

1. Introduction

The provision prohibiting anticompetitive unilateral conduct in Brazil is found in article 36 of Law n° 12.529 of November 30, 2011. This statute concerns exclusively competition law, structuring the Brazilian Antitrust System. The full text of this provision reads:

Article 36. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be construed as an antitrust violation:

I - limiting, misrepresenting or in any way harming fair competition or free enterprise;

II - dominating a relevant market for products or services;

III – arbitrarily increasing profits; and

IV – abusively exercising a dominant market position.

§ 1. Achieving market share as a result of a natural process caused by the greater efficiencies of a particular economic agent compared with its competitors shall not be deemed unlawful pursuant to item II above.

§ 2. A dominant market position shall be presumed to exist whenever a company or group of companies is capable of acting on a unilateral or coordinated basis to change Market conditions or when it controls 20% or more of a relevant market; CADE¹ may amend this percentage for specific sectors of the economy.

¹ Administrative Council for Economic Defense, the Brazilian antitrust authority.

§ 3. The following actions, and others falling within the terms of this article and its items, shall be interpreted as antitrust violations:

I - any agreement, combination, manipulation or arrangement with a competitor, in relation to:

a) the prices of goods or services offered on an individual basis;

b) the production or sale of a restricted or limited quantity of goods or the rendering of a restricted or limited number, volume or frequency of services;

c) the apportionment of parts or segments of the current or potential market for goods and services by distributing clients, suppliers, regions or periods, among other factors;

d) prices, terms, advantages or abstentions involving public procurement procedures;

II - supporting, obtaining or influencing the adoption of uniform or concerted commercial conduct between competitors;

III - limiting or restricting access of new companies to the market;

IV - obstructing the organization, operation or development of a competing company or supplier, acquire or financier of goods or services;

V - restricting competitors' access to sources of inputs, raw materials, equipment or technology as well as distribution channels;

VI – requiring or awarding advertising exclusivity in mass communications media;

VII - adopting misleading methods to provoke third-party price volatility;

VIII - interference in markets for goods or services by establishing agreements to limit or control research and development into technology, the production of goods or the rendering of services, or to obstruct investment for the production and distribution of goods or services;

IX - when trading goods or services, impose resale prices, discounts, payment terms, minimum or maximum quantities, profit margins or any other conditions of trade related to the business of distributors, retailers and representatives with third parties;

X - discriminating against purchasers or suppliers of goods or services by setting differentiated prices or operating conditions for the sale of goods or rendering of services;

XI - refusing to sell goods or render services in accordance with customary commercial payment terms;

XII - obstructing or disrupting ongoing or future commercial relationships when the other party refuses to accept unjustifiable anticompetitive commercial clauses and conditions;

XIII - destroying, disabling or appropriating raw materials, intermediate products or finished products as well as destroying, disabling or obstructing the operation of equipment used to produce, distribute or transport such items;

XIV - monopolizing or restricting the use of industrial or intellectual property or technology rights;

XV - selling goods or rendering services at below cost price without justification;

XVI - withholding producer or consumer goods, except to guarantee coverage of production costs;

XVII - wholly or partially suspending trading activities, without good cause;

XVIII - tying the sale of certain goods to the purchase of others or use of a service, or tying the provision of a service to use of another or the purchase of certain goods; and

XIX - abusively exercising or employing industrial, intellectual, technology or brand ownership rights.”

As seen in the text above, article 36 of Law n° 12.529 does not concern only anticompetitive unilateral conducts. The prohibition of this kind of antitrust violation is set forth in items II and IV of article 36 (dominating a relevant market for products or services and abusively exercising a dominant market position). Items III to XIX of Paragraph 3 constitute a list of potential anticompetitive unilateral conduct. This list of prohibited practices, though, is indicative and not exhaustive.

The first prohibition of anticompetitive unilateral conduct in Brazil can be found in Decree n° 7.666 of June 22, 1945. This statute was revoked months after its publication, being the next prohibition of this kind found in Law n° 4.137 of September 10, 1962. However, this statute was almost completely ineffective during decades, considering the government's option for a policy of national development by means of economic concentration. Finally, Law n° 8.884 of June 11, 1994, structured an effective antitrust system in Brazil, adopting a list of prohibited practices very close to the one seen above, set forth in Law n° 12.529, the current Brazilian antitrust law.

There is a legal rule found in Law n° 1521 of December 26, 1951, that establishes criminal liability for some practices.

2. Definition of ‘Abuse’

There is no clear definition of ‘abuse’ in the legislation. However, the ‘abuse’ defined in Law n° 12.529 is related to the exercise of a dominant market position (as seen in number IV of article 36 main section).

The competition authority does not provide a definition of ‘abuse’ in a guideline or internal rule, but it is possible to find parameters in recent decision. In recent cases (CADE vs. Philip Morris/Souza Cruz², Schincariol vs. AMBEV³ and Procon-SP vs. SKF⁴), CADE considered that ‘abusively exercising a dominant market position’ is equivalent to a misuse of market power that harms competition. In general, the competition authority finds a conduct abusive if (i) the company holds a dominant position; (ii) the conduct may cause anticompetitive effects over a relevant market and (iii) there are no legitimate business reasons and efficiency gains that outweigh the potential anticompetitive effects.

3. Exploitative and Exclusionary Abuse

The distinction between exploitative and exclusionary abuse in the Brazilian Antitrust System is controversial.

Currently, there is no legal provision literally distinguishing these types of abuse. By its turn, Law n° 8.884 referred above (revoked in 2012), listed as a possible anticompetitive practice the exploitative abuse by means of excessive pricing.

For many years during the enforcement of Law n° 8884, CADE’s precedents refused to recognize that excessive pricing could be unlawful and held that the statute could not be enforced in that regard for lack of appropriate parameters to define what is “excessive pricing”. However, in a case judged in 2010 (SINDIMIVA vs. WHITE MARTINS/AGA⁵), CADE recognized, by a narrow majority of 4 votes against 3, that the legal provision prohibiting excessive pricing should be enforced.

² Administrative Process n° 08012.003921/2005-10.

³ Administrative Process n° 08012003805/2004-10.

⁴ Administrative Process n° 08012.001271/2001-44.

⁵ Administrative Process n° 08012.000295/1998-92.

At present, this question remains open. Law 12,529 no longer contains a provision expressly banning excessive pricing, but item III of Law no. 12.529 article 36 consider “arbitrarily increasing profits” an antitrust violation. Therefore, it will be necessary to watch how precedents will evolve.

4. Price-Based and Non-Price-Based Abuse

As the distinction between exploitative and exclusionary abuse, legal provisions concerning unilateral anticompetitive conduct do not distinguish between price-based and non-price-based abuse. Similarly, CADE’s precedents do not establish different parameters for these type of practices. The only exception is predatory pricing, that is subject to particular tests.

5. Enforcement

5.1. Decision-Making Practice

There is no official data regarding the number of cases concerning the prohibition of anticompetitive unilateral conduct decided by CADE or by the courts in Brazil, therefore it is not possible to compare this number in relation to the total of cases decided. However, we can estimate, considering our experience, that 10-20% of the total of cases decided by CADE involve anticompetitive unilateral conduct.

Cases concerning anticompetitive unilateral conduct were not the focus of the Brazilian anticompetitive authority until recently, which explains this small percentage.

5.2 Competent Courts and Authorities

Law no. 12.529 of November, 30, 2011, structures the Brazilian Antitrust System - SBDC and sets out measures to prevent and restrain antitrust violations.

This system is composed by the Administrative Council for Economic Defense - CADE – and by the Secretariat of Economic Monitoring of the Ministry of the Treasury.

CADE is a federal administrative authority part of the Ministry of Justice, with offices and legal venue in the Federal District, holding power set forth by Law.

CADE structure is comprised of the following bodies: the Administrative Tribunal; the General Superintendence; and the Department of Economic Studies.

CADE is the administrative authority entitled to investigate and decide whether an antitrust violation has occurred, applying the penalties set forth by Law.

Though there is a recurrent debate about the limits of judicial review of CADE's decisions, it is well established that administrative decisions are subject judicial review if the Federal Statute is violated.

Furthermore, article 47 of Law no. 12.529 expressly allows any party harmed by an antitrust violation to file lawsuits in courts to defend its individual or collective interests, obtain cessation of the violations and redress losses and damages suffered.

There are no specialized courts in the Brazilian Judiciary to decide questions involving antitrust violations.

In addition to administrative enforcement by CADE and private enforcement, Competition Law can also be subject of actions by Public Prosecutors if they can establish standing to defend the interests of consumers in general.

Relatedly, other regulatory agencies can enforce specific competition rules (i.e. the Central Bank is entitled to consider competition issues in clearing mergers among banks).

5.3 Approach Followed by Competent Courts and Authorities

It is not easy to identify a particular approach or standard of harm in the decisional practice of the competition authority. 'Harm' is usually defined by CADE as the occurrence of negative effects against competition that are not outweighed by gains

in economic efficiency. Regarding the interpretation of 'abuse', the analysis of 'harm' involves items (ii) and (iii) described above.

The ultimate objective of competition law in Brazil is the protection of consumers' welfare. Therefore the negative effects against competition that constitute 'harm' are the possible effects that may lower consumers' welfare.

A common criticism against the administrative investigation of unilateral conducts is the problem of time. Investigations are time consuming and final decision take several years.