.)

[22] The European Commission ruled against Google and established a fine of 4.3 billion euros for the abuse of its dominant position.

[23] European Commission Case No 40099 – Google Android. Available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099.

[24] See Preliminary Proceeding No 08700.008318/2016-29 (Associação de Motoristas Autônomos de Aplicativos, Ministério Público do Estado de São Paulo and Uber Tecnologia do Brasil Ltda.) and Administrative Proceeding No 08700.006964/2015-71 (Diretório Central dos Estudantes Honestino Guimarães, Uber do Brasil Tecnologia Ltda. and others).

Another unilateral conduct case explored by CADE in the digital market involved three major online travel agencies operating in Brazil: Booking, Expedia, and Decolar[25], which were investigated in 2016 for adopting parity clauses, also known as most favored nation clauses ("MFN"). This case resulted in a cease and desist agreement that established the cease of broad parity clauses in commercial relations with accommodation suppliers, aiming to increase the competition among online travel agencies in Brazil and consequently bringing positive effects to the final customer and the hotel sector[26]. This case was particularly important because it involved a compared analysis of online platforms and traditional offline sales, in which CADE prioritized the consumer's welfare, by determining that in the long term the companies' conduct would cause harm to final customers.

Considering the cases under investigation and recent rulings, it is clear there are yet many challenges ahead for CADE. Especially when it comes to unilateral conducts, in which proof of the anticompetitive conduct is harder to obtain, CADE shall face the difficult task of dealing with instrumental problems and implementing new techniques to detect violations, caused by the digital market dynamic. The agency will more often have to deal with multisided platforms, extensive and asymmetrical information flows, data management, algorithms and other innovations to come.

In addition, CADE shall face the difficult task of determining how and when it shall intervene in the digital economy. There should be caution in establishing cases in which intervention is essential to protect competition and consumers and which might hamper innovation, as well as closely understanding the new ways of exerting abuse of market power resulting from data concentration, multi-homing, discriminatory treatment, among others.

Defining a strategy to tackle the hurdles imposed by the digital economy sounds like a great starting point. Although CADE may have internally discussed and defined such strategy, it is important to communicate it to the society and to allow comments and discussions to keep improving it. As an example, the Competition and Markets Authority (CMA) published in July 2019 the report called "*The CMA's Digital Markets Strategy*", in which the British agency established five strategic aims: "*(i) use our existing tools effectively and efficiently; (ii) build*

[25] See Administrative Proceeding No 08700.005679/2016-13 (Fórum de Operadores Hoteleiros do Brasil – FOHB, Expedia do BrasilAgência de Viagens e Turismo Ltda., Decolar.com Ltda. and Booking.com Brasil Serviços de Reserva de Hotéis Ltda.).

[26] *Decolar, and Expedia reach Cease and Desist Agreement with CADE*. Available at:http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense.

our knowledge and capability; (iii) adapt our tools to the digital economy; (iv) consider the case and options for regulation; and (v) consider potential future remedies in digital markets"[27].

V. Conclusion

There is no doubt that the various decisions and ongoing investigations from jurisdictions all over the world will be instrumental in shaping the future of competition law in digital markets. The digital economy presents not only challenges but opportunities for competition authorities to enhance enforcement tools and practices.

Especially with respect to unilateral conducts, these cases continue to be very complex from an evidence point of view. Understanding how the digital economy works must be a priority for any competition agency. In order to fully understand the effects of digital company's conducts, agencies must first have a deep knowledge about their operation. This will play a big role in antitrust agencies, because understanding the specificities of the digital market will help determine the impacts of digital companies' conducts and give greater knowledge on how to establish effective antitrust restrictions where such measures are required.

Looking back at CADE's accomplishments in the antitrust enforcement in Brazil, it is necessary to recognize that the authority has focused mainly in mergers and cartel cases while the unilateral conducts have not been a priority. However, as the digital markets evolve and achieve higher presence over the economy, the time has come to shorten the gap in order to protect the goals established in the Antitrust Law and not failing to intervene where appropriate. The biggest challenge is to strike the correct balance between fostering the development of the digital economy without allowing conduct that harms competition in related markets.

After the coronavirus pandemic, we have seen an unavoidable race towards digitalization, as reported by the World Economic Forum[28]. An increasing number of sectors and activities is changing and will continue to change through investments in digital solutions. This certainly means that the faster the companies adapt to a world with less physical presence but with unprecedented connectivity and use of digital platforms the faster they will find

[27] See https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy.
[28] See https://www.weforum.org/agenda/2020/04/covid-19-digital-foreign-direct-investment-economic-recovery/.

economic recovery from this crisis. Some companies have an undeniable competitive advantage in this race. It is the competition authorities' duty to watch for a fair play.

ONLINE BANS: WHAT ARE THE CHALLENGES AHEAD?

Enrico Spini Romanielo, Vinicius da Silva Ribeiro

Summary: The development and rise of the Internet changed markets drastically, and is challenging antitrust enforcers around the globe, including in Brazil. How consumers buy products is one of the aspects profoundly changed by the Internet over the last decades. E-commerce had major impacts on competition and the type of potential concerns that may arise. In this paper, we address the antitrust aspects of online bans, a kind of vertical restriction that can be imposed by manufacturers to control their distribution systems and limit the possibility of distributors/resellers to sell goods online. Considering the lack of consolidated case law in Brazil, the paper will address the European experience to obtain lessons and takeaways.

I. Online bans and potential antitrust risks

Vertical restraints are not always anticompetitive. On the contrary, they can generate significant efficiencies, such as protection of the brand and elimination of free riding effects. However, in certain cases, they can hinder competition, causing market foreclosure, increasing incentives to collusion and reducing intra-brand competition.

The Administrative Council for Economic Defense (CADE), the Brazilian antitrust authority, has investigated several cases related to vertical restraints and, except for few conducts (such as Resale Price Maintenance[1]), the approach seems to be the adoption of the rule of reason, comparing the anticompetitive effects and risks with the efficiencies arising from the practice.

In this sense, Exhibit I of Resolution CADE N. 20/1999 establishes a framework for assessing vertical restraints, and even gives specific guidance for restrictions regarding territory and client base. According to it, vertical restraints can be considered anticompetitive when they result in the creation of mechanisms to exclude competitors, either by increasing barriers to entry for potential competitors, increasing rival’s costs, or increasing the likelihood of collusion. Regarding specifically territory and client base restrictions, the Resolution provides for that they can potentially harm competition as they can (i) facilitate collusive behaviors, and (ii) unilaterally increase the producer’s market power.

In Europe, the European Commission establishes clearer and more objective criteria for the assessment. According to the authority, selective distribution agreements “*restrict on the*

[1] Since 2013, CADE’s case law regards fixing minimum resale prices as presumably unlawful, unless the party under investigation can prove the absence of antitrust risks, for example, due to the absence of market power (please refer to Administrative Process N. 08012.001271/2001-44).

one hand the number of authorized distributors and on the other the possibilities of resale"[2]. Although somewhat similar to exclusive distribution agreements, two major differences stand out: (i) the number of distributors does not depend on the number of territories involved, but rather on quantitative and qualitative criteria, and (ii) the restriction to resale is not a restriction to active sales, but a restriction to any sales to non-authorized distributors. [3]

Selective distribution systems are used by manufacturers to limit the number of distributors/reseller able to market their products, usually with the purpose to build/protect a brand image. But, as it is often the case with vertical restraints, there are potential anticompetitive effects in certain situations, including (i) the reduction in intra-brand competition, (ii) foreclosure of distributors, and (iii) softening of competition and facilitation of collusion between suppliers or buyers.[4]

Enforcers take into consideration the criteria in place for a distributor to enter the network, which can be qualitative and/or quantitative. Qualitative selective distribution systems are usually seen as pro-competitive, as they do not limit the number of dealers directly. Echoing the case law from the European Court of Justice (ECJ) in the *Metro Case*,[5] the European Commission's Vertical Guidelines state that purely qualitative selective distribution systems usually fall outside Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), provided that three conditions are met[6]: (i) the nature of the product must require a selective distribution system; (ii) distributors must be chosen under objective criteria of a qualitative nature, laid down uniformly for all and made available to all potential resellers, in a non-discriminatory manner; and (iii) the criteria must not go beyond what is necessary to achieve the goals.

In any event, even agreements that can theoretically generate anticompetitive effects might not be illegal. In Brazil, for instance, vertical restraints put into place by players without market power or dominant position should not be considered an antitrust infringement[7]. Moreover, when efficiencies surpass the anticompetitive effects (even potential ones), there

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[2] European Commission, Vertical Guidelines, item 174.
[3] European Commission, Vertical Guidelines, item 174.
[4] European Commission, Vertical Guidelines, item 175.
[5] Case 26/76 Metro SB-Großmärkte v Commission.
[6] European Commission, Vertical Guidelines, item 175.
[7] According to Article 36, §2º of the Law No. 12,529/11, "*a dominant position is assumed when a company or group of companies is able to unilaterally or jointly change market conditions or when it controls 20% (twenty percent) or more of the relevant market, provided that such percentage may be modified by Cade for specific sectors of the economy*".

should be no antitrust violation. Similarly, in the European Union, according to the revised Vertical Block Exemption Regulation (Regulation No. 330/2010), agreements meeting the following conditions will not be punished under antitrust law: (i) the market share held by the supplier does not exceed 30% of the relevant market, and the market share held by the buyer does not exceed 30% of the relevant market; and/or (ii) there are no hardcore restrictions in the agreement.[8] Moreover, and according to Article 101(3) of the TFEU, agreements will not be considered illegal in case of significant efficiencies.[9]

II. The case law in Europe

The two most important cases in Europe regarding selective distribution and online ban, often cited as milestones to the discussion[10], are Pierre Fabre (2013)[11] and Coty (2017)[12], which will be reviewed with more details in this paper. There are other cases decided and reviewed by national competition authorities throughout the continent, which will not be addressed with details by the paper either because they either (i) ended with settlement agreements, with no decision on the merits or (ii) do not seem to have the same relevance or followed the same reasoning of the two main cases under assessment. [13]

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[8] It is important to note that the restriction on "territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services" was considered a hardcore restriction. In any event, the guidelines issued by the European Commission provide specific guidance on how competition laws in selective distribution should be enforced, including with relation to online restrictions: (i) online restrictions were expressly mentioned in such guidelines, and no exemption was created , and (ii) such practices could benefit from the block exemption "regardless of the nature of the product concerned and regardless of the nature of the selection criteria", but such an exemption could be withdrawn when characteristics of the product do not require the selective distribution.

[9] Under 101(3) TFEU, article 101(1) can be declared inapplicable in the case of agreements, decisions or concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (ii) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[10] See European Commission. **EU competition rules and marketplace bans: Where do we stand after the Coty1 judgment?**, available in https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf (last access on March 12th, 2020).

[11] C-439/09 - Pierre Fabre Dermo-Cosmétique.

[12] Case C-230/16 – Coty Germany GmbH.

[13] For instance, in Spain, there was an investigation against a footwear manufacturer which was terminated after a settlement agreement. The case was under investigation since 2017, when a franchisee complained about online restrictions. In February 2020, the Spanish authority accepted commitments that included clarifications of conditions for distributors to sell products online. For more information, please refer to the ruling from the Comisión Nacional de Los Mercados Y La Competencia, available at https://www.cnmc.es/sites/default/files/2835757_4.pdf (last access on March 30th, 2020). In Germany, an investigation on this subject against a footwear manufacturer was also closed with no further charges because the company agreed to amend its policies. For more information, please refer to https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2 (last access on March 30th, 2020). In Germany, another footwear

a. The Pierre Fabre case[14]

In 2011, the ECJ rendered its first decision on online ban in a case involving Pierre Fabre Dermo-Coméstique, a cosmetic and personal care products manufacturer based in France that, in 2007, had 20% of the relevant market. The company adopted a selective distribution system in which potential distributors were required to have a physical outlet and a qualified pharmacist on location, requirements that prevented distributors from adopting any marketing actions of its products online.

It is relevant to mention that, in June 2006, the French Competition Authority had initiated a sector inquiry to investigate selective distribution agreements, especially the ones that somehow restricted online sales. By March 2007, several players that were under investigation settled and assumed obligations to change their policies. Since Pierre Fabre did not settle, an administrative proceeding was initiated against the company.

During the proceeding, it claimed that the physical presence of a pharmacist was necessary so that customers could obtain personalized advice from a specialist, and that the selective distribution system would allow it to maintain a prestigious brand image. The ban on internet sales would improve the distribution whilst avoiding risks of counterfeiting and of free-riding.

The French Competition Authority, however, considered that banning online sales would (i) result in a limitation of the commercial freedom of distributors by excluding a mean of marketing its products; (ii) restrict the choice of consumers wishing to purchase online and (iii) prevent sales to final purchasers who were not located around the distributor. According to the authority, that limitation had the object of restricting competition. And although Pierre Fabre's market share was under 30%, the authority adopted the view that the company could not benefit from the block exemption provided in Regulation No. 2790/1990, nor from the individual exemption mentioned in Article 81(3) of the TFEU (currently, Article 181 (3) of the TFEU).

manufacturer was investigated by the antitrust authority for alleged antitrust violations related to restrictions on distributor`s ability to sell or advertise products online (https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/25_01_2018_Entscheidung_Asics.html) (last access on March 30th, 2020). A similar case was brought by the British competition authority against PING, a golf club manufacturer, which was fined for prohibiting their distributors from selling the products online. For more information, please refer to https://www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs and https://www.competitionpolicyinternational.com/uk-appeals-court-upholds-cma-decision-on-online-sales/ (last access on March 30th, 2020).

[14] C-439/09 - Pierre Fabre Dermo-Cosmétique.

Therefore, it concluded that the ban was an antitrust violation and determined that the company amended its contracts – besides imposing a fine.

Pierre Fabre challenged the decision before courts, arguing that the French Antitrust Authority had wrongly rejected to consider the block exemption provided for in Regulation No 2790/1999 and the individual exemption provided for in Article 81(3) of the TFEU. In this context, the Cour d'Appel de Paris decided to stay the procedure and referred the case to the ECJ.

Initially, the ECJ discussed whether the online ban would amount to a restriction of competition by object. Upon doing so, it looked at the matter though the selective distribution network framework, especially as laid down in the Metro case[15]: selective distribution agreements are not inherently prohibited under Article 101(1) TFEU, as long as (i) resellers are chosen on the basis of objective criteria of a qualitative nature, (ii) the criteria are laid down uniformly for all and in a non-discriminatory fashion, and (iii) not go beyond what is necessary.

There were no doubts that the conditions (i) and (ii) were met. The main discussion was whether the online ban was beyond necessary to achieve the goals. And according to the ECJ, that analysis would require "*an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part*". The conclusion was that the restriction was not objectively necessary, especially because the products were not considered medicine and had no regulatory restrictions to their distribution.

The ECJ also took a very strict view on the prestigious image defense, stressing that *"the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."* (§46).

In light of those considerations, the ECJ concluded that "*in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object*".

Following this conclusion, the ECJ continued to examine whether it could benefit from exemptions. Firstly, the question on whether Pierre Fabre could benefit from individual exempt under Article 81(3) TFEU was left for the referring court in France to decide, as the ECJ did

[15] Case 26/76 Metro SB-Großmärkte v Commission.

not have enough information for the assessment. On the other hand, the authority expressly rejected the application of the block exemptions, since the online ban clause "*at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system*". In this sense, according to Article 4 (c) of Regulation No 2790/1999, agreements with restrictions of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade could not benefit from the block exemption.

The case was then referred to French courts, and in 2013 the Cour d'Appel de Paris dismissed Pierre Fabre appeal and maintained the French Competition Authority decision in full.

The decision had major impacts, leading to many conflicting decisions by National authorities (as mentioned above), to the extent that this was one of the reasons the European Commission initiated a sector inquiry into e-commerce.[16][17] In 2017, the final report of the inquiry was released by the authority, revealing that

> *[…] marketplace restrictions encountered in the e-commerce sector inquiry range from absolute bans to restrictions on selling on marketplaces that do not fulfil certain quality criteria. Restrictions on the use of marketplaces are mostly found in selective distribution agreements. They typically concern branded goods, but are not limited to luxury, complex or technical goods.*
>
> *(41) The information obtained in the e-commerce sector inquiry indicates that the importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the Member States concerned, and the product categories concerned. As a result, the findings indicate that marketplace bans do not generally amount to a de facto prohibition on selling online or restrict the effective use of the internet as a sales channel irrespective of the markets concerned. The findings of the sector inquiry also indicate that the potential justification and efficiencies reported by manufacturers differ from one product to another.*
>
> *(42) As a result, without prejudice to the pending preliminary reference, the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered*

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[16] For an overview of the discussion, please refer to Andrea Cicala, Kurt Haegeman and Rachel Cuff, **From Metro to Coty: a Story to Be Continued? The CJEU's Judgment in Coty Germany Gmbh v. Parfümerie Akzente Gmbh**, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2018/03/coty-ica-article.pdf?la=en (last access on March 12th,2020).

[17] In 2015, when the DG Comp Commissioner Margreth Vestager launched a sector inquiry into e-commerce as part of its wider "Digital Single Market" strategy, the commissioner made it clear that one of the reasons the inquiry was being launched was "*to strengthen and make more uniform the action that the Commission and Europe's national competition authorities take against restrictions of online sales*". See Competition policy for the Digital Single Market: Focus on ecommerce, Margrethe Vestager - Commissioner for Competition, Speech at the Bundeskartellamt International Conference on Competition, Berlin, 26 March 2015, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2018/03/coty-ica-article.pdf?la=en (last access on March 12th, 2020).

as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the VBER.

(43) This does not mean that absolute marketplace bans are generally compatible with the EU competition rules. The Commission or a national competition authority may decide to withdraw the protection of the VBER in particular cases when justified by the market situation.[18]

One can clearly note that, after the sector inquiry, the European Commission was able to have a better understanding on the types of online ban, and concluded that they may not always be totally anticompetitive and a restriction by the object. This reasoning was later confirmed in the second precedent reviewed by this paper.

b. The Coty case[19]

Coty is a German brand of luxury cosmetic products and distributes its products throughout Europe through a selective distribution system. In 2010, after the Vertical Block Exemption entered into force, Coty intended to amend its existing agreement with Parfümerie Akzente GmbH ("PA"), one of its distributors. Under the proposed terms, Coty's products could only be sold online through an "electronic shop window" of the authorized store – i.e., through the distributor's own website or through websites showing only its trademark, and provided that the luxurious character of the products was to be preserved. This effectively prevented PA from selling online through third parties' platforms and marketplaces such as Amazon (which was used by PA at the time).

PA did not agree with those terms and refused to sign the amendment. As a result, Coty sought to stop PA's operation before German courts, arguing that the selective distribution system was necessary in other to guarantee the prestige and luxurious image of their brands.

In July 2014, a court dismissed the claim, concluding that it was contrary to Article 101(1) of the TFEU, in addition to specific provisions of the German antitrust laws. The Pierre Fabre precedent was used as reasoning, in the sense that maintaining a prestigious image brand was not an objective justification that could legitimate a restriction of competition. The court also concluded that the agreement could not benefit from individual exemption under Article 101(3) of the TFEU, as there were not enough efficiencies associated with the restriction. Coty

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[18] Available at: <https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf>. (last access on March 30th, 2020).

[19] Case C-230/16 – Coty Germany GmbH.

appealed to the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), which referred the case to ECJ for preliminary ruling.

The ECJ reaffirmed that selective distribution could be a restriction on competition by object if not duly justified. However, it also pondered that "*selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods*" are to be considered objectively justified as such, provided that the other conditions applicable to selective distribution systems are met (i.e., considering that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary).

The authority highlighted that the products in the Pierre Fabre were not luxury, and that one could not argue that that decision "*sought to establish a statement of principle according to which the preservation of a luxury image can no longer be such as to justify a restriction of competition, such as that which stems from the existence of a selective distribution network, in regard to all goods, including in particular luxury goods, and consequently alter the settled case-law of the Court*". It clarified that (i) the restriction provided the supplier with a guarantee that goods would be exclusively associated with the authorized distributors, and (ii) that association would make the restriction coherent in the light of the specific characteristics of the selective distribution system. The system would also grant Coty more control over the quality of service of its distributors, which could not be achieved otherwise.

As to whether the restriction was strictly necessary to achieve its goals, the ECJ stressed how different this case was from Pierre Fabre, which banned all online sales from distributors. In fact, in the Coty case, the "*prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers*", so that "*authorized distributors are permitted to sell the contract goods online both via their own websites, as long as they have an electronic shop window for the authorized store and the luxury character of the goods is preserved, and via unauthorized third-party platforms when the use of such platforms is not discernible to the consumer*".

Finally, and regarding the Vertical Block Exemption regulation, it was found that the restriction would only affect a specific kind of internet sale, and therefore could not be likened to restricting distributors' passive sales to end users within the meaning of Article 4 (c) of that regulation. In other words, the agreement could theoretically benefit from the block exemption.

III. The Brazilian perspective

In Brazil, CADE has not yet decided on a specific case of online ban, and even discussions on selective distribution in other contexts are somewhat sparse.[20] The guidelines on unilateral conducts and vertical restrictions are outdated, although they do provide a general framework of assessment, comprised essentially of (i) defining relevant market(s), (ii) assessing the existence of market power/dominant position, (iii) analyzing the conduct and its impacts, (iv) assessing the anticompetitive impacts, and (v) comparing efficiencies to anticompetitive effects. For some specific conducts, CADE has a more detailed approach, such as Resale Price Maintenance, which is considered an infringement by the object if it establishes a minimum price.

By applying the general framework, and considering the opened nature of the Brazilian antitrust law, there is little doubt that, in certain circumstances, some kinds of online bans could be considered an infringement. This was even signalized by CADE in 2018, when the authority ruled on a consultation filed by Continental, a tire company[21], in which Continental asked whether a minimum advertised pricing policy according to which its distributors would not be able to advertise products in prices lower than the one determined by Continental itself would be compatible with Brazilian antitrust law. CADE concluded that the practice was not illegal based on three main arguments: (i) there was no market power (i.e., Continental's market share was inferior to 20%, and the C4 of the distributors was below 75%), (ii) the policy was unilaterally imposed by Continental itself and was not influenced in any way by the distributors and (iii) the policy resulted in no discrimination against online distributors in comparison with distributors owning brick-and-mortar outlets. Especially as to the discrimination between online distributors and brick-and-mortar outlets, CADE considered that as an important aspect, since this sort of discrimination could potentially "*have adverse effects for competition in downstream markets*".

The European experience seems to show that challenging cases of online ban is anything but simple, and that different degrees of ban (e.g., total online ban X restricting sales in market

[20] The few discussions in CADE's case law inclusive discussions on Microsoft's distribution network in the country (see Administrative Proceeding No. 08012.008024/1998-49), how a legal disposition in Lei Ferrari that resulted in multiple selective distribution systems for the distribution of vehicles was compatible with Brazilian competition laws (see 08012.006516/2001-20 [Volkswagen], 08012.006517/2001-74 [General Motors], 08012.006518/2001-19 [Ford] and 08012.006519/2001-63 [Fiat]) and whether the termination of a distribution agreement because of new selective distribution rules would amount to an antitrust violation (see case 0137/1993).
[21] Consultation Procedure N. 08700.004594/2018-80.

places) can pose different risks, which should always be taken into consideration upon reviewing the distribution policy, its reasoning and justifications, the conditions of rivalry in the market, and the risks and efficiencies associated. The underlying concept appears to be that there may be objective justifications associated with the restrictions, including the preservation of image. And the shift to a more reasonable approach post Coty was welcomed by both economists[22] and legal writers.[23]

In Brazil, it is expected that CADE faces similar challenges in the future, and although the international experience will be an important source of inspiration, it is crucial to take into consideration peculiarities of the national legislation and economic reality. Given the lack of established case law in Brazil on the matter, CADE should take into consideration its framework of assessment and review online bans according to the rule of reason, and not as a *per se* infringement (or a by object infringement). Accordingly, the authority must define the relevant markets potentially affected, the market shares of the players under investigation, the potential harms (if any) caused by the restrictions, as well as the efficiencies and benefits generated by the conduct – including, among others, the protection of brand images and prevention of counterfeit and free riding effects.

CADE must also bear in mind that different types of restrictions might usually generate different degrees of risks and/or potential effects. The extent of the online bans and the objective reasoning and criteria behind them will certainly be key factors in the antitrust assessment of such practices.

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[22] See Ralph A. Winter, **Pierre Fabre, Coty and Restrictions on Internet Sales: An Economist's Perspective**, available at http://blogs.ubc.ca/rawinter/files/2019/06/R.A.Winter-Pierre-Fabre-Coty-and-Restrictions-on-Internet-Sales-ECJCLP-2018.pdf (last access on March 24th, 2020).

[23] See Anne Witt, **Restrictions on the Use of Third-Party Platforms in Selective Distribution Agreements for Luxury Goods**, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921050 (last access on March 24th, 2020).

BIG DATA, GEOPRICING AND GEOBLOCKING

Clovis Lores, Marcel Medon Santos[1]

I. Big Data and Competition

There is no undisputed definition of Big Data that would fit perfectly into any type of analysis. However, there are basic characteristics that are commonly used to refer to Big Data, namely: (i) it encompasses large amount of various types of data; (ii) it is collected at high speed by multiple sources; and (iii) handling it requires large-scale computing power and advanced technology[2]. These overall characteristics of Big Data are also found expressed in four V's: (i) volume of data; (ii) velocity at which data is collected, processed and disseminated; (iii) variety; and (iv) value. The quantity of V's depends on the author, but these four are the most commonly and regularly accepted main characteristics of Big Data. There are also authors who defend more than seven V's, which would include: (v) variability; (vi) veracity; and (vii) visualization[3].

Big Data is commonly associated with Big Analytics which is the capability to process and analyze such huge amounts of raw data. The data in itself has limited value *per se*. If there are large amounts of data without the capability to analyze and process it, the data will have

[1] We thank Carolina Furlani Adriano and Gubram Mohamed Somaili Arroyo for their contributions.

[2] Regarding the definition of Big Data, the BRICS report on digital economy refers that: "*While there is no universally accepted definition of data or big data, the Autorité de la Concurrence and the Bundeskartellamt in the joint paper 'Competition Law and Data' refer to data as any information or representation that can be stored and used in a computer. The 'big' in 'big data' would refer to 'large amounts of different types of data, produced at high speed from multiple sources, whose handling and analysis require new and more powerful processors and algorithms' that are now in use*". (*BRICS in the digital economy – Competition Policy in Practice*. BRICS, 2019, p. 21). In a similar view, the OECD, in a recent report about Big Data, has registered that: "*Big Data is commonly understood as the use of large-scale computing power and technologically advanced software in order to collect, process and analyze data characterized by a large volume, velocity, variety and value. These interdependent characteristics drive both the benefits and potential risks of Big Data from a competition policy perspective. While the use of the term 'Big Data' is often vague and lacks precision (De Mauro et al, 2016), the most frequently used definitions of Big Data usually refer to (1) the large dimension of datasets; and (2) the need to use large scale computing power and non-standard software and methods to extract value from the data in a reasonable amount of time. According to De Mauro et al (2016), 'Big Data is the information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value'*" (*Big data: bringing competition policy to the digital era – executive summary and background notes*. OECD, 2016, p. 5).

[3] While the definition of Big Data started with three V's – namely, Volume, Velocity and Variety, other V's were included as the discussion regarding this subject got more mature (CURRY, Edward. *The Big Data Value Chain:* definitions, concepts, and theoretical approaches. In: CAVANILLAS, José M.; CURRY, Edward; WAHLSTER, Wolfgang. *New horizons for a data-driven economy*: a roadmap for usage and exploitation of Big Data in Europe. SpringOpen, 2016, p. 30).

limited to no value whatsoever[4]. The contrary is also true. If large-scale analytics capability exists without the relevant amount of data, it will also lead to limited usefulness[5].

Big Data can contribute to the improvement of the streamlining of production processes, predict market trends and reinforce consumer segmentation through targeted advertising and personalized offers[6]. Big Data has also been used as a key element to direct and elaborate commercial strategies, especially by companies that deal intensively with customer data, such as financial institutions and insurance companies. Several traditional industries have already started to use Big Data for the optimization of their operations and to incorporate smart solutions into their businesses. Studies show innovative companies that are data-driven increase their productivity by 5% to 10% on average when compared to similar companies that do not adopt the same strategy[7].

The generation of vast volumes of data combined with the dawn of the "Internet of Things"[8] has also led to the advent of new businesses which include the development of new technologies, new software analytics, and new information management.

The use of data in competitive strategies and processes in the digital economy has fueled significant debate on the Antitrust, Consumer and Data fronts. The main question is to what extent does the use of Big Data provide a competitive advantage to companies and how this

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[4] During the OECD hearing on Big Data, in November 29, 2016, chaired by Professor Frédéric Jenny, VARIAN was clear: "*Data is generally useless unless it can be turned into knowledge and action using data analytics, which requires heavy investment in complementary assets such as hardware, software and expertise. Due to cloud computing and open source tools, some of the fixed costs of these investments have been converted into variables costs, allowing small companies to enter the market more easily*". Furthermore, VARIAN complements: *"[…] data is not valuable* per se*; instead, business success depends more on the ability of high technology companies to develop new predictive algorithms, incorporate new regressors into the analysis and attract labor with expertise*" (VARIAN, Hal; Speech In: *Summary of the Hearing on Big Data.* OECD, 2016).

[5] In addition to VARIAN's position previously mentioned, which focused on the data's usefulness perspective, EZRACHI and STUCKE understands that there is a mutual relationship, since that Big Analytics capability depends on the access to large amount of data to be useful: "*Big Data and Big Analytics have a mutually reinforcing relationship. Big Data would have less value if companies couldn't rapidly analyze the data and act upon it. Machine learning, in turn, relies on accessing large data sets. […] The algorithms' capacity to learn increases as they process more relevant data. The belief is that simple algorithms with lots of data will eventually outperform sophisticated algorithms with little data*" (EZRACHI, Ariel; STUCKE, Maurice E. Virtual Competition. 2016, p. 16).

[6] OECD. Big data: bringing competition policy to the digital era. Background note by the Secretariat, 2016, p. 8. Available at: <https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>. Access on: Mar. 27, 2020.

[7] Ibid.

[8] *"In the broadest sense, the term IoT encompasses everything connected to the internet, but it is increasingly being used to define objects that 'talk' to each other. (…) By combining these connected devices with automated systems, it is possible to 'gather information, analyse it and create an action' to help someone with a particular task, or learn from a process".* Available at: <https://www.wired.co.uk/article/internet-of-things-what-is-explained-iot>. Access on: Mar. 27, 2020.

competitive variable should be addressed by the traditional Antitrust analysis of anticompetitive structures and conduct.

The potential for behavioral discrimination is one among several impacts and repercussions of Big Data on the Antitrust front. Companies that collect more personal data from consumers and use algorithms would be able to segregate users into groups of the same price range and similar purchase behavior. These companies would be able to estimate the price sensitivity of each user and/or group of users in a more individualized way. This could enable them to more easily implement discriminatory types of behavior[9]. The production of efficiencies by such practices, however, must be taken into account as it is done in any assessment of unilateral conduct, otherwise conduct that might benefit society will be discouraged.

Geo-pricing and geo-blocking are practices that would fit into the category of behavioral discrimination. Following is a brief overview of the key characteristics of geo-discrimination and a review of current international and Brazilian case law enforcement on the subject.

II. Geo-discrimination practices

Geo-pricing is defined as charging consumers differently based on their geographic origin, location or nationality. Geo-blocking is the use of geographic criteria to determine which products, services or content are available to customers or groups of customers. They both would have access to a personalized list of products, services or content according to specific geographic criteria as set by the provider.

The determination of the welfare effect of geo-pricing and geo-blocking depends on a case-by-case assessment. The potential positive effect on the suppliers' side seems quite clear while the positive or negative effect on the customers' side depends on the case. Accordingly, one cannot assume that the net effect of such practices will always be negative[10].

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[9] STUCKE, Maurice; GRUNES, Allen. Big data and competition policy. Oxford: Oxford University Press, 2016. p. 237-241.

[10] Indeed, ALAVERAS, GOMEZ-HERRERA and MARTENS highlight that: "*The welfare effect of geo-blocking and price differentiation on sellers can be safely assumed to be positive otherwise sellers would not apply this commercial strategy. The impact on consumer welfare is a-priori ambiguous and requires an empirical assessment. Some consumers may gain, for instance in low-income countries and buyers of products for which there is relatively weak demand. Others will lose, for instance in high-income countries and consumers of popular products with strong demand and thus relatively low-price elasticity. Whether it is welfare enhancing for society as a whole is also an empirical question that depends on the combination of seller and consumer effects. An empirical assessment can only be made if sellers make the required data on pricing and sales available to*

Geo-blocking and geo-pricing practices could involve charging consumers higher prices and denying them offers, without their knowledge, as well as exclude competitors and increase entry barriers[11]. Consequently, the discriminatory practice justifications must be economically reasonable.

The UK Competition and Markets Authority (CMA), for example, considers that some practices of price discrimination based on geographic area – and therefore geo-blocking where it supports price discrimination – could be justified in some scenarios. Some of the justifications are: (i) cost-reflective discrimination (i.e. different shipping costs, taxation, regulatory costs); (ii) divergent treatment based on societal norms; and (iii) different technical standards, although refusal may be disproportionate if there are means to standardize supply, for example[12].

The Brazilian Consumer defines as abusive practices against consumers refusals from suppliers of products or services to meet the demands of consumers, in the exact measure of their availability of stock, and also in accordance with customs (article 39, item II of the Law No. 8,078/90), as well as refusals to sell goods or provide services, directly to anyone who is willing to purchase them upon prompt payment, except in cases of intermediation regulated by special laws (article 39, item IX of the Law No. 8,078/90).

The Brazilian Antitrust Law[13], in turn, determines that discrimination against purchasers or suppliers of goods or services by establishing price differentials (article 36, § 3, item X of the Law No. 12,529/11), and the refusal to sell goods or provision of services for payment terms following normal business practices and customs (article 36, § 3, item XI of the Law No. 12,529/11) may characterize violations to the economic order.

These practices imply Antitrust violations if under any circumstance they have as an objective or may produce the following effects, regardless of fault and outcome: (i) limitation,

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researchers" (ALAVERAS, Georgios; GOMEZ-HERRERA, Estrella; and MARTENS, Bertin. Geo-blocking of Non-Audio-visual Digital Media Content in the EU Digital Single Market. JRC Digital Economy Working Paper, 2017, p. 9).

[11] EZRACHI, A.; STUCKE, M. E. Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy. Cambridge, Massachusetts: Harvard University Press, 2016.

[12] "Competition and Markets Authority responds to European Commission consultation on geo-blocking and other geographically based restrictions". Wiggin, 2016. Available at: <https://www.wiggin.co.uk/insight/competition-and-markets-authority-responds-to-european-commission-consultation-on-geo-blocking-and-other-geographically-based-restrictions/>. Access on: Mar. 29, 2020.

[13] Law No. 12.529/2011. Administrative Council for Economic Defense ("CADE"), 2011. Available at: <http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>. Access on: Mar. 29, 2020.

restraint or in any way injury to free competition or free initiative; (ii) control of relevant market of goods or services; (iii) arbitrary increase in profits; and (iv) abuse of dominant position (article 36, *caput*, and items I, II, III, and IV of the Law No. 12,529/11). Dominant position is assumed whenever an economic agent or group of agents can determine market conditions unilaterally or hold a 20% market share. Attaining relevant markets control by means of higher efficiency is excepted by the law.

It is always challenging to determine under which conditions practices of geo-blocking and geo-pricing could be characterized as behavioral discrimination that would harm society.

A review of both international and Brazilian enforcement on this subject follows. The latter has substantial inspiration from the European practice – source of the cases below – yet also incorporates some of the U.S. concerns, especially efficiencies. As illustrated, Brazil is not free of conflicting perspectives between Antitrust and Consumer Defense enforcement.

III. International case law regarding geo-pricing and geo-blocking

In 2018, the European Commission issued a regulation on geo-blocking[14] to address the problem of various customers' inability to buy goods and services from traders located in different Member States due to their nationality, place of residence or location of establishment.

The European Commission has already had various recent relevant cases related to this practice. The following is a brief review of several.

a. Videogame cases[15]

In April 2019, the European Commission addressed Statements of Objections to Valve, owner of the "Steam" which is the world's largest PC videogame distribution platform and five PC video game publishers[16]. These cases are still under investigation by the authority and the investigated parties have yet to exercise their rights of defense to the objections.

[14] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0302&from=NL>. Access on: Apr. 03, 2020.

[15] The European Commission launched several probes to investigate the agreements between Valve, a videogame distribution platform, and several videogame publishers that could contain relevant geo-blocking provisions. The cases are: (a) AT.40413 (Focus Home); (b) AT.40414 (Koch Media); (c) AT.40420 (ZeniMax); (d) AT.40422 (Bandai Namco) and AT.40424 (Capcom).

[16] Antitrust: Commission sends Statements of Objections to Valve and five videogame publishers on "geo-blocking" of PC video games of April 5 2019. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2010>. Access on: Apr. 03, 2020.

The Commission is concerned that Valve and the videogame publishers entered into bilateral agreements to prevent consumers from purchasing and using PC videogames acquired elsewhere than in their country of residence which EU Antitrust rules consider geo-blocking and consequently non-compliant. These companies allegedly agreed to use geo-blocked activation keys to prevent cross-border sales or even unsolicited consumer requests (so-called "passive sales") of PC videogames from several Member States. This could have prevented consumers from buying cheaper games available in other Member States.

In addition, some of the publishers included contractual export restrictions, which excluded Valve, with a number of distributors. These distributors were therefore prevented from selling the relevant PC videogames outside the allocated territories. As a consequence, consumers may have been prevented from purchasing and playing PC videogames sold by the distributors even on physical media, such as DVDs or through downloads. These business practices could ultimately have denied European consumers the benefits of the EU's Digital Single Market to shop around for the most attractive offer according to the European Commission.

b. Hotel pricing cases[17]

In February 2017, the European Commission launched an Antitrust investigation against four large European tour operators and the Meliá Hotels International chain concerning hotel accommodations. The investigation targeted potential clauses in hotel accommodations agreements, which allegedly discriminated against consumers based on their nationality or country of residence. Due to these clauses, consumers may not have been allowed to book hotel accommodations with better conditions offered by tour operators in other Member States.

In February 2020, the Commission fined Meliá Hotels International €6.7 million based on a clause in Meliá's standard terms and conditions for contracts with tour operators that was considered restrictive. The clause concerned reservations of consumers who were residents in specified countries. The Commission concluded that the practices of the hotel chain deprived European consumers of the core benefits of the Single Market, i.e., the possibility to have more choice and obtain better deals when shopping. The authority decided not to pursue the cases against the tour operators further after assessment of the evidence.

[17] The European Commission launched a probe to investigate hotel pricing practices anticompetitive effect arising from potential geo-pricing and/or geo-blocking provisions, namely Case AT.40308.

IV. Brazilian Case Law

Discussions on alleged geo-pricing in Brazil have been taking place at both the Consumer Administrative[18] and Civil State Court[19] levels.

The Department of Consumer Protection and Defense of the Ministry of Justice ("DPDC") launched an administrative investigation against Decolar.com in August 2016 based on a complaint filed by Booking.com. The accusation was that Decolar.com was using the IP (Internet Protocol) location of the consumers to offer them differing commercial conditions. Brazilian consumers allegedly were being offered higher reservation prices and were not receiving access to available accommodation options as shown to consumers abroad.

The DPDC concluded in its investigation that displaying different accommodation prices and the denial of services to users in Brazil characterized abusive discriminatory practice in opposition to the fundamentals of Consumer Law. The Department stated that: (i) the Brazilian consumers were unaware that other consumers in other countries could benefit from cheaper tariffs; (ii) they did not have access to the complete list of accommodations available, unlike foreign consumers; and (iii) they were unaware that their IP was providing Decolar.com with information used to treat them differently[20].

According to the authority, differing consumer freight costs of material products in different locations would be an example of reasonable differentiation. In the case under examination, however, there was allegedly no reasonable justification as the price discrimination was based solely on the use of information (i.e. geographic location)[21].

The defendant was then fined BRL 7.5 million, as well as ordered to immediately cease the practice under penalty of suspension of the activity and removal of the site from the Internet[22].

The decision is not free of criticism though. It is debatable whether such a complex issue should have been assessed through an Administrative Proceeding without calling for technical forensic evidence. The evidence presented might not have been enough to prove a deliberate,

[18] Preliminary Inquiry No 08012.002116/2016-21.
[19] Process 0018051-27.2018.8.19.0001. Civil Justice Court of the State of Rio de Janeiro.
[20] National Consumer Bureau ("Senacon") Decision No. 92/2018.
[21] Ibid.
[22] Ibid.

systematic practice. Even if proven intentional, the authority did not take into consideration any possible efficiencies which might be beneficial to society and ultimately to consumers.

The same accusations were brought to a State Civil Court in parallel, and may take years to have a final resolution. The Public Prosecutor's Office had asked for a preliminary injunction to forbid Decolar.com from continuing to practice the alleged geo-pricing which was denied by both the Judge of the lower level Court and the Appeals Court. Although the case is sealed, some Court decisions have been made public in accordance with the general principle of transparency of the Brazilian judicial system. The Judge of the lower level Court denied the preliminary injunction based on the fact that: (i) the welfare effect of geo-pricing and geo-blocking depends on a case-by-case basis assessment; and (ii) ordering the company to practice the same price indiscriminately to all consumers would be unfeasible[23]. The Court ordered a technical forensic report to understand the operation of the defendant's system and its rationale.

V. Conclusion

The impact of the use of Big Data is still nascent. Geo-discrimination, namely geo-pricing and geo-blocking, is possibly one of the most debated conducts related to Big Data.

The assessment of geo-pricing and geo-blocking is complex and depends on a case-by-case analysis. Antitrust and Consumer Defense enforcement may have different perspectives, yet some aspects, such as the effects on society, should be taken into account.

The European Commission has been discussing the matter from an Antitrust perspective in a more intense manner mainly due to concerns of the potential negative effects of the practice on the Single Market principle. There are at least two groups of investigations on this practice targeting: (i) videogame publishing; and (ii) hospitality. It is still not possible to determine a trend based on the development of the cases, although there have been condemnations.

The Consumer Defense enforcement in Brazil has embraced the debate with the launch of an administrative probe and a Civil Court action. The administrative probe has already resulted in an imposition of a fine on the defendant without considering technical justifications or any welfare effects from the practice. For its part, the Civil Court action is still ongoing with

[23] That is clearly stated in the decision: "*Besides that, the standards for it [preliminary injunction] are not met, since it is necessary to better elucidate about the existence or not of the alleged geo-pricing and geo-blocking, certain that the simple price differentiation or the unavailability of hotel rooms, do not indicate them [geo-pricing and geo-blocking], being able to exist other causes, and also for the reverse damage to the defendant […].*" (free translation of the judicial decision in the Process 0018051-27.2018.8.19.0001, in the Justice Court of the State of Rio de Janeiro).

some indication that a case-by-case analysis of the overall economic justifications and welfare effects would be necessary and beneficial.

THE BUNDLED PAYMENTS MODEL GENERATES INCENTIVES TO ANTICOMPETITIVE ACTS BY THE HEALTH INSURANCE COMPANIES

Elvino de Carvalho Mendonça, Rachel Pinheiro de Andrade Mendonça

I. Introduction

The health insurance companies in Brazil are applying the bundled payments model in substitution to fee-for-service model, with the aim to remunerates clinics of diagnostic medicine, hospitals and other kinds of health providers[1]. In the former model the provider is remunerated by a fixed price for a set of procedures, while in the second one the provider is remunerated by each procedure that he uses to do patient health care.

Three are the arguments to implement the new model from the point of view of the health insurers: (i) to decrease health inflation generated by the fee-for-service model; (ii) to divide the care risk of the patient among the health providers; and (iii) to improve the quality of medical and hospital care.

This new model has the aim to generate incentives for rational use of procedures in the medical and hospital care by the health providers. However, this model depends on the equilibrium between bargaining power of health insurance companies and health providers, and, depending on the equilibrium the consumer can be negatively affected by the decrease of medical procedures available.

However, from the point of view of health providers there is no clear understanding if this kind of model will be good for clinics, hospitals and doctors, mainly because the health insurers are usually integrated companies and have big market share in the relevant market of health plans as well as in the relevant market of health providers. By the way, CADE's jurisprudence has several concentration acts relating the acquisitions of providers by insurance health companies[2].

This paper will not discuss any regulatory aspect related to the best model to be applied in Brazil from the point of view of the beneficiaries of health plans. Our main objective is to

[1] According to the supplementary health care sector, the health insurers sell health plans to the costumers and buy health services from health providers in other to supply medical assistance to their beneficiaries.
[2] The Amil acquired several hospitals and clinics of diagnosis medicine, mainly before his acquisition by the UnitedHealth Group in 2012. CA nº 08012.010094/2008-63. In the same way, Rede D`or acquired 10% of the Qualicorp Company in 2019.

analyze the anticompetitive aspects that can be generated by this kind of remuneration, when the health insurance company has dominant position in the relevant market.

II. The bundled payment model as an alternative to the fee-for-service model

The health inflation has been increasing above the break-even point for a long time, which has been generated conflicts between health insurers and health providers, since the remuneration implemented by each procedure (fee-for-service) has been generated incentives to the overuses of procedures by the health providers since then.

The National Health Agency from Brazil (ANS) elaborated a work group (WG) to study the remuneration models of health providers by the health insurers. The WG was compounded by the medical entities, health providers, health insurers and universities with the aim to study the alternative models to fee-for-service model, since the health insurers commonly use the fee-for-service model to remunerate their providers. The WG studied a lot of different models and made comparisons with the fee-for-service model.

According to ANS (2019)[3], in the fee-for-service model the health insurers pay providers by procedure and the sum of all procedures payments is the remuneration of health providers in the health care treatment. The fee-for-service model *is essentially characterized by the stimulus to competition among the health plan customers and by the remuneration for the quantity of services produced* [ANS (2019), page 20].

However, according to the specialized literature the fee-for-service model generates overuse of procedures, which increase the costs of health insurers and the health plan customers as well as generates unnecessary exposition of the customers to procedures that could be avoided and that can affect their health (example: radiological exams). Additionally, as the focus of fee-for-service model remuneration is based in the quantity of procedures done, it is usual that the quality of services provided is neglected by health providers.

Therefore, the economic literature presents several models used by health insurers to remunerate their providers. These models of remuneration are only mechanisms of incentives to get the optimal equilibrium between insurance companies and health providers, as for

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[3]. Brasil. Guia para Implementação de Modelos de Remuneração baseados em valor. (Guideline to Implementation of the Remuneration Models based in value). ANS. 2019. Available at: http://www.ans.gov.br/images/Guia_-_Modelos_de_Remuneração_Baseados_em_Valor.pdf. Accessed: 2020.03.13.

example the bundled payment model. However, it is important to mention that the way these models are implemented can result in anticompetitive behaviors.

The bundled payment model is an alternative model to fee-for-service from the point of view of health insurers because it conjugates several health exams in only one procedure. These models have the aim to fix a unique price for a set of exams with the intention to reduce the overuses of exams demanded by the physician. However, the economic literature shows that the related model generates incentives to occur the inverse, with negative effects from the point of view of patient.

III. The bundle payment model decreases the bargaining power of the health providers

As pointed in the last section, the main advantage of the bundled model to the health insurers as compared to the fee-for-service model is the rationalization of medical procedures use. However, from the costumer point of view, this can be considered the main disadvantage, since under this model health providers will necessarily prescribe less medical procedures than in the fee-for-service model and, as a consequence, beneficiaries can have their well-being negatively affected.

From the health providers point of view, which are the other important agents in the private health system, the bundled model has an adverse effect on their bargain power because the health providers lose the control of an important variable, which is the medical procedures, mainly in the presence of the concentrated market of health insurers[4] relatively to the concentration of health providers market, as can be seen in the supplementary health sector of Brazil.

The bundled payments model fixes a unique price to a set of exams. This fixed price is commonly calculated as an average of the individual exam prices, so that the average price will be necessarily between the lower and higher prices. So, with this structure, health providers only will have incentives to supply exams that its cost is equal or lesser than the fixed price mentioned.

Exams with lesser individual prices are, in general, less technologically complex and are commonly supplied by a lot of competitors. Thus, the bundled payment model will attract a set of homogeneous firms that will supply less technologically complex exams, as for example

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[4] The necessary relationship between health insurers and health providers is weighted by the market power of each one agent and, depending on the market structures of the relevant markets of health insurers and health providers, monopoly power and monopsony/oligopsony power can arise.

ultrasonography and X-ray in the diagnostic medicine relevant market and will leave out of the market companies that supply exams more technologically complex. This phenomenon, called adverse selection, reduce the bargaining power of the health providers.

IV. The bundled payment model as maximum price table

According to the legal determination from ANS, all health insurer that intend to implement the bundled payment to their health providers must do in accordance with Unified Terminology in Supplementary Health Table – TUSS, which made the standardization of procedures.

The TUSS table does not suggests or imposes any kind of prices. Thus, the way that the exams will be compounded in the procedure and the way that the price will be chosen, should be object of negotiation between health insurer and the health providers. According to ANS, does not have any problem with any kind of remuneration model as long as the model violates the competition defense law, the autonomy of the health provider and it results in damage to patients.

However, the way that the exams are chosen to compound the procedures and the prices are fixed the bundled payments model generates incentives to anticompetitive acts by the health insurers, mainly because it aggregates several exams in only one maximum price, which can be understood as a maximum price table.

In general, the bundled payments model aggregates several exams with different costs in only one procedure with a unique price between the extremes. In this case, the health insurers will remunerate the health providers based on the average cost of exams and, from the point of view of the health providers, the maximum price payed by insurers will be the upper limit to the health providers.

Thus, the health provider only will have incentive to offer the exams until the point that preserve its profit margin and, as a result of adverse selection, only health providers that does not have choice will carry on working for the health insurer. So, if there will be competition in the health insurance market, then health providers will be in a favorable condition to sell their services and there would not be maximum price, otherwise health providers will receive payment as lower as possible like a maximum price.

Thus, the insurance health company imposes a fixed price to a set of procedures for all health providers, and these ones are affected in their initiative freedom, since they can not sell

their services because the insurance health companies have dominant position in the relevant market of health plans.

It is important to say that the fixed prices for a set of procedures imposed by the health insurers to different health providers only happens when the insurance health company has high market power, because this company is buying services from the providers and not selling to them.

Thus, the new model works like a maximum price table and generates a lot of acts that violates the economic order. First of all, the new model limits the initiative freedom of health providers, since they can not raise their remunerations above the ceiling price imposed in the table.

As a result of the initiative freedom limitation, the relevant markets of health providers become limited in their competition, mainly in terms of quality of service provided. It happens because the absence of price freedom decreases the incentives to improve the quality of service provided.

Like the minimum price table, the bundled payments model imposed by the insurance health companies also promotes the adoption of uniform or agreed business practices among competitors, since the ceiling price imposed by the price instrument represents the limit to competition among health providers. Additionally, the oligopsony power of the insurance health companies also damages the entrance of new companies as a health providers in the market and creates difficulties to the providers work.

V. CADE´s jurisprudence

The CADE´s jurisprudence about minimum price table is broad because CADE understands that minimum price tables limits the initiative freedom of companies and the competition freedom among competitors.

The CADE´s jurisprudence also has been classified the minimum price table as an act denominated uniform business practices among competitors. This anticompetitive act is

generated by associations and unions and it is typified as anticompetitive acts in the Brazilian competition law (law nº 12,529/2011[5], art. 36, I to IV[6] c/c II[7] of §3º).

There are a lot of administrative investigations in the CADE´s jurisprudence talking about minimum price tables when the anticompetitive act is implemented by associations in different sectors.

In the health sector there are some administrative investigations relating physician associations and insurance health associations as well as relating health providers and health associations. In the former cases the administrative investigations occur because the physician associations imposed minimum prices to the insurance health companies, while in the second ones the administrative investigations occur because the insurance health associations imposed maximum price to the health providers, inclusively to the physicians.

In relation to the minimum price tables as a violation of economic order, CADE condemned the Medicine Regional Conseil of São Paulo, São Paulo Medical Association and São Paulo Union of Physicians because they imposed the Brazilian Hierarchical Classification of Medical Procedures (CBHPM) table[8] to the health insurers, fixing minimum prices to physicians, to hospitals and exams.

In the same way, CADE also condemned the Medical Association of Divinópolis and Unimed Divinópolis because they imposed the same CBHPM table to the insurance health companies[9] and generated the same violations of economic order, as for example uniform business practices among competitors[10].

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[5]Available at: http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

[6] Art. 36. The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved:
I - to limit, restrain or in any way injure free competition or free initiative;
II - to control the relevant market of goods or services;
III – to arbitrarily increase profits; and
IV - to exercise a dominant position abusively.

[7] § 3 The following acts, among others, to the extent to which they conform to the principles set forth in the caput of this article and its clauses, shall characterize violations of the economic order:
...
II - to promote, obtain or influence the adoption of uniform or agreed business practices among competitors;

[8] Administrative investigation nº 08012.006647/2004-50.

[9] Administrative investigation nº 08012.000432/2005-14.

[10] Several other administrative investigations related to minimum price tables in the health sector: 08012.005374/2002-64; 08012.008477/2004-48; 08012.004020/2004-64; 08012.005135/2005-57; 08012.006552/2005-17; 08012.007833/2006-78; and 08012.002866/2011-99.

As an example of maximum price table condemnation by CADE, it is important to mention the case where the association of health insurers (UNIDAS)[11] imposed a maximum price table to health providers. In this case, the association worked like as a monopsonist and the anticompetitive act happened because the insurance health companies fixed the buy prices jointly.

CADE`s jurisprudence has given special attention to the coordinated effects of price tables and, because of it, CADE has condemned a lot of associations by anticompetitive acts denominated uniform or agreed business practices among competitors and several groups of firms in the cartel practices. In both cases, the practice is identified through the identical minimum and maximum price tables for all competitors.

However, the price tables mechanism can also be used as an instrument of anticompetitive conducts in the unilateral act context. In this case, the health insurer has high market share and the prices imposed are not equals for all health providers but is fixed in accordance with discriminatory methodology.

VI. Conclusion

This paper brought important aspects to reflect about the bundled model as remuneration model to the health providers, mainly where there is a big difference in the market structure between the relevant market of health providers and relevant market of health insurers, mainly because the adoption of this kind of way of remuneration decreases the bargaining power of the health providers.

As pointed, from the health insurers point of view fee-for-service model generates overuse of procedures and the bundled model solve this problem because part of the cost of treatment is divided with the health providers. However, from the health providers point of view the bundled model increases their effort in terms of treatment, amplify their treatment risk and decreases their control about the gains when compared with the fee-for-service model. Thus, the bundled model increases the bargaining power of health insurers as compared to the health providers.

According to the paper, the bundled model in the environment where the health insurers has dominant position in the relevant market of health plans works like as a maximum price table and violates the art. 36, I of Law nº 12,529/2011 (Brazilian Competition Law), since it

[11] Administrative investigation nº 08012.005135/2005-57.

imposes the ceiling price for a set of heterogeneous exams, getting limit to the initiative freedom of health providers and getting limit to the competition freedom among competitors, since they can not sell their services by higher price than the ceiling price.

Additionally, the bundled model used to remunerate health providers also violates the §3, I from art. 36 of the Brazilian Competition Law because it is an instrument to promote the adoption of uniform or agreed business practices among competitors.

INTERNET GIANTS AND ANTITRUST: THE GOOGLE SHOPPING CASE

Julia Namie Maia Pinto Ishihara, Stephanie Vendemiatto Penereiro

Abstract: the present article aims to identify and address possible trends in Brazilian antitrust analysis of digital markets. For this purpose, the authors conduct a comparative study of the Google Shopping case, analyzing the decisions of the US Federal Trade Commission, the European Commission and the Brazilian Administrative Council for Economic Defense.

Keywords: digital markets; Google Shopping; Administrative Council for Economic Defense; empirical analysis; effects analysis.

I. Introduction

Due to the development and emergence of digital markets, different antitrust authorities are being questioned and have started to reflect on the sufficiency and suitability of their traditional analysis methods to review mergers and investigate anticompetitive conducts. During the last years, few concrete cases have been brought to the attention of authorities and already received final decisions.

In light of this, the Google Shopping case is noteworthy because the same conduct was analyzed in several jurisdictions, allowing a comparative basis between the respective decisions. The authorities investigated whether Google abused its market dominance as a search engine to promote its own comparison shopping service in search results, as well as if Google manipulated its search algorithms to demote competitors' websites.

Investigations in different jurisdictions have reached distinct results: while the US Federal Trade Commission closed the investigation, the European Commission has fined Google €2.42 billions. In 2019, the Brazilian Administrative Council for Economic Defense, by majority of votes, has decided to close the investigation. The present article summarizes the decisions from the Federal Trade Commission (topic 2), from the European Commission (topic 3) and from the Brazilian Administrative Council for Economic Defense (topic 4), and concludes (topic 5) that, despite being a decision in a singular and concrete case, the Google Shopping analysis brings to light some important indications as to what possibly expect from the Brazilian authority in other digital market investigations.

II. No antitrust concerns? - The US Federal Trade Commission's decision

The Federal Trade Commission (FTC) decided in January 2013 to close the portion of its investigation related to Google Shopping, referred as "search bias". According to the FTC's

Statement,[1] the Commission reviewed over nine million pages of documents from Google and other relevant parties, interviewed numerous industry participants, conducted empirical analyses to investigate the impact of Google's design changes on search engine's traffic and user click-through behavior, and worked closely with state attorneys.

The FTC made an analysis in order to verify whether Google changed its search results primarily to exclude actual or potential competitors and inhibit the competitive process, or to improve the quality of its search product and the overall user experience. According to the Commission, evidence indicated that Google adopted design changes to improve the quality of its search results.

To the Commission, the evidence presented at the time of the Statement did not support the allegation of anticompetitive practices. The Statement indicates that Google's display of its own content could plausibly be viewed as an improvement in the overall quality of Google's search product and there was no sufficient evidence that Google manipulated its search algorithms to unfairly disadvantage vertical websites that compete with Google-owned vertical properties. Therefore, to the FTC, any negative impact on actual or potential competitors was incidental to that purpose: some of Google's rivals may have lost sales due to an improvement in Google's product, but that was a natural adverse effect of the competitive process.[2]

III. An empirical analysis - The European Commission's decision

The European Commission has fined Google €2.42 billion in June 2017, understanding that the platform had abused its market dominance as a search engine by providing an illegal advantage to another Google product, the comparison shopping service.[3-4]

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[1] FEDERAL TRADE COMISSION. **Statement of the Federal Trade Commission Regarding Google's Search Practices**. In the Matter of Google Inc. FTC File Number 111-0163. 3 January 2013.

[2] According to the Statement *"Notably, the documents, testimony and quantitative evidence the Commission examined are largely consistent with the conclusion that Google likely benefited consumers by prominently displaying its vertical content on its search results page. […] Analyses of "click through" data showing how consumers reacted to the proprietary content displayed by Google also suggest that users benefited from these changes to Google's search results. We also note that other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anticompetitive exclusion of rivals."*. FEDERAL TRADE COMISSION. **Statement of the Federal Trade Commission Regarding Google's Search Practices**. In the Matter of Google Inc. FTC File Number 111-0163. 3 January 2013.

[3] EUROPEAN COMMISSION. **Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet**. 27 June 2017. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

[4] 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. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

The Commission concluded that Google had dominant position for general internet search in each national market, including the 31 countries of the European Economic Area. Google's market position in internet search was verified by the Commission to exceed 90% in most countries, being consistently high since at least 2008, when the Commission has started to investigate it. In addition, the decision has highlighted the high barriers to entry considering network effects caused by advertisers and the amount of data which could be used to improve results.

As in Brazil, market dominance is not *per se* illegal under de European Union legislation, but companies must not abuse their powerful market position by restricting competition. This abuse may occur within the market in which the company has dominant position, or to increase its position within other related markets, which has occurred in Google Shopping's case.

The European Commission has verified that Google was systematically giving prominent placement to its own comparison shopping service in its general search platform: while Google Shopping's comparison results were displayed at the top of the search results (not subject to Google's generic search algorithms), rival comparison shopping services appeared only on page four or even further down. That way, consumers that used Google search engines (90% of the market) hardly saw rival comparison shopping services in search results.

To verify the conduct's effects on markets, the European Commission conducted important empirical analysis, gathering data and analyzing different types of evidence. The evidence gathered by the Commission included: (*i*) contemporary documents from Google and other players; (*ii*) significant quantities of real-world data including 5.2 Terabytes of search results from Google; (*iii*) experiments and surveys, analyzing the impact of visibility in search results on consumer behaviour; (*iv*) financial and traffic data which outline the commercial importance of visibility in Google's search results; and (*v*) market investigation of customers and competitors (questionnaires structured by the Commission).[5] According to this analysis, the practice had impact on competition in comparison shopping markets because:

> ***"Appearance in Google's search results impacts on user clicks/traffic**: Real-world consumer behaviour, surveys and eye-tracking studies demonstrate that consumers generally click far more on search results at or near the top of the first search results page than on results lower down the first page, or on subsequent pages, where rival comparison shopping services were most often found after demotion.*
> *a) In fact, even on desktops, the ten highest-ranking generic search results on page 1 together generally receive approximately 95% of all clicks on generic search results (with the top search result receiving about 35% of all the clicks). The first result on*

[5] *Id.*

page 2 of Google's search results receives only about 1% of all clicks. The effects on mobile devices are even more pronounced given the much smaller screen size. b) Furthermore, the effects cannot just be explained by the fact that the first result is more relevant because evidence also shows that moving the first result to the third rank leads to a reduction in the number of clicks by about 50%."

"More visibility in Google's search results has increased traffic to Google's comparison shopping service, whilst demotions have decreased traffic to rival services*: Since the start of the abuse in each country, Google's comparison shopping service has made significant gains in traffic, whilst rival comparison shopping services have suffered a decrease in traffic from Google's search results pages on a lasting basis:*
a) For example, since the beginning of the abuse in each country, Google's comparison shopping service has increased its traffic 45-fold in the United Kingdom, 35-fold in Germany, 29-fold in the Netherlands, 17-fold in Spain and 14-fold in Italy. b) Traffic to rival comparison shopping websites has decreased. Whilst Google's search engine is not the only source of traffic to comparison shopping websites, due to Google's dominance as a search engine, it is an important source of traffic. The Commission found evidence of sudden drops of traffic to certain rival websites following demotions applied in Google's generic search algorithms, of 85% in the United Kingdom, 92% in Germany and 80% in France. These sudden drops could not be explained by other factors. Some competitors have adapted subsequently and managed to recover some traffic, but never fully."[6]

Considering this scenario, the Commission concluded that European consumers were deprived from the existence of choice and innovation and, therefore, competition was affected. The European Commission considered that Google's abuse of dominance started from the moment Google began prominently displaying its shopping service in each country, varying from 2008 (Germany and United Kingdom) to 2013 (Czech Republic, Austria, Belgium, Denmark, Norway, Poland and Sweden).

It is important to highlight that in its analysis, the European Commission considered comparison shopping services a different market from merchant platforms services (marketplaces), after conducting a market test.[7] While comparison services consist in a tool for consumers to contrast products and prices online without offering the possibility to buy products on their site, merchant platforms consist of a service that allows consumers to buy directly from their website. The Commission has emphasized this difference, since Google's

[6] EUROPEAN COMMISSION. **Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet**. 27 June 2017. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

[7] The decision indicates the market test conducted by the authority and the amount of answers obtained. The Commission expressly affirms that in this case the SSNIP test was not carried out and *"would not have been appropriate in the present case because Google provides its search services for free to users"*. EUROPEAN COMMISSION. **CASE AT.39740. Google Search (Shopping)**. § 245. 27 June 2017. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

behavior reflected it, once merchant platforms were eligible to appear in Google Shopping whereas rival comparison shopping services were not.

Nevertheless, the Commission has expressly affirmed that even if comparison shopping services and merchant platforms were considered part of the same market, Google's conduct would also have been abusive, once its practices have distorted competition between them[8].

Google was fined €2.42 billion and had 90 days to stop the illegal practices, respecting the principle of equal treatment in its search results. The responsibility to ensure compliance was attributed to Google, but the company was imposed the obligation to inform the Commission about its actions periodically.

IV. A search for anticompetitive effects - The Brazilian Administrative Council for Economic Defense's decision

In June 2019, the Tribunal of the Brazilian Administrative Council for Economic Defense (CADE) judged the Administrative Proceeding n. 08012.010483/2011-94, known as the "Google Shopping case". Similarly to the Europe and the US investigations, the Brazilian probe also concerned complaints that Google was unlawfully favoring its own comparison shopping service (PCS), Google Shopping, in its general search results page.

After a deadlock in the judgment session, the Tribunal's President used his casting vote, thus the case was closed and no fines were issued. The majority of the Tribunal, following the understanding of the Reporting Commissioner, Mr. Maurício Oscar Bandeira Maia, ruled that Google's conduct had not been proven to have anticompetitive effects: *"[i]n Brazil, it was found that the price comparators were not discriminated against in the organic search results, differently from what happened in Europe"*.[9]

The Reporting Commissioner considered in his decision two relevant product markets: (*i*) the market for generic search engines and (*ii*) the market for price comparators (thematic search price comparison). Although Mr. Bandeira Maia recognized that the competitive

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[8] "*Moreover, even if the alternative product market definition proposed by Google, comprising both comparison shopping services and merchant platforms, were to be followed, the Commission concludes that the Conduct would be capable of having, or likely to have, anti-competitive effects in at least the comparison shopping services segments of the possible national markets comprising both comparison shopping services and merchant platforms.*". EUROPEAN COMMISSION. **CASE AT.39740. Google Search (Shopping)**. § 609. 27 June 2017. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[9] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia. Reporting Commissioner's Vote (SEI n. 0632170).

pressure and substitutability of price comparators by marketplaces/retailers should be viewed with caution, the analysis of the conduct's effects was carried out including these players. Thus, he concluded that, as evidenced by the studies carried out by the Department of Economic Studies (DEE), there was no drop in traffic from the Google page for price comparators, but an increase in traffic for marketplaces.

Contrary to this understanding, Commissioner João Paulo de Resende adopted a similar market definition to the European Commission, separating the relevant markets for the analysis of this conduct into three sections: (*i*) organic (or horizontal) search market; (*ii*) thematic (or vertical) search market; and (*iii*) online shopping market. As for the conduct's effect, the Commissioner emphasized that when only price comparators were considered – that is, without the marketplaces, according to the definition of the relevant market adopted – the analysis changed significantly:

> *"What the graphs above demonstrate is that, as of May 2013, the Google service has taken a monotonic and strongly upward trajectory, taking the market leadership after just two years, and having more than 50% of the market after less than three years. There is no doubt for me that Google's PCS has completely taken over this market in a few years.*[10] "

Moreover, Mr. João Paulo de Resende pointed out that: "*even considering a much larger market, which would include PCS marketplaces/main retailers, it is still possible to detect an significant increase in the share of Google Shopping, undoubtedly leveraged by Google's dominant position as an organic search engine*".[11] Therefore, the Commissioner concluded that there were concrete observable effects of Google's conduct on competitors, as well as potential effects on consumers.

Also in favor of Google's conviction, Commissioner Paula Farani de Azevedo Silveira understood data showed that "*the potential damage of the conduct was realized through the verification of two central concomitant facts: the departure of a considerable number of price comparators, associated with the accelerated growth of Google Shopping*".[12] The Commissioner defended that there was a causal link between the conduct practiced by Google

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[10] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia. Commissioner João Paulo de Resende's Vote (SEI n. 0632473).
[11] *Id.*
[12] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia. Commissioner Paula Farani de Azevedo da Silveira's Vote (SEI n. 0644436).

and its anticompetitive effects, since no other facts could explain the market share drop suffered by price comparators and the departure of certain players from that market.

Finally, in addition to the dissident position, Commissioner Paulo Burnier da Silveira stressed that the mere potential for anticompetitive effects was already sufficient to classify the conduct as an antitrust offense and that, when the unilateral conduct is in still progress, the use of this instrument is necessary.[13] The Commissioner pointed out that, in the context of the digital economy, it must be accepted that competition authorities will be urged to make decisions in an uncertainty scenario:

> *"The exclusive effects of the specific case, caused by Google Shopping's favored positioning in Google's organic search results, are evident; conversely, the alleged benefits of Google Shopping innovation are not easily perceived or measured. This dimension needs to be internalized in the practice of competition authorities, under penalty of the continued greater dominance of the major players in the digital economy."*[14]

Notwithstanding the arguments above, Commissioner Polyanna Ferreira Silva Vilanova and the President Alexandre Barreto de Souza agreed with the Reporting Commissioner that Google's conduct had not been proven to have anticompetitive effects in Brazil. The President stated the following:

> *"The composition and structure of the market in Brazil are very different from those observed in Europe with regard to: i) market definition; ii) damage to price comparison sites; iii) effect of the Panda algorithm; and iv) legality of product design changes.*
>
> *Regarding the definition of the relevant market, as already mentioned, the EC defined, as distinct, the markets for general search and price comparison sites. The definition proposed by the EC, in this respect, is contrary to the one I consider most appropriate to the case, based on the analysis carried out within the scope of SG and DEE, which is the definition of the relevant market including search engines, price comparison sites and marketplaces or the competitive interaction between marketplaces and price comparison sites (that is, it was concluded that in Brazil the growth of marketplaces affected the competitive position of price comparison sites, a scenario quite different from that mentioned in the European continent when the condemnation from Google Shopping).*
>
> *As for possible damage to the price comparison sites, there is also another important difference. According to the SG's opinion, the EC decision is distinguished from the*

[13] The European Commission has also highlighted the sufficiency of potential effects "*In the first place, the Commission is not required to prove that the Conduct has the actual effect of leading certain competing comparison shopping services to cease offering their services. Rather, it is sufficient for the Commission to demonstrate that the Conduct is capable of having, or likely to have, such an effect.*". EUROPEAN COMMISSION. **CASE AT.39740. Google Search (Shopping)**. § 602. 27 June 2017. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[14] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia. Commissioner Paulo Burnier's Vote (SEI n. 0632417).

> *facts under investigation in Brazil, since the Product Universale PLAs did not trigger a drop in traffic to the price comparison sites and that, "contrary to the investigation conducted in Europe, no evidence was found that Google had deliberately reduced the exposure of competing price comparators*".[15]

V. Possible trends in Brazilian antitrust analysis of digital markets

The Google Shopping case highlights the challenges that digital economy presents to antitrust authorities and how challenging it is to establish a universally accepted approach. Nevertheless, the reasoning behind all the different understandings can indicate important clues as to what are the possible trends in Brazilian antitrust analysis of digital markets, regardless of the decision itself.

The Reporting Commissioner stressed in his vote the challenges of market definition regarding multilateral platforms and the necessity of taking into consideration all the side's perspective in the analysis. In fact, the complexity to do so was one of the reasons for the relevant market definition adopted: "*given the complexity and dynamics of the market in question, I will adopt the conservative definition of the relevant market, as did the Superintendence and the DEE*".[16] On the other hand, Commissioner Paulo Burnier da Silveira's vote mentioned a quote by Professor Carl Shapiro: "*we need to be tougher in merger review and exclusionary practices; incumbents have very big advantages in digital markets*". [17]

This seems to reflect the core of the different approaches undertaken by antitrust authorities analyzed in this article, that is, the decision to adopt a more conservative or a more incisive position when facing challenges and the complexity of the digital economy.

The more conservative approach was the first formal antitrust answer to the Google Shopping case, given by the FTC in 2013: "*[t]he totality of the evidence indicates that, in the main, Google adopted [changes] improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose*".[18] However, the FTC's decision was criticized for not releasing details about the nature concerning the evidences, the types of tests used, or the standards employed.[19]

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[15] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019. Reporting Commissioner Mauricio Oscar Bandeira Maia. President Alexandre Barreto de Sousa's Vote (SEI n. 0632233).

[16] *Id. note 11,* Reporting Commissioner's Vote (SEI n. 0632170).

[17] *Id. note 16*, Commissioner Paulo Burnier's Vote (SEI n. 0632417).

[18] FEDERAL TRADE COMISSION. **Statement of the Federal Trade Commission Regarding Google's Search Practices**. In the Matter of Google Inc. FTC File Number 111-0163. 3 January 2013.

[19] PASQUALE, Frank. **Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias**. Harvard Journal of Law & Technology Occasional Paper Series, July 2013.

This position heavily contrasts with the European Commission's decision for the same case in 2017, which adopted a more incisive approach based on empirical evidence. Moreover, the European Commission appears to adopt the same approach in more recent decisions regarding digital markets. In July 2018, for instance, Google was fined €4.34 billion, the highest amount in the Commission's history so far, for imposing anti-competitive restrictions on Android device manufacturers and mobile network operators to consolidate its dominant position as a search engine on the Internet.[20] The European Commission has been transparent about its antitrust policy in the digital economy:

> *"Technology companies have enormous potential to do us a lot of good. But establishing people's trust that the technology serves us, and not the other way round, is more important than ever.*
> *Competition enforcement can make a difference here. It can give people confidence that technology companies play fair and do not close off markets to competition. Otherwise, they will be sanctioned – as Google was today."*[21]

Furthermore, it seems that the FTC itself is changing its approach towards the digital economy. The US Commission is recently adopting more incisive measures to investigate the Internet giants.[22]

This thorough scrutiny of the digital undertakings by the antitrust authorities is also affecting how the online economy will continue to evolve.[23] Antitrust authorities need to bear in mind that their decisions can influence the development of new technology that can foster competition or, on the contrary, aggravate dominant position and inhibit innovation.

So where does CADE stand in all of this? As stated above, perhaps the debate between the different understandings may answer this question better than the CADE's decision itself. The different opinions as to what is the appropriate definition of "relevant market" indicates

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[20] EUROPEAN COMMISSION. **CASE AT.40099. Google Android**.18 July 2018.

[21] EUROPEAN COMMISSION. **CASE AT.40099. Google Android**.18 July 2018. Statement by Commissioner Vestager on Commission decision to fine Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine. Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_18_4584.

[22] See: REUTERS. **U.S. moving toward major antitrust probe of tech giants**. 3 June 2019. Available at: https://www.reuters.com/article/us-usa-technology-antitrust/u-s-moving-toward-major-antitrust-probe-of-tech-giants-idUSKCN1T42JH. Also: THE WALL STREET JOURNAL. **FTC Expands Antitrust Investigation Into Big Tec**. 11 February 2020. Available at: https://www.wsj.com/articles/ftc-plans-to-examine-past-acquisitions-by-big-tech-companies-11581440270.

[23] In this sense, it was reported that Google was displaying links to third-party searchers on its results page in Europe. It seems that this measure is an anticipation to address some complaints that the company was scrutinizing third-parties' internal results and presenting them to users as if they were its own (CANALTECH. **Google Search está exibindo resultados de buscadores de terceiros na Europa**. 24 February 2020. Available at: https://canaltech.com.br/internet/google-search-esta-exibindo-resultados-de-buscadores-de-terceiros-na-europa-160900/).

the challenge of delimitating it in the digital economy. However, this is a crucial step to the analysis since, as indicated by Commissioner João Paulo de Resende, the conclusion about the existence (or not) of anticompetitive effects might change entirely.

Moreover, CADE's analysis also encompasses an approach that is, to some extent, different than the one applied to traditional markets. As previously seen, the Commissioners who voted to close the investigation justified their position based on the empirical analysis conducted by the DEE, which found no evidence of anticompetitive effects of the conduct, in opposition to what happened in Europe. Considering the complexity and constant changes of the digital economy, empirical studies appear to have even more impact on the antitrust decision. This, along with the European Commission's decisions, indicate a possible tendency that the antitrust analysis may be more empirical when tackling the Internet giants.

Furthermore, it is important to highlight that, as pointed out by Commissioner Paulo Burnier da Silveira, the Brazilian Antitrust Law states that the mere potential for anticompetitive effects could be considered sufficient to classify the conduct as an antitrust offense. The question of how (and if) the Tribunal will apply this potentiality of anticompetitive effects in unilateral conducts related to the digital economy, however, remains unclear.

Even though it is still not possible to determine how the Brazilian antitrust authority will address the digital economy in the near future, the Google Shopping case brings light to some important indications as to what possibly expect, or what aspects might be taking into consideration in future analysis. As to what extent these expectations will be met, is a question that remains unanswered.[24]

VI. References

ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. **Administrative Proceeding n. 08012.010483/2011-94**. 26 June 2019.

CANALTECH. **Google Search está exibindo resultados de buscadores de terceiros na Europa**. 24 February 2020. Available at: https://canaltech.com.br/internet/google-search-esta-exibindo-resultados-de-buscadores-de-terceiros-na-europa-160900/).

EUROPEAN COMMISSION. **Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison**

[24] As the European Commission stated "*Today's Decision is a precedent which establishes the framework for the assessment of the legality of this type of conduct. At the same time, it does not replace the need for a case-specific analysis to account for the specific characteristics of each market.*". 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. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

shopping service – Factsheet. 27 June 2017. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

______. **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. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

______. **CASE AT.39740. Google Search (Shopping)**. 27 June 2017. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

______. **CASE AT.40099. Google Android**.18 July 2018.

FEDERAL TRADE COMISSION. **Statement of the Federal Trade Commission Regarding Google's Search Practices**. In the Matter of Google Inc. FTC File Number 111-0163. 3 January 2013.

PASQUALE, Frank. **Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias**. Harvard Journal of Law & Technology Occasional Paper Series, July 2013.

REUTERS. **U.S. moving toward major antitrust probe of tech giants**. 3 June 2019. Available at: https://www.reuters.com/article/us-usa-technology-antitrust/u-s-moving-toward-major-antitrust-probe-of-tech-giants-idUSKCN1T42JH.

THE WALL STREET JOURNAL. **FTC Expands Antitrust Investigation Into Big Tec**. 11 February 2020. Available at: https://www.wsj.com/articles/ftc-plans-to-examine-past-acquisitions-by-big-tech-companies-11581440270.

Section 4

Competition advocacy and antitrust policy in specifically regulated markets

COMPETITION ADVOCACY: THE IMPORTANCE OF CADE'S ROLE IN THE PANDEMIC[1]

Alexandre Barreto de Souza, Rodrigo Abreu Belon Fernandes

In the sphere of competition law, the Administrative Council for Economic Defense (CADE), in addition to its reactive mission of analysing mergers and agreements between companies and investigating potentially anticompetitive behaviours, plays an active role in tracking proposed legislation and rules, overseeing markets, conducting cross-sectional studies with other agencies, doing advocacy work, and monitoring lawsuits (even when CADE is not a directly affected party). Such activities are aimed to address subjects that impact – or might impact – the values protected by the Brazilian Competition Law (i.e., free enterprise, free competition, the social function of private property, consumer protection, and combat against the abuse of economic power – Article 1 of Law 12529/11).

Among CADE's duties, there is one that, although not always in the spotlight of public debate, has vital importance: the analysis of rules (legislative and administrative) that, to the detriment of free competition, prioritize other social values that are relevant at a given time. Sometimes, in an attempt to "save markets, manufacturers, and jobs", parliaments or government departments emulate monopolistic or oligopolistic conditions by restricting imports, controlling prices, supporting supply chains, and creating artificial barriers to entry or to operate, among others. These measures – already relatively common in times of social normality – will tend to proliferate in the context of the new coronavirus pandemic and economic crisis as, on the one hand, market players seek to safeguard themselves from the effects of the crisis, while on the other hand the government is more prone to guarantee some type of "protection" to the economic activity of sectors that are more susceptible to instability.

Although these initiatives are in principle covered by antitrust exemptions – in case other reasons of public interest may justify a sectorial policy to mitigate competition for the sake of maximizing other constitutional principles and interests that demand more intervention from the government – the harm to free competition and, consequently, to consumers is inevitable, and therefore cannot be overlooked by the antitrust authority.

[1] A Portuguese version of this article, entitled "Advocacia da Concorrência: a importância da atuação do Cade na pandemia", was originally published on April 24, 2020 at https://m.migalhas.com.br/depeso/325545/advocacia-da-concorrencia-a-importancia-da-atuacao-do-cade-na-pandemia. It was translated into English on May 20, 2010.

In this context, CADE plays a strategic role, through its Office of the Attorney General, in relation to lawsuits that challenge the legality or constitutionality of these rules. It is clear that, while the monitoring of federal legislative proposals and regulations of regulatory agencies can be conducted – and indeed is – in a centralized way (and with their active participation prior to the publication of the rules), the monitoring of state and municipal legislation that restrict competition is much more complex and demands a more comprehensive view of an already crystallized situation. In light of this, Article 118 of Law 12529/11 is a great contribution, expressly providing for the notification to the antitrust authority and its participation in cases that involve competition law.

A recent example is the ruling on ADI 5986[2] by the Brazilian Federal Supreme Court, in which the court unanimously upheld the unconstitutionality of Law 19429 of March 15, 2018, of the State of Paraná (judge-rapporteur: Justice Gilmar Mendes). The state law challenged by this ADI concerned the establishment of minimum payments made by dental insurance plan operators to dentists in the State of Paraná (table of the *Brazilian Classification of Dental Procedures* [3]– CBHPO).

CADE was notified and called upon to provide its opinion. The agency argued that, by imposing a minimum salary, the concerned state law inhibited, in the long term, the beneficial effects to consumers of healthy competition, as it would prevent the provision of cheaper services while discouraging innovation and quality improvement by the health professionals.

Similar matters are pending in the Federal Supreme Court and other Brazilian courts. Possibly the most emblematic is the discussion about a "freight price table" (Law 130703 of 2018, challenged by ADI 5956) adopted by the Federal Government in response to a general strike of truck companies and drivers that paralyzed the national economy a couple of years ago. At the time, CADE recognized the existence of a crisis that required government intervention, but took a stand against the introduction of a price control policy in view of the consequences for consumers and the industry itself – in fact, the long-term effects would go against the very intention of the rule.

However, this is not the only kind of discussion on the radar of the Office of the Attorney General at Cade. The "Uber case" also offered an arena for much debate and involved several

[2] Translators' note (TN): ADI is the abbreviation for "Ação Direta de Inconstitucionalidade", a lawsuit filed directly in the Brazilian Federal Supreme Court to claim that a specific legal provision violates the Federal Constitution and should not be enforced.
[3] TN: *Classificação Brasileira Hierarquizada de Procedimentos Odontológicos*, in Portuguese.

lawsuits with claims of unconstitutionality: ADPF 449[4], Representation of Unconstitutionality[5] 0055838-98.2015.8.19.000 in the Court of Justice of Rio de Janeiro, and ADI 2216901-06.2015.8.26.0000 in the Court of Justice of São Paulo. In these lawsuits, CADE defended that opening the market (in this case, the transportation market) to disruptive technological innovations that reduced information asymmetry would bring competitive and consumer advantages and, for this reason, enable the offer of cheaper and better-quality services to consumers. CADE's evaluation was decisive in recognizing the unconstitutionality of the state laws that limited the implementation of passenger and goods transport applications.

In general, the main consequences of these types of invasive policies on free enterprise are less freedom of contract, which impacts individual interests (marked by the particularities of each situation) and encourages collusive behaviour; increases in costs along the production and distribution chains (pass-through), diminishing the bargaining capacity of consumers; reduction of incentives to innovation (in production or service provision) and, consequently, the loss of quality; and the possibility of diversion of demand to substitute products or services, directly impacting the sector that should be protected.

Such effects are common deleterious implications, in the antitrust literature, of a mistaken artificial fixation of market variables carried out by a state reaction intended to safeguard economic sectors, but without the necessary study and technical debate. Although widely known in academia, these effects are sometimes not properly addressed, evaluated, and tackled by parliaments (or even by the competent regulatory bodies). Throughout the Brazilian history, there are numerous examples of protectionism implemented through market control instruments and various types of direct interventions introduced with overly static plans, incapable of handling dynamic situations, whose mismatch with reality can cause serious problems.

It is up to the competition authority to shed light on such policies in debates (whether legislative, regulatory, or judicial), clarifying the risks of these measures – even if apparently necessary in exceptional situations – demonstrating their potential of aggravating the conditions that motivated them, and advising their adoption only on an extraordinary and monitored basis. In the context of the economic crisis generated by the social isolation, blocked supply chains, and collapse of some sectors, this activity will certainly be intensified.

[4] TN: abbreviation for *Arguição de Descumprimento de Preceito Fundamental*, in Portuguese
[5] TN: *Representação de Constitucionalidade*, in Portuguese.

ANTITRUST IN NEW REGULATORY PROCEEDINGS[1]

Denis Guimarães

The Brazilian government issued its first Regulatory Impact Analysis (RIA) Guidelines (published as "Guidebook"[2]) in June 2018. The work was coordinated by the Office for Public Policies (*SAG*), a body belonging to the Office of the Chief of Staff, one of the closest ministries to the Presidency of Brazil.

SAG is responsible for analyzing and monitoring governmental policies, and in the scope of the RIA Guidebook it has worked jointly with other core ministries, i.e., the Ministry of Finance and the Ministry of Planning[3].

Evidently, given the object of the Guidebook, the federal regulatory agencies were also involved in this task force, namely (by order of creation): *ANEEL* (Electric Energy); *ANATEL* (Telecommunications); *ANP* (Oil, Gas, and Biofuels); *ANVISA* (Food and Drugs); *ANS* (Healthcare); *ANA* (Water); *ANTT* (Rail and Road Transportation); *ANTAQ* (Water Transportation); *ANAC* (Civil Aviation); and *ANM* (Mining). In addition, the National Institute of Metrology, Quality, and Technology (*INMETRO*) was also involved.

The issuance of the 80-page Guidebook was made jointly with a 5-page corresponding summary called *Guidelines*. Both are *soft law*[4] tools applicable to any rulemaking entity.

I. The RIA proceedings

As soon as a rulemaking entity identifies a regulatory issue and starts working on it, the RIA should also be started. However, the RIA can be dismissed by means of a decision of the Board of the regulator duly alleging reasons of urgency or undisputed low impact.

The RIA Report can be made by the agency according to two different levels, depending on the complexity of the case (*RIA Level I* and *RIA Level II*). At the level one, the Report must

[1] This article is an updated and expanded version of two manuscripts sent for publication by *i)* the Public Law Committee of the Legal Practice Division of the *International Bar Association* (August, 2018) and *ii) Competition Policy International (CPI) Latin America Column* (October, 2019) – both available on SSRN, respectively, at https://ssrn.com/abstract=3254631 and https://ssrn.com/abstract=3469456. Access: May 30, 2020.
[2] OFFICE FOR PUBLIC POLICIES – OPP [et al.]. *RIA guidelines and RIA guidebook for Regulatory Impact Analysis*. Brasilia: Presidency of the Republic of Brazil, 2018.
[3] Both merged into the Ministry of the Economy under the current federal administration, in January 2019.
[4] It should be noted that the *Regulatory Agencies General Act* (Law 13,848/19) and the *Economic Liberty Act* (Law 13,874/19) established that RIAs will be mandatory as soon as a Presidential Decree enacts the RIA regulation – that should be based on the Guidelines and Guidebook.

present: *a)* executive summary; *b)* identification of the regulatory issue; *c)* identification of the stakeholders; *d)* identification of the law that authorizes the regulator to address the issue; *e)* definition of the policy objectives of the regulator; *f)* description of the possible alternatives (including lack of action) to face the regulatory issue; *g)* possible impacts of the alternatives; *h)* comparison between the alternatives and justification of the choice; *i)* implementation strategy, including inspection, monitoring, and the possible need of changing and revoking rules currently in force; *j)* relevant notes concerning information received in the scope of public consultations promoted in the course of the RIA; *k)* professional identification of the civil servant responsible for the RIA.

The *RIA Level II* is applicable to cases in which there is a complex regulatory issue, or when the possible alternatives to face the issue should lead to a significant impact. In these cases, in addition to the level one requirements, the level two report has to add the following: *a)* international experience; *b)* measurement of the impacts of the alternatives over the different stakeholders involved (mainly consumers); *c)* risk assessment of each alternative.

Still in respect to the RIA Report, it must also describe the applicable methodology.

II. Stakeholder engagement in RIA proceedings

One of the most important topics of the *Guidelines and Guidebook* is the one related to public consultations. Participation of stakeholders in the RIA proceedings has been a key concern of the SAG and several regulatory bodies. This is evidenced by the fact that the soft law tools under analysis recommend stakeholders' consultation in two different moments in the RIA proceedings – not excluding other public consultations or other interactions with stakeholders.

Consultations are recommended: *i)* before the rulemaking body starts drafting the new rule or the amendment to the current rule; *ii)* after the Board of the rulemaking body agrees with the RIA Report in the sense of issuing the drafted rule and releases its decision jointly with the report itself.

III. Antitrust as a tool to address the regulatory issue: traditional *competition advocacy in the public sector*[5]

[5] COSTA, A.; RAMOS, M.; TAUFICK, R. A New Horizon for Competition Advocacy in Brazil. In: SANT'ORSOLA, F.; NOORMOHAMED, R.; GUIMARAES, D. (eds.). *Communications and Competition Law*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, © 2015 International Bar Association, pp. 363-369.

Another important provision in the scope of the public consultations is the one stating that a body of the Ministry of the Economy (formerly Finance) can issue opinions on the regulatory impacts of draft rules. This provision actually refers to *SEAE*, the (reshaped) Secretariat for Competition Advocacy and Competitiveness, that holds the mission of conducting competition advocacy before regulatory bodies, that is, advocating the use of procompetitive tools in industry regulation when there is evidence that such tools would be more efficient than pure regulatory measures.

It should be noted that the Guidebook also mentions a possible role of the Brazilian antitrust adjudicatory body, CADE (Administrative Council for Economic Defense), in the RIA proceedings. Such mention takes place in the context of the item *d)* of the *RIA Level I* Report, that is, when the rulemaking body must identify the law that provides its authorization to regulate the issue identified. This means that **there might be several cases in which the regulatory issue can be addressed by more than one government body, and typical examples of that are cases in which regulatory and antitrust bodies are both involved**, either by their own initiative or led by stakeholders' advocacy or law practice.

IV. Possibility of justified rejection of the RIA report by the Board of the rulemaking body

It is also important to inform that the Guidelines and Guidebook make a clear disclaimer in the sense that the Board of the rulemaking body does not have the obligation of following the RIA Report, but if the Board decision contradicts the report recommendations, the authority must justify its reasons for doing so.

V. The Regulatory Outcome Evaluation (ROE) – the difference between ROE and RIA's inspection and monitoring

In addition to the RIA, it should be noted that the Guidebook includes a related issue that also calls the attention of the regulatory and antitrust community, namely: the Regulatory Outcome Evaluation (ROE).

The ROE "is the systematic evaluation process of an intervention to determine whether its objectives have been achieved". Thus, unlike RIA, that is a form of *ex ante* policy analysis, the ROE is *ex post*. A first consequence of such differentiation is that the ROE should not be

confused with the RIA's *inspection or monitoring processes*[6] – that is, the already mentioned item *i)* of the *RIA Level I* Report.

Basically, the inspection strategy consists on defining how the practices of the agents subject to a regulation will be followed, so that the regulator can check whether their obligations are being met. The monitoring strategy, by its turn, consists on defining indicators (quantitative or qualitative) that might be effectively used (in terms of time and cost) by the authorities to keep track of the impacts of the chosen regulatory measure after its implementation[7].

Therefore, what is done in the RIA report *ex ante* in the item on *inspection and monitoring strategies* is to lay a foundation for the ROE, an *ex post* evaluation of the actual "performance of the adopted or amended regulation, considering the achievement of desired objectives and outcomes, as well as other impacts observed on the market and society, resulting from its implementation"[8].

VI. Why/When a ROE is due – kinds of cases and timing

After differentiating RIA's inspection and monitoring from ROE, we should see in respect to the latter: *i)* the main kinds of cases in which it should be conducted; *ii)* what is the timing for its conduction; *iii)* like already seen for RIA, the government interest in stakeholder engagement; and *iv)* again in the RIA's same sense, the "principle-based approach" focused on "reducing administrative burdens or promoting competition"[9].

The Guidebook state that ROE should be conducted at least for two kinds of cases: *a)* when it refers to RIAs of Level II, that is, when the complexity of the case or an expected significant regulatory impact demand the formulation of the complete RIA report (Level II, instead of Level I); and *b)* when RIA has been dismissed by the regulatory authorities due to reasons of urgency.

The rules regarding timing for the conduction of the ROE are: *a)* when a regulation is analyzed through a RIA report of Level II, the regulation itself should set the ROE deadline; *b)* when a regulation is enacted without RIA due to reasons of urgency, the ROE should be conducted within 2 years of such enactment.

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[6] OPP, 2018: 83.
[7] OPP, 2018: 88.
[8] OPP, 2018: 11.
[9] OECD. *Regulatory Policy Outlook 2015*. Paris: OECD Publishing, 2015, p. 120.

VII. Stakeholder engagement in ROE proceedings

Such periods of time (case-by-case or 2 years) between the enactment of a regulation and the conclusion of the respective ROE may seem quite long to stakeholders that have invested in providing inputs to the RIA. However, the fact is that they do not need to just wait the authority conducting the ROE so that they can realize what has been the actual impact of the regulation over their activities – and then wait again to see whether the authority has learnt from the ROE and might use this knowledge to feed the next RIA to amend the regulation or create a new one. Following the general pace of the Guidebook, its section on ROE also makes clear the importance of stakeholder engagement, both in the main text and in the references.

The Guidebook mentions (among several other important publications[10]) the Magenta Book[11] to summarize three main kinds of ROEs that can be conducted: *i)* the process evaluation; *ii)* the impact evaluation; and *iii)* the economic evaluation. In the first two cases, the importance of stakeholder engagement is very clear. The Magenta Book states that "[p]rocess evaluations will often include the collection of qualitative and quantitative data from different stakeholders, using, for example, group interview, one to one interviews and surveys"[12]. Regarding impact evaluation, by its turn, the Book advocates that the ROE searches for changes "across different individuals, stakeholders, sections of society and so on, and how did they compare with what was anticipated"[13] in the RIA.

Thus, it should be noted that stakeholder engagement should not be a static action taking place during the RIA and/or ROE, but preferably a continuous activity of market observation and interactions with the regulatory authorities[14].

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[10] TREASURY BOARD OF CANADA SECRETARIAT. *What We Heard Report on Regulatory Reviews and modernization stakeholder consultations*. Apr 2, 2019; OECD Directorate for Public Governance. *OECD Best Practice Principles on Stakeholder Engagement in Regulatory Policy (Draft for Public Consultations)*, 2017; OECD Pilot Database on Stakeholder Engagement in Regulatory Policy – Directorate for Public Governance. *Stakeholder engagement examples by stage in the policy cycle* <http://www.oecd.org/gov/regulatory-policy/pilot-database-on-stakeholder-engagement-practices.htm>, access on May 30, 2020; EUROPEAN COMMISSION Better Regulation Guidelines Chapter VII. *Guidelines on Stakeholder Consultation*, 2015.

[11] HM Treasury – HMT. The Magenta Book: Guidance for Evaluation. London: HM Treasury, 2011.

[12] HMT, 2011: 18.

[13] HMT, 2011: 19; see also OFFICE OF THE CHIEF OF STAFF – PRESIDENCY OF BRAZIL [et al.]. *Public policy evaluation:* ex post *guidelines for practical analysis, volume 2*. Brasilia: Office of the Chief of Staff – Presidency of Brazil, 2018, p. 14 (only in Portuguese).

[14] OFFICE OF THE CHIEF OF STAFF – PRESIDENCY OF BRAZIL / INSTITUTE FOR APPLIED ECONOMIC RESEARCH – *IPEA*. *Public policy evaluation:* ex ante *guidelines for practical analysis, volume 1*. Brasilia: IPEA, 2018, p. 160 (only in Portuguese).

VIII. The new federal administration. The OECD competition principle-based approach: competition advocacy in RIA and ROE

Indeed, the SAG had been pointing out the importance of stakeholder engagement not only in different Guidebooks they had been coordinating up to the end of the last federal administration in December 2018, but also in events that have included the participation of the private sector.

The federal administration that took office in January 2019 has promoted some institutional changes, but the work of leading the Brazilian regulatory entities towards best practices goes on through the SAG, and mainly through the Ministry of the Economy (resulting from the merger between the four previous Ministries of Finance, Planning, Industry and International Trade, and Labor), where former SAG members have been allocated in the Executive-Secretariat (right below the Minister of the Economy), and have been developing further work on a regulatory improvement agenda.

One of the focuses of that agenda is the joint work with the already mentioned SEAE, and the also reshaped Secretariat for Evaluation, Planning, Energy, and Lottery (*SECAP*). Such secretariats must (among other duties) *i)* promote competition in regulated sectors and *ii)* analyze the regulatory impact of public policies. While *ii)* should include both RIA and ROE, it must be recalled that they include the analysis of possible antitrust issues that may be part of the regulatory problem[15]. In other words, such regulatory improvement agenda acknowledges the already quoted OECD principle-based approach that promoting competition should be, in general and when the market features permit, a more efficient way of (not) regulating the markets, leaving specific regulatory measures (and imposing administrative burdens) to the cases in which they are found actually indispensable, always according to RIA and ROE, when applicable.

IX. The SEAE *Competition Advocacy Guidelines*

In May 2020, SEAE published the *Competition Advocacy Guidelines* ("Guia de Advocacia da Concorrência[16]"), according to our interpretation, based on 2 core ideas: *i)* its

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[15] *IBRAC* – Brazilian Institute of Studies on Competition, Consumer Affairs, and International Trade. *Institutionalization and Practice of Regulatory Impact Analysis in Brazil.* San Bernardino, CA: Amazon, 2019, pp. 304-316 (only in Portuguese) <https://www.amazon.com/dp/1692562339?ref_=pe_3052080_397514860>, access on May 30, 2020.

[16] SECRETARIAT FOR COMPETITION ADVOCACY AND COMPETITIVENESS (SEAE) – SPECIAL SECRETARIAT OF PRODUCTIVITY, EMPLOYMENT, AND COMPETITIVENESS – MINISTRY OF THE ECONOMY. *Competition Advocacy Guidelines*. Brasilia, May 19, 2020 (only in Portuguese).

current understanding on the Article 19 of the Law 12,529/11 (antitrust law)[17], in which SEAE competition advocacy powers are established; and *ii)* its experience in following the OECD Competition Assessment Checklist[18].

IX.1. New issues to be considered in the enforcement of the Article 19 of the antitrust law: RIA; *ex post* evaluation of policies; regulatory stock, competition advocacy reviews and regulatory reviews

From the total 8 items in the Article 19 establishing SEAE powers, 3 of them could not have the current understanding made by the Secretariat at the time they entered in force in 2012. Item II (*art. 19, II*) empowers SEAE to issue non-binding opinions in the scope of public consultations on draft regulations to be issued by any public or private regulator, and the Secretariat argues in the Guidelines that the diffusion of regulatory impact analyses (RIA) promoted by the recently enacted *Economic Liberty Act* (Law 13,874/19) will make its work even more important when issuing opinions in the scope of RIA public consultations.

Item V (*art. 19, V*) empowers SEAE to formulate sectoral studies to support the participation of the Ministry of the Economy in interministerial forums in which it has a seat. The Guidelines points out that that is the case of forums discussing tax and public expenditure issues, and the Secretariat is in the position of aggregating to these debates measures concerning regulatory incentives and competition metrics. Given that this article also address *ex post* evaluation (such as ROE), it should be mentioned an important forum named *CMAP* – Public Policy Evaluation Monitoring Council. CMAP does not include SEAE, but does include the already mentioned SECAP. CMAP is comprised of two committees – *CMAG* (Direct Expenditure Monitoring and Evaluation Committee) and *CMAS* (Federal Subsidies Monitoring and Evaluation Committee) – in charge of making selected *ex post* evaluations of the respective policies. Both committees are coordinated by SECAP, while the broader council (CMAP) is coordinated by the already mentioned Executive Secretary of the Ministry of the Economy.

Item VI (*art. 19, VI*) empowers SEAE to propose competition advocacy reviews of federal, state, and local laws and regulations. The Guidelines makes reference to the fact that Brazil holds a huge regulatory stock, and that many of these regulations are anticompetitive. In this sense, it should be noted that *1)* the federal administration is currently promoting a

[17] As implied in the item 3 of this article, the Brazilian antitrust adjudicatory body, CADE, is also allowed to engage in competition advocacy activities.
[18] OECD (2019), *Competition Assessment Toolkit: Volume 1. Principles,* www.oecd.org/competition/toolkit. Access: May 30, 2020.

formal regulatory review (Decree 10,139/19) with the aim of revoking and consolidating hundreds of thousands of regulations, and *2)* SEAE should have a key role in the next step of this process, which should consist on an economic regulatory review, that is, one addressing competition concerns and *regulatory quality*[19].

IX.2. SEAE competition advocacy leading cases according to the OECD Competition Assessment Checklist

The 2nd core idea of the SEAE Guidelines is to report the Secretariat's work based on the OECD Competition Assessment Checklist[20]:

[19] Not always through RIA and ROE proceedings, due to the need of facing the already mentioned issue of the huge Brazilian regulatory stock – among other (technical) reasons.

[20] Following OECD recommendations is not a new practice at SEAE (see footnote 5), and Brazil made a formal request to OECD to start the accession process in 2017.

OECD **COMPETITION** ASSESSMENT TOOLKIT **CHECKLIST**

This checklist is part of the OECD Competition Assessment Toolkit, developed to help governments eliminate barriers to competition based on the recommendation. It notes that competition assessment should be conducted if a legal provision has any of the following effects:

A Limits the number or range of suppliers

This is likely to be the case if the provision:

- ☐ **A1** Grants exclusive rights for a supplier to provide goods or services
- ☐ **A2** Establishes a license, permit or authorisation process as a requirement of operation
- ☐ **A3** Limits the ability of some types of suppliers to provide a good or service
- ☐ **A4** Significantly raises cost of entry or exit by a supplier
- ☐ **A5** Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital

B Limits the ability of suppliers to compete

This is likely to be the case if the provision:

- ☐ **B1** Limits sellers' ability to set the prices for goods or services
- ☐ **B2** Limits freedom of suppliers to advertise or market their goods or services
- ☐ **B3** Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose
- ☐ **B4** Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

C Reduces the incentive of suppliers to compete

This may be the case if the provision:

- ☐ **C1** Creates a self-regulatory or co-regulatory regime
- ☐ **C2** Requires or encourages information on supplier outputs, prices, sales or costs to be published
- ☐ **C3** Exempts the activity of a particular industry or group of suppliers from the operation of general competition law

D Limits the choices and information available to customers

This may be the case if the provision:

- ☐ **D1** Limits the ability of consumers to decide from whom they purchase
- ☐ **D2** Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
- ☐ **D3** Fundamentally changes information required by buyers to shop effectively

Access the full text of the toolkit, available for download in several languages, at www.oecd.org/competition/toolkit

In this sense, SEAE summarizes in the Guidelines the following advocacy leading cases:

SEAE ADVOCACY LEADING CASES ACCORDING TO THE OECD COMPETITION ASSESSMENT CHECKLIST
Competition restrictions type A
Taxis and UBER *DARF* tax collection by fintechs Competition incentives in terrestrial intercity and international passenger transportation – advocacy before ANTT (Rail and Road Transportation) Introduction of competition in the market of oil refining
Competition restrictions type B
State traffic departments and driving schools Minimum wage for doctors and dentists Hybrid set-top box mandatory distribution – advocacy before ANATEL (Telecommunications) Competition incentives in maritime cabotage transportation Introduction of competition in the market of natural gas – jointly with **SECAP**[21] Accounting professional ethics code
Competition restrictions type C
Self-regulation regimes as ways of restricting competition Open banking Focal price in *health products* – advocacy before ANVISA (Food and Drugs)
Competition restrictions type D
Convenience services fees limitations and prohibitions

X. Concluding remarks

RIA and ROE proceedings have already started to demand the supervision and, in several cases, the participation of antitrust policymakers and private practitioners. These professionals should also have to work on an amplified enforcement of the Article 19 (competition advocacy)[22] of the antitrust law in the near future, encompassing, for instance (item IX.1 of

[21] SECRETARIAT FOR EVALUATION, PLANNING, ENERGY AND LOTTERY ("SECAP") – SPECIAL SECRETARIAT OF FINANCE – MINISTRY OF THE ECONOMY. *The New Gas Market in Brazil – CWC World Gas Series: Brazil & The Americas Summit*. May 21, 2019; SECAP. *SECAP vision on the energy sector – will the "low cost energy shock" reach bottled gas prices?* Brasilia, August 2019 (only in Portuguese); SECAP. *SECAP vision on the energy sector – legislative amendments' recommendations to strengthen the New Gas Market: complementary law, Senate resolution, and constitutional amendment proposals.* Brasilia, October 2019 (only in Portuguese).
[22] See footnote 17.

this article): *i)* regulatory stock reviews, including competition advocacy reviews and economic regulatory reviews; *ii)* new proceedings or measures in connection to the expected regulation of the Economic Liberty Act; *iii)* regulatory incentives and competition metrics discussed in the scope of *ex post* policy evaluation interministerial forums.

THE BRAZILIAN COMPETITION POLICIES AND ITS (NON) APPLICABILITY TO THE CRYPTOCURRENCY MARKET: A NATIONAL REGULATION OVERVIEW

Julia Werberich, Polyanna Vilanova

I. The premise of antitrust legislation and the Brazilian competition defense system

Antitrust legislation was created at the very end of the 19th century[1], aimed as a measure to combat conducts perpetrated by companies to interfere at the market with anticompetitive pricing and distribution of products, or attempts to monopolize it.

Those conducts taken by the firms – started in order to earn supracompetitive profits[2] over the others – were materialized in the form of four types of vehicles: the simple combinations, pools, corporations and the trusts. This structure interfered artificially on the economy system and generated losses for consumers, reason why the legislators, concerned about the prejudices that could be generated to the markets and the economy welfare, idealized the antitrust laws based on the "trusts" premise.

In Brazil, the competition institute emerged only at 1962 – more than seventy years after the U.S. –, with the Law n. 4,137/1962. Despite earlier rules provided a repulsion to any forms of economic power abuse – as the Decree n. 869/1938 and the article n. 148 of the Federal Constitution of 1946 –, the said law was the one to provide on its 2nd article preventive and repressive measures as instruments of sanction to the abuse of economic power[3], and to create the Administrative Council for Economic Defense[4] (CADE).

[1] As the Canadian competition legislation, 1889, Canada, and Sherman Act. 1890, U.S.
[2] Wayne D. Collins, Trusts and the Origins of Antitrust Legislation, 81 Fordham L. Rev. 2279 (2013). Available at: https://ir.lawnet.fordham.edu/flr/vol81/iss5/7. P. 2292.
[3] Examples of economy power abuse foreseen by the law: (i) domination of national markets or the total or partial elimination of competition; (ii) elevation without just cause, in cases of natural or fact monopoly, with the objective of arbitrarily increasing profits, without increasing production; (iii) provocation of monopolistic conditions or the exercise of abusive speculation, in order to promote the temporary increase of prices and (iv) formation of economic groups, by aggregation of companies, to the detriment of the free deliberation of buyers and sellers.
[4] CADE is the responsible agency in Brazil until nowadays to investigate and repress economy abuse and anticompetitive acts.

In the following years, the Law in question was extinct and replaced by others, until it came the promulgation of the Law n. 12,592 at 2011 – that currently regulates the antitrust acts in Brazil.

Differently from the United States' Sherman Act, the antitrust policy in Brazil – as well as happened at many developed countries, mostly in Europe – emerged due to a change in the government's role to decrease its intervention in the market because of the trade liberalization, deregulation and privatization.

The competition defense, though, is a product of the economic reform, considering that those three factors listed above – trade liberalization, deregulation and privatization – promote a social demand to the repression and prevention of the economy power abuse, more concentrated on private agents. As a result, the antitrust laws could help developing the liberalization process.

CADE, the Brazilian antitrust agency, has developed on the past years a valuable work of combat to harmful conducts to the economy system and the competition, especially considering the unilateral practices and cartel formation, through the identification of dominant positions in the market as well as the attribution of responsibility for anticompetitive practices.

Although Brazilian antitrust policies have emerged in a different context than original antitrust laws created at the US, their ultimate goal are the same, aiming the economy protection against acts that could undermine free competition. In spite each federal agency has its own means of performance, they base their investigations particularly on (i) defining the agent who engage in those anticompetitive practices, and also (ii) identifying the relevant market if the practical case requires it.

The Brazilian antitrust Law, n. 12,529/2011, defines on its article n. 36 the acts that constitute infractions to the economic order, providing on its item "ii" the dominancy of relevant market for goods and services as one of those infractions.

On the point, we must consider that besides the dominancy of relevant markets is considered one specific infraction against the economic order, the identification of the relevant market is one of the main points that the Brazilian antitrust agency considers when analyzing most part of the infraction proceedings – then giving this institute an enormous importance,

most than the doctrine understands as ideal[5], especially because market power isn't synonymous of an anti-competitive practice.

Still in this context, the referred law provides the principle of territoriality on its article n. 2, disposing that the antitrust legislation is to be applied to all practices that interfere in the national territory, produce or may produce effects on it.

That said, what we can infer of these two norms is that (i) an agent to be punished by an antitrust act must be known and defined, having – necessarily – to be the one who, for example, caused or coordinated the infraction; and (ii) once knowing the agent, the anti-competitive act must be proved to produce or may produce negative effects to the national territory.

Considering that one of the most usual practices of the Brazilian administrative council (CADE) is to define the relevant market to then characterize an anticompetitive practice, one of the main challenges to be faced by the antitrust agencies and politics are the markets originating from new technologies, such as the blockchains and the cryptocurrency markets.

But what if the named "trusts" – mentioned at the top of this article – simply don't exist in a defined field, how can antitrust corporations act? That's the problem to be faced by antitrust agencies when dealing with the so-called cryptocurrencies and blockchains.

II. Blockchains, cryptocurrency and the crypto exchanges: the arise of new economic markets

The last decade was marked by the arise and development of a new technology that would transform the World's Financial System and, consequently, the relations between the agents that work with it – what includes not only the individuals that operate in the market, but also the regulatory agencies – and the legislation system.

Blockchain technology was created to originate a cryptographically chain of blocks, in which it was enhanced digital trust based on the main aspect of the decentralization, meaning that nobody could ever be in control of the system. It gave rise to a new technology market,

[5] Market definition is customary and may provide a helpful first approximation but one should have no illusions about its meaning. (…) Market power does not itself create liability; it is, at most, a threshold requirement that must be satisfied before liability can be imposed. In some instances, society chooses to encourage invention by rewarding it with a patent that temporarily prevents competition. Similarly, we may promote superior skill, foresight, and industry by leaving undisturbed the power that it results. AREEDA, Phillip; KAPLOW, Louis. Antitrust analysis: problems, text, cases – 5th ed. p. 571-572.

enabling the frictionless transfer of values around the world, without depending on an agent that detained its governance or acted as an intermediary of the transactions.

However, different from the other digital market technologies, blockchains have some peculiar characteristics that make them – and their product, the cryptocurrencies – a challenge when its discussed about preventing anticompetitive practices and the agents to be held responsible.

In summary, the cryptography of blockchains outline its scope based on principles, as well pointed out by Dr. Thubault Scherpel[6]. The first is pseudonymity, meaning that all transactions are encoded and, although the existence of a transaction may be visible, its nature and purpose is unknown, as well as the person who is responsible for it.

The second principle is the distributed architecture, considering that there isn't an agent responsible to coordinate the transactions or the scope of the blockchain. This creates a distributed power, and if something fails, the failure is attributed only to the person that originated it – there is no central government agent to be punished. The third principle is the peer-to-peer transmission between users, ensuring the quick and safe transfer of the values.

The fourth principle is the free choose of consensus mechanism that will rule the blockchain – giving the participants the guarantee of participating on the validation process "without becoming liable for assenting to an anticompetitive practice the blockchain may be involved with another time"[7]. The fifth and last principle of the blockchain technology is the data immutability, giving the participants the assurance of the permanency of information and transactions – a feeling of trust created on the users, what makes the viability of the technology.

Despite those five principles rule the blockchain technology in general, the blockchains can be classified in public and private[8], considering its form of consensus – general agreement – and governance – regulation mechanism. On public blockchains, there is no access control, and applications can be added to network without any approval or trust of the other members, functioning as a platform layer. On the other side, private blockchains limit the participation

[6] SCHERPEL, Dr. Thibault. Is blockchain the death of antitrust law? The blockchain antitrust paradox. 3 GEO. L. TECH. VER.281 (2019).
[7] Ibid.
[8] Despite the fact that there is a middle ground between public and private blockchains – the so-called semi-private blockchains, as well as subdivisions of the private blockchains, so-called consortium and single entities – we will limit ourselves to dealing with the main characteristics of the public and private, mostly considering the generality of the analysis made on this article.

and transactions on it, by restricting the entry of new members or the reading permissions to some participants.

Public blockchains currently use the "proof of work" form of consensus[9], creating an economic incentive structure by convergence without coercive action. On the other side, on private blockchains there is no mining, no proof-of-work and no remuneration, whose benefits come from its valuation and applicability – what includes serving as a transfer value, a register to verify the exchange of products and assets, and as a smart contract.

Those characteristics of the public blockchains make them less susceptible to the identification of anticompetitive practices and, consequently, to its punishment by the antitrust agencies. However, the same cannot be said about the private blockchains, whose characteristics are more similar to the traditional format of the companies, creating a space to implement unilateral strategies.

On the other hand, we must notice that there are three generations[10] of blockchains, on which the cryptocurrencies are framed on the first generation of them, seen as a currency – making possible all transactions that permeate this type of assets.

Because cryptocurrencies aren't considered yet as a regular currency to be used as payment on the massive majority of the countries[11], their introduction into the Financial System is made through the so-called cryptocurrencies exchanges – such as the nationals Mercado Bitcoin, BitBlue, BitcoinTrade, Braziliex, Cointex, and others.

The exchanges are platforms that enable the purchase and sale – the trading – of cryptocurrencies, inserting them into the Financial System when they are sold and settled in local currencies. In Brazil, they operate as companies, duly registered in the national register of legal entities before the government. Indeed, the exchanges of cryptocurrencies must have a responsible owner – and, or, other partners – and a headquarters address, accordingly to the normative instruction n. 1863 of the Federal Revenue.

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[9] Proof-of-work is one of the consensus mechanisms for achieving agreement on the blockchain network to confirm transactions and produce new blocks to the chain. https://www.ledger.com/academy/blockchain/what-is-proof-of-work.

[10] The first – called 1.0 – are similar to a currency, making possible the transfer, remittance and digital payment. The second – 2.0 – are like contracts, what includes stocks, bonds, futures, loans, mortgages, titles, smart property and smart contracts. And the third – 3.0 – are all applications beyond currency, contracts and market, such as the areas of the government, health, science, literature, culture and art.

[11] Although some places and companies accept the cryptocurrencies as a method of payment.

Despite the fact that the exchanges are properly registered with the government, their product – the cryptocurrencies – doesn't have a specific regulation form, what impacts directly on the activity of the exchanges because of the lack of a specific code for intermediation in the purchase and sale of cryptocurrencies in the so-called national Classification of Economic Activities ("CNAE").

In that context, a discussion was held in both legal and administrative spheres due to the closing of the current accounts on behalf of the exchanges by the banks[12]. In summary, it was pointed out the (absence of) regulation of the cryptocurrencies in Brazil and its impact on the exchanges activities, mostly considering that the exchanges acts as financial intermediaries that, however, are not inspected by the responsible authorities for the financial system, as the Central Bank of Brazil (BACEN) or the Commission of Monetary Values (CVM), neither are ruled by any national law.

That said, we face a scenario in which (a) it arises a – still – new technology, the blockchain, whose impacts to the Financial System are starting to appear with greater force in recent times; (b) is responsible for the trading of its product, the cryptocurrencies, that work as a completely encrypted digital currency, that allows the anonymity of the agents and don't need an intermediate to operate the transactions; and that (c) are introduced on the economic system as a result of the activity performed by the exchanges, that, by their turn, are not regulated nor inspected in Brazil.

These circumstances represent, in all its aspects, a great challenge to the antitrust panorama, especially when defining the markets on which the illicit competitive practices can take place, identifying the responsible agent and, by the end, punishing it.

III. Difficulties to be faced by Antitrust Legal System at Brazil concerning the cryptocurrency market

Considering what was pointed out on the two first topics, we can identify the difficulties to be faced by the Brazilian Antitrust Authority when dealing with the emergence of, at least, three new markets: the blockchains, cryptocurrencies and also the so-called exchanges market.

Blockchains are decentralized organizations, not recognized as legal entities, and their originated product – the cryptocurrencies – work as a digital currency that isn't issued by any

[12] Recurso Especial nº 1696214/SP (2017/0224433-4), held before the Superior Court of Justice of Brazil, and Administrative Inquiry n. 08700.003599/2018-95, held before the Administrative Council for Economic Defense (CADE).

government entity. Indeed, the market in which cryptocurrencies operate are intrinsically linked to the blockchains market, considering that all transactions made with the cryptocurrencies are launched and registered by the blockchain.

However, how can any act be considered liable on a market whose organizations that perform on it are considered as non-entities? Or how can be defined the responsible agent for an anticompetitive act if there isn't an agent responsible for the blockchain or through intermediation of the cryptocurrency's transactions?

Six different theories of liability under those circumstances were conceived by Dr. Thibault Schrepel[13], considering a definition of a relevant market and the identification of the dominant position of the organization that performs on that specific market. Nonetheless we consider that there are other ways of identifying an anticompetitive practice and its deleterious effects on the market that are not strictly based on the definition of the relevant market and its market share, we assume that it would facilitate liability.

Specifically, in Brazil's case, the Law n. 12,529/2011 provides that can be investigated by the National Antitrust Agency all acts performed by any organization in the world that produces or attempts to produce effects on the National Territory, including the dominancy of relevant markets and abusively exercising a dominant position.

Thereby, it's a fact that as long as the cryptocurrencies trades evolve and they start to produce apparently negative effects on the National Financial System, the Administrative Council for Economic Defense will have to face a necessity on the definition of the relevant market and market power of the blockchains and cryptocurrencies – especially considering that two items of article 36 of the said Law involve the sense of relevant market and market power when providing an anti-competitive conduct.

However, the challenge remains on the main characteristics of the blockchains and cryptocurrencies that mitigate the idea of the relevant market: the absence of central power – mostly because it can't be considered a monopoly without a monopolist.

In another turn, even if the authorities are able to define the relevant market and determine the conducts that are prejudicing the competitivity, they still have to find the agent to be held

[13] SCHERPEL, Dr. Thibault. Is blockchain the death of antitrust law? The blockchain antitrust paradox. 3 GEO. L. TECH. VER.281 (2019).

responsible. What occurs is that the identity of the agents that perform on the blockchains and with the cryptocurrencies is most of the time anonymous and protected.

Because of the pseudonymity of the users that operate on blockchains and trade with the cryptocurrencies, it's more difficult for the authorities to track the responsible agent for some anticompetitive practice. Moreover, the antitrust enforcement if hindered by the network architecture of the blockchains, that is distributed and makes a system where nobody is in control of it. Thus, defining a responsible agent for the illegal competitive act is almost impossible.

Still, because of the immutability of the transactions operated with the cryptocurrencies, if an illegal competitive act is perpetrated, it cannot be stopped because "there is no system to shut down". It means that once the blockchain is launched, the transactions only depend on the users who join it. Consequently, even if an antitrust act is defined and found an agent to be punished, there is no enforcement remedy to be applied.

Finally, we must clarify that all those challenges posed above are concerning the public blockchains, because of their specific characteristics – as exposed on Topic II – that make them more distant to the traditional organizations then the private blockchains.

On the other hand, the scenario is a bit different when discussing about the crypto exchanges – nonetheless there are still difficulties to be faced by the antitrust authority. As explained above, the exchanges in Brazil are established on the National Territory as a company, duly registered with the Federal Government, with specific headquarters and registered owners. It would mean that defining the relevant market that the exchanges work is easier than if it had to be made with blockchains and cryptocurrencies. However, this premise is not necessarily true.

Analyzing the relevant market from the geographic perspective, we cannot attribute it by the headquarter of the exchange. That is because the product offered by those exchanges has a worldwide reach in a few seconds, and the definition of the market by the geographic perspective cannot be considered only by the settlement of the assets on the National Financial System – repeating, because they (the assets) can come from any part of the world.

The relevant market also cannot be identified by the product perspective simply because the exchanges do not have interference on their products price. As said above, if it was simpler

to be identified, the cryptocurrencies would form their own relevant market, totally apart from the activity performed by the exchanges.

Moreover, because of the absence of regulation and surveillance of the exchanges activities on the National Territory, it becomes even more difficult to define anything related to a possible market of exchanges and a dominant position that one of them could reach.

Considering that the exchanges function as a mean of operating cryptocurrencies, their owners can establish rules to increase the number of users and increase their profits. However, not necessarily these rules signify an anti-competitive act, because the value of the currency and its owner are not linked to the exchange.

Indeed, the difficulties faced by the antitrust agency to hold responsibility to an agent due to an anticompetitive practice in scope of the exchanges are linked to those faced in scope of the blockchains and the cryptocurrencies themselves.

That said, we can conclude that there are several nuances of that new technology called blockchain, considering that its structure and origin is different from everything ever created before.

Therefore, the product originated by the blockchains – the cryptocurrencies – and also the platforms on which they are operated and inserted on the Financial System create challenges to the Antitrust System, mostly considering the definition of the relevant market, characterizing the agent that detains the dominant position on it, and the principal: the attribution of liability once the anticompetitive practices are discovered.

Finally, whereas not even the National Legal System itself establishes a norm for the definition and regulation of cryptocurrencies and the activities that permeate it, necessary for their trading, the possibility of establishing antitrust enforcement becomes even more difficult.

The thought that must remain is that the nature of the cryptocurrencies reveals a new kind of asset that is not connected to any central power or state authority, it means, decentralized, and most important, self-regulating, fact that challenges the very purpose of antitrust law.

So then, we reformulate the initial questioning: what if the “trusts” that originated the antitrust legislation don’t require rules to protect the market and the economy against their activity, simply because this activity regulates the economy by itself? Maybe we are facing a new era of the antitrust activities considering the Digital Markets and the Financial System.

CONSTRAINTS CLAUSES OF MARKET SHARE IN THE PUBLIC BIDDING PROCEEDINGS

Elvino de Carvalho Mendonça, Rachel Pinheiro de Andrade Mendonça

I. Introduction

Nowadays, it is common to see the constraints clauses of market share in the public bidding proceedings of infrastructure sectors in Brazil. This subject is inserted in the regulatory function of bidding and has as aim to insert competition elements in the bidding proceedings *ex-ante* in order to design the market *ex-post*.

In general, the insertion of such clauses has the aim to avoid that one company with large market share gains all concessions of public services in infrastructure (ex. telecommunications, energy and airport).

The inclusion of such constraints is associated with the market power of the proponent and is based in the hypothesis that the existence of market power implies in the abuse of it. However, it is not right to say that the company that has market power in a specific market always abuses of it, mainly in the regulated sectors where the conditions of regulation are implemented by the regulatory agencies. Meantime, it is not right to say that the constraints like this one is not necessary in the regulated sectors where the economic group of public bidding winner has, for example, companies with dominant position in the upstream/downstream markets not regulated.

First of all, it is important to say that the market power is a necessary but not sufficient condition to abuse of it. By definition, any company can not abuse of market power if it does not have it. However, the existence of this condition does not guarantee that this company imposes a “significant and non-transitory” increase in prices.

There are several examples in the antitrust theory that show that the market share variable is not always the best one to explain the anti-competitive behaviour. The relevance of the market share variable in the sectors with homogeneous products is, for example, much more relevant to identify the possibility of dominant position abuse than in the sectors with heterogenous products.

Additionally, the market power variable gains less relevance when the sector is regulated and the company decision variables follow the classical economic regulation rules. In this way, the competition in the public bidding proceeding is given by the market and not in the market, which gives low importance to the market share of companies, since the dominant position is not, for example, a criterion to the firm participation in the public bidding proceedings.

The insertion of these clauses in the bidding notice does not solve the anticoncorrencial problem. In reality, when there is any kind of constraints that not allow the participation of a specific company in all lots of a given public bidding proceeding based, barriers to entry are created and the competition in the market carry on unchanged, since the anticompetition problem should be solved by the economic regulation.

However, the insertion of such clauses in the public bidding proceeding can make sense from the point of view antitrust theory when the economic group of the winner has dominant position in the upstream and/or downstream markets not regulated. In this case, to avoid that a specific firm wins all concessions of infrastructure public service can be important to avoid the market foreclosure. If, for example, the economic group of the winner is the main productor of a specific input to provide a regulated service, the competitors could not have access to this input and, as a consequence, can way out of the market.

The consequences of the market share clauses insertion in the public bidding proceedings to competition and the absence of it is competence of the Secretariat for Economic Monitoring (SEAE) from the Ministry of Economy (SEAE is responsible for the competition advocacy – art. 19 of Law nº 12,529/2011), which shall to present manifestation in the bidding notice always it identifies clauses that damage the economy from the point of view of the antitrust.

Notwithstanding SEAE has the competence to evaluate the bidding notice from the point of view of competition, this competence is limited to a suggestion, since the act of bidding notice publication is competence of the sectoral regulatory agency. According to Law nº 13,848/2019, article 25, the regulatory agency should work in cooperation with the Brazilian System of Competition Defense (SBDC) to promote competition and efficiency in the implementation of the competition law in its market. However, the regulatory agency can adopt or not the SEAE´s suggestions. If the regulatory agency does not accept the orientation of SEAE.

This paper talks about the insertion of market share constrains in the public bidding proceedings from the point of view of the competences of the Administrative Conseil for Economic Defense (CADE), SEAE and sectoral regulatory agencies, talks about the consequences over the competition of misallocation of market share clauses and presents some examples of this misallocation.

II. Brief considerations regarding the regulatory function of bidding

The Federal Constitution of Brazil postulates in the articles 37, XXI and 175 that the public services should be executed by the Union, States and Municipalities or granted to the private sector through concession contracts to explore them.

In accordance with the Brazilian judicial system, the public bidding proceeding is a competitive way to private sector celebrates a concession contracts with public sector in order to explore a specific public service. This instrument allows the government to: (i) look for the best propose to the public administration and (ii) ensure the principle of equality between stakeholders.

These two elements give transparence to the public bidding proceeding and improve the market competition. However, the public bidding proceeding can be used to obtain other objectives than the aim of the competition for the market[1,2]. In fact, this proceeding can be a subsidiary mechanism to the market regulation in order to become the competition viable. The instrument that becomes possible this objective is denominated as regulatory function of bidding.

The regulatory function of bidding is a mechanism of the market regulation, since the public bidding proceeding is compound by documents (bidding notice and contracts) that can

[1] In a seminal paper, Chadwick (1859) argues that all market should be available to the public through competition under the condition that efficiency, as well as cost reductions, was predictable and the winner had a limited term to supply goods or services.
CHADWICK, E. Results of Different Principles of Legislation and Administration in Europe; of Competition for the Field, as Compared with Competition within the Field, of Service Journal of the Statistical Society of London, Vol. 22, No. 3. 1859.
[2] The competition authority of France (*La Autorité de la Concurrence*) defines the concepts of competition in the market and competition for the market in the publication denominated “The competition in the market and the competition for the market”, *in verbis*:
“TALK ABOUT COMPETITION “WITHIN THE FIELD”*, IS TO SAY THAT THE ECONOMIC OPERATORS COMPETE FOR THE SAME GOODS OR SERVICES UNDER THE SAME JUDICIAL CONDITIONS, OR COMPETITION FOR THE FIELD, IS TO SAY THAT THE RIGHT TO SUPPLY A SPECIFIC GOOD OR SERVICE IN A SPECIFIC TERM AND INSIDE THE SPECIFIC TERRITORY”*.

be modeled with regulatory rules *ex-ante* with the aim to implement the competition rules *ex-post*.

Demsetz (1968)[3] presents the relevance of the regulatory function of bidding in the regulatory proceeding of economic sectors, which is called mechanism design theory[4]. According to this theory, it would be possible to elaborate an *ex-ante* contract that would take in account all future contingences in the market in order to obtain the optimum competition performance *ex-post*. In this case, the market solution would be efficient to fit the economic regulation during all the concession contract term. Demsetz (1968, p. 65) believed that rivalry generated by the competition for the market would discipline the regulatory proceedings.

Notwithstanding the mechanism design theory would be capable to obtain important private information to the performance of the concession contracts, this method would not be capable to produce a contract without loss to the seller, since the elements as, for example, regulatory changings had not to be incorporated in prices defined *ex ante*.

Stigler (1974)[5] argued that in Demsetz (1968) the concession contract would be complete and once-and-for-all, so that would contemplate all market contingences in only one act for all concession term. According to Stigler (1974), this hypothesis would be irrational from the economic point of view because the price bid would be associated to specific quantity of service supplied and which one change in the combination price/quantity supplied motivated by future events would not have to be forecast and the proposed method by Demsetz (1968) would be a fallacy.

In the same line as Stigler (1974), Veras (2018) postulated that it is impossible to the regulatory function of bidding anticipate all market regulation contingences efficiently. According to de author, the effects of this function under the infrastructure projects can be inefficient since: (i) the reduction in the number of players in the public bidding proceedings decreases in the value for money; (ii) the costs of proceeding to adopt these secondary

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[3] DEMSETZ, H. "Why Regulate Utilities?". Journal of Law and Economics, Vol. 11, No. 1, (Apr., 1968), pp. 55-65.

[4] The Professor Eric Maskin defines mechanism design theory as:
"You don't want to underbid, you don't want to overbid. Each company would bid exactly what the license is worth to that company. And therefore the winning bid will be to the company, that has the highest value. In other words, the government can realize its objective in assigning the license to the company with the highest value, even though it doesn't know, which company that is in advance. That's what that mechanism is all about – trying to achieve your goals, even though you, as the mechanism designer, lack critical information to do that directly. You have to do it indirectly through a mechanism." [http://serious-science.org/mechanism-design-theory-15].

[5] STIGLER, G. Free Riding and Collective Action: An Appendix to Theories of Economic Regulation. *Bell Journal of Economics*, 1974, vol. 5, issue 2, 359-365.

objectives can pass through above the prices proposed by players with negative consequences in the tariff of services supplied; and (iii) the costs of monitoring and execution can raise substantially the cost of government power.

Thus, concession contracts which include performance measures *ex-ante* are desirable, mainly when the bid object is a public good for the exploration by private sector. Meantime, the regulatory analysis *ex-post* is fundamental and necessary, since the regulatory conditions are dynamics and need to be adjusted along the way.

III. The analysis of the regulatory function of bidding in the horizontal and vertical overlap (market foreclosure)

The inclusion of market share constraints in the bidding notice of the infrastructure sectors has the aim to avoid that all concessions are got by only one firm. The argument to avoid the monopoly in the infrastructure with clauses like that does not have any real correlation with anticompetitive aspects, since the competition among companies occurs for the market and not in the market.

The competition for the market has a limited effect on the tariff chosen and in the services supplied during the concession, mainly because these variables are exposed to different aspects during the contract and its development depends on the regulatory agency and the administrative acts effectiveness.

Therefore, restrictions clauses like that does not have any impact above the horizontal overlap over the sector and over the winners of the public bidding proceedings, with a lot of concessions or not, because the winner will be monopolist in the relevant market and their behavior will be determined by the regulatory rules.

In the other hand, these restrictions clauses can raise the incentives to public bidding proceedings cartel and to misallocation of regulation design. In the former case because these clauses prevent the one company/economic group to participate in all distinct relevant markets which decreases the possibility of gains of scale in the competition for the market (*ex-ante*) without any competition benefits *ex-post*, and in the second one, because the market division put by the bidding notice generates incentives to the division of market among companies.

However, the mentioned constraints gain relevance when the winners are vertically integrated with the upstream and/or downstream markets, these markets are not regulated and the company has dominant position in one or in both markets.

For these cases, the regulation function of bidding is fundamental to the preservation of the competition environment in sectors not regulated, since avoids the anticompetition effects in both markets, as for example, the market foreclosure of inputs to the competitors of the regulated market.

Therefore, the insertion of constraints clauses of market share in the bidding notice of infrastructure sectors with the aim to avoid horizontal overlap does not make sense from the point of view of the competition, since, in these cases, competition is for the market and not in the market.

IV. The competence conflicts between CADE and SEAE and the competition advocacy in Brazil

In accordance with Law nº 12.529/2011, CADE has the legal competences to analyze the concentration acts, to produce the instruction of administrative proceedings, to investigate violations against the economic order and to promote competition in the markets.

The Secretariat for Economic Monitoring (SEAE) has, according to the art. 19 of the Brazilian competition law, the legal competence to promote competition among government agencies and society, producing reports in the public consults about the regulated sectors.

The regulatory agencies have the legal competence to produce regulatory acts and to adequate the market rules to the regulatory best practices, as well as to stimulate competition in the sectorial markets. The main competences of regulatory agencies are associated to bidding notices and concession contracts production.

The relationship between CADE, SEAE and regulatory agencies are defined in the arts. 25 to 28 of Law nº 13.848/2019: (i) the competition promotion and the defense of the competition law should be done by the cooperation among the Brazilian System for the Competition Defense (SBDC) and the regulatory agencies (art. 25[6]); (ii) the regulatory agencies must monitorate the market practices of the agents in the regulated market in order to contribute to the SBDC in the applicability of the Brazilian competition law (art. 26[7]); (iii) the regulatory

[6] Art. 25. With the aim to promote competition and de efficacy of competition law in the regulated markets, the regulatory agencies and competition defense agency should act in tight cooperation, given special attention to the experience exchanges.

[7] Art. 26. Inside its attributions, it is competences of regulatory agencies to monitorate and evaluate the market practices of regulated agents, with the aim to contribute to the compliance the competition law by the competition defense agencies, under of Law nº 12.529, from 30 of November of 2011 (Competition Law).

agency must informs CADE about all fact that configurate violation to the economic order (art. 27[8]); e (iv) the regulatory agency will be notified by CADE about the conducts implemented in the exercise of its activities (art. 28[9]).

Therefore, two are the steps from the insertion of market share clauses:

In the first step:

(i) The regulatory agency produces the normative act (bidding notice) and disclosure to community evaluation through public consultation;

(ii) SEAE produces a report about the normative act in relation to competition aspects;

(iii) The regulatory agency takes de decision based in its regulatory competence.

In the second step, if there will be possibility of violation to the economic order:

(i) CADE instructs and judges the administrative proceeding.

It is important to see that the regulatory agency executes its competence of regulatory design when it disclosure the bidding notice to the community through public consultation. The SEAE´s competence is guaranteed by the public consultation proceeding and, the competence of CADE is guaranteed when there is violation to the economic order.

V. The Brazilian experience

Grain (2010) presents several cases of restricted clauses use in the public bidding proceedings, as for example: (i) the case of prepared food supply to the penitentiary system; (ii) the Loterj case; and (iii) the case of 8th bidding round to oil and natural gas.

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§ 1º The competition defense agencies are responsible for the competition in the regulated sectors, entrusting them the analysis of concentration acts, as well as the initiation and instruction of administrative proceedings for evaluate violations to the economic order

§ 2º The competition defense agencies can solicitate technical reports to regulatory agencies related to its sectors of operation, which will be used as subsidy to the analysis of the concentration act and to the instructions to the administrative proceedings.

[8] Art. 27. When the regulatory agency, inside its attributions, has notice about the fact that can configurates violation to economic order, it should communicate immediately to the competition agencies to the adoption of appropriate measures.

[9] Art. 28. Without damage of legal competences, the Administrative Conseil for Economic Defense (Cade) will notify the regulatory agency about the decision of potential anticompetitive conducts committed in the exercise of regulated activities, as well as about the decisions relatively to the concentration acts judged by the agency, in 48 (forty eight) hours after the publication of decision, in order to be adopted of appropriate measures.

In relation to the prepared food supply to the penitentiary system, the bidding notice limited the participation of a specific company based on the argument that this company had already won all public bidding proceedings.

In the Loterj´s case, the bidding notice had barrier clause excluding from the public bidding proceedings all companies that had already gained the public bidding proceedings in the federal level. In accordance with the decision, they could not be habilitated to participate in the public bidding proceeding in the state level, since it would supply the same service in the federal level as well as in the state level.

In the third case, the National Agency for Petroleum (ANP) imposed in the 8th round of bidding proceedings the barrier clause which did not allow the participation of the same company in all bidded lots.

SEAE and its successor SEPRAC presented several reports in different public bidding proceedings related to infrastructure. SEAE presented a report in the public consultation formulated by the National Agency of Land Transportation (ANTT), which was related to the concession of the North South Railway located between Porto Nacional municipality in the State of Tocatins and Estrela d`Oeste municipality, located in the São Paulo State.

In accordance with the Secretariat, the case of the interconnectivity between the bordering and adjacent meshes was the relevant question in that public bidding proceeding. As a recommendation, SEAE suggested that ANTT had done analysis to evaluate the right of way with implementation of eventual regulatory measures.

In the infrastructure sector, more specifically in the port segment, the Secretariat for Productivity from the Brazilian Ministry of Finance (SEPRAC) issued statements in four public bidding proceedings related to leases of port terminals for handling liquid fuel bulk[10].

In the first one, which was related with five areas in port of Belém/PA and one area in the Port of Vila do Conde/PA, the bidding notice had not brought any constraints to participation of the incumbents operators in the Petrochemical Terminal of Miramar. Additionally, the bidding notice allowed that the same company had bid in until two areas.

In this case, the SEPRAC made a report to the National Waterway Transportation Agency (ANTAQ) public consultation with the justification that the competition benefits was higher

[10] Administrative Procedures nºs 10099.100101/2018-29, 10099.100113/2018-53, 10099.100111/2018-64 e 10099.100167/2018-19.

when the number of terminal operator was bigger, mainly because the concessions could be amplified until 70 years.

The second public bidding proceeding was related to the port of Vitória/ES, which was served by railway concessionaires that took cargo to that port. According to the Secretariat, there was not any clause in the bidding notice telling about the constraints to railway companies to participate in the public bidding proceeding. Thus, SEPRAC suggested that ANTAQ imposed constraints to the participation of railway concessionaries in the public bidding proceeding, since the verticalization of operation could bring several problems from the point of view of competition.

In the third public bidding proceeding, which occurred in the Port of Cabedelo/PB, the bidding notice neither brought constraints to participation of incumbent operators neither brought restrictions that the same company could be winner in the three areas bided. Thus, SEPRAC suggested that ANTAQ should present studies about the dynamic of competition in the relevant market of gas in the influence area of Porto de Cabedelo/PB.

In the fourth one, which is done to concession a specific area in the port of Santos, SEPRAC observed that there was not any kind of constraints of railway participation. However, according to the Secretariat if a relevant railway company won the concession, then it would raise the possibility of relevant position abuse in relation to the competitors in the railway market and the consumers in the terminal. Based on this understanding, SEPRAC suggested that ANTAQ evaluated the necessity to impose limits restrictions on the participation of the railway concessionaries.

VI. Conclusion

As demonstrated by the paper, the Brazilian experience showed that it is not ease to use the market share clauses in the infrastructure bidding notices without generates any kind of anticompetitive consequence, since there are cases where it is necessary to impose it and others that the imposition of this kind of restriction generates incentives to the anticompetitive behaviour, as for example cartel.

OPEN BANKING IN BRAZIL: BETWEEN REGULATION & COMPETITION

Bruno Renzetti, Daniel Tinoco Douek, Ricardo Pastore

Abstract: Brazil is undergoing a series of changes in its financial system. The recently enacted open banking regulation by the Brazilian Central Bank ("BCB") will certainly play a central role in future developments of this market. This short piece explores the possible impacts of open banking in the Brazilian financial sector, aiming especially at the intersection between competition and regulation.

I. The banking sector in Brazil: an overview

The Brazilian banking sector is no different than other banking systems around the world in relation to the presence of a limited number of relevant players and a fringe composed of smaller players, most of them *fintechs*. Indeed, according to a recent report produced by the Brazilian Central Bank ("BCB"), the number of financial institutions reduced from 2,423 in December 2008 to 1,677 institutions in December 2018, out of which 172 were banks[1] and a limited number of private and public banks accounted for approximately 80% of the financial assets in the Brazilian market.

In this scenario, many regulatory and investigative initiatives flourished in Brazil in order to allegedly promote more competition in the banking sector, many of them with the blessing of the BCB with its BC+ and BC# regulatory agendas[2].

As expected, technology is playing an important role in the financial revolution in Brazil, putting large financial institutions in alert mode. Brazil has witnessed a constant emergence of *fintechs*[3], which are able to provide services to consumers with almost zero tariffs and also to offer credit with lower interest rates to unbanked Brazilians. Brazil has witnessed the creation and ramp-up of *fintechs* in many sectors, namely digital banks, credit, payments and wealth and asset management[4].

[1] BANCO CENTRAL DO BRASIL. *Relatório de Economia Bancária*. 2018. Available at: < https://www.bcb.gov.br/content/publicacoes/relatorioeconomiabancaria/reb_2018.pdf>. Access: 01.03.2020

[2] The BC+ Agenda was established in 2016 and seeks to address structural problems of the National Financial System. The BC# Agenda is more recent and was launched in 2019 and its works are driven by four pillars: inclusion, competition, transparency and education. The agenda aims to connect the banking innovations to the microeconomic goals of the Central Bank.

[3] According to the *Radar Fintech* research, there were more than 400 fintechs active in Brazil in 2018. Available at: <https://fintechlab.com.br/index.php/2018/08/13/novo-radar-fintechlab-mapeia-mais-de-400-iniciativas/>. Access: 10.03.2020

[4] "There are certain difficulties in defining the exact scope of Fintech. However, there are easily identifiable product clusters, such as payments, lending/crowdfunding, deposits, financial planning, trading and investments, insurance, digital currency, wealth and asset management, enabling technologies and infrastructures. This reflects

The intense use of data has greatly benefited *fintechs* in Brazil. They tend to deliver tailored financial services to its customers, increasing revenue and reducing transaction costs. Moreover, the business model based on digital products seems to differentiate them from traditional banks and provides more capillarity to tis services, considering that a brick-and-mortar banking model does not necessarily reach more customers.

In this disruptive and innovative scenario with intense and rapid changes in the banking environment, the BCB has been called to act, in order to regulate the new financial services that are rapidly being created by these new players.

In order to fulfil its BC+ and BC# regulatory agendas and further promote the development and modernization of the Brazilian financial system, the BCB has taken several regulatory measures, such as: (i) the enactment of Resolution n. 4.649/2018, which streamlined the provision of certain financial services by banks to *fintechs* and other regulated entities; (ii) the enactment of Resolution n. 4,656/2018, which enabled the establishment of two new types of financial institutions with lesser regulatory oversight (the Direct Credit Companies – SCD and the Peer to Peer Lending Companies – SEP); and (iii) the setting up of a fast payments (or instant payments) network dubbed PIX that is set to be operational by the end of 2020.

In addition to the measures taken by the BCB, in 2019 the Brazilian President issued Decree n. 10,029/2019 which authorizes the BCB to recognize, as of interest to the Brazilian Government, the establishment in the country of new branches of financial institutions domiciled abroad and the increase of shareholdings in the capital of financial institutions headquartered in the country, by natural or legal persons resident or domiciled abroad, which paved the way for venture capital and other sources of financing for *fintechs* and other players interested in acting in the Brazilian market.

It is clear, therefore, that the current scenario of the banking sector in Brazil deserves attention as it is undergoing several and rapid changes. It's in this context that the open banking regulation recently enacted by a joint act of the Brazilian Monetary Council and the BCB (Joint Resolution n. 01/2020) comes to play and is expected to shape the future of competition in this sector. The current developments of open banking in Brazil are explored in the next topics.

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the gradual diffusion of Fintech into areas that have been a domain of traditional banking institutions (such as lending), as well as the emergence of completely new areas such as the trading of digital assets". (BRICS COMPETITION LAW AND POLICY CENTRE. *Digital Era Competition: a BRICS View,* p. 63. Available at: < http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf>. Access: 10.03.2020

II. Open banking in Brazil: current developments in regulations and potential impacts on competition

Before tackling the issues related to the implementation of open banking in Brazil, it is necessary to take a step back and fully understand what the definition of open banking is and the concepts behind its creation. For this purpose, it is interesting to look at the British pioneering experience with open banking.

In order to address this issue and promote a more competitive environment in the banking sector, the Competition and Markets Authority (CMA) issued a report in 2016 entitled "Retail banking market investigation". The findings of the report can be summarized in one phrase: even though there were positive developments in the banking sector, it is not yet as innovative or competitive as it needs to be[5].

In light of these findings, the CMA has put in place a package of remedies to target the concerns identified by the report. The main remedies were related to the establishment of open banking standards, overdrafts and customers prompts. They were named "Foundation Measures" and sought to strengthen competition in the markets analyzed.

The anchor measure was the establishment of open banking initiatives in the United Kingdom. According to the CMA report, open banking means reliable and personalized advice, tailored to one's particular needs. The customers would not need to handover any confidential banking information, but only share their information by using an Application Programming Interface (API). Thus, financial apps could find the best business opportunities for each customer, according to their personal needs[6].

After publishing the report, the CMA started putting in place their remedies, by releasing the Retail Banking Market Investigation Order 2017 (Order). Moreover, it set up the Open

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[5] "Despite these welcome developments, we have found that many problems remain. Essentially, the older and larger banks, which still account for the large majority of the retail banking market, do not have to work hard enough to win and retain customers and it is difficult for new and smaller providers to attract customers. These failings are having a pronounced effect on certain groups of customers, particularly overdraft users and smaller businesses. They also mean that the sector is still not as innovative or competitive as it needs to be. Banks will only invest in new products or services or reduce their prices and improve servisse quality, if they expect to win business as a result, or fear losing business if they do not". (CMA. *Making Banks Work Harder for You,* p. 1. Available at: < http://www.agefi.fr/sites/agefi.fr/files/fichiers/2016/08/cma_overview-of-the-banking-retail-market_9_aout.pdf. Access: 08.03.2020.

[6] "Open Banking enables Account Servicing Payment Service Providers (known as ASPSPs) including banks and building societies, to allow their personal and small business customers to share their account data securely with third party providers. This enables those parties to provide customers with services related to account information such as product comparison or payment initiation using the account and product information made available to them". (OBIE PUBLIC: *Open Banking Guidelines for Open Data Participants*, p. 4-5).

Banking Implementation Entity (OBIE), responsible to address innovation in the financial services. The development of APIs falls within the umbrella of OBIE's responsibilities. In January 2018, the open banking standard was launched and by January 2019 nearly a hundred providers were regulated.

Simultaneously, the European Union has also put in place similar initiatives to update the European payment framework, by enacting Directive EU 2015/2366 on payment services in internal market, known as PSD2. The Directive seeks to establish a more competitive market, enabling customers the possibility of sharing their data and carrying out payments through third-party providers, via APIs[7].

The Brazilian scenario, on the other hand, is very much different and incipient. In April 2019, the BCB provided the fundamental requirements of open banking in Brazil and also put forth the objectives, definition, scope, regulatory strategy and the actions to be taken for the implementation of open banking[8]. The open banking initiatives are coherent with the competitiveness dimension of the BC# regulatory Agenda ¸ a document that delineates the goals of the BCB, aiming to enhance credit efficiency and payment markets in Brazil through the promotion of a more competitive environment[9].

More recently, between November 2019 and January 2020, the BCB conducted its Public Consultation n. 73/2019, regarding the proposed regulation of open banking in Brazil. The result of the consultation was the enactment of Joint Resolution n. 01/2020, setting forth the rules for open banking in Brazil[10]. The regulation seeks to foster innovation, promote competitiveness, increase the efficiency of the National Financial System and stimulate the financial inclusion of Brazilians.

According to such regulation, participation of institutions authorized to operate by the BCB is voluntary, although financial institutions within segments S1, S2 and S3 of the

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[7] "The PSD2 enables new regulated Market entrants other than banks (i.e. fintech and other tech companies entering the payment services sector such as, for example, Apple Wallet, Google Pay and Samsung Pay) to access a customer's bank account information and associated data and/or request payments, with a customer's explicit consent". (VANDENBORRE, Ingrid; JANSSENS, Caroline; LEVI, Stuart D. *Fintech and Access to Data.* Concurrences n. 4-2019).

[8] Available in English at:https://www.bcb.gov.br/content/config/Documents/BCB_Open_Banking_Communique-April-2019.pdf>. The documents defines open banking as "the sharing of data, products and services by financial institutions and other authorized institutions, at the discretion of their clients, in the case of data related to them, through the opening and integration of information systems platforms and infrastructures, in a safe, agile and convenient way". Access: 08.03.2020

[9] Available at: <https://www.bcb.gov.br/en/pressdetail/2284/nota>. Access: 08.03.2020

[10] Such rules have also been further detailed in Circular n. 4015/2020.

prudential regulation must participate[11]. On the other hand, institutions that are not subject to authorization by the BCB may participate in open banking through partnerships with authorized participating institutions. All participants must abide by a reciprocity principle that all recipients of information must also share their information.

The roll out of open banking in Brazil is set to occur in four waves and the first is scheduled to be completed by November 30, 2020. In such wave, the participants should disclose less sensitive information about the institution itself, such as data related to customer services channels and for each of these channels data on how their customers access the services provided in each of them. In this wave, data related to services offered by the institutions should also be shared such as cash and savings accounts, prepaid and postpaid payment accounts (such as credit card offerings) and credit operations.

Wave 2, which is set to be completed by May 31, 2021, prescribes the sharing of data and transactions involving the customers of the participants, such as customer registration data and information on transactions carried out through a checking account or savings accounts, prepaid and postpaid payment accounts (including credit card transactions), and credit operations entered into by them.

In wave 3, which must be completed by August 30, 2021, involves the sharing of services related to the initiation of payment transactions and forwarding of credit proposals. Under the terms of Joint Resolution n. 01/2020, in relation to this wave, institutions that do not fall under segments S1 and S2 of the prudential regulation, but hold accounts (deposit or prepaid) or provide payment transaction initiation services, or which have signed a correspondent agreement in Brazil to receive and forward proposals for credit or leasing transactions must also join open banking.

Finally, in wave 4, which is bound to be completed by October 25, 2021, the BCB intends to expand the scope of open banking to include data involving foreign exchange services and transactions, insurance, private pension plans, investments, among other. To implement such wave, it is expected that the BCB will coordinate the efforts with other regulators such as the

[11] "11. On the subject of data sharing, institutions licensed by the Central Bank of Brazil that choose to participate in open banking should share the data described in paragraph 5 with other participating institutions. At first, the institutions that are part of prudential conglomerates under Segments 1 and 2 (S1 and S2) will be obliged to participate. Subsequently, this obligation may be extended to other institutions, at the discretion of the Central Bank of Brazil". (Communiqué 33,455/2019).

Brazilians Securities and Exchange Commission (CVM) and the Private Insurance Superintendence (Susep).

It is worth noting that the BCB's open banking regulation is founded on the concept of the customer's consent[12]. The consent of the data subject is also one of the legal basis over which the newly enacted Brazilian General Data Protection Law (LGPD)[13], which is considerably similar to the European General Data Protection Regulation (GDPR), is built, so it is safe to say that the open banking regulation is aligned with data protection guidelines as well.

Open banking has the potential to bring forth a wide array of new businesses in the financial sector, having data as their driving force. In spite of that, the handling of personal data must be watched closely, in order to avoid any misuses by the institutions. The customer must be aware of the necessity of his consent for data to be shared. Additionally, the development of APIs by banks and third parties must attend to the highest levels of data protection, observing the guidelines put forth by the LGPD. The regulation has a clear role in leading the implementation of open banking, with guidelines and frameworks, but it is also important to leave it to the industry to define central matters, such as API standards and models to manage consent for third-party providers.[14]

Nonetheless, new risks will undoubtedly arise from the open banking ecosystem due to greater and faster flow of customer information, considering that frauds and scams rely highly on information. According to the Institute of International Finance[15], the major areas of risk for users of open banking ecosystems are data breaches, unauthorized payments made without the account holder's permission and defective payments or transactions. In this sense, it can be said that the greatest challenge for the implementation of open banking is to provide an ecosystem that protects the customers by mitigating the operational risks.

[12] According to the regulation: "Art. 10. The institution receiving data or initiating a payment transaction, must identify the customer and obtain his consent, prior to the data sharing referred in this Regulation".

[13] The LGPD comes into force in May 2021.

[14] "8. In regard to self-regulation, the expectation is that participating entities will themselves agree on technology standards, operational procedures, safety standards and certificates and the implementation of interfaces, all in accordance with the regulation in place". (Communiqué 33.455/2019).

[15] INSTITUTE OF INTERNATIONAL FINANCE. *Liability and Consumer Protection in Open Banking*. September 2018. Available at: < https://www.iif.com/portals/0/Files/private/32370132_liability_and_consumer_protection_in_open_banking_091818.pdf>. Access: 07.03.2020.

Open banking is also directly related to data portability, providing consumers with greater control of their personal data. This means that the users regain control over their personal data, which could then be transferred between platforms at their request, potentially enabling consumers to more easily switch between platforms or accessing new services with their data, avoiding what is known as lock-in effect[16]. This is also a clear intersection point between open banking regulation and the LGPD because data portability is expressly mentioned as one of the main rights of the data subject[17]. However, it is important to point out that the open banking regulation does not provide for an express protection for business secrets of institutions that allow portability, as does the LGPD. Moreover, open banking would not be possible in Brazil without the enactment of the LGPD, given that it provides the legal background for the portability of personal data[18].

According to the *Stigler Report*, produced by the University of Chicago in 2019, theory suggests that the consumers will use the power of data portability to move their business to financial institutions with lower prices and innovative services. In this sense, open banking would be responsible for triggering more competitive outcomes and provide a strong case for regulated portability and interoperability in other markets[19].

The *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, chaired by Jason Furman for the Government of the United Kingdom, points out that open banking is a positive example of how the obstacles of implementing data mobility can be overcome. The report states that the open banking initiatives show the "*effectiveness of requiring at least a subset of firms to implement and deliver the solution. Without such powers, progress is likely to be slow, disjointed and in some cases non-existent. (…) Another lesson is*

[16] It is interesting to notice the differences between data portability and data mobility. While the former refers to the possibility of consumers requesting access to data and moving it from one business to another, the latter refers to the ease in which such data is moved or shared.

[17] "Art. 18. The personal data subject has the right to obtain the following from the controller, regarding the data subject's data being processed by the controller, at any time and by means of request: (...)V – portability of the data to another service or product provider, by means of an express request and subject to commercial and industrial secrecy, pursuant to the regulation of the controlling agency".

[18] COELHO, Alexandre Ramos; MARQUES, Fernanda Mascarenhas. *A Lei Geral de Proteção de Dados, o Open Banking, o Direito à Portabilidade e os Respectivos Impactos ao Sistema Financeiro Brasileiro.* Forthcoming. Cited with the authors' consent.

[19] Stigler Committee on Digital Platforms, Final Report, September 2019, available at https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report, p. 52. Access: 07.03.2020.

that just requiring common standards is not sufficient and that an active effort to make these work in practice is needed".[20]

As mentioned before, the Brazilian open banking regulation establishes mandatory participation of the financial institutions that are ranked in the segments S1 and S2 of the Prudential Regulation enforced by the BCB[21]. This means that relevant players in the Brazilian banking sector will be the first to be subject to the open banking regulation to level the playing field with other institutions that will later be joining this ecosystem.

The goal of the BCB is that once open banking is functioning in Brazil, customers will have full access to their data and will be able to compare prices and offers among several financial institutions, choosing to do business with the one that fits their needs the most. The challenge for traditional financial institutions will be to keep themselves up-to-date and develop innovative solutions.

Open banking will most likely also be able to reduce information asymmetry between the several financial institutions and thus provide for more competitive pricing to customers. Banking services will be delivered in a more personalized manner, due to the data portability and mobility allowed by the open banking regulation. This may have the power to increase rivalry and contestability of the financial market, with effects both on the demand and supply sides[22].

Intra-platform competition also greatly benefits from open banking, as it allows *fintechs* to directly engage with customers, without having to rely on third parties to grant them access

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[20] UK GOVERNMENT. *Unlocking Digital Competition: Report of the Digital Competition Expert Panel,* p. 70. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf. Access: 07.03.2020

[21] "Aiming to introduce proportionality in banking regulation – without compromising its effectiveness – financial institutions in Brazil are categorized in five segments, S1 through S5, according to their risk profile and the relevance of their international activity. In this proportionate approach, institutions more exposed to risks or with relevant international activity (S1) have to comply with a more comprehensive and complex regulation, while institutions with less risk exposure (S5) must observe simpler rules". (Available at: https://www.bcb.gov.br/en/financialstability/regulation). Access: 07.03.2020. The financial institutions currently ranked S1 are Banco do Brasil, Bradesco, BTG Pactual, Caixa Econômica Federal, Itaú and Santander and the financial institutions ranked S2 are Banrisul, Banco do Nordeste, BNDES, Citibank, Credit Suisse, Banco Safra and Banco Votorantim.

[22] "On the demand side, contestability increases as consumer preferences change. On the supply side, technological innovations increase competition in the short term, with the entry of new financial services providers into the market. Contestability increases on the supply side also because of the incentives created by regulatory and supervisory innovations". (BAHIA, Ana Letícia A. C.; BISELLI, Esther Collet Janny Teixeira; SCANDIUZZI, Stephanie. Open banking and competition: overview of the regulatory framework and impacts in the financial and banking markets from an antitrust perspective. In. MAIOLINO, Isabela (Coord). *Mulheres no Antitruste.* Volume II. São Paulo: Singular, 2019, p. 374.

to customer's data. This removes an important hurdle in the financial services value chain. Furthermore, open banking gives rise to the possibility of unbundling banking services. The rise of *fintechs* specialized in niched financial services will provide customers with the possibility of shopping for the best services, from multiple providers.

Therefore, open banking has a great potential of positively impacting competition, as customers will be able to open a savings account in one bank, take loans from another and manage investments from a third-party app[23]. At the end of the day, open banking has the potential to promote not only competition, but *effective* competitiveness: enabling consumers to make more accurate financial product comparisons and facilitate the creation and expansion of new digital services providers to compete with the long-established players[24].

III. Conclusions

The implementation of a data protection bill and the proposal of an open banking regulation demonstrate how the Brazilian regulators are looking to the ever-increasing importance of data in economic activities. Companies that have access to customer's data and the technology to duly process such data and extract relevant information will be able to offer more detailed and personalized services to its customers.

Currently, the Brazilian banking system operates under a closed model, in which the banks have control of the data collected from its customer and do not have an obligation to share such information with third parties. Due to this dynamic, banks are able to control not only the retail banking market, but also loan markets, for example. Usually, the services offered by banks are standard and may not always reflect the particular needs of each customer[25].

Such scenario will continue to change once an open banking ecosystem is in place. The open model of banking will allow data to travel more easily between financial institutions and customers will be able to share their information with third party providers of several financial services, boosting their appetite for more competitive offerings to such customers.

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[23] BRICS COMPETITION LAW AND POLICY CENTRE. *Digital Era Competition: a BRICS View,* p. 68. Available at: < http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf>. Access: 09.03.2020

[24] LAND, Adam; ROBERTS, Bill. *Move quickly and don't break things: the introduction of Open Banking in the UK.* Concurrences n. 4-2019.

[25] Nonetheless, it is worth noting that Brazil already has experiences with the open model, such as the open investment platforms (also known as investment supermarkets) that offer a wide variety of investment products to retail customers, including third-party products.

It does seem like the Brazilian Authorities are not only following the international best practices regarding open banking, especially the British experience, but also conducting the process very smoothly, providing time for the interested parties to have a say regarding the regulation and also prepare the banks to changes that will be imposed upon them.

In a country with more than 200 million people and with few relevant players in the banking sector, the implementation of an open banking ecosystem allowing data sharing conditional upon consumer consent may be the most obvious solution to foster market diversity and rivalry. There will be challenges associated with such mechanisms, but the correct implementation of open banking, respecting privacy guidelines, could lead to greater competition, due to the free flow of information that was previously not available.

Given the complexity of new digital markets and the importance of data nowadays, an up-to-date sector-specific regulation that combines the knowledge of different areas of law (competition law, data protection and economic regulation) and economics may have an important role in fostering competition and innovation. It is up for competition law to promote competitive markets, integrating values and principles from regulation. Regulation and competition cannot be seen as antagonistic, but as complementary.

Therefore, open banking should be viewed by market players, especially the long-established ones, as an opportunity to innovate and provide a better experience for their customers, developing new products and offering services tailored to their needs. Long established financial institutions and *fintechs* that quickly understand the new dynamics imposed by open banking will very likely benefit from it and compete more vigorously in the financial sector. There is no doubt that the Competition Authority and the BCB will have to work together in order to safely reach the goals pursued by open banking.

COMPETITION IN PAYMENTS IN BRAZIL: A CONVERGING AGENDA FOR CADE AND THE CENTRAL BANK

Carol Elizabeth Conway, Priscila Brolio Gonçalves

I. Background

Electronic payments and related financial services have been scrutinized by the Brazilian competition authorities for almost 25 years. The first investigation in this sector dates to 1996, when American Express issued a formal complaint against VISA, in connection to the alleged exclusivity with financial institutions, preventing them from issuing and distributing Amex credit cards in the country[1].

The *stricto sensu* regulation of payments by the Central Bank in Brazil[2], in its turn, increased substantially as of the 2000 decade. Until then, the main concern of the regulator was guaranteeing the net processing speed of the financial transactions, a key element for effective risk management in this industry, due to the high inflation rates at the time.

As per competition as policy, in 2006, the Brazilian Central Bank and two antitrust bodies (the Secretariat of Economic Law of the Ministry of Justice – "SDE" and the Secretariat of Economic Monitoring of the Ministry of Finance – "SEAE") executed a cooperation agreement, resulting, four years later, in a report on the cards payment industry ("2010 Report")[3]. The 2010 Report is the first diagnosis of cards payment services jointly issued by competition and regulatory agencies. It pointed out the increasing importance of the cards payment sector to the financial economy and opened the field to regulation towards more competition and digital innovation.

In 2012, a new antitrust Law (Law 12,529) entered into force. SDE's attributions have been incorporated by CADE (a General Superintendence was created for this purpose), while

[1] CADE's Administrative Proceeding n. 08000.022500/96-66, American Express Travel Related Services Company, Inc. and American Express do Brasil Tempo & Companhia *versus* Visa do Brasil Empreendimentos Ltda. The complaint has been shelved years later (06.19.2002), due to the lack of evidence of the implementation of the behavior in Brazil.

[2] The National Monetary Council ("Conselho Monetário Nacional" or "CMN") is the higher financial authority in Brazil. CMN is ultimately responsible for ruling payments and has delegated some powers to the Brazilian Central Bank.

[3] Available at: https://www.bcb.gov.br/content/estabilidadefinanceira/Documents/sistema_pagamentos_brasileiro/Publicacoes_SPB/Relatorio_Cartoes.pdf. Access on June 15, 2020.

SEAE remained independent and became in charge of competition advocacy before the private sector and other Government authorities, including the Central Bank.

In 2013, a regulatory framework for electronic payments has been approved (Law n. 12,865), setting the stage for increasing competition in cards sector and also promoting legal background for innovation on Brazilian Payments System- remarkably creating and regulating the e-money and digital accounts payment systems and promoting interoperability among all payment schemes, among other objectives. The Central Bank and the antitrust authorities – CADE and SEAE – continued to act, according to their competencies.

Between 2013 and 2015, the National Monetary Council and Central Bank issued several regulations to bring more transparency and competition to the System in order to concretize the goals of the Payments bill, while CADE investigated restrictive behavior, especially in connection to exclusivities and the requirement and exchange of sensitive information among players at different levels of the payments chain.

In 2015, CADE and the Central Bank initiated a structured exchange of information about the payments industry, a clear first-step for the negotiations towards a more comprehensive cooperation agreement between the two governmental bodies, executed 3 years later, in February 2018[4].

In 2016, the so called "Agenda BC+" of the Brazilian Central Bank expressly referred to "the inclusion of new payment methods", "the evaluation of technological innovation" and "competition", as tools to increase reduce efficiency and reduce the cost of credit.

In 2017, Law 13,455 authorized merchants to discriminate different prices for each payment method (for instance, between cards, money, billets and so on) according to the effective cost charged from the payment scheme owner and fostering competition between them.

One year later, in the beginning of 2018, the Central Bank issued fresh regulation and reviewed existing rules to continuing improve the Brazilian Payments System. The new regulation established a ceiling for interchange rates charged by payment schemes on debit transactions.

[4] Full contents of the cooperation agreement available at: http://www.cade.gov.br/noticias/banco-central-e-cade-assinam-memorando-de-entendimentos/memorando_cade_bc.pdf. Access on June 15, 2020.

Also, it published several draft regulations, on subjects such as rules of governance and non-discrimination in payment schemes (see Regulation n. 3928/18, approved in December 2018). There has been a large number of responses to the public consultations. Besides, there has been formal complaints to CADE, in a clear dispute between payments *fintechs,* on the one hand, and the traditional players in the payments industry in Brazil, on the other.

Aiming to better evaluate the situation, CADE scheduled a public hearing, which took place in November 2018[5]. Traditional players, *fintechs* and associations from both sides were invited and presented their views. After the hearing, CADE decided to continue investigating this industry and launched a sector inquiry (known as the "verticalization inquiry"), to analyze the relations among the several stages in the payments industry, eventually giving cause to other investigations with specific objects and identified defendants. The verticalization inquiry remains open and intends to address complaints of restrictive conducts still not under CADE's specific scrutiny[6].

In December 2018, CADE and the Central Bank issued a joint document to provide additional clarification in connection to the cooperation agreement executed earlier that year[7]. Besides providing the Central Bank with the last word to approve transactions involving financial institutions in certain circumstances (generally described as "prudential risk"), the document supplies details about the coordination between the two agencies. In particular, the normative ruling establishes a stream of information exchanges and periodic meetings to discuss both general technical cooperation and specific subjects that could become matter of regulation, with impacts to markets under the Central Bank supervision.

The memorandum of understandings between CADE and the Central Bank and the Regulatory Act formally ruling their cooperation is unprecedented in the history of the two agencies. Together with the amended interoperability regulation, CADE and Central Bank's public hearings and CADE's sector inquiry, they contribute to turn the year of 2018 into an important landmark for competition in the payments industry in Brazil.

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[5] CADE's announcement available at: http://www.cade.gov.br/noticias/cade-realiza-audiencia-publica-para-discutir-impactos-concorrenciais-da-verticalizacao-do-setor-financeiro. Access on June 15, 2020.

[6] Recently, during the COVID-19 pandemic, CADE's General Superintendence received complaints of abusive pricing and discriminatory behavior perpetrated by traditional banks to the detriment of *fintechs* and non-vertically integrated companies. CADE issued several requests for information in the case records of the existing inquiry, launching a new line of investigation.

[7] Full contents of the Joint Normative Act n. 1/2018 available at: https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205_12_2018%20limpa.pdf. Access on June 15, 2020.

2019 was also very fruitful. That was when the Brazilian Central Bank announced a new Agenda, named “Agenda BC#”, based on four pillars: inclusion, competition, transparency, and education, including Open Banking and Instant Payments as hot topics. It has also created a Department of Competition and Financial Market Structure, released public hearings on relevant subjects (including open banking and competitiveness) and published a working paper intitled “Bank Competition, Cost of Credit and Economic Activity: evidence from Brazil”. The later provides evidence of the causal effects of bank competition on the cost of credit and on the economic activity. Its conclusion is that a reduction in bank competition increases lending spreads and decreases credit volume, ultimately affecting the real economy.

CADE, in its turn, actively contributed to the Open Banking discussion and regulation. CADE’s Economic Department also published a working paper about the payments market (the series is called “Cadernos do CADE”), identifying the relevant markets, their main characteristics and the most important players, their roles and market shares, and summarizing all merger filings and investigations in this industry since 1995. The paper was presented in a seminar in November 2019 (Regulation and Competition in the Payments Market)[8], one year after the public hearing on impacts of vertical integration in the financial sector, with the participation of the Central Bank.

Two important events are scheduled for 2020. The first is the launch of Instant Payment System (called PIX). The second is the implementation of the first phase of the Open Banking project, consisting in the openness of information about products and services by the market players and the possibility for third parties to analyze and compare them[9]. Despite of the COVID-19 pandemic, the Central Bank has announced its intention to maintain the calendar for the launching of the open banking.

II. Competition as a converging agenda for CADE and the Central Bank

Differently from what happened in other markets involving financial institutions, such as banking services, where there used to be a conflict between the agencies[10], CADE and the

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[8] CADE’s announcement available at: http://www.cade.gov.br/noticias/seminario-promovido-pelo-cade-abordara-o-mercado-de-instrumentos-de-pagamentos. Access on June 15, 2020.

[9] The first phase of the implementation of the open banking in Brazil does not foresee any sharing of clients’ data.

[10] The institutional dispute between CADE and the Brazilian Central Bank over the reviewing of mergers involving financial institutions was taken to Courts by banks that have been fined by CADE for failing to comply with the obligation to submit their transaction to the antitrust body (see Act of Concentration n. 08012.002381/2001-23 between BCN – Banco de Crédito Nacional S/A and Alliance Capital Management S/A). The dispute was ruled by the Superior Court of Justice, by majority, in favor of the Central Bank, indicated as the

Brazilian Central Bank always worked very close to each other when exercising their respective roles in the payments industry.

At the same time, it is not an exaggeration to suppose that never have a regulator and an antitrust agency cooperated so much in Brazil.

For the last 5 years, CADE and the Central Bank have been working more and more closely within working groups and maintaining a constant interaction on both new regulation proposed by the Central Bank (such as Open Banking and Instant Payments public consultations in April 2019 and April 2020, respectively) and investigations of this industry conducted by CADE.

Although *stricto sensu* regulation and antitrust policy for financial markets do not have identical goals, they share competition as a common objective. In the last decade, it has become clear for the Central Bank that without competition, interests will not go down, no matter the extent and severity of other financial measures adopted by the Federal Government, including the Central Bank itself.

The payments industry is a prolific case of the successful introduction of competition resulting from efforts of both CADE and the regulator. Certain stages of the distribution chain would probably not exist nowadays if it were not for the intervention of these agencies at the proper time and their constant interaction. And as new players entered the market, prices such as discount rates, which were historically high, decreased substantially, benefiting clients, and increasing general welfare.

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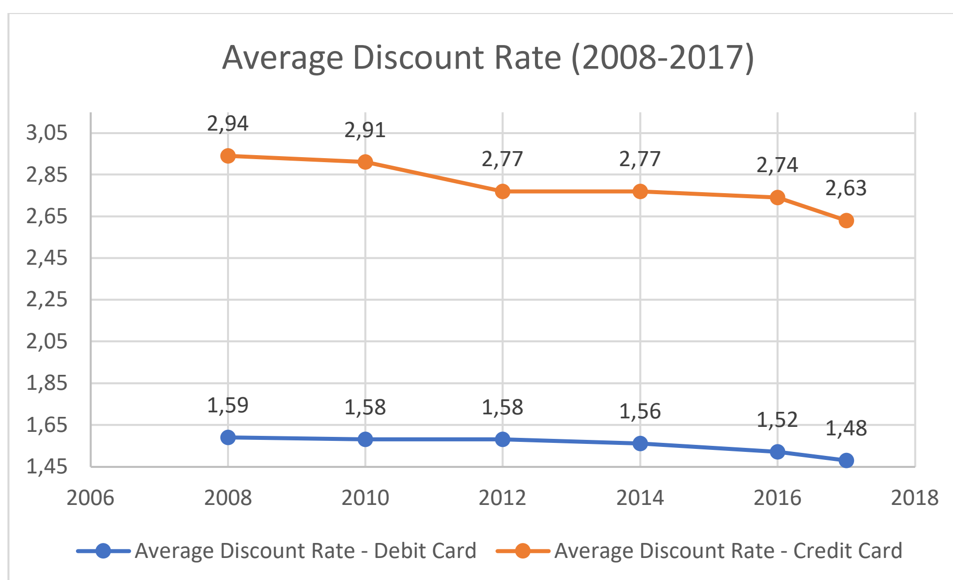
sole responsible for reviewing financial institutions mergers (https://stj.jusbrasil.com.br/jurisprudencia/19125979/recurso-especial-resp-1094218-df-2008-0173677-1/inteiro-teor-19125980). CADE appealed to the Supreme Court, but the appeal was dismissed on the argument that there were no direct constitutional offense that could justify the Court's jurisdiction on the matter (http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE664189.pdf). Access on June 15, 2020.



Source: CADE (based on the Brazilian Central Bank data). Cadernos do Cade: Mercado de Instrumentos de Pagamento, October 2019.

In addition, it is worth mentioning that, in this industry, competition goes hand in hand with social inclusion (another goal frequently pursued by the Central Bank), what contributes to reinforce the importance of the first as a tool of the regulator. Many individuals and small business that originally did not have access to the banking system became able to accept several types of payment, made viable by new entrants in the market, boosting their activities and promoting a general improve in the economy.

Having this in mind, it is not difficult to predict that CADE and the Central Bank will continue to work together to achieve more competition in the payments industry, independently of the individuals that occupy the relevant positions in each agency[11].

The COVID-19 should not negatively impact this relationship, except for the fact that, as most of the social and professional meetings and interactions in our contemporary society, it tends to become less presential and more virtual.

Actually, the need to deal with the economic crisis resulting from the social distancing measures adopted as a response to the pandemic tends to create a larger demand to regulatory and antitrust authorities in the payments industry. As an example, we refer to the increasing competition between traditional banks and digital payments services to distribute the financial relief announced by the Federal Government, as well as lending trough electronic payments

[11] Nowadays, former employees of antitrust bodies such as the Secretariat of Economic Monitoring of the Ministry of Finance – SEAE occupy key positions at the Brazilian Central Bank and vice-versa.

machines. The complaints received by CADE in connection to abusive prices and discrimination allegedly perpetrated by traditional banks regarding receivables during the crisis are also worth mentioning.

During financial distress times, it is important to pay special attention to restrictive or abusive behavior, to avoid that apt, innovative, and efficient companies are excluded from the market or have their costs artificially raised due to anticompetitive conducts or transactions.

The frequent intervention of CADE and the Central Bank has allowed or improved competition in several markets, but the work is not finished. Transactions (M&As, joint ventures and cooperation agreements) continue to be executed and commercial practices continue to be adopted and become more sophisticated, so their potential impact to competition in the payments industry should always be evaluated under both antitrust policy and specific regulation.

Last, but not least, the cooperation to create new and to improve existing regulation is a constant activity. As technologies evolve, new products and services are offered and player enter the markets, it is necessary to review the applicable rules, evaluate the possibility to change approach and create new landmarks.

III. A tentative agenda for CADE and the Central Bank for the years to come

For the next couple of years, CADE and the Central Bank are likely to intensify their interaction regarding the *implementation of Open Banking and Instant Payment projects*, which are key to strengthening competition in the financial industry. They will also keep interacting on electronic payments and other financial markets (including banking, investments and so on), as the technology will enhance (even more after COVID-19)[12] the competition between tech and traditional players and will naturally raise disputes.

Both new projects are expected to raise complaints and disputes before the Central Bank and CADE, mainly involving the incumbents, new entrants and also big techs, a very important third element in the scenario. The entry of big techs, illustrated by the announcement of the

[12] According to Instituto Locomotiva de Pesquisas, due to the COVID-19 pandemic, the transition to digital payments and e-commerce in Brazil could take only 5 months, in comparison to the originally estimated 5 years, similarly to what happened in China in 2003 as a consequence of SARS. Available at: https://0ca2d2b9-e33b-402b-b217-591d514593c7.filesusr.com/ugd/eaab21_a31e31678e364f51b6fd22153b77c259.pdf . Access on June 16, 2020.

launching of payment services by WhatsApp in Brazil[13], is expected to increase competition, but also to raise concerns in connection to the use big data, privacy and leverage of preexisting market positions, as indicated by investigations all over the world.[14]

Innovation and technology are in the epicenter of the debate. While they have been responsible for the success of some new players, new technologies and businesses models (especially when there is need of standardization and interoperability) can also represent a barrier to entry. So can regulation, depending on the choices adopted by the authorities. It is a very delicate moment and it is mostly welcome that each step is carefully considered and proceeded by an ample debate involving all stakeholders.

Open banking is advanced in what concerns to the initial regulation (the joint Resolution CMN-BCB n. 1 was published on May 4, 2020) but this is only the basic framework to kick-off all the discussion and implementation that is going to happen in the near future for self-regulation, standards adoption and future ruling.

This is an important time to enhance policy and cooperation between CADE and the Central Bank. The institutional cooperation between these authorities, and the interface between regulation and competition in the financial markets are so important that, in the United Kingdom, for instance, the Competition and Markets Authority ("CMA"), an agency with a strong antitrust role, is the main responsible for the Open Banking agenda[15]. Besides, the implementation of the Open Banking in Brazil will probably give rise to discussions about access conditions (bottlenecks), discrimination, and refusals do deal, as it happened in sectors like telecommunications and energy after privatization or modifications to legal landmarks.

Rules for Instant Payments (Circular BCB 4027, dated June 2020), on their turn, will give rise to a huge innovation starting November 2020, so CADE and the Central Bank must continue to work closely and keep a permanent dialog to be capable of quick responses, to be up to "Instant" Payments speed. Access discussions during preparation and implementation are also expected and would be addressed by the authorities according to their respective competencies.

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[13] Available at: https://www.theverge.com/2020/6/15/21291382/whatsapp-digital-payments-brazil-facebook-pay; https://valor.globo.com/financas/noticia/2020/06/15/whatsapp-inicia-servico-de-pagamento-no-aplicativo-no-brasil.ghtml. Access on June 15, 2020.

[14] Among others, see: "Commission opens investigation into Apple practices regarding Apple Pay". Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075. Access on June 16, 2020.

[15] Available at: https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution; https://www.openbanking.org.uk/about-us/. Access on June 15, 2020.

In a nutshell, Open Banking and Instant Payments are our bets for the material converging agenda for CADE and the Central Bank in the next years, together with electronic payments and other financial markets disputes increased by the acceleration of technology, discrimination, data sharing among competitors, excessive pricing, zero rating and subsidies, concerns that are already in the radar of the authorities and also tend to be exacerbated by the pandemic.

Finally, while *it is not expected* that agencies will neglect the traditional ways of cooperating when dealing with competition matters (in merger filings and behavior investigations), we believe that *advocacy is the future of antitrust in the payments industry* and will be more and more present in a joint agenda of CADE and the Brazilian Central Bank.

Business and commercial practices are very dynamic. Although CADE is often informed of potential restrictive behavior very early by the victims, it takes time to investigate the conducts and analyze effects (especially long-term) under the competition perspective. It takes even longer to make the behavior cease and punish the market players engaged in it, if appropriate. By the end of a formal behavior investigation, when there is enough evidence to convict, it is likely that anticompetitive harm is irreparable.

That is why one could also reasonably expect a reduction in the number of formal sanctioning procedures in the antitrust field, and an increase in the adoption of tools such as CADE's verticalization inquiry (it is likely that CADE's constant monitoring has caused a step-back on misconducts) or agreements in early stages of investigations. Simple measures such as official letters and inquiries, pervaded by intense institutional coordination, can be used to dissuade economic agents to go on with their conducts and prevent or mitigate competition concerns in early stages or even before they become a problem.

OPEN BANKING IN BRAZIL: POTENTIAL COMPETITION CONCERNS AND WHAT COULD BE DONE

Marcos Filipe Sussumu Ueda, Sérgio Costa Ravagnani, Stephanie Vendemiatto Penereiro

Abstract: in the context of Open Banking regulation initiatives carried out globally, the Central Bank of Brazil recently submitted normative proposals related to Open Banking regulation for public consultation. The implementation of Open Banking in Brazil seems promising from a competition standpoint as it should lead to lower grounds of information asymmetry in the financial sector. On the other hand, it is important to understand what competitive implications may result from the current terms proposed in the regulation, especially considering the complexity of interactions involving both the Administrative Council for Economic Defense and the Central Bank of Brazil in the competition assessment of financial markets and their impacts on related markets. This article intends to address which potential competition issues may arise from these proposals and what could be Cade's possible approaches to target these concerns.

Keywords: financial markets; banking regulation; open banking; antitrust; information asymmetry; discriminatory treatment; exchange of competitively-sensitive information; advocacy.

I. Introduction

The financial sector has undergone numerous innovations in recent years that have had significant impacts on the way products and services are offered and on the development of new business models. At the bottom of these transformations is the use of data combined with the development of new technologies related to digital platforms and artificial intelligence. These technologies enhanced the access of consumers to products and services in unprecedented ways, making it possible to collect a greater volume of data and managing it as an asset capable to create valuable inputs to business decision-making.

From a competition perspective, the use of data is relevant as it can shape the competition conditions in the markets. Companies' commercial decision-making are influenced by and may change according to the valuable economic information provided from data processing. This sort of data provides a competitive edge since companies can track consumer preferences and their willingness to acquire certain products and/or services, making it possible to accurately target customers, design customized offers and set prices in terms that can raise overall revenues and profits.

In this context of data-driven markets, certain levels of information asymmetry may present even greater consequences in terms of competition concerns, such as increasing barriers to entry and weaken competition. The asymmetry thereof seems to be a condition of all the markets operation. However, it is known that some markets present higher levels of asymmetry given to negative externalities based on specific economic and/or legal structures that affect

their functioning. The Brazilian financial sector is an example of a concentrated market characterized by data-intensive use in which the Central Bank of Brazil ("BCB") identified economic and legal structures that are likely to prevent the information flow in desirable levels.

The Open Banking is a concept designed to address information asymmetries in the financial markets by setting regulatory standards that reduce informational costs. In general lines, the idea of Open Banking is to allow the sharing of data, products and services through the opening and integration of platforms and infrastructures between financial and other licensed institutions to enable financials' data portability. In practice, this means ensuring that consumers have greater freedom to use their personal financial information, while facilitating companies to share and access these information to develop products and services that are better suited to meet consumer demands at lower costs and/or more favored conditions.

This initiative has been discussed and developed by banking system authorities around the world to foster competition and promote a more inclusive and secure environment to companies and consumers financial transactions. Considering the possible contributions to the international discussion across different models of Open Banking, the purpose of this article is to address: (*i*) which regulatory initiatives have been chosen by BCB to implement the Brazilian model so far; (*ii*) which are the potential competitive issues that may arise from the current normative proposals related to Open Banking; and (*iii*) what could be the possible approaches by the Administrative Council for Economic Defense ("Cade") to target these issues.

a. Initiatives for Open Banking implementation in Brazil

On April 24th, 2019, the BCB published the Announcement No. 33.455 ("Announcement")[1] that disclosed the fundamental requirements for the implementation of Open Banking in Brazil. The Announcement covered topics as the objective, definition, scope of the model, regulatory strategy and the actions for implementation in order to develop an Open Banking model in Brazil.

The introduction of Open Banking in Brazil still depends on a specific regulation issuance. In this respect, on November 28th, 2019, the BCB submitted the Public Notice No. 73/2019 – document which disclosed the proposals for normative acts related to the implementation of Open Banking in Brazil ("Regulation Draft") – for public consultation up

[1] Available at https://www.bcb.gov.br/content/config/Documents/BCB_Open_Banking_Communique-April-2019.pdf. Access on 3.29.2020.

to January 31th, 2020. According to the Public Notice, the Open Banking regulation is expected to be drafted in the first semester and published in the second semester of 2020.[2]

The Regulation Draft encompassed the following provisions: participating institutions, scope and information sharing, sharing liability, minimum requirements for operation, risk management and minimum conditions to third party providers hiring, reimbursement of expenses between participating institutions, the regulation implementation timeline and a convention model for governance and decision-making structure between participating institutions.

Also, the BCB proposed that participating institutions develop a self-regulation model. According to the Regulation Draft, these institutions are expected to decide on subjects as technological standardization and operational procedures, safety standards and certificates, as well as the implementation of the programming interfaces, assuring they are all in accordance with the regulation standards. BCB also established that may act in the initial stages of self-regulation coordination, including the approval of decisions and reviews, as well as vetoing, imposing restrictions, or regulating non-conventional aspects.

b. Open Banking in Brazil: definition, scope and participating institutions

The BCB defines Open Banking as *the sharing of data, products and services by financial institutions and other licensed institutions at the customers' discretion as far as their own data is concerned, through the opening and integration of platforms and infrastructures of information systems, in a safe, agile and convenient manner.*[3]

The definition brings aspects that will be further detailed to help understand what are the main features that currently characterize the Open Banking model in Brazil. The main features that will be assessed are: (*i*) the scope of data and services encompassed by Open Banking and level of sharing openness; and (*ii*) the Open Banking participants and participation eligibility criteria.

Concerning the scope of data and services shared in the Open Banking, the BCB focused on customer, transactions and payment initiation services data related to the payment and deposit and saving accounts segments. The Regulation Draft states the possibility of sharing the following: (*i*) data on products and services offered by participating institutions (*e.g.*

[2] Available at https://www.bcb.gov.br/en/pressdetail/2284/nota. Access on 3.29.2020.
[3] Ibid.

location of branches and other access channels, product characteristics, contractual terms and conditions, financial costs); (*ii*) customer personal data (*e.g.* name, filiation, address); (*iii*) customer transactional data (*e.g.* data related to deposit accounts, credit operations and other products and services contracted by customers); and (*iv*) payment services (*e.g.* initialization of payments, transfers of funds, payments of products and services).

The sharing of customer personal and transaction data, as well as the execution of payment services, are subject to customer's prior consent in accordance with the provisions of Law 13,709/2018 (Brazil's General Data Protection Law).

Concerning the participating institutions, the Regulation Draft established that only financial institutions, payment institutions and other institutions authorized to operate by the BCB will be able to access the Open Banking ("Participating Institutions"). It also states that the Open Banking will be mandatory supplied by customer data sourced from institutions that are part of prudential conglomerates classified under Segments 1 and 2 ("S1 and S2")[4] – which include the 13 Brazilian largest financial institutions and any account holding institution or payment initiation service provider – while other authorized institutions can voluntarily join at this first moment.

It is worth noting BCB adopted a two-sided openness approach. In order to gain access to the Open Banking database, the participating institutions need to disclose data from their own customers. This means any other licensed institutions that intend to join the Open Banking ecosystem would need to obtain consent from their own customers and be willing to share their information with other Open Banking participants before getting access to the database.

Finally, as previously mentioned, the Regulation Draft provided the possibility to extend the Open Banking model to other entities since covered by BCB's legal competence. It calls attention, however, the provisions described in article 5 of the Regulation Draft that include insurance and open complementary pension as segments covered by the Open Banking scope, even though these segments are related to markets that are not regulated by BCB. As will be detailed below, such provisions may trigger potential competition concerns that are likely to negatively affect the Open Banking implementation from a competition standpoint.

II. Regulation Draft's possible negative effects on competition

As anticipated in Section 1.b, the article 5, I, "*b*", 8, 9, and "*d*", 10, 11, of the Regulation Draft include products and services data related to insurance and open complementary pension

[4] Prudential conglomerates from Segments 1 and 2, classified according to size criteria, level of international activity and risk profile.

provided by a Participating Institution. In other words, insurance and open complementary companies without distribution agreements or vertically related with Participating Institutions will be deprived of the benefits that data sharing can bring to competitors with access to Open Banking database.

At first, one might think about a possible conflict of legal competencies involving the Superintendence of Private Insurance ("SUSEP")[5] and the Superintendence of Complementary Pension ("PREVIC")[6], the Brazilian insurance and open complementary pension regulators. However, this legal discussion is not object of the present article, which focuses on the competitive effects concerning the addition of non-financial products and services in the Brazilian Open Banking regulatory framework.

Cade has recently analyzed important cases related to industries vertically integrated with financial institutions. In this context, it is worth mentioning Cade's analysis regarding the acquisition of a minority stake on Brazil´s largest independent investment platform, XP Investimentos ("XP") – which also distributes insurance and open complementary pension products –, by the largest Brazilian private bank, Itaú Unibanco ("Itaú").[7] The transaction clearance was subjected to the signature of a Merger Control Agreement ("ACC").

More specifically, Cade understood the transaction could create incentives for Itaú to privilege the distribution of its own managed investment funds through XP, leading to a potential foreclosure in the investment product distribution market. Therefore, the ACC prohibited XP to unjustifiably discriminate investment products offered by Itaú's competitors and imposed the obligation to maintain an online complaint channel that allows third parties to report alleged exclusionary practices and/or other violations to the ACC terms.

Although not directly related to the insurance and open complementary pension markets, this is an example of a potential similar market foreclosure practice that could take place following the current terms of the Draft Regulation. Since financial conglomerates will have access to important information regarding these markets, it is possible for companies related to them (vertically or commercially) to design services and products that better meet consumers

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[5] Autarchy responsible for the supervision and control of the insurance, open private pension funds and capitalization markets in Brazil.
[6] Responsible for supervising the closed private pension funds.
[7] Merger Act No 08700.004431/2017-16.

needs and profiles, given the access they will have to Open Banking data. Therefore, this data asymmetry would benefit integrated companies.

In this context, independent companies[8] may have a significant competitive disadvantage and be forced to leave the market or face discriminatory treatment. Further, it is possible for financial institutions to use their market power in specific markets (*e.g.* deposit account market) to leverage on these insurance and open complementary pension companies' market shares. It is relevant to mention that the six largest financial conglomerates in Brazil have insurance and open complementary pension companies on their portfolio.[9]

During the last years, Cade has received complaints concerning the payment services market based on alleged anticompetitive practices involving vertically related companies. On April 2017, Cade's Tribunal approved a Cease and Desist Agreement ("TCC") negotiated by the General-Superintendence of Cade ("SG") with the companies Itaú, Rede S.A. [10] ("Rede") and Hipercard[11] ("Hipercard") for ceasing exclusionary practices.[12] Hipercard and Rede had an exclusivity agreement that required retailers to hire Rede's services for accepting and processing payments with the Hipercard brand. According to the TCC, Itaú and Rede agreed not to discriminate other payment service providers from operating the Hipercard brand.

In another example, on November 2019, Cade's Tribunal refused Rede and Itaú's appeal against a preventive measure imposed by SG[13]. In general lines, Rede had stopped charging small retailers an additional fee to anticipate receivables related to their credit sales with the condition that these retailers were also Itaú's banking account customers. The preventive measure determined Rede to extend such benefits to all its customers regardless of their bank accounts as a condition for the maintenance of the commercial campaign. The SG alleged the practice could harm competition on the payment and deposit account market given the potential exclusion of other payment service providers nonintegrated within a financial institution, as

[8] The terms "independent companies" or "independent agents" are used in this article to refer to non-vertically integrated agents and agents that are not part of a financial conglomerate.
[9] For instance, Banco do Brasil and Brasilprev Seguros e Previdência S.A.; Bradesco and Bradesco Vida e Previdência S.A., Bradesco Seguros S.A.; Santander and Zurich Santander Brasil Seguros e Previdência S.A.; Itaú and Itaú Vida e Previdência S.A., Itaú Seguradora S.A.; Caixa Econômica Federal and Caixa Seguradora S.A., Caixa Vida e Previdência S.A.
[10] Rede is a subsidiary of the Itaú Group and the second payment service provider in Brazil, operating in the electronic payment accreditation service.
[11] Hipercard is a card payment brand from the Itaú Group.
[12] Administrative Inquiry No 08700.000018/2015-11.
[13] Administrative Procedure nº 08700.002066/2019-77.

well as the likelihood of leveraging Itaú's market share on the deposit account segment. The investigation is still ongoing.

The cases mentioned are not directly related to Open Banking or to insurance and open complementary pension markets but do illustrate the dimension of potential competition harms linked to vertical related businesses and indicate that these concerns may not be unfounded. In fact, allowing only part of the market competitors to access such amount of data regarding consumer's profiles and preferences may cause significant information asymmetries. If companies that have access to this data are part of a conglomerate, it is likely that this asymmetry gives rise to discriminatory practices.

As consumers' engagement on Open Banking increases, the more likely will be for consumers to concentrate their transactions on the Open Banking participants, as a result of the expected decrease of transaction costs of moving from one financial service provider to another, and considering the best tailored offers the consumers will receive. By contrast, insurance and open complementary pension companies nonintegrated to financial conglomerates nor *fintechs* will be excluded to take part on this environment.

In the international context, the Retail Banking Market Investigation Order 2017, published by the United Kingdom Competition and Markets Authority, does not include insurance and open complementary pension products and services on the list of its Part *12. Release of product and reference information*.[14] In the same direction, the Article No 2 of the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market ("PSD2")[15] defines the scope of the Open Banking main rule in as payment services provided within the Union only. These examples point out that the sharing of data related to insurance and open complementary pension products and services seem to be an innovation.

III. The importance of an advocacy approach

Assuming Open Banking regulation was approved as the document BCB has submitted to public consultation, the possible negative competition effects previously listed and described could arise.

[14] Available at:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/600842/retail-banking-market-investigation-order-2017.pdf. Access on 3.10.2020. p. 23.
[15] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN. Access on 3.29.2020.

The first possible scenario to imagine is of the Administrative Council for Economic Defense ("Cade") receiving a complaint or formal representation presented by an independent agent that operates in the insurance or open complementary pension markets without a vertical relation to any Participating Institution. This agent could (*i*) claim the existence of competitively-sensitive information exchange between competitors within the Open Banking platform and system; and/or (*ii*) require access to information available in the platform, under the argument of discriminatory treatment.

In this situation, it could be hard to imagine a concrete satisfactory answer from the competition authority. It would not be reasonable for Cade to punish private agents participating in the open baking – especially the ones obliged to participate according to the item I, *a*, of article 6º of the Resolution, that are also the agents more likely to have greater market power – for sharing competitively-sensitive information, once the sharing was a regulatory imposition from the Public Administration. As long as the exchange of information occurs within the exact terms described in the Resolution[16], this could imply a scenario where the Public Administration requires the private agent to practice a conduct and then punishes him for doing so.

At the same time, even if Cade understood there was a discriminatory situation, it could be complex for the authority to request BCB to provide Open Banking access for these agents, once the Resolution expressly determines the access will be provided only for the Participating Institutions. Therefore, this request would demand to accept into Open Banking agents not authorized by BCB that would have access to information not only about insurance and open complementary pension markets, but also regarding many other financial sectors.

This scenario indicates the obstacles of an effective response by Cade assuming the Resolution was approved as its latest version. Thus, it is essential to adopt a preventive and proactive approach, through competition advocacy. Considering the important improvements to competition and efficiency that may result from Open Banking, it is necessary to reflect upon proposals that are capable of reducing possible negative externalities of the Regulation, without precluding it.

[16] The possibility of agents using the information available in the Open Banking platform for anti-competitive purposes is not being dismissed. The information may be used in the practice of collusive or unilateral conduct. If the competition authority identifies any anti-competitive conduct, it shall be punished, according to the Federal Law nº 12.529/2011, demanding an individual and detailed analysis. Therefore, the example referred in this article, comprehends only the difficulty of punishing a private agent exclusively for participating in the Open Banking platform and following the exact requirements made by legislation.

It is possible to assume insurance and open complementary pension markets were included between products and services whose information shall be provided by agents in the Open Banking given its intrinsic relation with other financial products and considering they can be offered by the financial institutions themselves, not only by other agents of their economic groups. Nevertheless, in Brazil it is possible for independent and non-vertically integrated agents – therefore not regulated by BCB – to offer these services.

To avoid a discriminatory treatment between vertically and non-vertically integrated agents regarding data, two possible measures could be adopted: (*i*) exclude insurance and open complementary pension from the list of markets from the Open Banking scope; or (*ii*) allow participation of agents that operate in these markets without being vertically integrated with Participating Institutions.

Considering BCB does not regulate and authorize these non-vertically integrated agents to operate, an important step to enable their participation in Open Banking could be the draft of a joint resolution between BCB, SUSEP, and PREVIC. This joint resolution could determinate the required mechanisms to assure the participation of these agents without creating risks to Open Banking's integrity, security and operation.

On the other hand, if the Public Administration decided to exclude insurance and open complementary pension from the list of markets that should have their data shared in Open Banking, the regulation would not create an additional information asymmetry. Either way, there would be a less unequal regulatory treatment between vertically and non-vertically integrated players.

Both possibilities draw attention for an additional reflection: the article 5º of the Resolution, which states: "*the Open Banking covers the sharing of, **at least***"[17]. Adopting this wording, the Resolution establishes the list indicated in this article is non-exhaustive. In other words, it makes it possible for companies to exchange information regarding other activities, products, and markets through the Open Banking system. Considering both vertical and conglomerate extensions of financial institutions' economic groups in Brazil, it is necessary to assure that this provision does not allow the exchange of competitively-sensitive information and encourages anti-competitive practices in other markets.

[17] In the original: "*O Open Banking abrange o compartilhamento de, **no mínimo***".

An advocacy approach could address all these concerns. This article does not aim to propose an exhaustive analysis of the regulation's possible impacts, but to identify possible negative effects and approaches to address them. These simple measures regarding competition advocacy could be easily adopted and would significantly reduce possible anti-competitive effects. Therefore, these recommendations aim to contribute to the debate towards a pro-competitive environment, without questioning the importance and the necessity of an individual and detailed analysis by the competition authority of each concrete situation that may be verified.

IV. Conclusion

The Open Banking system seems promising from a competition standpoint as it may reduce information asymmetries and it is likely to establish a fairer level-playing field for financial markets participants in terms of information access. In this context, companies shall have conditions to develop financial products and services more accurately in order to meet the consumer's demands, while consumers may be presented with better standards to compare different financial products and services. Combined, these conditions are expected to foster competition and ensure that consumers have better products and services at lower costs and/or favored conditions.

However, the regulation implementation demands certain precautions. Based on the normative proposals submitted by the BCB to public consultation it is fair to say that the regulation can raise competition concerns by including markets not regulated by the BCB on the Open Banking scope – insurance and open complementary pension segments – and making it possible to include related markets not necessarily limited to those expressly described in the regulation. Such provisions may result in concerns involving companies that do not have access to the Open Banking database and still compete in the same market with the ones that have. This situation could lead to complaints related to discriminatory treatment and exchange of competitively-sensitive information that might not be satisfactorily addressed by Cade if assumed that these market conditions could be considered presumably lawful as based on the BCB regulation.

Finally, considering these potential negative effects on competition and the competence of BCB in the regulation, it seems that the best approach to target these issues is through advocacy. That said, is important to say this article is intended to contribute with the Open Banking discussions by casting light on potential competition issues that may arise from this

regulation. Also, it must bear in mind that each case must be assessed with the proper care as circumstances may vary and market, as well as other regulatory conditions, can change. For all purposes, the opinions presented in this article do not represent an official position of Cade about the BCB regulation and should be assigned exclusively to the authors.

Section 5
Antitrust litigation in Brazil: damages and beyond

PUBLIC ANTITRUST ENFORCEMENT AND PRIVATE ACTIONS FOR ANTITRUST DAMAGES: BUILDING A MODEL

Breno Fraga Miranda e Silva, Izabella de Menezes Passos Barbosa, Mauricio Oscar Bandeira Maia

I. Introduction

Private actions for antitrust damages are expanding rapidly in several countries, as a consequence of some incentives created with the purpose of increasing the deterrent factor of anticompetitive illicit conduct, complementing the public enforcement in this field. As an example, we can name the prediction of punitive damages; the creation of mechanisms that facilitate access to documents held by the competition authority; the exemption of punitive damages due to collaboration with the authority, among other initiatives.

The feasibility of private prosecution, through encouragement for private actions has an evident economic rationale, which is to provide sanctions related to the benefits obtained by the economic agent through its unlawful conduct, and make it clear that the anticompetitive practice would not compensate economically.

In the Brazilian context, private actions for antitrust damages can be characterized as legal actions with a civil nature, prescribed on the notion of non-contractual civil liability, with the main objective of repairing the damage related to the existence of an illegal act with a competitive essence. They can be understood as an instrument able to give greater efficiency to the system of disincentives to anticompetitive behavior, including a new potential economic damage to the analysis of the economic agent's rationality.

Despite the current moment, in which the Brazilian antitrust legal environment actively debates the incentive for private actions to repair damages resulting from cartels and the best techniques for its improvement, we assume that the development of private actions for antitrust damages brings some advantage for the Brazilian Competition Protection System (BCPS), and the question that must be faced is related with which are the incentives that should be offered. These topics are being discussed a lot around the world, but in Brazil they still demand further analysis and legislative and procedural changes.

Currently, the Brazilian legal system is not attractive for filing private actions for antitrust damages, since: *i.* there is no express and specific provision in the legislation for this type of

action; *ii.* there is a reasonable doubt about the limitation period for filing these actions; *iii.* there are difficulties with the responsibility related to the supply chain; *iv*. there are serious obstacles in producing economic evidence of the conduct; *v*. there is an uncertainty about solidarity between economic agents in the payment of competitive damages; and *vi*. there is a concern regarding the access to documents and evidence produced in the administrative proceedings of the antitrust authority.

Despite the difficulties above mentioned, when it comes to Private Actions for Antitrust Damages, the Administrative Council for Economic Defense (CADE), the competition defense authority in Brazil, is aware of the necessity to balance public and private enforcement and it has been acting especially through regulations on access to documents and evidence produced in its administrative proceedings.

One must take into account the necessity of not privileging private actions for antitrust damages and private pursuit over CADE's Leniency Program, since the golden rule of the Program is that the signatory can't be in a worse situation than the other members or participants of the offending conduct. Considering these concerns, and the fact that state action may not be enough to restrain anti-competitive practices, CADE has been gradually establishing mechanisms to foster and clarify the resources for private pursuit of values enshrined in Brazilian Antitrust Law (Federal Law No. 12,529/2011), which has led to the growing debate on how to stimulate private initiatives in this sense, in special private actions for antitrust damages related to cartels, without undermining the public policy adopted to fight cartels in our country. In this sense, it is necessary to take into account that the stimulus to this type of demand doesn't mean that public pursuit won't continue to be the main instrument capable of helping final consumers or other economic agents that were harmed by anticompetitive conduct.

One of the main challenges in filing private actions for compensation of competitive damages in Brazil concerns exactly on the capacity (or the lack of it) of the injured parties to produce, in judicial proceedings, the necessary evidence to prove the civil liability of the cause of the competitive damages. Like all civil liability cases, the imputation of the offense to the

author of the cartel depends on the demonstration of anti-legal conduct, the existence of the damage and the relation between the damage and the conduct[1] .

And by the procedural rules in force in Brazil[2], it is up to the plaintiff to prove the constitutive fact of his right and up to the defendant to prove the impediment, modification or extinction of the rights. Therefore, in these actions, the plaintiff must find a way of demonstrating the occurrence of the unlawful act, the damage it experienced and the relationship (cause/effect) of this damage to the practice of the unlawful act.

However, this task is quite difficult, given the hidden nature of the collusive acts practiced by economic agents in collusion, who seek to hide at any cost the evidences of this coordination and cooperation that distorts competition and affect consumers.

The antitrust authority, which investigates and punishes such offenses, even though usually has the means to obtain evidence and prosecute the ones responsible, has made the evidence available to individuals to file private actions for antitrust damages, under the justification that the provision of such elements, usually obtained via leniency agreement and cease and desist agreement for cartel cases, could create disincentives to adhere to these instruments, destabilizing its own program and compromising the public policy of combating cartels. The balance between these goals is the challenge of combining systems of public and private enforcement. Considering these challenges, it is necessary to talk about the document disclosure rules.

II. Document Disclosure Rules

Dealing specifically with the availability of documents held by CADE, it is important to consider that the Brazilian Superior Court of Justice[3] has manifested itself authorizing access to confidential documents contained in a leniency agreement to an individual that may have been harmed by the practice of a cartel.

This decision has led CADE and the antitrust community to reflect on its duty to open documents and also on the very importance of private actions for antitrust damages as an instrument to complement public policy to combat cartels.

[1] CARVALHO, Livia Cristina Lavandeira Gândara de. Responsabilidade civil concorrencial: elementos de responsabilização civil e análise crítica dos problemas enfrentados pelos tribunais brasileiros. **Revista do IBRAC**, v. 19, n.21, jan.-jul. 2012, p. 332-350.

[2] Article 373 from Brazilian Code of Civil Procedure. Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.

[3] Recurso Especial No. 1,554,986/SP.

In this judicial precedent, the aim was precisely to obtain access to restricted documents arising from a leniency agreement signed with CADE. The Brazilian Superior Court of Justice granted this measure, establishing the CADE Tribunal decision as a final mark for document confidentiality. It is important to mention that this decision is based in the provisions of transparency and publicity brought by the Access to Information Law currently in vigor. This rule privileges public access to documents and information contained in the administrative procedures in rule in Brazil.

Since then, CADE has been studying the matter internally and also dialoguing with the antitrust community to design regulations able to provide documents and information that can satisfy the need for document disclosure pointed out by the Brazilian Superior Court of Justice and, equally, provide the means to develop civil reparation actions for competitive damages, without prejudicing its own public enforcement. The result of this work is currently embodied in Resolution No. 21/2018[4] and Resolution No. 869/2019[5].

The first one (Resolution No. 21/2018), beyond protecting Cade's Antitrust Leniency Program and cease and desist agreements for cartel cases, seeks to encourage the filing of private actions for antitrust damages, facilitating the access of those harmed to the evidence used by the CADE in the scope of the administrative proceedings, to promote a true balance between the vectors of public and private prosecution in antitrust matters, in favor of a plural system of defense of competition. As an effort to achieve this goal, and pursuing transparency in the acts of the Antitrust agency, the Resolution No. 869/2019 lays down internal procedures to guide the uncovering of documents.

When trying to reconcile the need for protection of Cade's Antitrust Leniency Program and cease and desist agreements for cartel cases in recent years, with the interest in stimulating the promotion of the filing of damages repair actions, Resolution No. 21/2018 is in the right path by electing the publicity of documents and information of administrative proceedings as a general precept, and establishing confidentiality as an exception.

The protection of the leniency agreement's “History of Conduct”[6] and its additives demonstrates a caution by CADE in safeguarding documents and information that could be

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[4] Available at http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-no-21-de-12-de-setembro-de-2018.pdf/view.

[5] Available at http://www.cade.gov.br/noticias/portaria-do-cade-disciplina-acesso-a-documentos-de-processos

[6] The History of Conduct is a document drawn up by CADE’s General Superintendence that contains a detailed description of the anticompetitive conduct, according to the understanding of the SG/CADE, based on the information and the documents submitted by the leniency applicant.

incriminating to the parties that entered into the cease and desist agreements for cartel cases or in a leniency agreement, and that would not exist without the settlement, since they are produced at the request of the authority and as a requirement for the conclusion of the respective agreement.

Therefore, documents and information whose private provision is already contained in the Brazilian Antitrust Law, such as information that constitutes an industrial, tax, banking or commercial secrets, as well as those covered by confidentiality due to a judicial decision, remain undisclosed.

Otherwise, anyone interested in maintaining restricted access to certain documents must provide CADE with information and arguments to support the requested confidentiality, which may indicate the need to maintain them unrevealed at any time during the administrative proceedings.

The Resolution also conditions access to documents and information to CADE's evaluation. It's up to the antitrust authority to check the legitimacy of the applicant, the specific facts that support the application, the proportionality of the request, as well as the stage of the investigation proceedings.

The regulation also deals with the publicity of documents and information from the final decision of the CADE Court, which encourages Private Actions for Antitrust Damages, as previously restricted documents and information are made public, as long as they don't consist of the exceptions listed before.

Finally, it is important to note that CADE included the provision for a reduction of its sanctions or penalties in its final decision, at the time of the administrative proceeding, considering eventual proof, by the represented companies, of the reimbursement of anticompetitive damages to the injured parties.

III. Conclusion

By stipulating parameters for document disclosure, CADE fulfilled its role of preserving the national Competition Protection Policy to combat anticompetitive behavior, which has been successful and has given rise to the recognition of authority's excellence at national and international levels. At the same time, the regulations mentioned provided respect for the fundamental right to publicity of states acts, allowing document disclosure and transparency

related to administrative proceedings, including the provision of public versions of essential documents produced by CADE.

The main policy goal is to build the most comprehensive document disclosure system possible, which has the potential to provide interested parties with the necessary information for filing private actions for antitrust damages and to prevent them from having to use legal measures to obtain documents.

On the other hand, efforts were made to preserve the incentives and rights of those who face administrative proceedings and negotiate leniency agreements, in not leaving the agreement in a worse situation than they would have had if they not adhered to it, maintaining the attractiveness of the negotiated solutions (leniency agreements and cease and abandon agreements for cartel cases), instruments that are essential for the proper functioning of the repressive and punitive activity performed by CADE.

One way of achieving the goal mentioned above was adopted by the agency, providing clear and objective rules according to transparency of the documents, and also prescribing the reduction of the penalties already imposed by CADE in case of reimbursements made directly to those injured for their conduct, providing a better environment for private actions.

IV. References

BRASIL. **Constituição da República Federativa do Brasil**, de 05 de outubro de 1988. Portal da Legislação. Brasília. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Access on: November 30, 2019.

__________. **Código Civil**. Lei n. 10.406, de 10 de janeiro de 2002. Available at: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm Access on: November 30, 2019.

__________. **Lei n. 12.529, de 30 de novembro de 2011**. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm Access on: November 30, 2019.

__________. **Código de Processo Civil**. Lei nº 13.105, de 16 de março de 2015. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm Access on: November 30, 2019.

CARVALHO, Livia Cristina Lavandeira Gândara de. Responsabilidade civil concorrencial: elementos de responsabilização civil e análise crítica dos problemas enfrentados pelos tribunais brasileiros. **Revista do IBRAC**, v. 19, n.21, jan.-jul. 2012, p. 332-350.

CASELTA, Daniel Costa. **Responsabilidade civil por danos decorrentes da prática de cartel**. São Paulo: Singular, 2016, p. 117.

CAVALIERI FILHO, Sergio**. Programa de Responsabilidade Civil**. 13. Ed. São Paulo. Atlas, 2019. P.16.

DRAGO, Bruno de Luca (Coord.). **A livre concorrência e os tribunais brasileiros: análise crítica dos julgados no Poder Judiciário envolvendo matéria concorrencial**. São Paulo: Ed. Singular, 2018.

DUNNE, Niamh. The role of private enforcement within EU Competition Law. **Cambridge Yearbook of European Legal Studies**, v. 16, p. 143-187, 2014. Available at: https://www.castudies/article/role-of-private-enforcement-within-eu-competition-law/57F7E18DF12B08046B08001C0783DDB2. Access on November 25, 2019.

FERRAZ JÚNIOR, Tercio Sampaio. Direito da concorrência e enforcement privado na legislação brasileira. **Revista de Defesa da Concorrência**, v. 1, n. 2, p. 11-31, 2013. Available at: http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/75. Access on November 20, 2019.

FORGIONI, Paula**. Os Fundamentos do Antitruste**. 9ª edição revista, atualizada e ampliada. São Paulo: Revista dos Tribunais, 2017.

HOVENKAMP, Herbert. Quantification of harm in private antitrust actions in the United States. **University of Iowa Legal Studies Research Paper**, 2011. Available at: https://ssrn.com/abstract=1758751. Access on November 8, 2019.

MAGGI, Bruno Oliveira. **O cartel e seus efeitos no âmbito da responsabilidade civil.** Dissertação de mestrado em Direito Civil – Faculdade de Direito da Universidade de São Paulo (USP), São Paulo, 2010.

MARQUES FRANCISCO, André. **Responsabilidade civil por infração da ordem econômica**. Dissertação. Universidade de São Paulo, São Paulo-SP, 2014.

Organização para a Cooperação e Desenvolvimento Econômico (OECD). **Cartels and anti-competitive agreements.** Available at: http://www.oecd.org/competition/cartels/ Access on November 30, 2019.

PEREIRA NETO, Caio Mário da Silva e CASAGRANDE, Paulo Leonardo. **Direito Concorrencial: Doutrina, jurisprudência e legislação**. São Paulo, Saraiva, 2016. P. 91/92.

ROSENVALD, Nelson. **As Funções da Responsabilidade Civil: a reparação e a pena civil**. São Paulo. Atlas, 2013.

WILS, Wouter P. J. The Relationship between Public Antitrust Enforcement and Private Actions for Damages. **World Competition**, Vol. 32, n. 1, março de 2009, p 3-26. Available at: http://papers.ssrn.com/sol2/sf_dev/AbsByAuth.cfm?per_id=456087. Access on May 29, 2019.

CIVIL DAMAGES CLAIMS: PAST, PRESENT AND FUTURE?

Bruno Drago, Daniel Oliveira Andreoli, Vinicius Hercos

I. Introduction

Competition Law has held a prominent position for decades in the more established jurisdictions, such as the US and the European Union. In Brazil, this field of law only gained prominence within the last twenty years. Even more recently, the enactment of Law No. 12,529/2011 ("LDC", the current Brazilian Competition Law in its Portuguese acronym) represented the consolidation of the recent developments achieved with the previous legislation, Law No. 8,884/94. The principal actor responsible for ensuring compliance with the LDC is an autonomous body, the Administrative Council for Economic Defense ("CADE"), which has among its main roles[1], the investigation of anticompetitive practices by economic agents that may affect competition in the Brazilian territory and, indirectly, Brazilian consumers.

Over the last years of legal enforcement, despite more recent efforts to increase the number of unilateral conduct investigations, the majority of the cases initiated before CADE have concerned collusive conduct, *i.e,* agreements between competitors which aim at diminishing or eliminating competition in a given market. The outcome of these illegal arrangements is the increase or maintenance of artificial prices, or the reduction of consumer choices or quality of products or services, consequently leading to the reduction of competition in the marketplace and consumer losses.

The increasing number of investigations and, most importantly, the significant range of convictions concluded by CADE have created the basis for the development of the second stage of competition enforcement against illegal conduct: the antitrust damages claims ("ADCs") filed by those affected by anticompetitive practices. Article 47 of the LDC provides for the legal support for damages claims[2]. However, there are still substantial challenges in Brazil to

[1] CADE is also responsible for the analysis of merger reviews and for the advocacy of competition in Brazil, in this last function together with SEAE, a secretariat of the Ministry of Economy.
[2] Article 47 of the LDC: "The aggrieved parties, on their own accord or by someone legally entitled and referred to in Article 82 of Law No. 8078, of September 11th, 1990, may take legal action in defense of their individual interests or shared common interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative proceeding, which will not be suspended due to the filing of a court action."

establishing an effective system of judicial scrutiny related to damages generated by antitrust infringements involving cartels.

This article attempts to detail some of these challenges, as well to explore some of the possible mitigating solutions, to enable a proper legal environment for the development of antitrust damages claims and, possibly, to achieve a true revolution in Brazil's competition enforcement. For this purpose, the article will discuss past and present practices and anticipate future perspectives in relation to Bills of Law and discussions currently in progress in Brazil.

II. Challenges to the development of ADCs

II.1. Independence of the civil and administrative spheres

The first element to be considered is the fact that, despite the existence of different spheres of the judiciary branch – administrative, criminal and civil –, these spheres are to be recognized as independent from each other under the Brazilian legal system. Such principle derives from several infra-constitutional provisions setting forth the independence of the judiciary, such as Article 935[3] of the Brazilian Civil Code and Articles 65 to 67[4] of the Brazilian Criminal Procedure Code.

Prosecution and conviction under the different spheres, therefore, concurrently or subsequently, even if originating from the same fact, should not be considered a *bis in idem*, which establishes that no person can be convicted twice for the same crime, as referenced in the following decision:

> *"EXTRACT: Writ of mandamus. - This Court's case law determines the independence of the administrative, civil and criminal spheres and considers that this independence does not violate the presumption of innocence principle, or Articles 126 of Law No. 8.112/90 and 20 of Law No. 8.429/92, is settled. Precedents of Brazil's Federal Supreme Court - Inexistence of the alleged restrictions on people's rights to defend themselves. Dismissal of the claim that the sanction imposed on the plaintiff regards their failure to comply with duties which are not defined by any statutory or non-statutory norm. Writ dismissed[5]."*

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[3] Article 935 of Brazilian Civil Code: "Civil liability is independent from criminal liability, and one cannot question the existence of the fact, or who its perpetrator is, if these questions have been decided in the criminal court."

[4] Article 65 of the Brazilian Criminal Procedure Code: "A criminal judgment is *res judicata* in the civil sphere if it recognizes that the act was committed in a state of necessity, in self-defense, in strict performance of a legal obligation or in the regular exercise of a right."

[5] Writ of mandamus No. 22899 AgR, Reporting Judge: Justice MOREIRA ALVES, Full Session, ruled on 04/02/2003, DJ 05-16-2003 pp-00092 EMENT VOL-02110-02 PP-00279.

The aforementioned independence of spheres is also applicable to cartel conduct. A simple reading of the various legislations in force under the Brazilian legal system reveals that the practice of cartel formation is prohibited, and that agents participating in collusive conduct may be held liable in all three judicial spheres: (i) administrative[6]; (ii) criminal[7] and (iii) civil[8].

Therefore, nothing prevents an investigation involving cartel practices from being conducted in three distinct spheres. This often has an impact on the submission of ADCs, especially considering the statute of limitations periods in force in Brazil, as will be elaborated on further below.

II.2. Procedural barriers to the progression of damages claims.

II.2.1 Challenges to establishing the existence of the cartel offence.

The first – and perhaps greatest – challenge of plaintiffs in damages claims concerns the proof related to the committing of a cartel felony. Perpetrators are often aware of the illicit nature of the conduct and tend to disguise their methods to conceal their intentions, in attempts to ensure they are not discovered by the authorities.

Private agents do not have access to the investigative tools that are usually available to public authorities. For this reason, despite the fact that the LDC allows plaintiffs to file an independent claim, those affected by cartel practices regularly wait for the outcome of competition authorities' investigations and the ultimate conviction of defendants in the administrative sphere prior to filing civil claims.

More recently, CADE published Resolution No. 21, which establishes procedures for ADCs' plaintiffs to have access to certain documents and information on which leniency agreements and settlement agreements ("TCC", in the Portuguese acronym) were based. Another view of such Resolution would be that it in fact strengthens the protection of leniency applicants' and TCCs' submitted documents to the benefit of, and under the duty to cooperate with, the investigation. The Resolution wisely exempted from disclosure the leniency agreements and the reported conduct (History of the Conduct), so as not to put the settling parties (that are not protected in the civil sphere) in a worse situation than the defendants in a cartel investigation.

[6] See Article 36, paragraph 3 of Brazilian Antitrust Law.
[7] Law No. 8,137/90, which provides for crimes against the economic order, in its Article 4. The penalty for the perpetrators of such conduct is of imprisonment, from 2 to 5 years, and a fine.
[8] For civil liability, see Article 47 of the LDC and Article 927 et seq. of Brazilian Civil Code.

Nevertheless, it is worth noting that, in most cases, these documents are not indispensable to the positive outcome of the ADCs, since CADE's public documents concerning the investigation tend to establish the main elements able to prove the illicit conduct by the cartelists. Economic theories would then jump into the discussions, backed-up by the formal/informal contractual arrangements between the parties, to determine the extent of the damage.

II.2.2 Statute of limitations in antitrust damages claims (cartel).

The statute of limitations is based on the constitutional principle of legal certainty, which means that after a certain period of time elapses, the right to sue expires, presuming that there would be no interest from the injured party to pursue such right. The institution, therefore, provides for the termination of the party's right to sue.

Brazilian statutory norms contain many expiry terms for the statute of limitations, according to each hypothetical circumstance. Therefore, the period for statute of limitations varies according to the circumstances provided for in each law, in particular, related to the nature of the claim. The following table describes the expiry terms which could potentially be applicable to antitrust claims:

Nature of the liability	Period of time
Non-contractual liability (Article 206 of Brazilian Civil Code)	3 years
Non-contractual liability in consumer relations (Article 27 of Brazilian Consumer Defense Code)	5 years
Contractual liability (Article 205 of Brazilian Civil Code)	10 years
Indemnity to the National Treasury	No limit

In addition to the nature of the legal relationship involved as regards the illicit conduct, it is also essential that the event considered is established as the triggering date for the legal term, as discussed below.

II.2.2.1. The triggering event for determining the statute of limitations' starting period.

According to Article 189 of the Brazilian Civil Code[9], a damage claim originates from the violation of a right and is extinguished by the statute of limitation, within the expiration term specified in Articles 205 and 206 of the Civil Code.

A literal interpretation of the expression "violation of a right" of the aforementioned Article 189 would lead to the initial date as being counted from the date that the offence was first perpetrated, regardless of the date on which the conduct or the identity of the infringing party was acknowledged, or the date of the effective damages. Under this interpretation, the statute of limitations expiration term would be counted as from the implementation date of the illegal arrangement itself.

However, if the literal interpretation above were to prevail, possibly all ADCs would bear the time bar. Moreover, if the institution of the statute of limitations aims to punish the non-exercise of a right to sue, it would not be plausible to punish someone who is not yet aware of his or her rights. Thus, a more reasonable interpretation of Article 189 of the Civil Code would take into account the date on which the conduct has become public, as decided by the Brazilian Superior Court of Justice.[10]

II.2.2.2. The *dies a quo* for the statute of limitations on antitrust damages claims.

As explained above, the statute of limitations expiration term initiates when the aggrieved party becomes aware of the existence of the illicit conduct. The practical questions would then become how to define when the victim acknowledged its undeniable existence? Intuitively, the mere suspicion of an unlawful conduct and its potential harms is hardly enough to trigger the *dies a quo*. There must be at least a credible expectation of the illegality of the practice, of the harm caused and of the identity of perpetrator(s) of the practice.

There is still no definitive understanding from the courts to respond to this question, as there are judicial decisions that are divergent in their conclusions. For instance, a recent ruling

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[9] Article 189 of Brazilian Civil Code: "With a violation of a right, its holder's claim to demand a reparation is born. This claim is extinguished by the statute of limitations, within the expiry term specified in Articles 205 and 206".

[10] STJ, Second Panel, REsp No. 1.257.387. Reporting Judge Eliana Calmon. DJE: 09.05.2013.
STJ First Panel, REsp No. 999.324/RS, Reporting Judge Luiz Fux. DJE: 10.26.2010.

by the 38th Civil Court of the São Paulo District understood that the statute of limitations expiration term initiates as from the final decision by CADE, as follows:

> *"The claim regards the early judgment that is rendered, pursuant to Articles 330, item I of the Code of Civil Procedure, since it is unnecessary to produce other evidence in addition to the documentary evidence already attached to the case files. The preliminary ineptitude of the initial petition does not prosper. The abusiveness of the defendant's conduct throughout the legal relationship existing between the parties constituted the merit of the claim and will be assessed with it. The defendant's allegation of the occurrence of statute of limitations cannot be received. The three-year statute of limitations expiration term set forth in Article 206, paragraph 3, of the Civil Code must be counted as from the final ruling rendered in the administrative sphere by CADE, which occurred only in 2010. Only on that date the unfair competition (the basis for the indemnification claim) was characterized."* [11]

In another ruling, the 28th Civil Court of the Belo Horizonte District[12] concluded that the statute of limitations expiration term initiates as from the date on which the investigation regarding the anticompetitive conduct was made public by CADE, namely the date on which CADE's General Superintendence rendered its preliminary non-binding opinion.

Other decisions follow along the same lines. As it can be perceived from these examples, the Judiciary Courts are far from reaching a consistent understanding of the matter. For this reason, those who are interested in filing ADCs tend to adopt a conservative approach, either by filing the claims as soon as they become aware of the accusations, or by filing motions with the sole purpose to interrupt the statute of limitations, preserving their rights to lodge, at the suitable time, the material damages claim. As a result, determining and settling on the correct time to apply statute of limitations rules is essential for the carrying out and advancement ADCs in Brazil.

III. The current scenario for damages claims in Brazil

Between 2016 and 2018, the Economic Litigation Committee of IBRAC carried out extensive research in pursuit of any nature of lawsuits in progress before the Judiciary Courts involving discussion related to competition matters. Such report has been of utmost importance to understanding the courts' positions regarding several issues that have touched on

[11] Process No 0130316-15.2011.8.26.0100; 38th Civil Court of the Central Jurisdiction of São Paulo District. Plaintiff Granel Química Ltda.

[12] 28th Civil Court of the Belo Horizonte District - Proceeding No. 0024.09.709.934-5 - Plaintiff: Association of Hospitals of Minas Gerais - AHMG.

competition aspects and, of particular interest to this article, to assess the development of follow-on litigation in Brazil.[13]

One hundred and twenty-seven decisions regarding claims for damages were initially identified as a result of the survey. More than half of the decisions (approximately 63%) were rendered by the State of Sao Paulo and the State of Minas Gerais Courts. Another extremely significant fact is that of the 127 cases, around 90 (approximately 71%) are not in any way related to CADE's ongoing or concluded administrative proceedings.

Among the illicit practices identified in the survey, cartels represent the vast majority – around 68% – of the original infringements giving cause to the damages claims. In second place are other general illicit practices involving unilateral conduct, such as exclusivity clauses.

Thus, only 37 judicial claims related in some way to administrative proceedings scrutinized in the past or currently by CADE. Moreover, these 37 judicial claims are linked to only five (5) of CADE's investigations. To demonstrate the level of underdevelopment of private enforcement in Brazil, this number represents far below the number of cartel convictions rendered by CADE since the LDC came into force in 2012. As a result, this leads us to the inevitable conclusion that private enforcement in Brazil holds an enormous potential for growth, despite all challenges discussed herein.

IV. Solutions and incentives for the progression of damages claims in Brazil

In light of the scenario above, pointing to procedural challenges and lack of economic incentives for the progression of damages claims in Brazil, it has become apparent over the years that some legislative adjustments are necessary. Waiting for the judicial courts to pave the way for this legal institution seems neither reasonable nor effective. In this regard, Bill No. 283/2016 (numbered 11,275/18 before the Lower House), which has been subject to long discussions among the different stakeholders, has achieved a relative consensus. A positive outcome is expected in the near future.

IV.1. Amendments to the LDC aiming to encourage private enforcement

The referred Bill has as its main purpose the adjustment of certain features of the Brazilian Competition Law, which intends to create additional incentives for new damages

[13] To be noted that data collected by the research may not be extensive nor reflect the totality of the range of damages claims derived from cartel cases before the Brazilian Judicial Courts, due to the secrecy and confidentiality involving the majority of these claims. https://ibrac.org.br/planilha.htm. Accessed: May 27th, 2020.

claims arising from conviction decisions by CADE. Finding the right balance between these incentives and the risks of jeopardizing the successful leniency program created by CADE is a key element in this public policy.

In this sense, the Bill both innovates and solves a great part of the statute of limitations controversy when establishing that CADE's decision shall trigger the clock for statute of limitations related to damages claims, as well as fixing a five-year term for such. It also attempts to give greater consideration to CADE's original decision regarding the existence of illicit conduct, since this is an element essential to the indemnification claim.

Moreover, the Bill sets forth double damages incentives for financial recoupment by aggrieved claimants, although this should not apply to leniency applicants and defendants that enter into settlement agreements with CADE. It also establishes that joint and several liabilities for damages claims shall not affect leniency applicants and settling parties. And finally, it innovates with the introduction of a new requirement for settlements with CADE, which is a consent for arbitration in the case that aggrieved parties wish to start indemnifications discussions.

Thus, the use of arbitration to host ADCs seems promising, since it can contribute to faster decisions when compared to judicial claims. Some Brazilian antitrust lawyers estimate that an ADC could last almost 20 years until a final judgement in the Brazilian Courts is reached, due to the slow pace and the high possibility of appeals in the Brazilian legal system. Another advantage of arbitration is that the arbitrator would be a specialist in antitrust or economics. For a complex subject such as ADC, this could be a very important factor to facilitate the ADC in Brazil.

Other initiatives are also being discussed to speed up the decisions in ADCs, such as the creation of specialized courts that, regardless of CADE's decision, would be able to analyze and decide on damages claims derived from cartel or anticompetitive practices.

Ultimately, regardless of the time still needed for the initiatives above to be approved by Congress and become effective, we are finally witnessing a potential rise of the ADCs in Brazil in the near future. A brave new world for those desiring to collect their damages.

DAMAGE CLAIMS AND LENIENCY PROGRAMS: LEGISLATIVE PERSPECTIVES IN BRAZIL

Daniel Costa Rebello, José Alexandre Buaiz Neto, Renê Guilherme S. Medrado

I. Introduction

In the past decade, the rest of the world noticed a significant increase in private cartel enforcement. To a certain extent, Brazil was excluded from the private enforcement wave. While there were limited damage claims filed, private enforcement is far from being relevant from a policy perspective.

In fact, research shows that from 1995 until August 31, 2017, only 69 cartel claims were disclosed in the main public sources and 50.8% of such claims were filed by the parties which would have potentially suffered damages. The remaining lawsuits were filed by the Public Prosecutor's Office. Moreover, these lawsuits are related to only 41 different identified cartels, of which only 20 were investigated by the Administrative Council for Economic Defense ("CADE")[1], the Brazilian Competition Authority[2]. By comparison, from 2015 to 2019, CADE imposed fines in 45 administrative proceedings involving legal entities[3].

There are a number of reasons for the cautious approach of plaintiffs towards litigation in Brazil. First, the Judiciary Branch is subject to time-consuming formalities and still not fully experienced to deal with cartel claims. In fact, the Brazilian Code of Civil Procedure allows for a significant number of appeals, which may easily drag a damage claim for more than ten years before a final decision is handed down. Second, there is no additional incentive for plaintiffs to try to collect damages suffered, such as treble damages. Third, there are also unresolved questions about the co-participant that is liable for the violation, considering the current framework on joint and several liability. Fourth, the term for applicability of the statute of limitations is not completely clear and may have lapsed by the time that a final ruling by

[1] According to a different research by the Working Group of IBRAC; 31 lawsuits were identified as follow-on litigation. These lawsuits were related to the (i) Steel Bar Cartel; (ii) Gas Cartel; (iii) Compressor Gas; (iv) CRT Cartel; and (v) Cement Cartel. Other 55 cases were stand-alone claims. See presentation of Bruno Drago available at https://www.ibrac.org.br/UPLOADS/Eventos/383/Slides%20-%20Painel%202%20-%20A%C3%A7%C3%B5es%20de%20Repara%C3%A7%C3%A3o%20Civil.pdf. Access: May 20, 2020.

[2] PORTO, Giovana. "A cessão de crédito devido por ressarcimento ao dano material oriundo de cartel: um novo business?" In Revista de Defesa da Concorrência. Vol. 5. November, 2017. For further information on the methodology adopted in the research, see http://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/view/352/173. Access: May 20, 2020.

[3] CADE in Numbers. Available at www.cade.gov.br. Access: May 20, 2020.

CADE is available. Finally, there are no clear rules or case law regarding the pass-on defense, which may hamper lawsuits from intermediaries in the production or distribution chains[4].

In order to address these bottlenecks, the Brazilian Congress is currently examining Bill of Law No. 11,275/2018[5] ("Damage Claims BoL"), which amends Law No. 12529/2011 (the "Brazilian Competition Act") and contains specific proposals for each of the issues above. After approval by the Senate, the Damage Claims BoL is now under review by the House of Representatives. The Damage Claims BoL is expected to be approved until 2021. This article will discuss how the Damage Claims BoL intends to foster private enforcement in Brazil, as well as the limitations of the bill.

Other bottlenecks are equally important in the discussion regarding the fostering of private enforcement. For example, access to documents and evidence is not always simple and discovery rules are limited, therefore creating additional hurdles for potential plaintiffs. Moreover, although litigation costs are comparably low to those of other jurisdictions, they can easily reduce the incentive for private enforcement[6].

The impact of the potential approval of the Damage Claims BoL towards the successful Leniency and Cease and Desist Commitment (*Termo de Compromisso de Cessação* – "TCC") Programs of CADE is yet unknown. However, as it will be indicated below, the proposals in the Damage Claims BoL on such topic are limited and not fully aligned with the best practices to strike a balance between the Leniency and TCC Programs and private enforcement.

[4] In at least two lawsuits, the pass-on defense was successfully used to convince the judge that the plaintiff's claim lacked grounds. In Case No. 1047853-52.2018.8.26.0100, related to the alleged cartel in the market for hydrogen peroxides, the lower court judge mentioned that "[t]he composition of variable and fixed costs is an essential element for price fixing of products to reach economic results, reason why it is possible to conclude that the claimant was not affected by damages regarding the acquisition of goods, but, on the contrary, passed them on through the procedures of price fixing to end customers". In Case No. 1077205-89.2017.8.26.01000, related to the alleged cartel in the market for cement, the Lower Court Judge had considered that, in order to survive, construction companies must include the costs of the inputs in their prices. Please note that the latter decision was appealed and the Court of Appeals annul the sentence and ordered the case to be returned to the Judge to order for a financial expert to review (i) the damages caused to the claimant and (ii) whether the claimant passed on the alleged overcharge to its customers.

[5] Reference number in the Senate: Bill of Law No. 283/2016.

[6] In this respect, PORTO, Giovana. "*A cessão de crédito devido por ressarcimento ao dano material oriundo de cartel: um novo business?*" In Revista de Defesa da Concorrência. Vol. 5. November 2017.

II. Measures to address timing of the Judiciary Branch

Considering that the rules of Civil Procedure would require a difficult debate in Congress and the slowness of the Judiciary Branch is a systemic issue that is hard to be addressed, the Damage Claims BoL proposes two solutions to address timing issues and foster private claims.

The first proposal of the Damage Claims BoL is straight-forward: it indicates that a decision by CADE may be sufficient for the court to grant an injunction to the party claiming damages. In fact, courts are not required to grant injunctions based solely on a CADE decision. CADE is part of the Executive Branch of the Government and, under the Brazilian Constitution, the Judiciary Branch and the Executive Branch are independent. Therefore, the Damage Claims BoL only makes it clearer that CADE decisions may be used in court for the request and granting of injunctions, but courts are not bound by CADE's decisions and is free to decide according to the judge's own analysis of the evidence offered by plaintiffs.

The second proposal aims at fostering arbitration. If the Damage Claims BoL is approved by Congress, companies that enter into a TCC and acknowledge their participation in a potential violation will be required to accept arbitration in damage claims, whenever the harmed party decides to initiate arbitration proceedings. In this respect, two clarifications are necessary:

(i) Under Brazilian Law, only the first company that reports an infringement is eligible for entering into a leniency agreement with CADE. Other companies may enter into TCCs with CADE and full immunity is not available to them. Under the Damage Claims BoL, leniency applicants are not required to accept arbitration proceedings in damage claims. This commitment would only be required from signatories of TCCs. The basis for the different treatment of leniency applicants and parties entering into TCCs is not clear;

(ii) In order to enter into a TCC with CADE in relation to a cartel, the parties are required to acknowledge their participation in the practice under investigation. Therefore, in practice all TCCs regarding cartel investigations would have to include the arbitration commitment, if the Damage Claims BoL is approved.

The Damage Claims BoL does not provide for additional arbitration rules. Therefore, the commitment of accepting arbitration may not be sufficient *per se* for a counterparty to successfully initiate a proceeding. There may be difficulties that could result in litigation with

respect, for example, to the arbitration chamber that would deal with the case, the number of arbitrators, or even the language of the arbitration. In this sense, it is advisable that CADE specifies, in the TCCs, objective criteria with respect to arbitration commitments, including the obligation of the committing party to accept any renowned arbitration chamber and rules that would be fair and reasonable with respect to proceedings.

III. Incentives for the filing of damage claims

Consistently with the legislation of other countries, the Brazilian Congress adopted a "carrot and stick" approach to incentivize damage claims and to try to preserve CADE's Leniency Program.

In this sense, the Damage Claims BoL provides that the harmed parties would be entitled to double damages due to cartel violations. However, this provision is not applicable to co-participants that enter into leniency agreements or TCCs with CADE. Leniency or settlement applicants would only be liable for actual damages caused to the harmed parties. Therefore, the Brazilian Congress tried to minimize the impact of the new legislation on the Leniency and TCC Programs.

Notwithstanding the attempt of Congress to limit the impact of the proposed legislation towards the Leniency and TCC Programs, it failed to take into account that often times the leniency applicants are the preferred targets of damage claims. Therefore, the mere fact that it would have to consider civil claims when deciding to enter into a leniency agreement with CADE may shift the incentives of the applicant.

Considering the importance of the Leniency Program to bring to light cartel activities, one potential alternative would be to adopt the Hungarian model EC pre-directive, pursuant to which the leniency applicant – but not settlement applicants – would only be liable to compensate cartel victims "*if and only if other cartel members are unable to pay the damages*"[7]. This additional protection to leniency applicants would create a great incentive to win the leniency race, therefore revealing illegal agreements that could otherwise never be disclosed. It would also have the positive secondary effect of reducing the problems associated with the disclosure of leniency documents: if leniency applicants are immune also from civil liability, they would have less problems associated with the disclosure of information on cartel activities.

[7] MARVÃO, Catarina; SPAGNOLO, Giancarlo; and BUCCIROSSI; Paolo. Leniency and Damages. Available at: https://www.econstor.eu/bitstream/10419/204743/1/site-wp0032.pdf. Access: May 20, 2020.

As an alternative, in order to also avoid over-enforcement to other participants of the cartel (which, as mentioned above, will already be liable to pay double damages) part of the fine imposed on the cartel members could be used to set-off the civil liability of the leniency applicant. In our view, maximizing the incentives for companies to apply for leniency, enabling efficient deterrence, is a sufficient argument to mitigate the civil liability of leniency applicants.

IV. Rules regarding joint and several liability

It must also be noted that, under the Brazilian Civil Code[8], some scholars[9] sustain that all participants of a cartel violation are jointly and severally liable for damages. Moreover, when the harmed party is a consumer, it is arguable that the Consumer Code could apply, which specifically provides for joint and several liability for damages resulting from a violation to the consumer rules[10].

Even though other scholars have a more restrictive view on the joint and several liability for cartel participants[11], the Damage Claims BoL makes it clear that the co-participants that enter into Leniency Agreements or TCCs with CADE are only liable for damages actually caused by them and are not jointly and severally liable.

This was another measure adopted by Congress to try to strike a balance between private enforcement and the preservation of the Leniency and TCC Programs of CADE. However, in this measure Congress failed to account for the possibility that plaintiffs may not be able to be compensated depending on the circumstances. A better solution would be to expressly indicate that leniency and settlement applicants would not be jointly and severally liable, except if the claimants are unable to recover adequate compensation (and not double damages) from the other cartel participants. In this case, the leniency and settlement applicants could seek indemnification from the other co-participants of the cartel. Another possibility seeking to preserve the incentives for the leniency and settlement applicants is even to allow them to be reimbursed with part of the fine applied by the authorities, something that may have to be expressly provided by law.

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[8] Article 942 of the Civil Code.

[9] CASELTA, Daniel Costa. Responsabilidade Civil por danos decorrentes da prática de cartel. Available at: https://www.teses.usp.br/teses/disponiveis/2/2132/tde-09112015-114806/pt-br.php. Access: May 20, 2020.

[10] Article 7, Paragraph 1, of the Consumer Code

[11] BURINI, Bruno. As ações de indenização contra quem faz cartel e as mudanças na Lei do Cade. Available at: https://politica.estadao.com.br/blogs/fausto-macedo/as-acoes-de-indenizacao-contra-quem-faz-cartel-e-as-mudancas-na-lei-do-cade/. Access: May 20, 2020.

V. Measures related to the statute of limitations

Another issue that currently hampers the filing of damage claims is related to the statute of limitations. Under the Brazilian Civil Code, the statute of limitations for damage claims is of three years. Settled case law provides that the statute of limitations is only triggered by "*unequivocal knowledge*" of the illegal act. However, this expression is far from clear when courts are reviewing damage claims. For example, courts could consider that unequivocal knowledge happened when (i) potential claimants got to know about the cartel through the press; (ii) a leniency agreement is disclosed; (iii) an investigation is launched by CADE; or (iv) CADE decided that there was a violation to the Competition Act.

Therefore, the discussion on the applicable statute of limitations, on itself, was not only controversial and time consuming, but also of unknown result.

The Damage Claims BoL provides for three important clarifications regarding the statute of limitations, all extremely pro-plaintiff:

(i) The Damage Claims BoL provides that the statute of limitations is of five years, instead of three years;

(ii) It also provides that the "*unequivocal knowledge*" is deemed to happen at the date of the publication of the final decision by CADE; and

(iii) The Damage Claims BoL provides for the tolling of the statute of limitations while formal investigations or the administrative proceedings are underway before CADE.

It is important to remark that the Damage Claims BoL does not indicate that "*unequivocal knowledge*" only happens at the date of the publication of CADE's final decision. The Damage Claims BoL only creates a presumption that at the time of such publication, there will be "*unequivocal knowledge*". Therefore, in concrete cases and depending on the circumstances, it will still be possible to argue that "*unequivocal knowledge*" happened at a prior date.

VI. Measures to address the pass-on defense

The Damage Claims BoL provides that the burden of proof of the potential pass-on of overprices in cartel cases lies on the defendants.

While this provision is consistent with the practice of other countries, most notably of the European Commission, the Damage Claims BoL fell short in the regulation. Directive

2014/104/EU of the European Parliament and of the Council, for example, indicates that "*the burden of proving that the overcharge was passed on shall be on the defendant*", but it also sets forth that the defendant may "*reasonably require disclosure from the claimant or from third parties*". There is no such specification on the Damage Claims BoL.

Considering that the documents required to evidence the pass-on of overprices are most likely in the possession of the plaintiff, the application of the Damage Claims BoL without care will result in unfair treatment of the parties, potentially leading to overcompensation. Therefore, if the Damage Claims BoL passes as proposed by the Senate, courts would have to apply the provision with due care, in order to allow defendants to actually meet the burden of proof by obtaining and reviewing invoices, costs and other documents that only the plaintiffs may have.

In this regard, the opinion of Congressmen Amaro Neto in relation to the Damage Claims BoL indicated clearly that defendants may request courts to allow for the access to accounting data of plaintiffs, including with respect to prices, to demonstrate the inexistence of damages.[12] While this specification did not find its way into the Damage Claims BoL, this legislative history is important to compel judges to grant access to such documents to the defendants.

Finally, the Damage Claims BoL did not shift the burden of proof with respect to loss of profits related to volume effects. At least in theory, the burden still lies on defendants to show their potential lost profits.

VI. Access to documents presented by leniency or settlement applicants

In September 2018, CADE approved Resolution No. 21, which regulates the procedures to grant access to documents and information contained in the case files of administrative proceedings, including those from leniency agreements and TCCs.

In summary, CADE indicated that all documents and information are public, including those originated from leniency agreements, TCCs or dawn raids, except (among others):

(i) Infringement report and their amendments drafted by the General Superintendence based on documents and information submitted by the leniency or settlement applicants,

[12] See: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1766898&filename=PRL+1+CDEICS+%3D%3E+PL+11275/2018. Access: May 20, 2020.

considering the risks to the negotiations, the intelligence activities and/or the effectiveness of the Leniency and TCC Programs of CADE;

(ii) Documents and information that must be treated as confidential in the interest of the investigation or society;

(iii) Documents that contain industrial secrets or that disclosure may result in competitive advantages to other economic agents;

(iv) Cases of legal secrecy, such as tax and banking secrecy; and

(v) Documents that are confidential due to court decisions.

Resolution No. 21 also indicates that the documents and information may only become public after final decisions of CADE's Tribunal. This provision is in line with CADE's case law. The Superior Court of Justice has already indicated that the confidentiality of documents should subsist until a final decision is handed down by CADE's Tribunal[13]. While the issue is not finally settled yet, there are important indications that documents provided by leniency and settlement applicants may, at least to a certain extent, become public.

VIII. Potential implications towards the Leniency and Settlement Programs

As indicated above, the Damage Claims BoL provides interesting incentives for potential plaintiffs, but still opens the door for several legal discussions that are likely to take significant time to be settled. Therefore, the overall impact on fostering damage claims is uncertain at best.

However, as the approval of the Damage Claims BoL becomes more of a reality, it is a fact that potential leniency or settlement applicants will have to consider a myriad of issues before deciding to cooperate with CADE:

(i) Follow-on damage claims may create more financial exposure to leniency or settlement applicants than the fines potentially imposed by CADE;

(ii) If the cartel investigation already takes a long time to be adjudicated by CADE, a potential arbitration or lawsuit following CADE's decision may not only increase costs, but also not render finality to the company that wants to turn the page;

[13] See Motion for Clarification in Special Appeal No. 1.554.986/SP, Justice Marco Aurélio Belizze, February 20, 2018.

(iii) CADE has done a fairly decent job in protecting the confidentiality of documents. As a general rule, litigations are public in Brazil, which may create reputational issues, especially if important documents that were kept confidential are brought to light after CADE's Tribunal decision, as expected;

(iv) The initiation of an investigation will toll the statute of limitations, potentially for a long period. In addition to this direct result of the tolling of the statute of limitations, it will also be important for leniency and settlement applicants to preserve documents that could show the lack of effects of damages of the practice in a potential future litigation;

(v) An effective pass-on defense is likely to be harder to be made or evidenced in court.

While the Damage Claims BoL provides for some protection to leniency and settlement applicants, this protection may not be sufficient to fully avoid that CADE's Leniency and TCC Programs are jeopardized.

IX. Conclusion

It is more or less a consensus that the optimal combination between private enforcement and preservation of leniency programs involves, as indicated by Marvão, Spagnolo and Buccirossi, (i) minimizing the amount of damages the leniency applicant is liable for; and (ii) maximize the sharing of information collected by the competition authority and made accessible to potential claimants[14].

While the Damage Claims BoL provides for interesting mechanisms to try to foster private enforcement, it seems to fail to adequately protect the Leniency Program of CADE, which is one of the main successes of the authority.

It is still possible to amend the Damage Claims BoL and CADE should act before Congress. Minor modifications to the Damage Claims BoL could secure a great deal of leniency applications in the future.

Finally, it is relevant to point out that, in addition to the measures above, CADE has already indicated that it is studying other alternatives to foster private enforcement in Brazil.

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[14] MARVÃO, Catarina; SPAGNOLO, Giancarlo; and BUCCIROSSI; Paolo. Leniency and Damages. Available at: https://www.econstor.eu/bitstream/10419/204743/1/site-wp0032.pdf. Access: May 20, 2020.

One of the measures would be for the Economic Department of CADE to calculate the amounts of potential damages, making it easier for plaintiffs to seek recovery[15]. However, a document prepared unilaterally by CADE, without respecting the right to full defense, is unlikely to be sufficient in court. At most, it could be the starting point of proper discovery with respect to damages that should obviously obey the discovery rules of the Brazilian Civil Procedure Code.

Furthermore, Resolution 445 of the Federal Justice Council approved the recommendation for specialized courts with competence for cases related to competition law. There are several courts currently analyzing the feasibility of creating specialized courts. At first sight, this is a prudent and positive measure, considering the specificities of competition law cases.

Overall, the conjunction of these measures is hopefully sufficient to foster private enforcement. However, whenever in conflict with the purposes of public deterrence, the incentives to plaintiffs should be revisited to preserve CADE's Leniency and TCC Programs.

[15] See https://www.ibrac.org.br/UPLOADS/Eventos/383/Slides%20-%20Painel%202%20-%20A%C3%A7%C3%B5es%20de%20Repara%C3%A7%C3%A3o%20Civil.pdf. Access: May 20, 2020.

DISCLOSURE OF LENIENCY MATERIALS IN BRAZIL: AN ANALYSIS OF LEGISLATION, ADMINISTRATIVE REGULATIONS AND COURT DECISIONS

Adriano Camargo Gomes, Kelly Fortes Violada

I. Introduction

Brazilian Competition Authority's (Cade)[1] recently edited new rules on disclosure of administrative procedure documents – a topic of particular interest for claimants on follow-on damage actions. This paper analyses the legal framework on this topic, including not only the most recent administrative regulations edited by Cade on this topic (Cade's Internal Statute – RiCade, Resolution No. 21/18 and Cade's Ordinance No. 869/19), but also the related provisions of the Antitrust Act (Law No. 12,529/11) and the most relevant decisions of the Superior Court of Justice – STJ (REsp No. 1,554,986 – SP and REsp No. 1,296,281 – RS).

In order to do so, the analysis will be divided in three parts: (i) material limits for disclosure, defining which materials can be disclosed when considered the document's form and content; (ii) time limits for disclosure, defining the procedural moment in which the documents can be disclosed; (iii) subjective limits for disclosure, defining who can obtain access to the documents.

II. Material Limits for Disclosure

Article 1 of Cade's Regulation No. 21/18 acknowledges the general rule of public access for all "documents and information contained in administrative proceedings, including those originated from leniency agreements, settlements (Cease and Desist Agreements – TCCs), as well as search and seizure actions".

Exceptions provided for by law and administrative regulations to this general rule can be of two categories: (i) documents which are confidential regardless of the content of the information, and (ii) documents which are completely or partially confidential because of the content of the information.

The first one refers to documents covered by confidentiality regardless of their content, such as leniency or TCC proposals which were rejected or withdrawn as well as all documents and information provided within the scope of these proposals (Article 2º, II, 'g', of Regulation

[1] Administrative Council for Economic Defense (CADE).

No. 21/18 and Article 86, §10, of Law No. 12,529/11). In these cases, it does not matter what is the information contained in these documents in order to establish confidentiality.

The second one refers to situations in which the content of the information is determinant for confidentiality, such as industrial secrecy or competitively sensitive information.[2] A document which fits this category can even be redacted if only part of its information is protected by confidentiality.

This classification is in line with what states the most important precedent of STJ regarding confidentiality of leniency agreement's documents. In 2016, ruling on a case in which a party who suffered damages sought access to Cade's administrative procedure documents, the court decided that (i) public access is the general rule for all materials presented in Cade's; (ii) those materials "[…] should be widely accessible to interested parties"[3]; (iii) leniency and TCC proposals are exceptions to the general rule because they must remain confidential (iv) all remaining acts and documents, including the leniency and TCC agreements (once they are agreed between the applicant and the competition authority) follow the general rule – in this case, they may be confidential depending on their content:

> *"[...] the exceptionally extended secrecy beyond the proposed agreement depends on concrete circumstances based on the collective interest – be it the interest of investigations, be it the protection of industrial secrets, which, after all, also result in the protection of competition, collective interest institutionally protected by Cade"*[4].

Therefore, the STJ has decided in favor of granting public access to almost all documents and information related to Cade's procedures. Based on articles 85, §5º and 86, §9º and 10º of Law No. 12,529/11, the court ruled that the leniency and settlement proposals are confidential. The same would not apply to the leniency agreements and the TCCs, their amendments and the history of conduct[5], which would be subject to the general public access rule or, eventually, be redacted due to their content.

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[2] For example: Article 51 of RiCade, article 44, §2º of Law No. 12,529/11 and article 2º, II, 'b', 'c' and 'd', of Regulation No. 21/18.

[3] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP. Relator Ministro Marco Aurélio Bellizze. Brasília, 08 mar. 2016, pp. 9-10.

[4] "[...] o sigilo excepcionalmente estendido para além da proposta de acordo depende de circunstâncias concretas fundadas no interesse coletivo – seja ele o interesse das apurações, seja ele a proteção de segredos industriais, que, ao fim e ao cabo, resultam igualmente na proteção da concorrência, interesse coletivo tutelado institucionalmente pelo Cade". Ibidem, pp. 9-10.

[5] "The History of Conduct is a document drawn up by Cade's General Superintendence that contains a detailed description of the anticompetitive conduct, according to the understanding of the SG-Cade, based on the information and the documents submitted by the leniency applicant". (unofficial translation) CADE. Guidelines – Cade's Leniency Antitrust Program. June/2016, p. 42.

Through the comparison of administrative regulations and the STJ's decision, a question arises: If, on one hand, it's obvious that all documents presented in leniency or TCC proposals that are rejected should be returned to the applicant and have their content kept confidential; on the other hand, what must be done with these proposals when the agreement is accepted?

In order to answer this question, it is necessary to differentiate the TCC proposal from the leniency proposal. The TCC proposal can be submitted by the applicant (Article 180, §3º and Article 181, §4º of RiCade) or by the General Superintendence – SG (Article 189 of RiCade) and when accepted, it constitutes the TCC itself. The confidentially provided for in Article 85, §5º of Law No. 12,529/11, is applicable only for rejected or withdrawn proposals, since the TCC is public (Article 85, §7º, of Law No. 12,529/11). The leniency proposal, however, consists of a description of the reported infringement (including the identification of the other participants of the infringement, the geographic area, products or services affected and the estimated duration) and of the documents which will be provided when signing the agreement (Article 201, I and 202, I, of RiCade). The proposal itself cannot be disclosed when accepted or rejected[6]. However, strictly speaking, confidentiality does not apply to the leniency agreement which will contain pieces of information and documents previously mentioned in the leniency proposal (Article 206, § 1º, IV and VII of RiCade).

Considering this framework provided for by the Antitrust Law, the RiCade and the STJ precedent, all different categories of confidentiality established in Article 2 of Regulation No. 21/18 may be more easily understood despite the poor wording of the regulation, as well as the redundancy and overlapping of its provisions.

The only material limit that concerns the type of document and not its content is the one related to leniency and TCC proposals[7]. This limitation applies to all documents, information and materials submitted until the respective agreement has been signed. When signed, the leniency agreement and its documents, as well as the TCC agreement and its documents are not conditioned to material limits, but only to time limits. [8] The question is not *what* can be disclosed of them, but *when* they can be disclosed. This perspective is fully aligned with the STJ's decision on the topic.

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[6] Article. 86, §9º and 10, of Law No. 12,529/11, Article 205 of RiCade, and Article 2, II, 'g', of Regulation No. 21/18.
[7] Articles 85, §5º and 86, §9º of Law No. 12,529/11, Article 178, § 7º of RiCade, and Article 2, II, 'e' and 'g' of Regulation No. 21/18.
[8] See item III below.

Still, there are several material limits concerning the content of the documents, such as those provided for by Article 2, II, 'b', 'c', 'd', and 'e' of Regulation No. 21/18, article 51 of RiCade. Most of them are related to industrial secrecy and competitively sensitive information. In this sense, the STJ understood that allowing access of certain documents and information related to the investigated business activity to the general public can lead to a competitive advantage, requiring Cade to exercises its duty of protecting competition itself[9] by granting confidential treatment to these materials. Ruling on a case regarding the abusive price charged by gas stations, the STJ determined that a Public Civil Action should be handled with restricted access considering that some documents contained sensitive information.[10] Nevertheless, the decision is clear that other facts may justify the public access[11].

> *"From what has been said, even if public access is recognized as a general precept of administrative and procedural acts, it is possible to recognise that confidentiality is imposed in several situations. Therefore, there are situations in which the person under investigation or the part of an administrative or judicial action has a "legitimate expectation of secrecy"[12], which must be protected by the legal system."*[13]

The provision of Article 2, II, 'f' of Regulation No. 21/18 (confidentiality determined by a court decision) does not concern any type of material limit, as it only refers to the authority which can determine the confidentiality. As the precedents of STJ made clear, in addition to Cade, and with primacy over it, confidentiality or disclosure may be determined by a court decision.

In conclusion, it must be noticed that legislation, administrative regulations and court precedents establish a spectrum of situations regarding material limits from strict confidentiality to public access. They also provide for the need of eventually balancing different interests – such as on one hand, the infringing party's right to have their information kept confidential, and, on the other hand, the injured party's right to access evidence when it is essential to obtain damage compensation.

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[9] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, op. cit., p. 10.

[10] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,296,281 – RS. Relator Ministro Herman Benjamin. Brasília, 15 mai. 2013, p. 7.

[11] CAMARGO GOMES, Adriano. *Private enforcement of competition law in Brazil: the adequacy of procedural rules to compensatory damages*, p 393.

[12] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1.296.281 – RS, op. cit., p. 6.

[13] "Do que foi dito, mesmo que se reconheça a publicidade como preceito geral dos atos administrativos e processuais, é possível perceber que em diversas situações o sigilo se impõe. Há, portanto, situações em que o investigado ou a parte de processo administrativo ou judicial tem uma "legítima expectativa de sigilo", que deve ser tutelada pela ordem jurídica". CAMARGO GOMES, Adriano, op. cit., p. 396.

III. Time Limits for Disclosure

As seen in the previous item, most documents relating to Cade's administrative procedures are public. However, these documents, although public, may have their access temporarily restricted.

Procedures related to anticompetitive infringements may be confidential if necessary to elucidate the facts investigated (Article 49 of Law No. 12,529/11 and Article 50 of RiCade).[14] The goal of confidentiality in this case is clear: to prevent investigations of anticompetitive infringements from being hampered by the publication of information and disclosure of documents.

Thus, the Antitrust Law and RiCade ensure the possibility of confidential treatment at all stages of administrative procedures relating to the investigation and sanction of anticompetitive infringements. Depending on the procedural moment, confidentiality can be determined by the Rapporteur, the General Superintendence of Cade or the Plenary Session of Cade's Tribunal (Articles 66, §10 and 67, §3º of Law No. 12,529/11).

Regulation No. 21/18 regulates the time limits for disclosure, establishing that documents and information related to Cade's administrative proceedings are public, but that "their disclosure will occur at the appropriate procedural stage" (Article 1).

Articles 8 to 11 of the Regulation, as well as Section II of Cade's Ordinance[15] No. 869/19[16], establish specific rules for each stage of the administrative proceeding. During the negotiation and execution of the leniency and TCC agreements, the proposal and all documents, information and procedural acts necessary to elucidate the facts have restricted access and can only be disclosed to people authorized by Cade (Article 8 of the Regulation).

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[14]Article 49 of Law No. 12,529/11 also establishes another requirement for confidential treatment of documents: which is "if required by the interest of society". This broad clause for granting confidential treatment is not used by Cade in isolation. On the contrary, Article 50 of RiCade indicates that the two criteria "need to clarify the facts" and "society's interest" should be both present for confidential treatment to be possible. When analyzing the "collective interest", the STJ in REsp 1,554,986 - SP, equated it with two hypotheses: the interest in investigations and the protection of industrial secrets. STJ stated that "[...] after all, they also result in the protection of competition, a collective interest institutionally protected by Cade". BRASIL, Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, op. cit., p. 10.

[15] While a Regulation (Resolução, in Portuguese) is a normative act issued by Cade due to the competence established in a legal act, an Ordinance (*Portaria*, in Portuguese) is the instrument by which Cade, by regulatory or delegated competence, establish instructions and procedures for the enforcement of laws, decrees and regulations, and perform other acts of its competence.

[16] The Ordinance, especially in its Articles 2 and 5, establishes the procedures for disclosure of documents and information, within the competence of the General Procedural Coordination, by request of the Rapporteur of the case.

During the investigatory phase, redacted versions of the Initiation and the Final Report[17] are released. These Reports must contain at least the following information: indication of the individuals, illicit conduct, summary of facts and applicable legal precept (Article 10 of the Regulation). The rest of the documents and information may remain confidential.

After the final decision by Cade's Tribunal, the documents with restricted access during the investigation phase become public and may be disclosed once the final decision can no longer be subjected to appeal. Nonetheless, the documents and information indicated in Article 2 of Regulation No. 21/18 remain with restricted access even after Cade's final decision[18]. The reason is obvious: it is assumed that these documents have a material limit for disclosure, as described in the previous topic.

With regard to Articles 49 of Law No. 12,529/11 and 91 of RiCade (mentioned by Article 2, II, 'a' and 'e' of Regulation No. 21/18) which deal with confidentiality related to the "need to clarify the facts", there is an error in the Regulation. These provisions deal with situations in which confidentiality is temporary only because it is necessary for the investigations. After the decision has become final, there is nothing more to investigate, and so the documents that were restricted based on these provisions must be disclosed.

The STJ analysed the time limits in Resp 1,554,986 – SP and its focus were the negotiation and signing of the leniency agreement. While in Regulation No. 21/18 these activities are considered as a single phase, the STJ understood that they comprised 3 phases: (i) leniency application, (ii) negotiation between the applicant and Cade, and (iii) formalization of the leniency agreement[19].

According to the STJ, phases (i) and (ii) would be protected by legal confidentiality, which binds the Public Administration and the applicant of the leniency agreement – it's a case defined in this paper as a material limit. Phase (iii) would mark the end of the material limit, but it would still be possible for confidentiality to be maintained in the interest of the investigation. In this case, confidentiality would be justified, according to the STJ, until the

[17] These Reports are documents prepared by a group of specialists, offering a complete analysis of the infringement, containing a description of the facts and the legal basis applicable to them. It is issued when it is identified a need for formal reasoning or specific information of the area responsible for the matter. Available at: https://www.justica.gov.br/seus-direitos/consumidor/notas-tecnicas. Access: 03/24/2020. The Reports available here are redacted versions.

[18] "Are exceptions to Article 1 and will remain with restricted access, **even after the final decision by Cade's Plenary Tribunal**, without the possibility of being disclosed to third parties" (Article 2 of Resolution No. 21/18).

[19] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1.554.986 – SP, op. cit., pp. 10-11.

end of the investigation phase, when the General Superintendence delivers its Final Report to the President of Cade's Tribunal[20].

> *"In fact, when investigating anticompetitive infringements, confidentiality may be essential to elucidating the facts examined. [...] In this sense, according to Cade, "unrestricted access to information obtained as a result of the leniency agreement can generate irreversible damage to the investigation of the cartel [...]".[21] However, after the investigative proceeding is completed, the confidentiality related to the elucidation of facts or the interest of investigation is no longer justified[22]: as there are no other factors that motivate the restrictive treatment, the records must become accessible to any interested party."*[23].[24] (unofficial translation)

The STJ also understood that the provision of Article 207 of RiCade, about maintaining the confidentiality of the applicant of the leniency agreement until Cade's final decision, besides not having legal support in Law No. 12,529/11, is also disproportionate, as it prevents third parties from seeking their right to compensation[25]. "In summary, the confidentiality of the leniency agreement cannot be extended indefinitely over time, as it can perpetuate the damage caused to third parties, guaranteeing the applicant of the leniency agreement a favor not guaranteed by law"[26].

Cade appealed the STJ decision, arguing that the final term of confidentiality established STJ would be at odds with antitrust world practice, and could discourage leniency agreements. The STJ then partially reformed its ruling, deciding that the most appropriate time for

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[20] The decision also states that the delivery of the Final Report marks "(…) the limit beyond which it is understood that there are sufficient evidential elements, so that the possibility of interference in the investigations and in the success of its result disappears, no longer justifying the restriction of disclosure". (unofficial translation) BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, pp. 10-12.

[21] Ibidem, p. 5.

[22] "Considering that, after the distribution of the administrative process (Article 157 of RiCade) the Rapporteur can "determine complementary proceedings" to be carried out by himself or by the General Superintendence, it would be possible to maintain confidentiality, when necessary, until this moment". (unofficial translation). CAMARGO GOMES, Adriano, op. cit., p. 391.

[23] On this issue, a wrong interpretation can arise form the sole paragraph of Article 54 of RiCade, which determines that: "After Cade's final decision, according to Article 7, §3 of Law No. 12,529/11, any information that is not included in the hypothesis of Article 51 of this Internal Statute may be restricted by an act of the President or another competent authority, according to Law No. 12,527/11 and Decree No. 7,724/11". First, it mentions Article 7, §3 of the antitrust law when, in fact, it wanted to mention the same article by LAI [Law No. 12,527/11] that establishes: "the right of access to the documents or information contained therein used as a basis for decision-making and the administrative act will be ensured with the edition of the respective decision-making act ". Second, it makes no sense to use Article 7, § 3 of LAI in order to "classify" information (make it confidential), since it provides for the opposite measure: the guarantee of access to information. Thirdly, it also does not make sense for information not provided for in cases of restricted access to be classified. (unofficial translation) Idem.

[24] Idem.

[25] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, op. cit., pp. 12-13.

[26] [...] Em síntese, o sigilo do acordo de leniência não pode se protrair no tempo indefinidamente, sob pena de perpetuar o dano causado a terceiros, garantindo ao signatário do acordo de leniência favor não assegurado pela lei". BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, op. cit., p. 13.

disclosure would be after Cade’s final decision[27]. Although it leaves open the possibility of exceptions to be considered on a case-by-case basis by the judicial courts, this understanding supports the solution put forward in Regulation No. 21/18 regarding the procedural phases.

Therefore, the STJ is one step ahead in the defense of public access: confidentiality can be determined “only as long as investigative measures last”[28]. The Court also established Cade's discretion in making a proportionality exercise[29] when deciding the time limits for disclosure, especially because, in this case, confidentiality remains not in the interest of the leniency applicant, but in the interest of investigations and protection of the leniency program.

IV. Subjective Limits for Disclosure

The question of *when* it is possible to have access to documents relating to Cade's administrative proceedings must also be analyzed from the perspective of *who* can have access. In other words, the restriction of access from a time perspective aims to select those who will have access to documents and information over time.

Article 207, §2º of RiCade restricts access to the leniency agreement and its annexes only to investigated parties “strictly for the purpose of exercising their right of defense in the administrative inquiry or administrative proceeding in progress before Cade”, and prohibits its “disclosure or sharing, total or partial, with other individuals, legal entities or entities from other jurisdictions”, which can result in administrative, civil and criminal liability.

In addition to the access provided for in the legislation to the investigated parties in order to exercise their right of defense, Cade's Regulation No. 21/18 guarantees access to the Public Prosecution Service when acting as a intervening as third-party in the signing of the leniency agreement (Article 7) and reinforces the provision that the application and negotiation phases of the leniency agreement and TCC "can only be accessed by the people authorized by Cade" (Article 9).

Confidentiality resulting from the need to investigate the facts is justified especially concerning the potential investigated parties, so that they are not able, for example, to anticipate Cade’s inspection and destroy evidence. Thus, it is difficult to understand the need to protect confidentiality when all the investigated parties have already had access to all information as a

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[27] BRASIL. Superior Tribunal de Justiça. EDcl no Recurso Especial nº 1,554,986 – SP. Relator Ministro Marco Aurélio Bellizze. Brasília, 06 mar. 2018, p. 9.
[28] Ibidem, p. 1
[29] Ibidem, p. 9.

basis for exercising their right of defense. Therefore, the first understanding of the STJ seemed correct, which considered the end of investigations as the time limit for disclosure. Other evidence that could be produced after that, in general, would not need confidentiality since all those investigated parties would be aware of this condition.

From this perspective, it seems difficult to differentiate the moment of disclosure for the investigated parties (when they all become aware of the existence of administrative proceedings against them), and the moment of disclosure for those who suffered damages caused by the anticompetitive infringement.

Nevertheless, Cade's Regulation No. 21/18 implies that, in general, access by potential damage action claimants will only happen when the proceeding becomes public, i.e. after Cade's final decision. Before that, the exceptional granting of disclosure is regulated by several requirements in the sole paragraph of Article 3. Moreover, Article 53 of RiCade establishes that it's up to the interested party to formulate in her application the request for restricted access to information indicating the legal provision that authorizes the request.

This is perhaps the topic in which administrative regulations most sharply contrasts with judicial precedent. After all, the difference between the condition of being an investigated party as opposed to the general public in order to have access to documents is not recognized by the STJ in the terms that it seems to be by Cade. For the STJ, in the proceedings being judged by Cade there must be "the prevalence of the general rule of public access, so that the proceedings conducted by the antitrust authority must be widely accessible to interested parties"[30]. Even without specifically considering the subjective limits for disclosure[31], the STJ does not at any time distinguish the investigated party from the damage action claimant or the general public.

Moreover, regarding cases with material limit, Article 3 of Regulation No. 21/18, mentioned above, recognizes an exceptional possibility of disclosure[32]. In this case, in addition to strictly material aspects such as motivation, reasonableness and proportionality of the application, the sole paragraph of Article 3 also establishes legitimacy as a requirement for this exceptional disclosure. Such requirement implies that the possibility of exceeding the material

[30] BRASIL. Superior Tribunal de Justiça. Recurso Especial nº 1,554,986 – SP, op. cit., p. 9.
[31] BRASIL. Superior Tribunal de Justiça. EDcl no Recurso Especial nº 1,554,986 – SP, op. cit., p. 8.
[32] This application is regulated in more detail by Ordinance No. 869/19 and must be addressed to Cade's Presidency (Article 6) and sent for analysis by the unit responsible for the main proceeding (Article 8). When the application for disclosure occurs by determination of a court decision, it must be sent to the Federal Specialized Attorney's Office at Cade (Sole paragraph of Article 8), and the "General Procedural Coordination will comply with the decision for disclosure" (art 11).

limits mentioned above could exceptionally occur when there is a requirement from someone that has legitimacy – specially individuals who have suffered damages from anticompetitive infringements. In such cases apparently there would be a need for Cade to balance conflicting interests (confidentiality due to material limits and disclosure due to the right of compensation).

Besides the requirements in the sole paragraph of Article 3, there are no other requirements in the Regulation No. 21/18 for establishing subjective limits for disclosure, i.e. who is authorized to obtain access to confidential documents and information.

V. Final remarks

The correct understanding of material, time and subjective limits to disclosure led to the conclusion that the general rule is that "all documents and information of Cade's administrative procedure must be made public after Cade's final decision". There are two main exceptions to this rule (material limits): (i) documents which are confidential regardless of the content of the information, and (ii) documents which are completely or partially confidential because of the content of the information.

Furthermore, there are cases in which the authority (Cade or judicial court) responsible for determining the disclosure of documents will need to carry out a proportionality exercise regarding these exceptions. Most of these cases involve situations in which those who are entitled to file a damage claim need confidential documents or information in order to obtain evidence, which could never be accessed by a competitor instead. In these cases, the authority must balance, on one hand, access to justice and the legitimate expectation of compensating damages, and, on the other hand, the legitimate expectation of confidentiality. For this purpose, as it can be inferred from the STJ's precedent, the control of the legitimacy of the party seeking access would be necessary, but only regarding completely sensitive information which carries a legitimate expectation of confidentiality by the leniency or TCC applicant.

PRIVATE ENFORCEMENT: ACCESS TO RELEVANT DOCUMENTS IN BRAZIL

Frederico Martins, Marcio Soares

I. Introduction

One of the greatest challenges to private enforcement of competition law in Brazil is related to plaintiffs' ability to produce before a court of law evidence of the infringement that substantiate their claims. Whether plaintiffs are filing their claims in Brazil or abroad, a successful lawsuit strategy encompasses the plaintiffs' ability to produce evidence of not only the infringement itself but also materials that can enable a reasonable quantification of damages. Most economic models to quantify antitrust damages rely heavily on data, so the more data the plaintiffs are able to produce, the better are their chances to successfully use economic models to quantify damages with statistical significance and that a court may, in consequence, deem a reliable assessment of the damages claimed.

Due to the hidden nature of most antitrust infringements, such evidence is usually not readily available to plaintiffs as it can be in the possession of either the companies involved in the infringement or the antitrust authority, in the event evidence was disclosed to the enforcer in the context of a leniency or settlement agreement. And while requests for access to evidence in possession of the opposing party may straightforwardly handled by Brazilian courts, confidentiality rules usually prevent access to leniency and settlement documents produced in the context of a given cartel investigation handled by the Brazilian antitrust authority ("CADE").

This paper describes the steps by means of which third parties may gain access to materials that could be used as evidence in damage claims, in the possession of either the companies involved in the infringement or the antitrust authority. It is divided in five parts, the first one being this introduction and the fifth a brief conclusion. The second part describes the legal roadmap for access of evidence in possession of the companies involved in the infringement. The third part provides an overview of the Brazilian leniency and settlement agreements program and how both the Brazilian courts and CADE itself are handling third parties request for access to leniency and settlement documents. Finally, the forth part addresses court proceedings that can be used for accessing such evidence either in the context of damage claims filed in Brazil or as fact-finding measure to substantiate claims filed abroad.

II. Documents in possession of the companies involved in the infringement

Although the plaintiff may be in possession of some evidence related to its contractual relationship with one of the companies involved in the antitrust infringement, the exact comprehension of the effects of the unlawful conduct and the amount of damages may depend on the analysis of additional materials and information only held by the defendant.

While the companies involved in the infringement may not voluntarily disclose such documents, the Brazilian Code of Civil Procedure[1] sets forth that a court may order the opposing party to produce the documents they possess, as long as they guard nexus to the main claim. A request for document production can be made either incidentally, over the course of damages claim, or by means of an autonomous lawsuit, as it will be further explained in part four of this paper.

Ordinarily, plaintiffs will seek documents that the companies involved in the infringement have a legal obligation to keep (e.g. invoices, accounting books, etc.) and for that reason the law provides that they cannot be excused from producing them after a court request. However, due to the hidden nature of antitrust infringements, damage claims are usually filed years after the illegal conduct took place, so it is not uncommon for defendants to oppose a request to produce documents on the grounds that the obligation to keep accounting materials such as invoices and books ceases once the statute of limitations for tax credits represented in such documents runs out[2].

While from a tax perspective such argument is correct, the Brazilian courts have decided differently in the context of cartel damages claim. In a private lawsuit[3] related to a construction steel cartel, the plaintiffs requested a court order to compel the defendant to produce the following documents: (i) invoices of transfer of steel to the defendants' distribution centers, in an attempt to demonstrate price discrimination against independent distributors, such as the plaintiffs; and (ii) invoices for steel exports made by the defendants, in an attempt to demonstrate that cartel prices in Brazil.

The defendant opposed such request claiming that it no longer had the legal obligation to keep such invoices, as the statute of limitations of their tax credits had run out. The Court of

[1] See Articles 396 to 404 of Brazil's Code of Civil Procedure (Law No. 13,105, of March 16, 2015).
[2] See Article 195 of Brazil's Tax Code (Law No. 5,172, of October 25, 1966).
[3] See Lawsuit No. 0600850-72.2010.8.13.0145 – 7th Civil Court of County of Juiz de Fora/MG. Plaintiffs: Comercial Mineira de Ferro e Aço Ltda. and Indústria e Comércio de Produtos Siderúrgicos Açomax Ltda. Defendant: Gerdau S/A.

Appeals of the State of Minas Gerais, however, ruled[4] that since the investigation on the cartel had started before the tax limitation period elapsed, the obligation to keep such documents was still valid. The Court ruling was also based on the fact that at the time the defendant had a pending lawsuit by which it was attempting to annul CADE's decision that found it guilty of the cartel infringement that substantiated the damages claim. For that reason, the Court found it was counterintuitive that the defendant would not keep the documents, as it was trying to prove its innocence in the lawsuit that challenged CADE's decision. At the end, the defendant produced all the documents once the ruling was issued.

Requests for the exhibition of documents are common during civil litigation, and there is significant case law that supports such requests, the reason why they are usually straightforwardly handled by Brazilian courts. Documents in possession of the antitrust authority, however, may be harder to access in light of confidentiality rules applicable to such materials.

III. Documents in possession of the antitrust authority

CADE has a well settled leniency and settlement program by means of which companies and individuals can either be granted full or partial immunity from applicable penalties or a reduction of the applicable fine, depending on the moment they contact CADE to negotiate such agreement. In order to execute the agreement and reap the benefits, the applicants must provide a detailed account of the facts corroborated with evidence of what is disclosed.

Brazil's leniency and settlement program relies on confidentiality rules that prevent disclosure of evidence produced by leniency and settlement applicants. One of the purposes of the confidentiality rules is to mitigate the exposure of the leniency and settlement applicants and prevent them from being in a worse position than the parties that are not collaborating with CADE, what, in theory, could impact their willingness to enter into such agreements.

Those confidentiality rules, however, are not absolute. In 2016, the Brazilian Superior Court of Justice ("STJ") issued a ruling that limits the confidentiality of leniency and settlement agreements entered into with CADE. Pursuant to the ruling, third parties may have access to such agreements and related materials after CADE's Tribunal issues a final decision on the related investigation. In light of such ruling, CADE issued Resolution No. 21 in 2018, which

[4] See Interlocutory Appeal n. 1.0145.10.060085-0/001 – 14th Chamber of Civil Law of the Minas Gerais Court of Appeals – Rapporteur: Judge Estevão Lucchesi – Decision published on August 13, 2015.

establishes rules for third party access to certain documents and information arising from leniency and settlement agreements.

The applicant of a leniency/settlement agreement is required to submit information and documents demonstrating the scope and duration of the infringement, indicating other companies and individuals involved in the conduct as well as clients and competitors affected by the reported conduct. CADE's General Superintendent ("GS") will then prepare the so-called *Histórico da Conduta* ("HoC") based on the information and documents submitted by the applicant. The HoC document containing a detailed account of the reported conduct and its effects is prepared and signed by CADE's GS, and it is not signed by the applicant or the applicant counsel.

CADE's rules set forth that during leniency/settlement negotiations with CADE, only the applicant, its attorneys and CADE itself will have access to the information on the case. Only when CADE executes the agreement can other defendants be granted access to the HoC document, related documents and contemporaneous evidence, and the applicant's identity[5].

While the existence and general terms of the leniency/settlement agreement is disclosed to third parties either after CADE reaches a final decision in the case leniency agreement or once CADE's ratifies the settlement agreement, CADE's confidentiality rules would prevent the disclosure of the HoC document and underlying documents to third parties, even after the end of the investigation within CADE. The purpose of such confidentiality rules is to maintain the structure of incentives for parties to negotiate leniency and settlement agreements with CADE. Due to the benefits associated with such agreements, they have become a cornerstone in the public enforcement of antitrust law in Brazil, and since neither the leniency or the settlement agreement grant immunity to damage claims, the disclosure of leniency/settlement materials could make settling parties more susceptible to lawsuits, which would serve as a disincentive from negotiating such agreements. For some time, such confidentiality rules remained undisputed, until recently, however, when a challenge to such rules reach the Brazilian courts and set path for a change.

[5] The leniency applicant identity is kept confidential to third parties until CADE reached a final decision on the case, while the identity of settlement applicant is disclosed once the agreement is ratified by CADE's Tribunal.

a. The STJ Ruling

In 2016, a challenge to CADE's confidentiality rules over leniency and settlement agreements reached the STJ[6].

The STJ upheld a decision issued by the São Paulo Court of Appeals ("TJSP")[7] in a damage claim regarding an alleged cartel in the market for hermetic compressors for cooling systems.[8] The TJSP granted the plaintiff's motion to compel CADE and the former Secretariat of Economic Law to produce documents related to a settlement agreement that some of the members of the alleged cartel had entered into with CADE.

The defendant (a compressors manufacturer) appealed the TJSP ruling to the STJ. In a nutshell, the defendant argued that the agreement with CADE was confidential and contained documents relating to its business strategy and industry secrets. Those documents should therefore not be shared with the plaintiff, the defendant argued, as the plaintiff was one of its competitors (in addition to also being a customer).

The rapporteur of the appeal at the STJ, Justice Marco Aurélio Bellizze, rejected such argument and upheld the TJSP ruling, thereby granting the plaintiff the right to access all the materials. Justice Bellizze indicated that while the confidentiality of leniency and settlement agreements played a crucial role in encouraging collaboration with CADE, it could not be absolute. He further stressed that the confidentiality should be preserved while the CADE investigation was pending. Upon conclusion of the CADE proceeding, all materials supporting leniency/settlement agreements (which could potentially include even the HoC document and contemporaneous evidence) should be made available to plaintiffs seeking compensation for damages from cartelists.

Justice Bellizze added that to deny access to leniency/settlement materials would be an illegal and disproportionate measure because it would prevent third parties harmed by the cartel from seeking compensation for damages. In the event confidentiality is required for other reasons (e.g., protection of trade secrets), courts may grant it on a case-by-case basis.

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[6] See Special Appeal n. 1554986/SP - Third Chamber of the Superior Court of Justice – Rapporteur: Justice Marco Aurélio Belizze – Decision published on April 5, 2016.
[7] See Interlocutory Appeal n. 2034855-20.2013.8.26.0000 – 6th Chamber of Private Law of the São Paulo Court of Appeals – Rapporteur: Judge Vito Guglielmi – Decision published on February 12, 2014.
[8] See Case n. 0116924-71.2012.8.26.0100 – 33rd Civil Court of the City of São Paulo – Plaintiff: Electrolux do Brasil S.A.; Defendants: Whirpool S.A.; Brasmotos S.A; Tecumseh do Brasil Ltda. (Case is currently under seal).

While the case was being heard by the STJ, CADE put forward the argument that the full disclosure of leniency and settlement documents could potentially harm its leniency program and requested that the court should determine exactly (i) which parties could gain access to such documents; and (ii) what documents could be disclosed and what should be kept confidential. The STJ, however, ruled[9] that it could not create a general rule of confidentiality to documents attached to CADE's investigations as it was bound by the limited scope of the appeal (and thus the specific case) it was ruling, and the very institutional limits of the Judiciary. Such ruling ultimately set pavement for CADE to issue its own rules on access to leniency and settlement materials.

b. CADE's Resolution No. 21: access to documents within CADE

Following the STJ decision, CADE issued new rules to regulate access to leniency and settlement materials. Resolution No. 21[10], issued in September 2018, establishes that access to such materials will only be granted after CADE's Tribunal issues a final decision on the merits of the related investigation. The rules also limit the documents and information that may be granted access to third parties.

As a rule, the documents that CADE will keep confidential are: (i) the HoC document and its amendments; (ii) leniency and settlement agreement proposals; (iii) documents and information relating to business strategy and business secrets; (iv) documents and information protected by legal confidentiality, such as tax and banking data; (v) documents submitted in unsuccessful proposals for leniency or settlement agreements; and (vi) other documents classified as documents of restricted access in the course of an administrative proceeding (such as sales and volumes data). Access by third parties to such documents will be granted only: (i) when expressly authorized by law; (ii) upon the granting of a court order to a party seeking access to them; (iii) upon a waiver signed by the signatory to the leniency or settlement agreement; or (iv) due to obligations relating to international judicial cooperation.

Documents that do not fall within the categories above, in particular contemporaneous evidence of the infringement, may be accessed by third parties after CADE's final decision on the merits of the administrative proceeding. At that point, and after hearing the interested

[9] See Motion for Clarification on Special Appeal n. 1554986/SP - Third Chamber of the Superior Court of Justice – Rapporteur: Justice Marco Aurélio Belizze – Decision published on March 6 2018.
[10] The proceedings for access to documents set forth in Resolution No. 21 are further regulated by Ordinance No. 869, issued in November 2019.

parties, CADE will specify which documents should be transferred to the non-confidential case file and be freely accessed by third parties.

Access to documents from cases that were ruled by CADE's Tribunal before Resolution No. 21 was issued will be subject to a different proceeding. The party seeking access must request disclosure of the documents to the case's Reporting Commissioner or CADE's Chairman, as the case may be, who will notify interested parties to present their reasons as to why the documents should remain confidential. After the parties present their arguments, CADE's Tribunal will rule on the request for access.

As discussed above, Resolution No. 21 excludes certain categories of documents from disclosure to third parties and CADE's decisional practice is shaping an opinion that the publicity rule does not apply to agreements signed prior to the Resolution No. 21. For instance, to date, in at least one opportunity[11] CADE's Tribunal has ruled that Resolution No. 21 could not be applied retroactively to agreements that were signed before it was issued and decided not to disclose any of the materials produced in the context of such agreements. The STJ ruling that serves as basis to this discussion, however, does not make such distinction. Since Brazilian courts are not bound by CADE's regulations, third parties may still request a more comprehensive disclosure order from the courts.

IV. Judicial proceedings to seek documents disclosure

As explained above, a plaintiff may need a court order to compel the companies involved in the antitrust infringement or even CADE to produce materials in their possession and that could be of use in a damages claim.

There are two proceedings available under Brazilian law for such request, namely (i) an incidental claim filed in connection with an ongoing lawsuit in which the facts related to the documents to be disclosed are being discussed, and (ii) an autonomous lawsuit designed to provide the plaintiff with evidence that may be used to support future claims.

The incidental request in connection with an ongoing lawsuit is pretty common as it constitutes a part of the fact-finding phase of the lawsuit. The plaintiff, however, may want to gather all the evidence before filing the lawsuit, as it would have more elements to quantify the damages and even more leverage to try and settle the claim before reaching the courts.

[11] See Case No. 08700.004073/2016-61, Defendants: Marcelo Tonon, Marcelo Pavani, Eliana Maria Giannocaro Allodi, Dino Maggioni, Gerson Carrasco, Edison Lino Duarte, Edison Galassi, José Luis Cucchietti and CVN Comércio, Importação, Exportação e Distribuição de Peças Automotivas Ltda.

Likewise, the plaintiff may want to gather evidence in Brazil and filed the damages lawsuit before a foreign court.

For the purpose of gathering evidence to support a future lawsuit, particularly one to be filed with foreign courts, for example, the autonomous lawsuit is more appropriate. There are two types of proceedings for that purpose, namely (i) the so-called "early production of evidence," and (ii) the so-called "evidentiary action."

The early production of evidence is an autonomous proceeding by means of which the plaintiff may pursue the production of evidence before the filing of a complaint seeking compensation for damages. This proceeding is admissible when (i) there are reasonable grounds to believe that it may become impossible or very difficult to obtain the evidence during the course of the damages claim, (ii) the evidence to be produced may facilitate amicable resolution of the dispute between the parties, or (iii) obtaining the evidence may either justify or avoid the filing of the damages complaint.

The early production of evidence is usually a faster proceeding because there is no discussion on the merits of the evidence. The plaintiff has no obligation to file a complaint after gaining access to the pursued evidence. If it decides to do so, the complaint may be assigned to a court other than the one before which the early production of evidence was processed.[12]

The evidentiary action lacks specific regulation under the Code of Civil Procedure, and typically follows the ordinary proceeding applicable to most types of complaints. The STJ considers it admissible and even more suitable than the early production of evidence in situations in which the plaintiff requires a document disclosure based on a legal or a contract provision.

Regardless of the chosen proceeding, the plaintiff must (i) describe the documents to be disclosed, (ii) explain why it needs access to such documents, and (iii) describe the circumstances indicating that the documents exist and are being held by the defendant. Moreover, the plaintiff must present evidence that it has tried unsuccessfully to obtain access to the documents prior to filing the complaint.

[12] See Articles 381 to 384 of Brazil's Code of Civil Procedure (Law No. 13,105, of March 16, 2015).

V. Conclusion

Although antitrust private enforcement is still incipient in Brazil, there is a clear pathway that plaintiffs could take in order to overcome one of the main obstacles to such claims: the production of evidence. As seen above, courts may issue orders to compel parties to produce evidence in their possession, and although confidentiality rules may initially prevent access to leniency and settlement materials, both CADE's Resolution No. 21 and the STJ ruling indicate that those confidentiality rules are no longer absolute, as both CADE and the Brazilian courts have been recognizing the important part that civil liability plays in the antitrust enforcement.

The Brazilian Code of Civil Procedure recognizes that the parties have an autonomous right to the evidence, as it not only serves the purpose of demonstrating the truth of the facts related to the lawsuit controversy, but it can also be useful to assess the chances of success of a future claim, or as an incentive for parties to settle out of court. In that spirit, the judicial proceedings to seek document disclosure can play a relevant role in reducing the plaintiffs' information asymmetry, particularly the autonomous lawsuit, as they may be used to gather evidence prior to the damages lawsuit and build a stronger case. These tools may also be used by plaintiffs bringing damages claims outside Brazil, as long as the plaintiffs succeed in obtaining authorization to use the materials for such purposes.

PASS-ON DEFENSE: UPDATES AND NEW PERSPECTIVES RELATED TO THE BILL 11,275/2018

Leonardo Mansur Lunardi Danesi, Ricardo Lara Gaillard, Thales de Melo e Lemos

I. Introduction

This paper aims to provide a brief overview on the treatment of the passing-on of overcharges in the production chain (passing-on or pass-on defense theory) in Brazil and the possible impacts caused by an eventual legislative change resulting from the Proposed Bill No. 11,275/2018 (Bill).

The theory of passing-on is discussed in the context of antitrust damage claims, which are lawsuits filed by those affected by an anticompetitive conduct, with cartels being one example of such. In Brazil, anticompetitive practices, in addition to administrative violations, pursuant to art. 36, Paragraph 3, I, of the Brazilian Antitrust Law (Law No. 12,529/11) and art. 5, VI, *a*, of the Anticorruption Law (Law 12.846/13), are also civil violations, in accordance to art. 186 of the Brazilian Civil Code (Law No. 10.406/2002)[1].

II. Civil liability and pass-on theory

For the establishment of the civil liability that constitutes the right to seek damages, it is necessary that the following three essential elements are demonstrated: (i) the wrongful act; (ii) the damage caused to the victim; and (iii) the causal link, i.e., the cause and effect relationship between the wrongful act and the damage.

Therefore, basic evidence that anticompetitive conduct has occurred is not sufficient for damages to be awarded. The claimant is required to prove that it has suffered damage from this conduct – and that the damage resulted directly from the anticompetitive conduct. In the case of a cartel, such damage, among other outcomes, usually results from overcharges added to what would be the fair market price for the relevant product or service.

According to the pass-on theory, since the product or service purchased with overcharges may be used in the manufacturing of another product or provision of another service, at least

[1] Cartels, specifically, are also criminal offenses in Brazil, according to art. 4 of the Economic and Tax Crimes Law (Law 8,137/90) and art. 90 of the Public Procurement Law (Law 8,666/93).

part of such increase in costs may be passed-on indirectly to the end consumers[2]. In consideration of such, damages should be considered only to those economic agents which absorbed the damage, under penalty of unjust and undue enrichment of the economic agent who, instead of assuming the excessive costs, raised its own prices and transferred the damage down the production chain in the form of higher prices for goods and services purchased.

Since article 944 of the Brazilian Civil Code establishes that compensation is measured by the extent of damage, and Article 884 of the same Law prohibits unjust enrichment, the passing-on defense is applicable in Brazil[3], even if it is not expressly set forth in any legislation in force. The objective of pass-on defense is to allow for the damaged entity from the anticompetitive conduct to revert back to its previous economic state, whereby no damage was suffered, and no unjust gains had taken place[4].

The discussion on the theory of passing-on takes place in this context and surrounds mainly two points: (i) the question about which segment in the production chain has supported and absorbed the overcharges as a result from the anticompetitive conduct; and (ii) if the burden of proof should fall on the claimant, who must prove the facts that constitute its rights, in accordance with Article 373, I, of the Brazilian Code of Civil Procedure; or if the defendant is obliged to prove the existence of facts that can block, modify or dismiss the claimant's rights, in accordance with Article 373, II of the Brazilian Code of Civil Procedure. As will be demonstrated, there is debate regarding both questions with no clearly settled case law in any instance, as this is a new matter in Brazil. However, first and second instance courts have recently decided that the burden of proof would fall on the claimant, especially since the passing-on of overcharges is an expected result in the context of entrepreneurial activities that target profits.

The authors are of the position, in line with such Brazilian courts recent decisions, that, in Brazil, it is not sufficient for the claimant to file the lawsuit with an attached final ruling from the antitrust authority, or submitting invoices that demonstrate the company purchased

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[2] *Guidelines for Private Enforcement for Cartel Damages*, issued by the Brazilian Secretariat for Productivity and Competition Advocacy (SEPRAC) in December 2018 and available at: http://www.fazenda.gov.br/centrais-de-conteudos/publicacoes/guias-e-manuais/acao-privada-de-reparacao-de-danos-por-carteis-private-enforcement-for-cartel-damages.

[3] CASELTA, Daniel Costa. *Responsabilidade civil por danos decorrentes da prática de cartel*. São Paulo: Singular, 2016. p. 158.

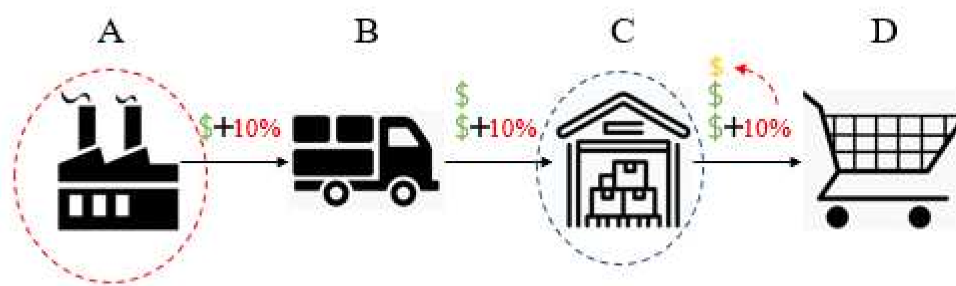
[4] VICENTINI, Pedro C. *Dano antitruste aos compradores diretos e indiretos: breves considerações sobre o pass-on effect nos regimes norte-americano, europeu e brasileiro*. In: A livre concorrência e os tribunais brasileiros: análise crítica dos julgados no Poder Judiciário envolvendo matéria concorrencial / Bruno de Luca Drago, Bruno Lanna Peixoto (coord.). São Paulo: Singular, 2018.

the products during the cartel period. Essentially, to support a claim, evidence must be produced that demonstrates the damage resulting from the cartel was effectively borne individually by the company, even if partially.

For instance, imagine, as illustrated below, a sector in which there is a cartel between producers of the A group and the product is sold to intermediaries with overcharges. If the intermediary C is unable to raise prices to consumer D, for example because there is strong competition in this market or there are other companies not affected by the cartel, the intermediary C is unable to *pass on* these additional costs and will *absorb* the overcharges. If the intermediary B sells the product including its margin and passes on the overcharges, and prices charged to the final consumer D do not change due to the cartel, the intermediary C is the only segment of the production chain effectively damaged by the anticompetitive conduct.

Figure 1 – Proposed production chain in which C absorbs the excessive pricing

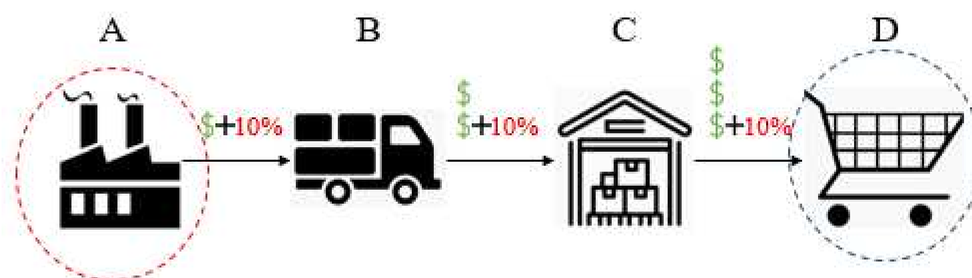
In this figure, C is not able to pass-on the 10% overcharges to D, thus its costs have increased and profit margins reduced



Source: Self elaborated.

Looking from the other direction, the scenario illustrated below demonstrates the premise that intermediary C can *pass on* the overcharges due to the cartel of producers A to final consumer D. In this scenario, C keeps its usual margin by raising prices in the same level as the raise in costs and, therefore, the price increases to final consumer D, which is ultimately the only segment damaged by the cartel.

Figure 2 – Proposed production chain in which D absorbs the excessive pricing



Source: Self elaborated.

The passing-on defense is accepted by the European Commission, according to Directive 2014/014/EU on antitrust damages actions. The European Commission even issued guidelines on the subject[5]. In Brazil, the theory is being applied in recent cases of antitrust damage claims.

It is important to highlight that, in general, the criticism to the passing-on theory comes from direct clients of companies investigated by cartel practices, based on the argument that there is already a large degree of difficulty in proving the existence and quantifying the damage caused by cartels, in addition to proving that overcharges have been equally absorbed, and not passed on.

However, the legal validity and application of the passing-on defense plays a very important role in antitrust damages claims, especially because it allows for both indirect and final consumers to be rightfully recognized to seek antitrust damages as a result from cartel practices that may have affected them. This understanding is also in accordance with art. 47 of the Brazilian Antitrust Law, which makes no distinction between direct and indirect consumers as rightful to take legal action aimed to cease anticompetitive conduct or pursue compensation for damage suffered because of such antitrust behavior.

III. Case law in Brazil

Considering that antitrust damage claims are still in the early stages of development in Brazil, there remains little consensus on legal precedents and positions regarding the passing-on theory in Brazilian courts. In any case, at least the first instance and second instance courts[6] have given priority and substance to the issue by accepting the defense in some important decisions, such as the following transcribed:

[5] Please see the following link (accessed on March 27, 2020): https://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf.
[6] The authors are not aware of any public decision from the superior/supreme Brazilian courts yet.

> *"To recap: the existence of a cartel, even if proven, does not in itself result in a certain acceptance or recognition of a claim, as damage to society can be considered dispersed in a broad fashion. Specific individual damage has not been proven and may not be plausible. (…) it is certain that there was no demonstration of damage, an essential element for civil liability (art. 186, of the CC), the burden of proof was of the claimant (art. 373, I, of the NCPC) and not subject to production by simple expertise (art. 464, Par. 1, III, NCPC), and the facts in which the conclusion of the sentence are based are notorious and do not depend of evidence[7]." (art. 374, I, NCPC).*" (free translation) (TJ/SP. Appeal No. 1076730-36.2017.8.26.0100. Fabio Henrique Podesta. j. May 30, 2019)

> *"Furthermore, based on the guiding principles of the current economic system, based on the market economy, in which the Claimant company, as well as the Defendants, provide services in accordance with the principle of supply and demand, given a wide scope to define the final price of its services, it is assumed that the eventual overvaluation of the raw material is passed on to the final recipient of the production chain, that is, the consumer. Indeed, despite the allegation of having borne excessive pricing (…), it is clear that the real losses arising from the existence of a possible cartel among the Defendants were passed on to the consumer market. Otherwise, it would be up to the Claimant to prove and justify that it did not pass on such damage to the final consumer(…) and the attached relevant documents"* (free translation) (31th Civil Court of the Central Forum of São Paulo, Proceeding No. 1076912-22.2017.8.26.0100, decision published on March 09, 2018)

> "*It turns out that the claimant was not the final and economic recipient of the product (…) as a result, the illicit act described in the initial petition, even if it actually happened, would not be able to generate financial losses for the claimant, since the excessive pricing (…), as well as the costs of all other inputs, was entirely passed on to final consumers. And it goes without saying that this passing-on would need to be proved in the case records, since maximizing profits is a reasonable and natural consequence of all economic activity. In view of this scenario, the conclusion that the claimant did not experience any financial loss, and that there are no damages to be awarded, is inexorable. Moreover, as the claimant did not suffer material damages, granting the claim would result in unjust enrichment: the material damage borne exclusively by the final consumers would be compensated to the claimant*". (free translation) (17th Civil Court of the Central Forum of São Paulo, Proceeding No. 1076721-74.2017.8.26.0100, decision published on May 30, 2019).

IV. New perspectives under bill no. 11,275/2018

Bill No. 11,275/2018 was proposed in the Federal Senate in 2016, initially as Senate Bill No. 283/2016, and originally had the main purposes of: (i) associating the administrative fines imposed on cartel participants to the economic advantages obtained by infringers; and (ii) fostering antitrust damages claims, mostly through the establishment of double damages (providing relevant exemptions for signatories of leniency agreements and settlements with the

[7] The lower court had already dismissed the claim based on the argument that "*the composition of fixed and variable costs is an essential element of product pricing, aiming to reach economic results, reason why it can be concluded that the claimant did not absorb any harm (…) but, on the contrary, passed them on through pricing formation mechanisms to final consumers*" (free translation).

Brazilian Antitrust Authority – "CADE") and solving legal uncertainties around the statute of limitation for this kind of claim.

The Bill was approved in the first vote in the Senate at the end of 2018[8] and advanced to the Chamber of Deputies, becoming Bill No. 11,275/2018[9]. Since then, the Bill has undergone some major changes, and has been received and approved by the Commission for Economic Development, Industry, Trade and Service (CDEICS). Up to the date of writing of this paper, in April 2020, the Bill was still being analyzed by the Constitutional, Justice and Citizenship Commission of the Chamber of Deputies.

Among the various topics currently covered by the Bill, the most relevant for the purposes of this paper – and which requires a high degree of consideration – is the inclusion of Paragraph 4 to the already mentioned article 47 of the Brazilian Antitrust Law, in the following terms:

> "*Par. 4. The passing on of excessive pricing is not assumed in cases of violation of the economic order set forth in art. 36, Par. 3, items I and II, therefore the defendant who argues such be obliged to prove such.*"

The authors understand that the proposed text may circumvent the rational that bases the burden of proof and complicate the application of the passing-on defense, making it challenging or even unfeasible, since it forces the defendant (in general, the claimant's direct supplier) to prove that the claimant did not absorb the supposed overcharges. This, with due respect, seems unlikely as the defendant does not maintain the claimant's competitively sensitive information necessary for this purpose (e.g. pricing strategies and information regarding costs, profits and margins).

As already highlighted, under the applicable Brazilian law, the claimant in antitrust damage claims must prove the damage (the existence of anticompetitive conduct), the result (the effect of the damage on the competitive environment, which, in case of cartels, constitutes mainly of overcharges) and the causal link between them (i.e., that the alleged overcharge was indeed caused by the anticompetitive conduct, and not by external factors, such as market and economic contexts).

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[8] The original proposal and the final text of the PLS approved by the Senate are available at the following link: https://www25.senado.leg.br/web/atividade/materias/-/materia/126392.
[9] The processing of the PL can be followed through the following link: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2190209.

In other words, in general, it is the claimant's duty to prove that it has sustained damage caused by the anticompetitive conduct of which the claimant has been a victim. The claimant is the only one capable of producing this evidence, considering this is internal information and documents from the company and competitively sensitive – e.g. the pricing strategies, the costs of production or service and others.

If the claimant is not able to prove whether it absorbed any overcharges, with the availability of such documents and information, it would be unreasonable, therefore, to expect that the defendant would be able to prove such claim. In addition, even if the courts were to allow the defendant to request documents and information held by the claimant, there are competitive problems associated with allowing the defendant to access this kind of records of its customers and uncertainties around then measure to provide such access. The conclusion is, if this provision would be enacted, the defendant would be required to produce impossible evidence, which in turn would be waived from the claimant.

The result of the proposed provision will simply be the limitation of the full exercise of the defendant's right of defense, restricting the application of the pass-on defense in Brazil, even though it should be admitted in accordance to legal provisions mentioned before.

Finally, in the other direction of what the proposed text implies, there is currently no assumption that pass-on happens in every case. This argument is fallacious: the necessity to prove that the pass-on of overcharges did not happen is merely an outcome of the Brazilian civil procedural regulations regarding the burden of proof and civil liability.

It is undeniable that Bill No. 11,275/2018 is very important for the development of antitrust damage claims in Brazil, and as a result, very helpful in the combat against cartels. However, the aforementioned provision, regarding the burden of proof for the pass-on defense, deserves special attention by the Brazilian Congress, under penalty of creating a provision that is not legally sustainable, limits the exercise of the right of defense and unduly penalizes the defendants, opening space for fragile judicial convictions and undue enrichment for claimants that were not actually damaged.

COMPETITION LAW AND RIGHT TO DIGNITY: UNAVAILABLE PUBLIC INTEREST AND FEDERAL JURISDICTION

João Marcelo de Lima Assafim, Luiz Eduardo de Queiroz Cardoso Jr.

I. Free competition as cornerstone of democracy and unavailable legal interests

The government agent – who maintains the free competition – is, after all is said and done, the guardian of democracy.

Monopoly, although not illicit in itself at first, tends to be a fertile environment for capture and even, more often than not, corruption, given the monopolist's temptation to "try" and do everything in his power to maintain its monopoly position (achieve or try to achieve). The acts performed in order to obtain monopoly or maintain the position of monopoly are illicit.

According to international and national literature, the structurally concentrated environment[1] – although not limited to it – invariably and often tends to be the scenario of conducts that restrict free competition, whether through price fixing on classic or pure (naked) cartels[2] or through illicit **exclusionary conduct** through the use of a patent right obtained through false pretenses[3], postponed beyond expiration (overlapping[4]) or nonexistent. All are

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[1]In Brazil, as a rule, competitive environments (relevant markets) are often merged under the application of Herfindhal Hirschman Index (HHI). See below an example of mergers: **Kolinos-Colgate, Brahma-Antartica, Nordisk-Biobras, Itaú-XP.**

[2] "*A cartel is a **group of firms** who* should *be competitors, but who have agreed with each other to "fix" their prices in order to earn monopoly profits.* Cartels are analyzed under Section 1 of the Sherman Act, which prevents contracts, combinations, and conspiracies in restraint of trade. Price fixing is said to be "naked" when it is unaccompanied by any joint venture or other integration of the participants' business activities. Naked price fixing is, *per se,* illegal under par. 1. *This was established in an important series of price fixing decisions. U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17S.Ct. 540 (1897); U.S. v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377 (1927; U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940)."* HOVENKAMP, H., Antitrust, 4th Ed., Thompson/West, St. Paul (Minnesota), 2005, p. 92.

[3] "*The principal patent misuse cases that presented issues of antitrust policy were cases in which the patent owner conditioned the the use of his patented process or product on the licensee's buying another, unpatented product from him, as when the patentee of mimeograph machine required his licensees to agree to buy the ink they used in the machine from him.*" POSNER, The Economic Structure of the Intellectual Property Law, Harvard Univ. Press, Cambridge, Massachusetts, and London, 2003, p. 372.

[4] "*Illegality - from (b) the overlapping of exclusive rights or (a) the "choice" of relief to a legal interest different in kind from the genuine constitutive cause [and repeatedly listed by strict legality, whether in Law No. 9.279/1996, of Law No. 9.457/1997 or of Law No. 9.610/1998. However, illegality* per se *is not enough to dissuade scammers from trying to receive (i) more than once for the social bilaterallity of creation or (ii) a higher award, of less demanding analysis; of what is deserved for the purpose of creation and for the minimum contribution performed. Such procedures—where noticed—have been strictly fought by the good praetorian precedents and by the performance of the parquet."* (our translation) See BARBOSA, P.M.N., A vedação da sobreposição dos direitos de propriedade intelectual na ordenação brasileira, in: RABPI No. 162, sep./oct. 2019, pp. 63-71., p. 68.

acts or agreements performed for or entered into for the same purpose: obtaining or maintaining a monopoly position with out of market measures or overprices to the detriment of consumer.

The economic order – as the environment where the sum of Brazilians' entire estate is located in deposit – and this interest, if not diffuse, homogeneous and individual, are, therefore, unavailable.

The description of economic order is easy if we come from the estate relief. The deprivation of personal property (even if it occurs only once), for example, is typical unlawful conduct, within the scope of criminal law[5]. If this is so in the private scope, imagine a escalated, en bloc deprivation of estate, artificially procrastinated over time. Antitrust restrictions, in general, are spread over time and impose a loss on consumers' estate, at the end of the productive scale. Thus, the wrongdoer is nothing more than a parasite that suckles on the lifespan of citizens, consumers and small entrepreneurs, demanding more time and more work hours to acquire goods and services. Therefore, the anticompetitive practice is jurisdiction of the Prosecution Office, both in civil and criminal scopes.

The vectors of "lifespan" (yes, lifespan) deprivation allocated in labor to acquire goods (notably, a patrimonial deprivation – more serious than that of a single asset – as it extends over time, in a lasting, that is, "successive in title"), depriving citizens who pay "royalties" to the monopolist from their resources also obviously imply an illegal act and, invariably, a felony. The monopolist is a "leech", a parasite that drains the financial vitality of the collective [6] for entire, lasting, uninterrupted periods, spread over time, for more or less time.

As lawfulness in the estate attribution (acquisition and possession) of the instrument used to "kill" (be it a weapon, an automobile or a patent) does not legitimize criminal conduct, the use of assets to subtract the public interest, does not either. Therefore, it is socially more serious than the classic criminal charge to abuse intellectual property rights (either through the use of null titles, false information by the depositor or applicant of the request or by misuse or

[5] As per Article 157 of the Penal Code, Decree-Law No. 2.848/1940. This is a private criminal prosecution, with the jurisdiction to file the Prosecution Office's criminal prosecution. There are aggravating factors, such as, for example, if a motor vehicle transported to another state or abroad is subjected to deprivation (see item IV, included by the text of Law No. 9.426/1996). Certainly, the economic dimension of the pecuniary damage caused by the theft of a single motor vehicle (suppressed by the Articles of Criminal Law), for example, is inferior not only to the volume of resources transferred from consumers to the monopolist, but also, it is inferior to the – real or potential – social, diffuse, collective or individual and homogeneous damage in case of anticompetitive conduct. The economic theory of the perfect monopoly exemplifies the phenomenon as a resource transfer (in law, estate) from citizen (consumer) to the monopolist's "pocket", due to the so-called monopoly's deadweight loss.

overlapping of rights) in order to artificially create a non-existent monopoly inconsistent with the innovation incentive hypothesis.

Yes, because the market power, as a power to cause scarcity, and therefore overpricing, tends to imply a deterioration in the (Brazilian) people's quality of life, as consumers. Brazilian citizens tend to work more hours than their foreign counterparts from more mature and structurally more decentralized markets and/or better disciplined in antitrust matters (including antitrust advocacy, very active in continental Europe and in Common Law countries, such as Australia) in order to obtain the same goods. In case of pandemics, such as the situation of the new coronavirus (COVID19)[7], these distortions generated by scarcity are clear (although, previously observed in other public health situations[8]).

In other words, the monopoly price degenerates citizens' quality of life because it either consumes the **lifespan** allocated to work, or, worse, subjects them to scarcity. In matters related to public health, the problem of a scarcity artificially imposed by the monopolist or by market power has more serious implications. Thus, acts and contracts restricting free competition violate people's dignity.

The dimension of public interest has relevance to mercantile or commercial law (or corporate law, if one so prefers). It is not by chance that the dichotomy between public and private law has become useless due to the infusion of public matters into the former private law. The unavailability of this **public interest** raises doubts and inaccuracies, such as, for example, "objective arbitrability"[9] and even the jurisdiction of the antitrust authority to extend agreements, from merger agreements, through leniency agreements, to terms of termination commitment. In fact, procedural nullities are subject to judicial review.

Certainly, a negotiating agreement – whether involving public administration or not (public policy agent or not) – can only deal with the Party available. This point, then, is a

[7]The alcohol gel overpricing during the pandemic is subject of an ongoing investigation under the Brazilian antitrust authority in march 18 th, 2020.

[8] See our ASSAFIM, J.M.L., "Proteção de dados de testes: articulação entre direitos de propriedade intelectual e direito da concorrência", in: ASSAFIM, J.M.L. e MARINHO, M.E.P., Inovação e Setor Farmacêutico (aspectos jurídicos – proteção de dados de testes), Saraiva, São Paulo, 2019, pp. 293-374.

[9] Public interest inherent in the granting of a patent by exclusion from the public domain prevented the Brazilian Patent and Trademark Office (Instituto Nacional de Propriedade Industrial, INPI) from setting up an arbitration chamber for trademarks and patents (INPI, Agenda 2013), due to the difficulty of dissociating the private part of law from the unavailable public interest. This difficulty arises especially in cases of rejection of the patent application by the authority (INPI) or of disputes between two holders who come up against the public interest by covering technologies that are entirely or partly in public domain.

controversial element, even with regard to the extension of agreements between the authority and requesting firms in mergers (which is not the subject of this text).

II. Application of antitrust law by the judge

As Thomas Piketty, author winner of the Nobel Prize in Economics, indicates, the distribution of wealth is one of the most lively and controversial issues today. After presenting some questions, this author adds the fact that *"when the rate of return on capital exceeds the rate of growth of production and income, as it happened in the 19th century and it seems likely to happen again in the 21st century, capitalism automatically produces unsustainable, arbitrary inequalities that radically threaten values."* (Our translation).

The first research works on the application of substantive antitrust law by the judicial branch was more affected or related to the reputation of competition policy in the relationship between administrative authorities and the judicial branch.

However, the increase in the relevance of antitrust legislation in the defense of public interest, combined with the quantitative increase in new businesses (demanded not only by the growth of the economy but also by the new economy), the volume of which implied an extraordinary increase in the resulting social demand, to a large extent, from the enormous source of issues arising from technological change, from the scale of network spillover, generated by communication through the Internet. Invariably, with the growth of digital platforms[10], there has also been an increasing volume of vertical relationships over big data (original databases containing personal data of consumers – or acquirers – protected by copyright), certainly combined with network spillover and intensive use of intellectual property. This new panorama tends, at the same time, to concentrate the structure of the markets while also to increases the base of interested people or individuals affected by antitrust violations.

Then, following the increase in the volume of investigations by horizontal agreements, private enforcement of the[11] indemnity for antitrust violation gains importance, at least in theory.

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[10] See KËLLEZI, P.; KILPATRICK, B.; KOBEL, P., Antirust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions, Springer, London, 2019. See, also our ASSAFIM, J.M.L., International Report, in: KËLLEZI, P.; KILPATRICK, B.; KOBEL, P., Antirust Analysis of Online Sales Platforms, cit., pp. 3-40.
[11] See KËLLEZI, P.; KILPATRICK, B.; KOBEL, P., Liability for Antitrust Law Infringements & Protection of IP Rights in Distribution, Springer, London, 2019.

In another line of considerations, this is the judicial review of administrative decisions by the executive branch (policy maker) by the judiciary, in the Brazilian system, federal justice (jurisdiction as to the person).

Additionally, in Brazilian law, the possibility of the antitrust law (positive law) being applied directly by the judge, both in state and federal courts, remains. The legislator just clarifies that the judicial litigation should not suspend the administrative procedure, as long as it is not a judicial review of an administrative act (policy maker's decision)[12].

A new fact is that specialized courts were created within the scope of federal justice in the second region, the states of Espírito Santo and Rio de Janeiro, whose competence covers competition law.

III. Jurisdiction of the District Court

District Courts have the jurisdiction to prosecute and judge private enforcement that eventually derives from the Brazilian Antitrust Authority's (Conselho Administrativo de Defesa Econômica, CADE) acknowledgement of the practice of a competitive act.

Where a company suffers losses due to the illicit competition practiced by another, the District Court is the competent authority to process and judge any demand.

Thus, an eventual private dispute due to unlawful competitive acts, such as abuse of a dominant position, shall be judged by the District Court, insofar as the action is only filed against the individual.

In a recent case, judged by the Superior Court of Justice, a sham litigation was decided, for example. On such decision *"[The] ruse is often camouflaged and obscure, so as to confuse the vision of who needs find it. The hustler never presents himself as such, but, on the contrary, he allegedly acts under the cloak of the most dear principles, such as access to justice, due process of law and fair hearing, to commit and hide his vileness. Abuse is configured not by what is revealed, but by what is hidden. For such reasons, it is necessary to rethink the process in the light of the most basic canons of law itself, not to frustrate the regular exercise of fundamental rights by the serious and probable litigator, but to restrain those who abuse fundamental rights on a whim, out of emulative spirit, out of intent or that, in reckless actions*

[12] Art. 47. The ones worse off, by themselves or by the ones legitimized in art. 82 of Law No. 8.078, dated as of 11 of September, 1990, may go to court to, in defense of their homogeneous individual or individual interests, obtain the cessation of practices that constitute an anticompetitive conduct, as well as the receipt of damages, regardless of the investigation or administrative process, which shall not be suspended due to filing a lawsuit.

or incidents, convey frivolous pretensions or defenses, able to make the process a mock process nobly pursuant to the fundamental right of access to justice." (Our translation) See Special Appeal No. 1.817.845-MS (2016/0147826-7).

IV. Jurisdiction of the State Court

The jurisdiction of State Court is provided in the Federal Constitution in its Article 109[13], which encompasses rules of jurisdiction due to the person and due to the matter.

According to the aforementioned constitutional provision, it is incumbent upon the federal judge to render judgment on cases in which the Government, governmental agency or state-owned company are interested, as authors, offenders, assistants or opponents, except for Chapter 11, work accidents and the ones subject to Electoral and Labor Court.

It is important to emphasize the fact that, in the general repercussion, the Supreme Federal Court established an understanding that the establishment of official seat location as the only competent venue for filing suits against the governmental agency would be the granting of a procedural advantage not established for the Government, a larger entity, which has jurisdictional prerogative limited by that constitutional provision.

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[13] Art. 109. Federal judges are responsible for prosecuting and judging:
I - the cases in which the Government, governmental agency or state-owned company are interested, as authors, offenders, assistants or opponents, except for Chapter 11, work accidents and the ones subject to Electoral and Labour Court;
II - the cases between a foreign State or international agency and the Municipality or a person domiciled or resident in the Country;
III - cases based on a treaty or contract between the Government and a foreign State or international agency;
IV - political crimes and criminal offenses committed to the detriment of property, services or interests of the Government or its governmental agencies or state-owned companies, except for contraventions and subject to the jurisdiction of Military and Electoral Courts;
V - the crimes provided in an international treaty or convention, where, when execution begins in the Country, the result has or should have occurred abroad, or vice versa;
VI - the cases pertaining human rights, to which § 5 of this Article refers to; (Included by Constitutional Amendment No. 45, of 2004).
VII - crimes against the organization of work and, in cases provided by law, against the financial system and anticompetitive conduct;
VIII - habeas corpus, in criminal matters within its jurisdiction or where the constraint comes from an authority whose acts are not directly subject to another jurisdiction;
IX - writs of mandamus and habeas data against an act of governmental authorities, except in cases of jurisdiction of Federal Courts;
X - crimes committed on board ships or aircrafts, with the exception of the jurisdiction of the Military Court;
XI - crimes of illegal entry or permanence of a foreigner, execution of a rogatory letter, after the "exequatur", and a foreign sentence, after ratification, the cases pertaining nationality, including the respective option and naturalization; and
XII - litigation on the rights of indigenous peoples.

On the same occasion, the Federal Supreme Court decided that actions against governmental agencies can be filed both at the plaintiff's and defendant's domicile, pursuant to Article 109, Paragraph 2.

Therefore, it is possible to file a suit against a federal agency before a venue other than that of its official seat.

V. Jurisdiction of State Courts for actions which grounds are in the competition law within the scope of the regional federal court of the 2nd region

The official seat of CADE, federal agency, is in Brasília, which is why, at first, the suits questioning its decisions were processed only before the Federal Courts of the Brazilian capital.

Due to the aforementioned decision issued by the Supreme Federal Court, the suits against CADE started to be filed before the District Courts, not being restricted to Brasilia, as the plaintiff can sue at its domicile.

Thus, to the extent that actions against CADE can be filed at the plaintiff's domicile, there is a need for a greater number of Courts specialized in competition law.

In this sense, the Federal Justice Bench amended Resolution No. 445/2017, determining that the Federal Regional Courts should create Courts with competing jurisdiction to prosecute and judge the suits based on Competition Law.

In order to guarantee a more appropriative judgment of such demands, the Federal Regional Court of the 2nd Region, which encompasses the states of Rio de Janeiro and Espírito Santo, issued Resolution No. TRF2-RSP-2018/00019, dated as of 6 of April, 2018, created specialized Federal Courts with competing jurisdiction to prosecute and judge facts that deal with Competition Law. In Rio de Janeiro, the 16th Federal Court and the 29th Federal Court have jurisdiction to prosecute and judge the facts involving competition matters.

From the above, a business company domiciled in Rio de Janeiro shall be able to file, in the jurisdiction of its headquarters, a suit based on Competition Law, with CADE being a defendant, or in competition matters affecting any other body, entity, or governmental agency.

VI. Conclusion

The policy maker's jurisdiction does not restrict the examination of the judicial branch in terms of competition. On the contrary, the Brazilian Antitrust Law guarantees consumers and interested parties the search for redress and damages against antitrust violations. Indeed, insofar

as judicial analyses do not suspend administrative investigations, they can certainly examine antitrust merits, even earlier in the administrative decision. However, there is still no analysis of precedents after the creation of specialized courts within the scope of Federal Courts in the Second Region.

ARBITRATION IN ANTITRUST DISPUTES

Constança Burity Simões Barbosa, Fernanda Akiyo Mitsuya, Pedro Paulo Salles Cristofaro

In the recent years there has been a growing interest in arbitration proceedings involving antitrust matters around the world. This trend was not left unobserved by the Brazilian Administrative Council for Economic Defense (Conselho Administrativo da Defesa Econômica – CADE), who has been experimenting with arbitration, as can be observed from a few interesting precedents which will be latter analyzed in this article.

At first there was some mistrust regarding the arbitrability of antitrust matters. This was mainly due to hesitation regarding the arbitrability of antitrust and competition matters due to the public interest which the subject entails.

This issue has been somewhat surpassed in the extent that it has been widely recognized, and consolidated by several precedents and by legal doctrine, that there would be no prohibition for arbitrators to decide on conflicts based on the antitrust law with respects to the private rights of the parties of the arbitration. On this list of matters that can be object of arbitration indemnification claims based on antitrust practices or the validity of contractual clauses that may constitute barriers to the entry of new incumbents in the market are included. This of course in no way prevents or limits CADE from supervising or sanctioning antitrust practices, considering the public interest involved in the protection of the competition in the market.

The acceptance of the arbitrability of antitrust matters allowed for this theme to fester in the antitrust community amounting to (i) the inclusion of arbitration clauses, or other alternative dispute mechanisms, as a condition for the approval of concentration acts by CADE; as well as (ii) raising the discussion regarding the use of arbitration clauses as a condition to the execution of some conduct adjustment agreements by antitrust authorities.

a. Arbitration in Concentration Acts

Within the scope of concentration acts it is common for CADE and the proponents of the concentration act to enter into an agreement regarding protective measures which may be stipulated as means to hinder illicit, discriminatory and prejudicial competitive activity. In this context, the inclusion of arbitration clauses has been predicted in some cases in such a way that the proponents of the concentration act agree to accept any and all arbitrations they are presented with which deal with possible harmful practices or effects related to the concentration

act. There are cases where the proponents also agree to fund the arbitration proceedings that are presented against them, with the exception of those which are clearly improperly presented.

The adoption of the aforementioned arbitration clauses in approval proceedings of concentration acts has precisely the aim to make it more difficult to create barriers to competition resulting from concentration. The arbitration clause would be an obstacle to harmful competition practices.

The logic behind these clauses is that the easier it is for the harmed parties to seek indemnification or even an injunction directly before the harming party due to illicit practices, contractual breaches or the mere creation of barriers to entry in the market, the more expensive – and therefore less interesting – you make it for the parties that are engaging in a concentration act to perform in any manner which could damage third parties. In this case, the possibility of using the arbitration procedure to avoid discriminatory measures or even to obtain indemnification is seen as a way to increase the accessibility of these demands and, consequently, to avoid the occurrence of acts considered harmful to competition.

The first time CADE imposed the stipulation of an arbitration clause for these purposes was in 2014 whilst analyzing the approval of the joint venture intended by the Israel Corporation Group, Fosbrasil S.A. and the Vale Group[1]. The introduction of an arbitration clause was a bit shy in this first instance. The agreement regarding the concentration act predicted only an arbitration-like mechanism where the arbitrator's jurisdiction was limited to a very specific scope and where the arbitral decision served only to guide CADE's decision on whether or not there was antitrust malpractice.

In the following case in which CADE stipulated the inclusion of an arbitration clause[2], the predicted mechanism was now intended to be an additional tool which parties who felt discriminated could resort to. In any case, the competence of the arbitral panel as established by the arbitration clause was limited exclusively to ascertaining whether or not there was discrimination within the contracting of the parties. In this event, it was expressly stated that the arbitral decisions were in no way binding for the administrative body.

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[1] Concentration Act. No. 08700.000344/2014-47. Interested parties: Bromisa Industrial e Comercial Ltda., ICL Brasil Ltda. and Vale Fertilizantes S.A. Judged December 10th, 2014.

[2] Concentration Act No. 08700.005719/2014-47. Interested parties: Rumo Logística Operadora Multimodal S.A. and ALL – América Latina Logística S.A.; Judged February 11th, 2015.

In other opportunity, when CADE analyzed the transaction involving Brazilian Stock Exchange, BM&FBOVESPA S.A., and CETIP S.A., the imposed arbitration clause allowed for any third parties who felt harmed by antitrust practices to seek indemnification via an arbitral proceeding[3]. There was much discussion on whether or not the arbitration clause should be restricted to the scope of the main antitrust issue, as identified by the antitrust authority or whether other pre-existing market problems could be solved via arbitration. The majority of CADE Commissioners decided that the clause should in fact be restricted to the main antitrust concern.

The last and most recent case where an arbitration clause was included in an agreement for the approval of a concentration act was the AT&T and Time Warner Inc. merger[4]. The stipulation in this case was very similar to the one predicted for the BM&FBOVESPA S.A. and CETIP case, with the exception that, in this case, the agreement predicted that arbitral proceedings involving less than R$7,000,000.00 should be solved by a single arbitrator. With this provision, CADE intended to address a quite common concern in arbitral proceeding related to elevated costs. By stipulating a rule considering the amount involved in the dispute, this provision seeks to simplify and diminish costs of arbitral proceedings regarding matters of less economic importance. It is our understanding that, on matters that do not involve high values or high complexity discussions, imposing the dispute resolution by arbitration is not the best alternative. Still, a provision imposing a minimum value for the presentation of an arbitral procedure was not yet stipulated in any agreements entered into by CADE.

The abovementioned cases are very interesting from an arbitration perspective since the stipulation of an arbitration clause is intended as a way to provide third parties who have been harmed by antitrust malpractice with an alternative dispute resolution. In this sense, and as can be expressly seen in certain CADE precedents[5], arbitration is seen in this context as a more efficient dispute resolution mechanism which would encourage harmed parties to effectively seek indemnification for the damages they endured.

From an antitrust point of view, these cases are interesting since they reduce the need for public enforcement of good competitive practices, as well as of public monitoring of the aftermath of concentration acts. With a more comprehensive adoption of these clauses,

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[3] Concentration Act No. 08700.004860/2016-11. Interested parties: BM&FBOVESPA S.A. – Bolsa de Valores, Mercadorias e Futuros and CETIP S.A. – Mercados Organizados. Judged May 15th, 2017.

[4] Concentration Act No. 08700.001390/2017-14. Interested parties: AT&T Inc. and Time Warner Inc. Judged October 18th, 2017.

[5] For instance, Maurício Oscar Bandeira Maia's vote in the AT&T and Time Warner merger case.

economic defense agencies are able to shift the burden of controlling and hindering illicit activity carried out by concentrating players to private parties.

b. Arbitration in CADE's punitive activity

In fact, this shift is possible not only in the control of concentration acts but may also be applicable in the exercise of CADE's punitive competence. Off course, the punitive action over infractions regarding the economic order belongs exclusively to CADE, who is the designated administrative body, as established by Law No. 12,529.

This, however, is in no way incompatible or confused with the right to seek indemnification for the damages suffered as a consequence of an infraction regarding the economic order. Article 47 of the Antirust Law, Law No. 12,529 establishes that:

> "*Article 47. The harmed parties, be it for themselves or by the legitimated parties established on article 82th of the Law No. 8,078 of September 11th, 1990, may demand in court, in the defense of their own individual interests or in defense of individual homogeneous rights, the ceasing of practices which constitute an infraction to the economic order, as well as the indemnification for the losses and damages suffered, regardless of an administrative proceeding, which will not be suspended due to the presentation of a suit*".

That is, if, for example, one enters into an agreement with a certain supplier and later discovers that said supplier was part of a cartel and was charging higher prices for the products it supplied as a consequence thereof, the harmed party may rectify this situation in court, demanding an indemnification for the surplus it paid.

The same rationale applied to the protective measures established in agreements for the approval of concentration acts applies here. The more you make it accessible and effective for harmed parties to seek indemnification for antitrust malpractice, by, for instance, allowing parties to submit their claims to arbitration, the less public enforcement you need.

The problem here is that, unless it is private and individually stipulated, there is no arbitration clause which binds the harming party to the arbitration. In a case involving an agreement entered into by the supplier who is party to a cartel which does not contains an arbitration clause, the harmed party will lack the necessary tools to impose an arbitral proceeding on the harming party.

This could be overcome by predicting arbitration clauses in conduct adjustment agreements. That is, whenever CADE enters into an agreement with those who have conducted antitrust malpractices, it could stipulate as one of the sanctions that the harming party is to

accept any and all arbitration procedures which it is presented with and that are related to said antitrust malpractice.

With the stipulation of arbitration clauses, CADE may even reduce certain monetary penalties, shifting this sanctioning burden to the private parties. Following the same rationale of the inclusion of arbitration clauses in concentration acts, the stipulation of clauses in punitive agreements allows for the imposition of lower fines since the infracting party will already face costs regarding the indemnification suits. It also servers the purpose of discouraging further illegal conduct since the infracting party will have to whey whether the illicit activity will sufficiently advantageous considering the possible indemnification costs.

In it so far, CADE has not yet stipulated an arbitration clause in the exercise of its sanctioning function. There is however a bill of law which intends to address this idea, Bill No. 11,275 (also known as PL-11.). The bill was proposed by the federal senator Aécio Neves and on December 26th, 2018 it was presented for revision by the House of Representatives. Its approval procedure is fairly advanced, and the bill currently awaits the expert opinion of the reporting member of the Constitution, Justice and Citizenship Commission.

The project intends to add a paragraph to the article which establishes the necessary elements which the deed of undertaking for the ceasing of a certain malpractice, article 85 of Law No. 12,529, determining the stipulation of an arbitration clause which obligates the undertakers to accept any and all arbitration procedures which deal with indemnification demands. It is interesting to note that, unlike the pattern which was observed in the agreements for approval of concentration acts, the bill does not determine that the proceeding shall be funded by the harming party.

As can be seen from the above, despite its yet incipient use, there is so much space for arbitration in the antitrust field which can be an important ally in implementing effective private enforcement and relieving the enforcement burden of the administrative agencies.