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**Questionnaire for question A**

**Is the concept of the abuse of relative market power beyond market**

**dominance necessary to ensure a functioning competition and what criteria should be used to assess it?**

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**THE ABUSE OF RELATIVE MARKET POWER BEYOND MARKET DOMINANCE AS A NECESSARY CONCEPT TO ENSURE A FUNCTIONING COMPETITION**

# By João Marcelo de Lima Assafim[[1]](#footnote-1).

# INTRODUCTION: ORIGIN AND DEVELOPMENT OF THE RULES IN BRAZILIAN JURISDICTION[[2]](#footnote-2)

**I.1. POSITIVE LAW: ABUSE OF A DOMINANT POSITION, RELATIVE MARKET POWER AND ABUSE OF ECONOMIC DEPENDENCE**

**I.1.1. POSITIVE LAW AND ITS ORIGIN**

1. The abuse of economic dependence appears as a variant of the abuse of a dominant position, however, with the position of relative dominance, situations in which it describes a catalog of restrictions arising from legal relationships in which **the bargaining power is unbalanced. The imbalance between the parties** to the point of allowing a lack of interaction between sellers and buyers[[3]](#footnote-3) (which can be seen as a lack or failure of consensus), resulting in the abuse of bargaining power. In this case, the abuse of rights allows for the occurrence of defects in the conclusion and completion of the commercial contract (in the convergence of opposing expressions of will), whose potential externalities are distorted competitive relations with an impact on conditions, quantities and price formation, generating competitive and pecuniary advantages for the dominant party to the detriment of the subordinate party, which the Brazilian legislator has called, in the context of antitrust discipline, **arbitrary profits**[[4]](#footnote-4). Indeed, the lack of consensus tends to have immediate civil effects, such as the non-existence of an objective legal relationship or law between the parties.

1. On the other hand, in Brazilian law there are elements related to **objective good faith** which lead to the perception that the **autonomy of will is in crisis**[[5]](#footnote-5) (hence the consecration of the Latin brocardo *rebus* *sic standibus*). Regardless of the aspects that infuse the dogmatic rigor[[6]](#footnote-6) of contracts and the protection of consensus inherent in their respective legal regime[[7]](#footnote-7), the imposition of contractual conditions tends to have competitive effects. The question is: in which institute of positive law and in which precedents?
2. The first question would be to ascertain whether, to what extent, conduct that involves restrictions practiced by agents who do not hold a position of formal dominance in a given relevant market could imply an antitrust concern and eventually violation[[8]](#footnote-8).
3. There is a controversy in the literature, as part of it believes that any damages resulting from the abuse of a relative dominant position or the abuse of bargaining power would be restricted to the civil discipline of civil liability or, where appropriate[[9]](#footnote-9), the mercantile discipline, as far as private law refers to the repression of unfair competition[[10]](#footnote-10) (pecuniary compensation), as it supposedly has no impact on the market.
4. Despite the polemics of the debate, the fact is that Brazilian positive law is inspired by the literalness of European Community law (in the current TFEU) not only in the discipline of abuse of a dominant position (art. 86, renumbered to 82 and now 102) but also in the imported text of article 101 of TFEU (born 85, renumbered to 81 and now 101) in relation to agreements (commercial contracts), despite the counterpoint of part of the literature regarding the methods of interpretation.
5. In Brazil, paragraph 3 of article 36 of the Competition Defense Law (Law number 12.529, of June 11, 2011)[[11]](#footnote-11) lists the conducts that are restrictive to the freedom to compete and, although not necessarily illegal per se (*per se*) against the economic order (because economic analysis[[12]](#footnote-12) can justify exemptions by demonstrating compensations[[13]](#footnote-13)), among which are listed in sections I and III, conducts that - in theory in the form of the origin in art. 101.1 of TFEU - stand out as categories of restrictions that may be independent of a situation of dominant position in a market in order to be practiced (*limiting, distorting or in any way harming free competition or free enterprise [I]* and *arbitrarily increasing profits[III]* ).
6. Article 36 of LDC establishes this.

*Art. 36. Violations of the economic order constitute, regardless of guilt, acts in any form that have as their purpose or may produce the following effects, even if they are not achieved:*

*I - limit, distort or in any way harm free competition[[14]](#footnote-14) or free enterprise;*

*II - dominate the relevant market for goods or services;*

*III - arbitrarily increase profits; and*

*IV - abusively exercise a dominant position.*

1. Despite the fact that part of the literature dedicated to the study of administrative decisions may eventually understand that in Brazil there would not be a hypothesis of **antitrust infringement by agents without a position of control** (perhaps due to the influence of the American structure-conduct-performance criterion partially interpreted and, eventually, uncontained by the apparent opacity in the **delimitation of the scope of application of the different categories of conduct** of originally European positivization in a certain number of administrative precedents)[[15]](#footnote-15), a free philological interpretation of the provision **does not seem to ratify this understanding in an obvious logical conclusion**.
2. On the contrary, dominant position or market power is a requirement for an antitrust violation exclusively in section IV (a conclusion ratified by the criterion for analyzing conduct, especially horizontal conduct - but not restricted to it). Even so, **there does not seem to be a rigid delimitation** (or presumption *iure et de jure*) of what would be **dominant position**, since the forecast of 20% market share (as some kind of threshold) is just a reference[[16]](#footnote-16), based on a relative presumption (*iuris tantum*), subject to change as a result of the characteristics of each market. In fact, he certain origin of the number is unknown, but it seems to tacitly coincide or somehow try converse with the criteria of the HHI (*Herfindahl Hirschman Index*), even without mentioning it in the text of the Law.

1. In this sense, the literature[[17]](#footnote-17) rightly indicates that item III (of the heading of art. 36 of LDC) in Brazilian law would be the expression in positive antitrust law of the conduct designated in the European Union and its Member States as **abuse of economic dependence** or in Japan, Taiwan and Korea as **abuse of bargaining power**. One cannot fail to mention the European contributions of French law (Art. L.420-2 of the Code de Commerce) and German competition law in paragraph 20 of GWB. In short, the same phenomenon: a species of **abuse of right** genre of article 187 of the Brazilian Civil Code.
2. Thus, it can be said that in Brazil, the rules on abuse of economic dependence fall within the scope of competition law and can be applied to any contractual relationship that generates competitive repercussions, notably in asymmetric markets or market failures, but not necessarily restricted to these.
3. However, the phenomenon that occurs in the competitive hypothesis, that is, the **unilateral imposition of conditions and/or price above normal market conditions** and competition generating negative externalities and damage to individuals that may imply the violation of provisions of both the **general part** and the special part of the Civil Code. Thus, to begin the analysis, the constraint of subjective right in the discipline of the unlawful act applies (art. 186 of CC).
4. Along these lines, the hypothesis of abuse of bargain power (*poder de barganha*) tends to imply abuse of law in accordance with the legal provision of article 187[[18]](#footnote-18) of the Brazilian Civil Code[[19]](#footnote-19), and falls under its respective legal-dogmatic umbrella. The intention to exercise legal power by its agent beyond the limits of his or her sphere of legal power, whether it is a faculty or a property right, implies abuse perpetrated in order to carry out an unlawful act. In fact, the general discipline of civil law may, in the event of damage, imply compensation by application of article 927 of the Civil Code and, ultimately, in the event of fraud against creditors or confusion of assets, or even the lack of domicile which prevents the assignment of assets as collateral in the event of liability (which makes non-resident companies depersonalized entities), may imply the disregard of the legal personality by determination of article 50 of the Civil Code.
5. With regard to the special discipline of contracts, the protection of consensus is one of the essential elements of the contract in Brazilian law. Article 421 of the Civil Code of 2002 states the following: “*contractual freedom shall be exercised within the limits of the social function of the contract*.” Positive law determines that, although the parties have the autonomy of will to establish the content and terms of the agreement, the exercise of the freedom to contract is subject to limits for the sake of **preserving the public interest**. In fact, the public interest is an **unavailable legal asset** under Brazilian law (public policy).
6. Consensus is the cornerstone of the objective legal relationship, so it should not be interpreted as a mere convergence or juxtaposition of isolated wills, but rather as a perfected agreement, built on the principles of objective good faith[[20]](#footnote-20) (art. 422 of CC), **social function of the contract** (art. 421) and the material equivalence of benefits. Brazilian jurisprudence and doctrine recognize that the protection of consensus aims to ensure not only the free expression of will, but also the process of forming the consensus that precedes it in a way that is ethical, transparent and compatible with the trust placed by the parties in the legal relationship born at the end of the **subjective phase** of the contract (the negotiation). In effect, the subjective legal relationship does not generate law between the parties, but it does generate civil liability. Thus, the **objective legal relationship** that creates law between the parties arises from consensus.
7. Thus, the protection of consensus is not restricted to the sterile interpretation of the literal nature of contracts, but requires an examination of the real intention of the parties (including the reliability of the information disclosed in the subjective phase) and the balance of benefits in the form of articles 421-A[[21]](#footnote-21) and 422 of the Civil Code. The perception of the social function of the market derives from the evolution of Brazilian contract law, which emphasizes the protection of consensus, interpreted in the light of principles of justice and social function that strive for solidarity, balance and cooperation within obligatory relationships[[22]](#footnote-22), **mitigating possible abuses and protecting the vulnerable party**. Indeed, despite the traditional rejection by certain schools of competition law of matters relating to political issues (*political issues*), the constitutional values[[23]](#footnote-23) of preserving the vulnerable party and micro and small enterprises (MSEs) from the bargaining power of big players and their abuse are indeed among the **informing principles of mercantile law**, pass strongly through consumer law and land softly on the great platform of competition law. It may embrace antitrust concerns. Competition law is the law that limits the freedom to compete, which, of course, acts as a universal solvent for the discipline of economic activity, protecting the convergence in the market of **legal interests**[[24]](#footnote-24) protected by the two previous disciplines (civil law and consumer law).
8. The law determines that the **community** is the holder of the **legal asset** protected by antitrust law[[25]](#footnote-25). Well, given the public interest that underlies individual homogeneous, collective and diffuse rights, this is an unavailable legal asset. According to article 219 of the Federative Republic of Brazil Constitution, this legal asset, community heritage, is the environment in which exchange takes place in the country: the national market.
9. In the field of consumer relations, for example, the abuse of economic dependence justifies a specific discipline for abusive clauses and offers [[26]](#footnote-26), considered **null and void[[27]](#footnote-27)** (as in European competition law). In this sense, the abuse of economic dependence can achieve discrepant results in certain aspects in the analysis of civil, consumer and antitrust law, and, on the latter side, discrepant results in certain aspects in the administrative and judicial spheres as well.
10. Well, to a certain extent, it shall come as no surprise to find a rarefied environment in the precedents of the Brazilian antitrust authority regarding the abuse of a relative dominant position[[28]](#footnote-28). However, interpretation by the administrative authorities is not immune to review by the judiciary, and in this context, in particular, systemic interpretation allows for a series of legal alternatives in Brazilian law[[29]](#footnote-29). Perhaps for this reason, the “*maximalist theory*” of the scope of consumer law has gained ground in order to equate micro and small businesses with consumers, due to the hyposufficiency (technical and economic) or economic subordination of SMEs in relation to suppliers and purchasers. Although the break in the scope of application comes with difficulties of technical justification from the point of view of dogma, it is clearly a legitimate attempt to meet social demand in the absence of a more forceful response from the antitrust authorities.
11. Well, as already mentioned, the criterion adopted by the *policy maker* in Public Administration is not immutable in judicial sphere. Review of CADE’s decisions is possible because it is a “binding administrative act” (*ato adiministrativo vinculado*, unlike discretionary administrative acts, which do not merit judicial review in Brazilian law). For example, it is not uncommon for convictions for abuse of a dominant position, or in horizontal agreements, by CADE’s Administrative Court to be received by the Federal Courts and Tribunals[[30]](#footnote-30) (jurisdiction as to the person, since CADE is a federal authority) or in collective actions (public civil actions) in defense of diffuse, collective or homogeneous individual interests to be reformed or ratified. The same can happen in complaints of unilateral conduct regarding abuse of a dominant position and, especially, abuse of economic dependence.
12. Along these lines, if the Administrative Court eventually decides, for example, an administrative process based on criteria more inspired by a particular school of antitrust thought, such as the so called “Chicago consensus”[[31]](#footnote-31) or even the nuancing effect of Post-Chicago thought, it would not prevent a particular Federal Regional Court (such as the 2nd Region), for example, from basing its decision on the interpretation of positive law according to the integrative function of civil law or even on the basis of the German civil law dogmatics, of the Frankfurt School or even the French civil law, based on a system of prohibitions and exemptions (the economic analysis of compensation is used to justify exemptions) possibly more suited to the civil law logic of the Brazilian system.
13. In addition, there may also be a judicial solution arising from the systemic interpretation of the Brazilian legal system. In this context, there is an “inflection in the curve” of understandings in antitrust matters in Brazil. The first signs of a wide-ranging review are in the “gestation” of the regulation of digital platforms[[32]](#footnote-32), which, as a result of the structural asymmetry of the respective relevant markets, should imply changes in the analysis and control criteria, as well as institutional improvements and in the organization chart of the Brazilian competition authotity, the Administrative Council for Economic Defense (CADE)[[33]](#footnote-33). The logic of this new regulation is similar to the European DMA.
14. In this sense, the Ministry of Finance’s Public Taking of Subsidies, in addition to previous legislative initiatives, has its technical note enshrined in bills currently in the process and, in the wake of the trade dispute with the US, in two more bills aimed at regulating personal data (under the attribution of the National Data Protection Agency - ANPD) and the defense of competition in the new economy (under the attribution of the Administrative Council for Economic Defense - CADE). The possibility of regulating vertical restrictions as per se prohibition may change the antitrust criteria and even change the notification rules according to the new ex ante control. The following question remains: do behavioral solutions through remedies still work in asymmetric markets? Or is it time for structural solutions? The fact is certain that asymmetric markets create conglomerate problems and abuse of bargaining power in vertical relationships.
15. The ex-ante control is in the Brazilian system *de lege ferenda*.

# BILLS TO REGULATE DIGITAL PLATFORMS IN BRAZIL: DATA PROTECTION AND COMPETITION.

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| --- | --- | --- | --- |
| Project / Proposal | Author / Origin | Central theme | Current situation |
| PL 2768/2022 | João Maia (PL/RN) | General regulation of platforms | Awaiting opinion in the House committee |
| Government project (2025) | Federal Government (Lula) | Regulation of big tech and social networks | In preparation, expected to be sent to Congress |
| PL 1068/2025 (CIDE-Detox Digital) | Alex Santana (PL) | Tax on platforms to fund healthy use policies | In progress in the Chamber |
| PL 2630/2020 (Fake News Bill) | Alessandro Vieira (Senate) | Content moderation and transparency | Archived April 2024 |

**I.1.2. THE NATURE OF THE RULES**

1. The rules applicable to the protection of competition policy in Brazil have a constitutional basis. Thus, we can reproduce the reasoning of the CDCOR technical note: The economic and competition reasons that justify regulation in Brazil are the same as those that justify it in the context of the discipline of the economic order in the form of article 219 of the Federal Constitution, which designates the market as the patrimony of the Brazilian people. Within this scope, which is strengthened by other provisions, is the protection of the right to development (inc. IV of art. 3 and art. 218 of the CRFB)[[34]](#footnote-34), dignity (item III of art. 1 of the CRFB), consumer welfare, interaction between the parties and, finally, the social function of work and free enterprise (inc. IV of art. 1 of the CRFB) through free competition and the equitable distribution of the results of economic activity (art. 170 of the CRFB), the encouragement and protection of the entrepreneurial activity of micro and small enterprises, so that, at the end of the day, by guaranteeing the right to development of citizens and nationals (items I to IV of art. 3 of the CRFB), jobs and income are generated for Brazilian citizens. In this sense, the catalyst for all the factors that make up the economic order is the market which, in turn, is a direct result of the sum of the assets of Brazilian citizens (art. 219 of the CRFB) and, therefore, a national asset, an unavailable public interest.
2. This, then, is the age-old problem of wealth distribution. The merger of income due to the structural merger resulting from the formation of monopolies implies allocative inefficiency, and when it passes through the famine, the impoverishment of the Brazilian population as well as the impact on public entities, such as negative externalities imposed on public managers (in charge of public purchases), the public purse and public policies.
3. Positive law deals with the protection of consensus and the so-called “crisis of the autonomy of will” in a systemic way. Well then, it would be correct to say that, although in terms of nature, these rules are based on the civil discipline of contracts and the protection of consensus, they have their origins in antitrust provisions (item III of the heading and paragraph 3, both of article 36 of LDC), especially with regard to the projection of their effects on competition.
4. In this sense, although the administrative interpretation may eventually disagree with or act to discredit in its decisions, for the most part, the antitrust analysis of abuse of a relative dominant position, on the one hand, the judiciary, on the other, can use positive antitrust law with a different perception. In this regard, the relatively recent creation of Federal Courts specializing in the defense of free competition, within the Federal Regional Court of the Second Region[[35]](#footnote-35) (states of Rio de Janeiro and Espírito Santo), is noteworthy. Stakeholders are looking forward to the answers that this institutional legal improvement can provide in the near future.

**I.1.3. THE DEBATES IN NATIONAL LITERATURE**

1. There are a number of ongoing debates on the issue. This is because the abuse of economic dependence has its foundations in the cornerstone of antitrust law: its **objectives**. This is where the literature diverges. The debate on the foundations of antitrust is certainly not the privilege of the Brazilian competition system. It goes back a long way. For example, the catalog of objectives debated in the legislative process that created the Sherman Act already listed, alongside consumer welfare, the defense of interaction between sellers and buyers. In effect, this is the protection of consensus against distortions that are not to be confused with the category of abuse of a dominant position in a given relevant market. Although there are jurists who advocate an interpretation that indicates that the essential element (or requirement) of antitrust infringement is the position of dominance of its active agent, and therefore ruling out everything that supposedly does not fit within the traditional interpretation of abuse of a dominant position and thus restricting positive law considering there would not be an antitrust concern for the abuse of bargain power. Eventhoug, this does not mean that the biased interpretation is the only one.
2. On the contrary, this restrictive understanding of the objective scope of application of antitrust law (acts objectively covered by the rule), in addition to implying an irregular clipping of the literality of positive law, disregards the history and origins of the application of the abuse of economic dependence in Brazilian antitrust law[[36]](#footnote-36).
3. The historical background explains much of the debate. The restrictive interpretation of the antitrust rule may have been a consequence of the first rule, Law no. 4.137/1962, of September 10, 1962 (establishes rules to repress infractions against the economic order) which, in addition to bringing to light the concept of company in Brazil, was effectively a law to repress the abuse of economic power. In times of hyperinflation and an economy closed by the import substitution policy instituted by President Juscelino Kubitschek (which replaced consumer goods with capital goods), this was a rule with a literal interpretation criterion (literalistic) used especially to prevent the abuse of bargaining power in **technology transfer contracts**. This was the first institute to discipline the abuse of bargaining power in vertical agreements, which provided for the notification of technology transfer contracts.
4. At this time, in the mid-1970s, the Cartagena Agreement inspired the creation in Brazil of Normative Act No. 15 of September 11, 1975, which created the mandatory regulation of technology transfer contracts on the basis of Law No. 15 of September 11, 1975. 4.137/1962 (the first economic power abuse law) and related legislation such as foreign capital (Law no. 4131/1962) and foreign trade taxation (such as the Income Tax Regulations and Resolution no. 436 of the Ministry of Finance). Under this system, technology transfer contracts had to be notified ex-ante to the Contracts Directorate of the National Institute of Industrial Property, whose registration in the public register was a requirement for exchange transactions, remittances and tax deductibility (exchange, tax and competition effects). In fact, the hypothesis of abuse of bargaining power was repressed by a “literalistic” criterion of prohibitions of clauses considered restrictive. In later years, even after deregulation by INPI Resolution no. 22, technical cooperation agreements have been signed between CADE and INPI, the most recent being in 2018[[37]](#footnote-37).
5. After the promulgation of the 1988 Constitution, Law no. 8.158/1990 changed the landscape, which only truly began to have an antitrust function after the monetary stability achieved through the Real plan. Since the beginning of Brazilian antitrust legislation, with the enactment of Law No. 8.884/1994, the defense of competition in Brazil has been clearly inspired by the treatment of the matter in the European Union. The aforementioned article 36 fully reproduces article 20 of the previous law, which in turn is clearly inspired by article 101.1 of the Treaty on the Functioning of the European Union.
6. The literature tries to punctuate this perception of competitive discipline, especially when it comes to long-term contracts, which can have repercussions on models or a pattern in the market. Some prominent authors, such as Professor Calixto Salomão Filho, focus on the abuse of economic dependence in long-term contracts in a legal relationship with three main vectors of dependence, with emphasis on distribution contracts and, in this sense, why not mention, other commercial contracts[[38]](#footnote-38) such as, for example, representation contracts, shopping center contracts, franchising and, why not mention, technology transfer contracts[[39]](#footnote-39) (an umbrella that covers patent licenses[[40]](#footnote-40), trademarks, know-how and technical assistance). Indeed, the lessons of Professor Botana Agra show that exclusives are not necessarily incompatible with Article 36 of LDC.
7. In these cases, dependence occurs on the part of the party, as Professor Calixto Salomão Filho describes, in long-lasting legal relationships, in which the hypothesis of dependence between parties stands out in contracts of long duration, concluded on certain elements. Of course, this is not the only category of agreements subject to abuse of economic dependence, but it is the one that deserves to be highlighted because it involves legal relationships (contracts) characterized by dependence arising from the difficulty or impossibility for the subordinate party to replace the product or service that is the subject of such agreements, either because of the competitive disadvantage arising from asymmetric bargaining power, or due to the coordination of other factors, which prevent the subordinate party from withdrawing from the agreement and continuing in the market, including, among these determinants, the characteristics of the market (which can even replicate market asymmetries and, in some way, standardize contracting conditions by **spreading adhesion contracts**[[41]](#footnote-41)).

1. The literature contributes to this interpretation. In the same vein, Professor Paula Forgioni[[42]](#footnote-42) of the University of São Paulo, notes the possibility of anti-competitive conduct by agents in a position of relative market dominance:

“*It is also important to add the institute of the abuse of economic dependence, that is, the abuse perpetrated against the economic agent who is in a position of subjection in relation to the other. Recognizing situations of economic dependence as an antitrust offense requires opening up new hermeneutic paths, entering the area of unilateral conduct by economic agents that (...) have the capacity to alter the correct functioning of the market.” Abuse of economic dependence can lead to situations (...) such as increased costs for competitors and barriers to entry into new markets. As an example, the cementing of a distribution channel that could be used by a competitor, the adoption of exclusivity at points of sale, preventing competitors from accessing distribution channels*”[[43]](#footnote-43)

1. However, as said before, this doesn’t mean that some Brazilian literature can’t diverge and thus interpret positive law in a restrictive or limited way. On the contrary, there are schools of thought that believe that there is no evidence of an antitrust violation without the agent holding a position of dominance having a relevant impact. Thus, if the interpreter chooses to resort to analytical criteria in some way linked to an interpretative source that has little to do with Brazilian antitrust law in its origin (it is not difficult to ascertain the fact that the literal text of the Sherman Act is more distant from article 36 of LDC than the text of art. 101.1 of TFEU), the antitrust law of the United States, will tend to conclude that the conduct typified in the LDC should not be considered illegal when practiced by agents who do not hold a position of formal dominance in the market under analysis.
2. In this sense, as an illustration of the scenario, it is notorious that part of the Brazilian antitrust literature claims part of US law, from 1978 onwards (with the paradigmatic work of Robert Bork and its subsequent derivations[[44]](#footnote-44)), greatly influenced by what was later called the Chicago school, has reverberated in Brazilian antitrust interpretation by renowned research. Likewise, the intellectual production of a sector of academia has influenced a significant part of administrative precedents. But that doesn’t mean that biased perceptions inspired by a supposed sort of laissez-faire doctrine in Brazil (which doesn’t look all that much like the Sherman Act when it was passed in 1890) claimed by certain interest groups, in relation to market practices perhaps beyond the scope of positive law, **solve the serious problem of competitive asymmetries**.
3. On the contrary, the hypothesis of shrinking the scope of application of LDC **does not seem to be able to deal with various economic problems that arise in markets with great potential for structural merger, market failures and/or concerted business methods**.
4. Well, in fact, concentrated markets end up having the effect of **concerting business** methods and “popularizing” adhesion contracts outside of consumer relations and beyond the original relevant market (upstream and downstream). Thus, adding this to a catalog of problems that can arise from an economy with typical characteristics of high levels of structural merger, the debate arises about the evolution or involution of antitrust in Brazil[[45]](#footnote-45).
5. Well, in markets with certain characteristics, distributors often go to a supplier who is subject to some kind of **exclusivity clause** and therefore become economically dependent on the counterparty. Some of these phenomena can occur in intellectual property license contracts (such as patents, for example) where the combination of legal and contractual exclusivity allows interference in the licensee’s gestation[[46]](#footnote-46). In this scenario, during the **term of the contract**, the supplier can impose abrupt changes on the subordinate purchaser, even though they are often permitted in the instruments signed, which can adversely affect the ability of the distributor/buyer (subordinate party) to operate in the market during the term of the contract or even independently.
6. In asymmetric markets, this phenomenon is clear. For example, in a structurally concentrated market in which there are three competitors, but one of which does not hold a position of dominance according to the legal presumption, but does hold a relative dominant position in relation to its distributors (or suppliers) in long contracts (whether successive and/or lasting) and with an exclusivity clause (to the disadvantage of subordinate distributors), if, by hypothesis, and commits one of the conducts described in positive law (in the aforementioned clauses of the third paragraph of article 36 of LDC - limiting, distorting or in any way harming free competition or free enterprise and, notably, acting to arbitrarily increase profits) may be subject to restrictions whose aim is to distort the price formation process, impose obligations, exclude incumbents and create barriers to entry[[47]](#footnote-47).
7. This means that such restrictions in asymmetric markets shall not only cause damage to the individual, but also to the market insofar as they tend to repeat in the market the clauses imposed in **adhesion contracts** or with abuse of bargaining power which, instead of generating a pro-competitive effect and efficiencies, on the contrary, shall tend to constitute fertile ground for **anti-competitive restrictions** and/or **uniformization of contracting conditions** (and not a counterpoint to the structural merger already established), in short, inefficiency.
8. The problem is even more evident and exposed in markets that have suffered a wave of vertical mergers, such as the supplementary health markets in Brazil. A series of merger notifications[[48]](#footnote-48) occurred following associations[[49]](#footnote-49), consolidations and acquisitions of health plan operators with hospitals and clinical analysis laboratories[[50]](#footnote-50). Here is a summary of vertical mergers in the supplementary health sector.

# Mergers - Supplementary Health (CADE) - Expanded Version

Table showing the main Mergers in supplementary health analyzed by CADE, highlighting the recurring concern with verticalization, the asymmetry of information between operators and providers, and the structural and behavioral remedies applied. The table below summarizes the operations and then each case is detailed with additional comments taken from votes, economic opinions and technical analyses.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Process / Case | Parties involved | Market / Sector | Competitive risks | Results / Remedies |
| 08700.002346/2019-85 | Athena Saúde Espírito Santo Holding S.A. - purchasing suppliers | Health plans / hospitals | Information asymmetry; risk of market closure; reduced competition | Approved with restrictions and monitoring |
| Hapvida - Plamed (portfolio transfer) | Hapvida acquired Plamed’s portfolio | Health plans | Verticalization; exclusion of local competitors; increase in Hapvida’s market power | Approved with conditions and obligations to maintain contracts |
| Ream / Rede D’Or - SulAmérica | Rede D’Or (Ream) acquired a stake in SulAmérica | Operators and hospital network | Vertical integration; risk of excluding rival hospitals; bargaining power over doctors and operators | Approved with behavioral remedies and limits to integration |
| 08700.004046/2022-36 (Hapvida - Smile) | Hapvida acquires Smile operator | Dental health plans | Reduced competition; regional merger; risk of price rises | Approved with restrictions and conduct monitoring |
| DaVita - Brasnefro (2025) | DaVita acquired Brasnefro (dialysis services) | Dialysis services | High merger; barriers to entry; risk of price increases and exclusion of rivals | Approved with partial divestment and contractual obligations |
| Unimed Cascavel - Polyclinic Hospital | Unimed Cascavel acquires regional hospital | Health plans / hospital | Vertical integration; risk of excluding independent providers increased local power | Approved with commitments to maintain third-party access for 10 years |

1. After that, the imposition of exclusives and unilateral terminations can be imposed on subordinate parties, and health professionals, doctors, hospitals and laboratories are not given the opportunity to negotiate conditions[[51]](#footnote-51). This scenario could apply, for example, to doctors who are traditional clients of the absorbed hospital where they have performed surgeries for several years, but since they are not accredited professionals under the acquiring Operator’s plan, they are exposed to the imposition of new clauses and conditions and, thus, hypothetically, unilaterally excluded from long-term or repeated contracts with the hospital (creating a market reserve for doctors -professional or enterprise - accredited by the operator). In this hypothesis, the subordinate party suffers from an abuse of bargaining power (or abuse of economic dependence) with an impact on consumer rights, i.e. the doctor’s patient (who is prevented from receiving the surgical intervention by an extra price restriction)[[52]](#footnote-52). Even if the patient (consumer or “enterprise”[[53]](#footnote-53)) could quickly change their trusted doctor or hospital, they would still be subject to cost and possibly a shortage of professionals. In this case, in an asymmetrical relevant market, market foreclosure by exclusionary conduct occurs as a result of abuse of a dominant position, and even so, the adverse effects on the consumer if the position of dominance is considered relative by the authorities. However, as in vertical integration, the economic agent chooses in which link of the production scale he will make a profit (it is possible to distort the price formation process in the other links as well) and so the problem of economic dependence tends to get worse.
2. In fact, this situation requires the use of instruments to protect the consensus and repair the respective effects projected on the market and, where appropriate, repair any damages[[54]](#footnote-54).

**I.1.4. STAKEHOLDERS AND SECTORS**

1. This issue is a field of tension because in an economy with asymmetrical markets (in Brazil, we can mention supplementary health, pharmaceuticals, medical equipment, prostheses and orthoses, seed varieties, automobiles, oil, banking, animal protein, among others) the leading entrepreneurs in concentrated sectors tend to use their political pressure on institutions to try to influence them in the legislative and regulatory spheres in order to reduce social control over their business methods[[55]](#footnote-55). In fact, theses created by *stakeholders* are usually presented to the public administration and the National Congress in the form of bills and proposals to amend *soft law.* Or through attempts to judicially stop public consultations whose subject matter comes from *stakeholders* who do not agree with the regulatory impact report, such as the revision of the unilateral price adjustment criteria for health plans.

# 2. CRITERIA FOR DEFINING RELATIVE MARKET POWER OR SIMILAR CONCEPTS

* 1. **DEFINITION OF RELATIVE MARKET POWER OR SIMILAR CONCEPTS**
1. The positive law set out in the text of Law No. 12.529/2011 does not provide an express definition of “relative market power” or “economic dependence”. However, paragraph 3 of article 36 admits anti-competitive practices even without a dominant position, especially in item III (**arbitrarily increasing profits**), which the doctrine has interpreted as a normative opening to encompass the concept of economic dependence or relative power.
2. There is a relationship between the notion of abuse of economic dependence and restrictions arising from potential abuse of rights or abuse of bargaining power in asymmetric markets. Academic intellectual production had examined the markets (the respective determinations of which are not so evident either from the point of view of price, product or geography) of health plans. Thus, market asymmetries allow for the incidence of problems such as adverse selection and moral hazard, which can be aggravated by constant regulatory interventions or, at the opposite extreme, regulatory omissions due to various elements, including, in some cases, capture. The study concludes that regulation has failed to reduce these asymmetries, jeopardizing the sustainability of the sector, the dominant position of plans pressuring service providers, hospitals and clinical analysis laboratories, and consumer welfare[[56]](#footnote-56).
3. In this scenario, academic research in the field of economics shows that the combination of market asymmetry and verticalized structures - which are characteristic of supplementary healthcare in Brazil - favours a persistent imbalance between operators and medical service providers (doctors, nurses, clinical analysis laboratories, etc.).
4. Thus, the supplementary health sector has substantial bargaining power on the part of health plan operators. Medical service providers face significant restrictions in acting independently or negotiating more balanced conditions. This situation is fertile ground for exclusivity practices or other restrictions that tend to deepen economic dependence.
5. One of the criteria applicable in cases of economic dependence in vertical relationships in technology markets such as the leading case of the Intellectual Proprerty Licensing between Monsanto and Bayer[[57]](#footnote-57) (plant variety, chemical and GMO patents) is to segment the relevant market downstream and upstream, between the supplier and its distributors, with a view to applying the notion of economic dependence in these legal relationships.
6. In technology transfer and franchise agreements, the supplier can benefit from market power in the secondary markets for inputs, spare parts and maintenance services (secondary and tertiary markets)[[58]](#footnote-58). This type of dominant position of the licensor-supplier is anchored in the dependence that legal or contractual exclusivity can impose on the licensed party potentially subordinated to the licensor[[59]](#footnote-59). The market within the brand (*intra brand*) becomes an environment closed by exclusivity devices (aftermarkets) and with little or no competition and, therefore, emerges as a relevant market within the brand that provides extraordinary bargaining power to the licensor or, simply, **single brand market power**.

**2.2. CRITERIA REGARDING THE NATURE OF THE LEGAL RELATIONSHIP**

1. As can be seen from the positive law and its interpretation in both conduct and associative contracts (including those for patent licenses, know-how, plant varieties, etc.), the legislation is general and does not formally differentiate according to the type of party (customer or supplier). However, case law and doctrine indicate that the abuse of economic dependence can be analyzed in both vertical (supplier/distributor) and horizontal relationships, taking into account the **unbalance of the relationship**. In fact, horizontal relations follow the **criteria and standards of proof** for this category.
2. In this sense, there is no way to encapsulate economic dependence and the respective abuse in a restrictive analysis criterion outside the category of arbitrary profits with the constitutional support of paragraph 4 of article 173 of the Federative Republic of Brazil Constitution - CRFB[[60]](#footnote-60), considering, in fact, that arbitrary profits and abuse of a dominant position are not synonymous either in the Brazilian or in the European order (notably, in the provisions of articles 101 and 102 of TFEU).
3. As already indicated, there is a list of conducts in paragraph 3 of article 36 which, it is not known for what reason, the legislator saw fit not to break down into categories (between items I to IV of the heading of article 36 of the LPI), presenting a large package with 19 items. Thus, these conducts can result from any of the sections of the heading, and have no direct or indirect relationship with section IV (as occurs, for example, in the discipline of agreements restricting free competition – *acordos restritivos* - hypothesized in art. 101 of TFEU).

**2.3. THE POWER OF INTERMEDIATION AS AN ELEMENT OF ANALYSIS**

1. Although the term **“intermediation power”** is not spelled out in the law, it can be implied in the analysis of relative market power, especially in two-sided (or more-sided) markets, digital platforms and, notably, in the supplementary health market and in conduct such as, for example, that of imposing exclusivity in advertising[[61]](#footnote-61). CADE has already analyzed cases in which the control of distribution channels or digital intermediation constituted a relevant competitive advantage. In certain situations of market asymmetry, such as that which can be observed in digital platforms and health plans where certain agents have control over the “door” of the market, such as the notion of ***gate keeper[[62]](#footnote-62)*** in the context of digital platforms[[63]](#footnote-63).
2. Therefore, the situations designated as intermediation power - in connection with the abuse of economic dependence - are those in which a company occupies a strategic position between supply and demand in such a way as to allow it to control the flow of transactions or even control access to markets throughout the production scale (which would imply an attack on the freedom to undertake protected by articles 170 and 173 of the CRFB). In some, more extreme cases, the holder of the power of intermediation could choose who buys what from whom and at what price (as can happen with a search engine). This is why, in some cases, these agents can use their intermediary position to create barriers to entry to such an extent that it would be possible to create a vertical closure of such magnitude that it crystallizes into a market failure that is difficult to solve through behavioral remedies, requiring, perhaps, regulation *ex ante*, or even a structural solution.
3. In this scenario, such agents include, for example, payment companies that control access to transactions, large retailers that concentrate monopsony power, health insurance providers (in relation to doctors, health professionals, hospitals and laboratories) and, last but not least, digital platforms (social networks, online sales platforms, delivery platforms, app stores, etc.) Situations of abuse of rights can be mentioned when the competitive advantage is used to impose unjustified or excessive commercial conditions in comparison with competing market practices, restrictions on competition by means of boycotts, advertising exclusives or technological lock-in or discriminatory refusal to contract, or obtaining disadvantages that are excessively onerous to the point of preventing the purchaser or supplier from changing technology or changing intermediaries.
4. Faced with these challenges, the collaboration of jurisprudence in the construction of the concept and the adaptation and improvement of criteria is pivotal.

**2.4. THE COLLABORATION OF JURISPRUDENCE**

1. As positive law does not expressly mention the category of restrictions known as abuse of economic dependence, the interpretation of the head of article 36 of LDC has depended to a large extent on the contribution of CADE’s literature and administrative precedents. Some cases can be mentioned, such as the **abuse of rights or misuse** in relation to bargaining power or even the abusive exercise of a relative dominant position along the production scale in typical vertical relationships.
2. Thus, restrictions on certain mergers can be a preventive response to the abuse of economic dependence. In the case of the IP license considered by the Brazilian authorities as an association between Monsanto and Bayer, CADE not only recognized and authorized the agreement but also **imposed restrictions** on the approved agreement that **limit certain clauses in contracts with purchasers of seed varieties and chemical products protected by intellectual property rights** because they subordinate Bayer to Monsanto effectively in the downstream market, and potentially in the upstream market.

233. *The imposition of any right of preference or refusal for Mansanto in relation to possible Bayer target companies, target technologies or target businesses of any kind is unacceptable, as it would result in Monsanto controlling its business operations, with the possibility of effectively blocking its expansion in the downstream market for obtaining cultivars (in which Bayer is a direct competitor of Monsoy, a Monsanto subsidiary) and even undermining its possible entry into the upstream market (as has been pointed out, Bayer has already approved and patented transgenic soybean technology - Liberty Link). This is the consecration of corporate control* ab extra *based on the supply of technology, with harmful anti-competitive effects. I don’t see any efficiency generated by this clause that could compensate for the enormous risk created. (...)*

*235. As you can see, there are no exclusivity clauses in this case for companies that have already been rejected by this Council in previous situations. However, various contractual stipulations effectively increase the costs of the licensee using transgenic technologies that compete with Monsanto’s and consequently raise the barriers to entry into these markets. Despite not requiring it, these clauses intensely and perversely induce the exclusive production of Intacta Soy by Bayer.*

*236. Furthermore, due to the vertical integration of Monsanto’s operations in the upstream and downstream links of the transgenic suja production chain, and due to the fact that only one other technology (RR1 Technology) is currently available in the transgenic suja market, I believe that these contractual obligations have their competitive implications reinforced by Monsanto’s market power.*

*237. In this sense, it is worth highlighting the position of the US competition authority, contained in the “Antitrust Guidelines for the Lincensing of Intellectual Property” (DOJ/FTC):*

*“A license that explicitly does not require exclusivity may have the effect of exclusivity if it is structured to significantly increase the licensee’s cost when using competing technologies*.”

238. *These restrictions must therefore be implemented. In addition, any other clauses that give Monsanto external influence over Bayer should be excluded from the contract.*

1. Thus, it can be concluded that the analysis of Monsanto’s technology licensing contract with Bayer (considered as an association by CADE and treated as an “concentration act”), for the *development, testing, production and commercialization, in Brazil, of varieties of seeds containing Intacta RR2 PRO technology, responsible for conferring on the plants simultaneously tolerance to glyphosate and resistance to insects, is based on the analysis of the effects of the technology market, simultaneously tolerance to glyphosate and resistance to insects* based on the analysis of the effects of the technology market, seeks to expunge from the license agreement the clauses imposed under possible **abuse of bargaining power**, notably those in which the external influence of the dominant company interferes with the acquisition of competing technologies by the subordinate (in the technology market, and, probability in the innovation market) and limits it in decisions to enter upstream or downstream markets.
2. The application of these consensus protection rules is carried out within the scope of public administration, as a rule by the Administrative Council for Economic Defense itself, but it can also be done through collaborative action with other regulatory agencies and social control bodies such as **Procon[[64]](#footnote-64)** and **Senacon** - **National Secretariat for Consumer Protection** (Ministry of Justice) and by the judiciary itself with the material analysis of questions of law or by reviewing administrative acts of CADE itself.
3. The practical application of these rules regarding abuse of economic dependence is limited in case law but is emerging in new precedents. In researching the jurisprudence of Brazilian courts and CADE itself, few cases in which the term “abuse of economic dependence” has been mentioned have arisen in environments of asymmetric markets or markets that are vertically integrated due to the growing merger of conglomerate power (such as, for example, health insurance markets in which health insurance operators, hospitals and clinical analysis laboratories are vertically associated), which reflects the dispute over the **nature of the legal good being protected** (the nature of the legal interest), the application or not, the requirements and **standard of proof** of this institute in the Brazilian legal system.
4. In this regard, it is worth mentioning a relevant court case, dealt with in case number 0115303-49.2006.8.26.0100[[65]](#footnote-65), 4th Civil Court of the São Paulo Central Court, judged at first instance in May/2008. Thus, the answer given by the Judiciary to the first question, on the applicable legal regime, is that the actual contract existing between the parties was a form of concession, and not a mere distribution as described in its written terms. Consequently, the answer given to the second question was that the termination did not take place in accordance with the legal regime applicable to the case.
5. In the Supreme (Constitutional) Court, the Special Appeal REsp 1989291, which originated in the case SP 2022/0062883-6[[66]](#footnote-66), when disciplining the distribution contract that had lasted for more than two decades, despite the disagreement between justices, applying the Civil Code and the LDC, mitigated the understanding that commercial contracts should be treated differently from civil contracts and consumer contracts, ruling out the validity of a clause considered inconsistent with the dictates of good faith, even in commercial matters. The STJ ruling determined that the requirement of full civil liability after the termination of a long-term contract does not require the nullity of a clause limiting civil liability, which, after all, recognizes economic dependence and mitigates the self-determination of the parties[[67]](#footnote-67). The first relationship between **abuse of bargaining power** and objective **good faith**.

 *“The fact that [...] has asked for full compensation for damages shows a broader claim which, logically, implicitly includes the request to remove the limitation of liability clause. Those who want more obviously want less, and it’s unnecessary to ask for this explicitly.
According to article 322, paragraph 2, of CPC, the interpretation of the request shall consider the whole of the request and shall observe the* ***principle of good faith****”.

“[...] what the judge is forbidden to do under Article 492 of the Code of Civil Procedure is to issue a decision of a different nature from that requested, as well as to order the party to pay more or to pay for something different from what was requested, but not to give less than what was requested [...]”.*

1. Next, criteria emerge from the mention of the antitrust category (in the form of item III of the caput of art. 36 of LDC): **arbitrary increase in profits**.

*“[...] the Court of São Paulo recognized that [...], a renowned multinational in the* ***field of technology****, would have taken* ***advantage of its technical and economic superiority to arbitrarily increase its profits, mortally damaging the company*** *[...].
This, with all due respect,* ***could justify breaking the contract****, but not disregarding the penalty clause, because it was provided for and serves precisely for cases in which the contracting party fails to fulfill the obligation (art. 408, Civil Code) and, in order to be demanded, it is not necessary for the creditor to allege damage (art. 416, Civil Code)”.

“[...] contracts concluded in foreign currency are legitimate, provided that payment is made by conversion into national currency [...]”.

“[...] it is correct to apply the penalty provided for in art. 1.026, §2, of CPC/2015 when the issues addressed were duly substantiated in the embargoed decision and the manifestly protelatory nature of the second motion for clarification was evidenced.”* [The highlights are ours.]

1. In the vote, the thesis that commercial contracts do not merit review was defeated.

*(VOTE) (MIN. MARCO AURÉLIO BELLIZZE)
“[...] the length of the relationship between the****contract****signed between the parties and the need for a concrete calculation of the amounts are not suitable grounds for dismissing the clause set out in the agreement.
The fact that the* ***parties have been contractually related for more than two decades*** *has* ***nothing to do*** *with the* ***nullity of the clause limiting liability****, nor even with the need to determine the amounts in liquidation.”* [The highlights are ours.] *“[...] the compensation limitation clause, in turn, only has the function of limiting the compensation amount, if the creditor proves the damage committed by the debtor, its extent and the respective causal link”.*

1. Similarly, another relevant vote of quality and technical rigor, but defeated, indicates the difference between the scope of application of civil and commercial law with regard to business contracts and the principle of freedom of contract.

*(VOTE) (MIN. NANCY ANDRIGHI)
“[...] STJ understands that ‘****Business contracts should not be treated in the same way as civil contracts in general or consumer contracts****. In these cases, contractual dirigisme is allowed.
In the former, the principles of autonomy of will and the binding force of agreements must prevail’ [...]”.

“[...] the clause limiting the extent of liability, which deals with a right available to the parties, is included in a business****contract*** *signed between large companies (for large sums),* ***there being no asymmetry between the contracting parties that would justify judicial intervention in its terms, so that the autonomy of will and the binding force of contracts****must prevail.”*

1. The winning vote, which prevailed over the rapporteur’s unsuccessful vote, enshrines the “crisis of the autonomy of the will”, highlighting the limits of the potestative freedom to manifest or impose one’s will, in order to finally bring up the situations and criteria for the nullity of clauses in a situation of increased economic dependence.

*(WINNING VOTE) (MIN. MOURA RIBEIRO)
“[...] if, on the one hand, in private relations in general (civil and business), clauses limiting liability can, as a rule, be freely agreed, on the other hand it is important to note, for the resolution of the present controversy, that the doctrine points out some causes of restriction of this freedom, which are founded on cogent objective law and on the general duty not to enrich oneself unlawfully”.

“[...] clauses limiting liability may be* ***declared null and void*** *when: i) they violate a rule of public policy; ii) they represent the limitation of liability arising from intentional or seriously culpable conduct; iii) they exempt from indemnity the default of the principal obligation, and iv) they offend the life or physical integrity of persons.”

“[...] an unjustified and unsustainable increase in contractual economic dependence, resulting in the termination of the pact. It is well known that economic dependence can be an inherent part of the agreement and the type of business. Excess, however, creates an imbalance that cannot be overlooked, otherwise the relationship shall become dysfunctional, especially when considering the main objective of business contracts, which is profit for both parties and free commercial activity.”*“[...] *the case at hand clearly presents a situation in which* ***the limitation of liability clause****, in line with the grounds outlined above,* ***can be set aside, in order to ascertain the real extent of the damage suffered by the plaintiff and the full reparation of this damage*** [...]”.

1. For all the above reasons, **restrictive clauses can be removed** in order to allow for the ascertainment of damage resulting from the abuse of bargaining power. In fact, a process of structural merger that is successive and prolonged over time can create an environment that is favorable to the spread of distortions due to the abuse of bargaining power. Let’s look at the supplementary health market.

# CADE’s Main Precedents – Contracts and Abuse of Intermediation Power or Relative Dominance (or Dominance cf. Relevant Market)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Case / Company | Administrative Process No. | Market / Sector | Conduct Investigated | Status / Result |
| iFood - exclusivity with restaurants | 08700.004588/2020-47 | Meal delivery | Exclusive contracts with restaurant chains | Preventive measure (2021); process underway |
| Gympass - exclusivity and MFN | 08700.004136/2020-65 | Gyms / Corporate benefits | Exclusivity and “parity” clauses (MFN) | Closed by TCC (2022) |
| OTAs (Booking, Decolar, Expedia) | 08700.005679/2016-13 | Tourism / Hospitality | Price parity clauses (MFN) | Closed by TCC |
| Google Shopping / Buscapé | 08012.010483/2011-94 | Search platforms / comparators | Auto-preference in search results | Archived 2019 (insufficient evidence) |
| Google - AdWords / Portability | 08700.005694/2013-19 | Online advertising | Restrictions on campaigns and interoperability | Filed under |
| E-Commerce Media Group vs Google | 08700.009082/2013-03 | Price comparators / search engines | Vertical leverage and exclusivity | Filed under |
| Yelp vs Google (Local Search) | 08700.003211/2016-94 | Local search / reviews | Traffic detour and self-preference | Archived by SG in 2022 |
| OLX (Marketplace) | 08700.002958/2022-73 | Online classifieds / Marketplace | Vertical pipelines and linking services | Under review |

1. The criteria for antitrust analysis are directly related to each of the respective categories of restrictions on free competition. Well then, if the categories of restrictions on free competition have been classified as prohibited conduct in the substantive law provided for in the text of Article 36, caput and §3 of LDC, it follows that there are four independent categories. The criteria for analysis, such as dominant position (paragraphs 2 and 3 of art. 36 of LDC), degree of dependence, offenses by object in horizontal agreements and concerts, vertical restrictions and exclusivity (viable alternatives in the market) and measurement of the competitive impact (anticompetitive), are specific to each category and have been developed mainly by CADE **case law and literature**[[68]](#footnote-68).
2. As strange as this may seem to the followers of the so called “Chicago consensus”[[69]](#footnote-69), the fact is that under normal conditions, items I and III of article 36 of LDC are not directly or necessarily related to the dominant position. The reasoning is simple: by way of clarification, agreements that in the European Union would fall within the scope of Article 101 of TFEU (agreements restricting free competition), do not depend on any dominant position. The similar Article 36(I) of LDC (clearly inspired by Article 101 TFEU), when applied to commercial contracts, when such agreements use or impose (depending on the extent and use of bargaining power by the parties) **restrictive clauses** on the freedom to compete with characteristics considered to be associative, fall under general prohibitions. I.e., agreements that in some way interfere in the management of the subordinate party, whether the party is a patent licensee, know-how licensee, trademark licensee, technical assistance purchaser, a franchisee, or a motor vehicle distributor (or the other way around), with various clauses implying **exclusives[[70]](#footnote-70)** on product markets, technology and innovation, can end up in a kind of limbo between two distinct categories: merger acts and vertical conducts.
3. There is no legislative reason (itself) for the discrepancy in understanding. As far as we can see, this giving meaning evolution was probably due to a practice born of extralegal interpretation by policymakers and part of the literature (in the sense of presuming iuris tantum that vertical conduct practiced in agreements by agents without a dominant position would not affect the market, ever). This presumption led the authority to treat such agreements or respective collaborations and their consequences (economic dependence) as missing from the analysis or subject to other categories. As it has been said before, some restrictions may arise with antitrust concerns, such as, for example, because of specific conditions generally not accepted to the other party in a competitive environment. So, clause related to exclusivity or an export ban, or any other condition that permit the dominant influence of the on the subordinate’s decision-making power, directly because of restrictions the vertical contract carry on. It would be considered by the Brazilian authorities as if it were object of structural control – calling them associative contracts-.[[71]](#footnote-71) This is a way do exam the abuse of bargain power *ex ante*.
4. These contracts, therefore, are subject to notification *ex-ante* in accordance with the provisions of item IV of article 90 of LDC (Law no. 12.529/2011), which restricted the scope of application of the notification provision of the previous law, article 54 of Law no. 8884/1994 which stipulated “*the notification of all acts which, in any way manifested, could harm competition.*” The repealed Article 54 was the counterpart of Article 101.1 of TFEU, extending the scope of agreements and the concept of undertaking to acts. What some of the literature indicates as an advance of the new LDC in relation to the previous norm, given the high structural merger of certain markets (such as digital platforms[[72]](#footnote-72), banks and health plans, etc.) and the dissemination or even standardization of commercial business models applying contracts of adhesion between entrepreneurs (see secondary markets or *after markets*) and the dissemination or even standardization of commercial business models applying adhesion contracts between entrepreneurs (see secondary markets or *after markets*, technology transfer contracts, franchises and situations of technological dependence, or *lock in* in secondary markets), may, from the point of view of other observers and victims of the bargaining power of oligopolists and monopolists (and companies technologically dependent on contractual exclusives), seem like another step backwards[[73]](#footnote-73).
5. In this sense, a separate issue is that of the legal presumptions that exist in positive law. The legal presumptions about the indices needed to characterize a dominant position therefore do not apply directly to the abuse of economic dependence. Even intrinsically, with regard to the dominant position, what exists is a relative presumption (*iuris tantum*) with regard to the market share from which the existence of market power is presumed by the administrative authority (set at 20% by article 36 of LDC).
6. The dominance is power, and power is a fact. The factual presumption tends to have an impact on the flexibility of the standard of proof, which, in general terms, has no effect on controls of structures, unilateral conduct or vertical relations, but somehow works in the illicit by object that characterizes hardcore cartels (which can lead to convictions in situations without any anti-competitive effect). In fact, the discipline developed for collaboration or associative contracts, for example, the factual presumptions in horizontal collaborations end up being nuanced[[74]](#footnote-74). Well, except to assume that a vertical relationship tends not to concentrate the market.
7. Thus, once again it is worth mentioning the construction of the paradigm precedent, especially the case of the intellectual property license agreement for the Intacta transgenic soybean technology between **Monsanto and Bayer**, in clarifying the conditions of the licensor’s interference in the licensee’s business, establishing criteria on the analysis of clauses regarding economic dependence.

*212. As can be seen, these clauses (i) go beyond the scope of the legal business of the contract, (ii) go beyond the scope of the legal business and involve sufficient efficiencies to remove the competition concerns described above.*

*213. I would also point out that this conclusion seems to indicate that these clauses, by imposing restrictions that go beyond the scope of the legal business of licensing Intacta technology, would have as their very and explicit object the restriction of competition and are therefore intrinsically unlawful. The treatment of clauses is, of course, nothing new in the Council’s jurisprudence, such as the understanding given to non-competition clauses that go beyond the dimensions of the relevant market of the operation.*

*214. Another sensitive point in the analysis of the competitive impacts of this contact is the royalty collection mechanism structured by Monsanto, the so-called “Commercial Soy System”.*

*215. As explained above, the existence of an effective royalty collection system is a fundamental condition for technology development companies to operate in Brazil and even for the development of a national biotechnology market.*

*(...)*

*220. There is no question that the effective collection of royalties is a basic condition for biotechnology developers to operate in the Brazilian market. However, Monsanto’s access to some of the information contained in the “Commercial Soybean System” in particular enhances its control over the licensee and unreasonably increases the market power already held by the company, due to its significant participation in the* ***transgenic soybean technology market****. These concerns are made even more relevant by the vertical integration that exists in the sector (as described above, Monsanto operates in the downstream link of the soy production chain through its wholly-owned subsidiary Monsoy).*

*(...)*

*240. I therefore conclude with the restriction that no clause enabling Monsanto to* ***exercise external influence*** *over Bayern should remain in the contract.*

1. The CADE’s jurisprudence on collaboration between companies in commercial contracts was first set out in the paradigmatic CADE Resolution no. 10/2014[[75]](#footnote-75). This resolution will develop the provisions of Article 90(V) of LDC. According to the Guidelines, association agreements are contracts subject to the control ex-ante of horizontal and vertical mergers above a certain market share[[76]](#footnote-76).
2. This resolution was amended by CADE Resolution 17, which restricts corporate agreements to collaborative relationships **between competitors**. Thus, CADE seems to be referring the issue of abuse of bargaining power in vertical agreements to the category of conduct.
3. In the end, from the point of view of *soft law*, there is no legal or factual presumption for abuse of economic dependence, but, on the other hand, conduct and agreements resulting from abuse of relative dominance or abuse of bargaining power are not immune from conduct or agreements resulting from abuse of bargaining power or abuse of economic dependence on ex-post social and antitrust control[[77]](#footnote-77).
4. A different scenario can occur with judicial precedents. There are no express legal presumptions, but case law admits factual presumptions based on the analysis of long-term contracts, exclusivity or specific investments that generate economic dependence.
	1. **MARKET-RELATED CRITERIA**
5. There are criteria related to the market, its structure or the market shares of companies for dominance. Thus, positive law determines that *a dominant position is presumed whenever a company or group of companies is capable of unilaterally or coordinately altering market conditions or when it controls 20% (twenty percent) or more of the relevant market, and this percentage may be altered by CADE for specific sectors of the economy*.
6. That said, the definition of relevant market, market share and degree of merger are criteria used by the antitrust authority to assess market power or dominant position. In fact, even in cases where there is a relative dominant position, even when there is no dominance, the tool of economic analysis tends to be used by the judge within CADE with the application of indices. The most frequent index is still the HHI (*Herfindahl Hirschmann Index*), but the high levels of market merger in Brazil lead the authority to use other indices (C4, pareto optimum, etc.) to examine, for example, mergers. This does not mean that in the context of judicial review these analysis criteria are peaceful or essential.
7. In fact, positive law, by providing for a dominant[[78]](#footnote-78) position as a requirement for abuse in unilateral conduct, in the form of paragraph 2 of article 36 of LDC, gives rise to a legal presumption on the notion of a relevant market. However, the law does not define the relevant market or the economic criteria for determining it. So, too, in Brazil, the definition of the relevant market occurs in the light of literature, microeconomics, the antitrust tradition and guidelines as a requirement for measuring market power, determined from the possibility of substituting products, services or technology, allowing entrepreneurs possible alternatives by changing suppliers and buyers. In fact, there is still a lack of precision in the precedents on innovation markets, as well as with regard to dynamic analysis.
8. As indicated above, the rules of the Brazilian legal system relating to the abuse of economic dependence arise from civil law and the discipline of contracts and thus reach all sectors; however, it is important to note that they apply to **commercial contracts**. In fact, some of the literature considers that the protection of consensus and the freedom to undertake in the civil system should be nuanced in professional commercial relationships by the level of technical knowledge of the parties and the impact of the “crisis of the autonomy of will” on decision-making about alea and risk in strictly professional relationships. However, this issue is controversial because the civil regime for the protection of consensus is anchored in constitutional limits, such as Article 170[[79]](#footnote-79) of the Federative Republic of Brazil Constitution.
9. It should be reiterated here that the previous antitrust law (Law no. 8.884/1994[[80]](#footnote-80)) an important polemic regarding article 54, which reproduced, in its text, for some, a broad system of ex-ante notification not only for mergers for agreements (in the form of article 101 of TFEU), but for any acts restricting free competition, while others, at the time, defended that this provision was restricted to the notification of mergers in the control of structures and not to any category that could be classified as conduct.
10. See the text of Article 54 of the previous Antitrust Law, Law No. 8.884 of June 11, 1994, which is very similar to the European system of prohibitions and exemptions for agreements.

*Art. 54. Acts, in any form whatsoever, that may limit or in any way harm free competition, or result in the domination of relevant markets for goods or services, must be submitted to CADE.*

*§ Paragraph 1 CADE may authorize the acts referred to in the heading, provided that the following conditions are met:*

*I - have as their objective, cumulatively or alternatively:*

*a) increase productivity;*

*b) improve the quality of goods or services; or*

*c) to promote efficiency and technological or economic development;*

*II - the resulting benefits are distributed equitably between its participants, on the one hand, and consumers or end users, on the other;*

*III - do not imply the elimination of competition in a substantial part of the relevant market for goods and services;*

*IV - the limits strictly necessary to achieve the objectives are observed.*

*§ Paragraph 2. The acts provided for in this article may also be considered legitimate, provided that at least three of the conditions set out in the preceding paragraph are met, when they are necessary for reasons that are preponderant to the national economy and the common good, and provided that they do not harm the consumer or end user.*

*§ Paragraph 3. The acts referred to in the caput include those aimed at any form of economic merger, whether through the merger or incorporation of companies, the incorporation of a company to exercise control over companies or any form of corporate grouping, which implies the participation of a company or group of companies resulting in thirty percent or more of the relevant market, or in which any of the participants has registered annual gross revenues in the last balance sheet equivalent to 100,000,000 (one hundred million) Ufir, or a unit of a supervening value.*

*§ 3 The acts referred to in the caput include those aimed at any form of economic merger, whether through the merger or incorporation of companies, the incorporation of a company to exercise control of companies or any form of corporate grouping, which implies the participation of a company or group of companies resulting in twenty percent of a relevant market, or in which any of the participants has registered annual gross revenues in the last balance sheet equivalent to R$ 400,000,000.00 (four hundred million reais).*[*(See Provisional Measure No. 2.055-4, of 2000)*](https://www.planalto.gov.br/ccivil_03/MPV/Antigas/2055-4.htm#art1)[*(Edited by Law No. 10.149, of 12.21.2000)*](https://www.planalto.gov.br/ccivil_03/leis/L10149.htm#art1)

*§ Paragraph 4. The acts referred to in the caput must be submitted for examination, beforehand or within a maximum of fifteen working days, by sending the respective documentation in three copies to SDE, which will immediately send one copy to CADE and another to SEAE.*[*(Redação dada pela Lei nº 9.021, de 30.3.95)*](https://www.planalto.gov.br/ccivil_03/leis/L9021.htm#art5)

*§ Paragraph 5. Failure to comply with the submission deadlines set out in the previous paragraph shall be punishable by a pecuniary fine of not less than 60,000 (sixty thousand) Ufir nor more than 6,000,000 (six million) Ufir, to be applied by CADE, without prejudice to the opening of administrative proceedings, under the terms of Article 32.*

1. Therefore, although there was no doubt that Article 101.1 of TFEU was inspired by the European notification system for agreements, Article 88 of Law No. 12,529 restricted the notification obligation *ex-ante* for mergers. Nevertheless, there has been pressure from interest groups to restrict the hypothesis of ex-ante notification to mergers or arrangements with such characteristics due to the influence of one party on the management of another.

Art. 88. The parties involved in the operation will submit to CADE acts of economic merger in which, cumulatively:

I - at least one of the groups involved in the operation has recorded, in the last balance sheet, annual gross turnover or total turnover in the country, in the year prior to the operation, equivalent to or greater than R$ 400,000,000.00 (four hundred million reais); and

II - at least one other group involved in the operation has recorded, in the last balance sheet, annual gross turnover or total turnover in the country, in the year prior to the operation, equivalent to or greater than R$ 30,000,000.00 (thirty million reais).

§ Paragraph 1 The amounts mentioned in items I and II of the main body of this article may be adjusted, simultaneously or independently, as indicated by CADE’s Plenary, by inter-ministerial decree of the Ministers of State for Finance and Justice.

§ Paragraph 2 - The control of the mergers referred to in the main body of this article shall be prior and carried out within a maximum of 240 (two hundred and forty) days from the filing of the petition or its amendment.

§ Paragraph 3 Acts that fall under the provisions of the main body of this article may not be consummated before they have been assessed, under the terms of this article and the procedure set out in Chapter II of Title VI of this Law, **under penalty of nullity**, and a pecuniary fine of not less than R$ 60.000.00 (sixty thousand reais) or more than R$ 60,000,000.00 (sixty million reais), to be applied under the terms of the regulations, without prejudice to the opening of administrative proceedings, under the terms of art. 69 of this Law.

1. In fact, the system of notification ex-ante exists in the legal system and works, so far, restricted to the notification of mergers within the scope of the antitrust authority (CADE). This does not mean that *de lege ferenda* cannot work for sectors to be regulated in the future - such as, for example, agreements in relevant digital platform markets[[81]](#footnote-81).
2. However, there has been an improvement, as notification has become an essential element in the conclusion of legal transactions with regard to the nature of this formal requirement (in the conception of Civil Law[[82]](#footnote-82)), which means that certain business operations (such as consolidations, acquisitions, joint ventures, and associative contracts) must be previously analyzed and approved by CADE before being consummated, under penalty of a fine and, more than that, legally, failure to comply with the formal requirement (gun jump) implies the non-establishment of the objective legal relationship between the parties (forma ad solemnitatem). The basis for this formal requirement is Article 88 of LDC.
3. Thus, this “form” requirement in competition matters differs from the form requirement of other situations such as, for example, that of certain commercial contracts, such as **technology transfer and franchising contracts** (cf. art. 211 of the LPI, Law number 9.279, of May 14, 1996) which are subject to registration in a public register in order to be enforceable against third parties, i.e., ***ad probationem tantum***. This is a **preemptive mechanism** to prevent such operations from harming competition in the market.
4. Although the scope of application of the obligation to notify *ex-ante* does not extend *de lege lata* to all categories of restrictions on competition, notably contracts, it does reach **associative agreements[[83]](#footnote-83)** and nothing prevents it from being extended to sectors with notoriously asymmetrical markets, market failures and monopolies[[84]](#footnote-84), for example, the application of *ex-ante control* *de lege ferenda* does not refer to the regulation of digital platforms, which are essentially antitrust in nature (without dismissing the relevance of civil liability and *private advocacy*). Thus, association contracts between two potential competitors or to fund applied research for a next generation technology[[85]](#footnote-85) for a given product (such as the association of digital platform manufacturers with a view to creating standard artificial intelligence services for the two parties), make it necessary to notify CADE.
5. - Indeed, the alternatives for the dependent undertaking are evaluated, as indicated by the precedents of Monsanto-Bayer and ANFAPE v. Volkswagen/FCA/Ford[[86]](#footnote-86). In this sense, they must be analyzed according to the economic, legal and technical feasibility of substitution, taking into account barriers to entry, loyalty, exclusivity contracts and technological lock-in. Thus, this conclusion seems to indicate that *such clauses, by imposing restrictions that go beyond the scope of the legal business of licensing the technology (...), would have as their own and explicit object the restriction of competition and are, therefore, intrinsically illicit. The treatment of clauses is, of course, not new in the jurisprudence of this Council, such as the understanding given to non-competition clauses that go beyond the dimensions of the relevant market of the operation*.
6. Indeed, relative dominance by definition does not imply dominance over the relevant market, but rather extraordinary[[87]](#footnote-87) bargaining power in a specific bilateral relationship. It can coexist with dominance, but also operate in isolation in an apparently not so concentrated market, but limiting the freedom of the subordinate party, such as the imposition of binding pacts and the restriction of the freedom to undertake in other relevant markets[[88]](#footnote-88) (which in the end implies a constraint on the subjective right of the subordinate party and especially the freedom to undertake in violation of article 170 of the CRFB).
7. Although rare, there are cases in which CADE has recognized an imbalance of power in relationships without strict dominance, notably in asymmetric markets. In others, the absence of dominance has not prevented accountability for illegal conduct in the form of positive law.
8. The analysis of conduct in two-sided markets is not new. As an example, we have the print newspaper markets and, specifically, advertising exclusivity. In newspapers, for example, there is, on the one hand, the circulation of copies (sales of printed newspapers), which indicates the size of the reader base (and thus determines the cost per thousand of the advertising investment of its clients) and, on the other hand, the advertising market itself. In the case of JB/ODIA v. Infoglobo, a discount on volume that could have the effect of exclusivity in a vertical relationship, the technical note at the end of the investigation determined that there were indications; however, the process was concluded with the signing of a cease-and-desist agreement. On digital platforms and bilateral markets, the power of intermediation and network externalities (instead of newspaper circulation) complicate the analysis, requiring more sophisticated criteria of substitutability and competitive impact[[89]](#footnote-89).
9. Related to the collaboration contracts, the Guidelines initially considered Notification is required when the agreement (i) establishes a lasting joint enterprise between independent firms for at least two years; (ii) involves risk- or profit-sharing; and (iii) entails market overlap such that: (a) in horizontal relationships, the parties jointly hold 20% or more of the relevant market; or (b) in vertical relationships, at least one party holds 30% or more of the relevant market involved. The Resolution thus extends merger control to contractual structures that may replicate the effects of joint ventures, ensuring that cooperative agreements with significant competitive impact are subject to prior review. The Guideline CADE number 10 was repealed by Guideline CADE number 17 of 2016, which restricted the obligation to notify **ex ante** contracts between competitors or horizontal contracts. However, nothing prevents ex post control of potential anticompetitive restrictions in vertical relationships, especially those arising from asymmetry.

**2.6 CRITERIA RELATING TO THE COMPANY WITH RELATIVE MARKET POWER**

1. Under normal conditions, market share, brand reputation, legal or contractual exclusivity, the extent of verticalization, access to inputs and distribution channels, and the ability to dictate contractual terms are generally taken into account when analyzing conduct. However, there is no provision for market share limits as a criterion. The aim of this market analysis would be to examine whether the conducts in the list of examples in paragraph 3 can generate adverse competitive effects (even though, for some of the literature, the lack of a dominant position in a static market “hinders” this hypothesis in theory). Even so, the abuse of the right itself[[90]](#footnote-90) and conglomerate power tend to be relevant, and the discipline of industrial organization and the purchase of shares in competitors, suppliers and acquirers have gained new prominence as relevant variables for the analysis of market asymmetries and economic dependence.
2. Let’s take a look at some of the conducts restricting free competition provided for in paragraph 3 of article 36 of LDC:

*III - limit or prevent new companies from entering the market;*

*IV - creating difficulties for the constitution, operation or development of a competing company or a supplier, purchaser or financier of goods or services;*

*V - impede a competitor’s access to sources of input, raw materials, equipment or technology, as well as distribution channels;*

*VI - demand or grant exclusivity for advertising in the mass media;*

*VII - using misleading means to cause third parties’ prices to fluctuate;*

*VIII - regulating markets for goods or services, establishing agreements to limit or control research and technological development, the production of goods or the provision of services, or to hinder investments aimed at the production of goods or services or their distribution;*

*IX - imposing, in the trade of goods or services, on distributors, retailers and representatives resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins or any other marketing conditions relating to their business with third parties;*

*X - discriminate against buyers or suppliers of goods or services by setting different prices or operating conditions for the sale or provision of services;*

*XI - to refuse the sale of goods or the provision of services, within the payment conditions normal to commercial uses and customs;*

*XII - hindering or breaking the continuity or development of commercial relations of indefinite duration due to the other party’s refusal to submit to unjustifiable or anti-competitive commercial terms and conditions;*

*XIII - destroying, rendering useless or hoarding raw materials, intermediate or finished products, as well as destroying, rendering useless or hindering the operation of equipment intended to produce, distribute or transport them;*

*XIV - hoarding or preventing the exploitation of industrial or intellectual property rights or technology;*

*XV - selling goods or providing services unjustifiably below cost price;*

*XVI - withholding production or consumer goods, except to ensure that production costs are covered;*

*XVII - partial or total cessation of the company’s activities without proven just cause;*

*XVIII - making the sale of one good conditional on the acquisition of another or on the use of a service, or making the provision of a service conditional on the use of another or on the acquisition of a good; and*

*XIX - abusively exercising or exploiting industrial, intellectual property, technology or trademark rights.*

1. Although economic dependence has been addressed by a number of decisions, albeit often without employing the notion as a dogmatic category, the effects of the abuse of bargaining power on the dependent party tend to be examined in the light of objective market data, such as share in the relevant market, merger index, number of upstream-downstream trading partners, the existence of lock-in within a given technology, the existence of technological standards, the use of intellectual property, standardized contractual clauses and impacts on the behavior of partners. Nevertheless, it is true that in CADE, in addition to hardcore cartels, there are **vertical legal relationships** that condemn the illegal act for agents without a dominant position, such as, for example, the Shoptour case (Box 3 Video)[[91]](#footnote-91), although treated as a case of **sham litigation**.
2. The **external influence** on the management of the subordinate party is a relevant element for characterizing the abuse of bargaining power, and thus economic dependence in the form of item III of the caput of art. 36 of LDC. In this sense, it is worth mentioning part of the winning vote in the Monsanto-Bayer case: *it is necessary to implement these restrictions. In addition, any other clauses that give Monsanto* ***external influence*** *over Bayer should be excluded from the contract.*
	1. **CRITERIA RELATING TO THE COMPANY IN A SITUATION OF DEPENDENCY**
3. *The* criteria relating to the determination of the subordinate company have been constructed by administrative precedents and case law. The elements that determine **subordination in a mercantile relationship** are those related to the **external influence** of the dominant society on the subordinate one. In this sense, the precedents indicate as relevant elements for the subordinate the degree of specialization of the activity, investments in specific assets, difficulties of substitution, control over an essential facility and the relevance of the commercial partner in the total revenue. In this sense, the LDC includes in its catalog of restrictions on free competition “*XIV - hoarding or preventing the exploitation of industrial or intellectual property rights or technology; V - preventing a competitor’s access to sources of inputs, raw materials, equipment or technology, as well as distribution channels.”*.
4. The alternatives for the dependent company in the analysis of the abuse of economic dependence, and these alternatives - or the lack of them - are evaluated in the context of dependence. In the instruction, the cost and time needed to find a substitute is assessed, as well as the risk of loss of scale or access to the market. Of course, arguments from dominant agents, relative dominants or agents of the abuse of bargaining power, when imposing unfair conditions, cannot claim that the subordinate could choose not to join, if that means not entering the market.
5. Therefore, closing down or abandoning the activity would not be considered a valid alternative. In the light of positive law and economic analysis, this is not usually considered a viable criterion, except in exceptional situations, as it attempts to restrict the freedom to undertake with an adverse impact on competition. In this sense, we can highlight the prohibitions in the LDC’s list of restrictions, among others: *XI - refusing the sale of goods or the provision of services, within the payment conditions normal to commercial uses and customs, XII - hindering or breaking the continuity or development of commercial relations of an indefinite term due to the refusal of the other party to submit to unjustifiable or anti-competitive commercial clauses and conditions.*
6. Along these lines, case law seeks to preserve the economic viability of the vulnerable party under the terms of articles 420 and 421 of CC and preserves the freedom to undertake of the subordinate party or the victim of the antitrust conduct as a fundamental right under articles 5 and 170 of the CRFB.
7. The direct consequences for the dependent party are taken into account in two respects. Firstly, especially when there is an impact on the market with an impact on jobs, market access or continuity of operation, and, on the other hand, *private advocacy* in matters of civil liability or for the purposes of **unfair competition** for infringement against the economic order if the restrictions were imposed by the dominant party to favor a competing subsidiary of the subordinate party, conferring a competitive advantage or preventing the subsidiary from competing with the dominant party’s subsidiary in the present or future product or technology market (see Monsanto/Bayer case and Unidas Case).
8. The commitment to diversify activities, share facilities or work with different partners is a criterion for the good of the dominant society. This factor – mitigate exclusivity - can be considered to mitigate dependency and even used in cease-and-desist orders and as restrictions in merger control structures (as in the AMBEV case[[92]](#footnote-92)). Let’s look at some cases of economic dependence in vertical relationships.

# Ambev’s Administrative Proceedings at CADE

|  |  |  |
| --- | --- | --- |
| Process No. | Theme | Summary |
| PA 08012.003805/2004‑10 | Tô Contigo” loyalty program | Determination of exclusivity with points of sale via a loyalty program. Ambev was convicted, the program was terminated and a fine was imposed (approximately R$353 million), which was partially reversed via a court settlement and payment of R$229.14 million. |
| PA 08012.002474/2008‑24 | AmBev 630ml Bottle Introduction | Investigation into the new distinctive bottle that made it difficult for competitors to share containers, generating additional costs and possibly closing the market. Preventive measure imposed. |
| PA 08700.001992/2022‑21 | Exclusive agreements with points of sale | Inquiry into alleged abuse of a dominant position through exclusive contracts in bars and restaurants. After a preventive measure, a Cessation Commitment Agreement (TCC) was signed, limiting the scope and duration of the contracts until 2028. |

1. The mitigation of the exclusivity related to the economic dependence is a path to diminish or null the effect of external influence. And, probably, it’s impacts on the prospective structural effects (e.g., not to enter in a technology market). That’s the reason why exclusivity over asymmetric markets is an antitrust concern. The same reasons make technical standards so important from the point of view of antitrust concerns.
2. In the case of conduct, it is worth mentioning the case of technical standards (most recently in the case of Standard Essential Patents - SEP - currently under appeal *ex officio* by CADE[[93]](#footnote-93)), but does not exclude the characterization of dependence in factual situations (TELEMAR case, regarding the physical structure of optical fiber in the telecommunications market as an essential facility, treated as a case of unbundling local loop). Thus, part of the literature considers the hypothesis of abuse of intellectual property rights as a species within the situations of essential facility[[94]](#footnote-94). However, not every abuse of intellectual property rights is a case of essential facility.
3. Although CADE recently published an institutional study on the matter[[95]](#footnote-95), it has yet to rule on standard-essential patents in concrete cases. But by opening the current investigation, it recognizes that **patents do not violate antitrust law** as an **exercise of a private right**.

*“VII. PATENTS ESSENTIAL TO THE STANDARD*

*57. In general, patent disputes are considered to be individual and private disputes. Thus, it is up to the person interested in using the patent to obtain the necessary license and pay the owner of the intellectual property the amount agreed between the parties.*

*58. However, there are cases in which patent rights can harm free competition, and there are situations in which the abusive use of a patent may constitute an infringement of the law and order economic, as expressly recognized by the Competition Law:*

*“Art. 36. Violations of the economic order constitute, regardless of guilt, acts in any form that have as their purpose or may produce the following effects, even if they are not achieved:*

*§3º, XIX - exercising or abusively exploiting industrial, intellectual property, technology or trademark rights.”*

*60. The possibility that restrictions arising from the registration of patents may cause damage to competition and anti-competitive conduct is expressly provided for in the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights), notably in Section 8 of Part II. Under the terms of Article 40 of that Agreement, the signatory members agreed that some licensing practices or conditions relating to intellectual property rights that restrict competition may have adverse effects on trade and impede the transfer and dissemination of technology.*

*61. For this reason, TRIPS is clear in stating that nothing in that agreement prevents signatory countries from specifying in their legislation licensing practices or conditions that may, in specific cases, constitute an abuse of intellectual property rights with an adverse effect on competition in the relevant market[4].*

1. In the grounds for its order, CADE considers that although the **exercise of patent rights** is a **matter of private law**, the **bargaining power** of the SEP patent holder is the **subject of attention** by the antitrust authorities.

*62. One of the hypotheses that attracts the action of the antitrust authorities are the so-called Standard Essential Patents, or SEPs. SEPs refer to patents whose implementation is indispensable if a certain technical standard is to be met by the company.*

*several companies that operate or wish to operate in a relevant market.*

*63. For example, when launching a new technology, such as 5G telephony, it is necessary to establish certain interoperability standards to ensure that the various devices can operate and exchange information with devices belonging to rival manufacturers. Without such standardization, it could be extremely costly, or even impossible, for devices produced by different manufacturers to operate simultaneously on the same network, or for equipment from different brands to exchange data with each other. For this reason, in some industries, interoperability standards are established to ensure that equipment manufactured by different companies is compatible with a given standard. Such standardization can generate greater efficiency and benefit the consumer by expanding the range of alternative products available in a given market.*

1. Along these lines, the problem arises when the technological standard is patented by a specific business company, since any non-authorization (license) by the holder could effectively **exclude a competitor** from the relevant market and thus create a **barrier to entry**, or, in the end, structurally affect the affected markets and create a monopoly. The authority concludes that in the face of the holder’s bargaining power, Brazilian law has **remedies**, including the **compulsory license**.

*64. The problem is when such technology, adopted by default in a given industry, is patented by a specific company. In this case, not authorizing the use of a patent can effectively exclude a competitor from a relevant market, become an undue barrier to entry or even allow the creation of a monopoly.*

*65. The TRIPS Agreement has no specific rules for SEPs. However, Article 31 of the agreement is express in stating that member countries may allow the use of unlicensed patents if the interested party has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time[5].*

*66. In other words, the TRIPS agreement expressly provides for the possibility of signatory countries forcing the owner of a given patent to license its product if the owner refuses to license it on reasonable terms and conditions. This power was expressly provided for in Brazilian law, which allowed CADE to carry out compulsory licensing of intellectual property rights, under the terms of art. 38, IV, ‘a’ and item V of §2 of art. 61 of LDC.*

1. At this point the question arises: when should CADE intervene? When it comes to economic determinants, the first element is interoperability.

*67. The question that arises is: in what cases should CADE intervene in patent law and, if necessary, consider the refusal of its owner to license it to be abusive? This is the issue I intend to tackle in this vote.*

*68. SEPs, especially in the context of 5G, are key to ensuring the interoperability of devices and networks, enabling global connectivity and the efficient operation of the digital cell phone ecosystem. The relevance of SEPs in the regulatory and economic environment has been widely discussed, considering the challenges in licensing and implementing them.”*

1. The behavior and willingness of the dependent party to **reduce the risk of dependency** over time tends to be taken into account, but it cannot be said that this **willingness alone can constitute a criterion in situations of asymmetry**. Therefore, the willingness to reduce dependency does not rule out the analysis of the imbalance present at the time of the infraction.
2. The guilt of the company in a situation of dependency is not a criterion. Positive law expressly states that a wrongful act is an infringement regardless of fault. In this sense, liability is objective in competition matters, but behaviors that indicate bad faith or inertia tend to be taken into account in the dosimetry of the sanction.
3. In the investigation, all these factors must be evaluated in the light of antitrust restrictions in the form of positive law, in a systemic and contextual way, based on documentary evidence, economic analysis and technical opinions. *De lege ferenda*, in markets that are known to be asymmetrical, there is the prospect of economic logic being used to mitigate less serious anti-competitive restrictions by exemptions, as, for example, may occur in the antitrust regulation of digital platforms currently being developed by CADE.

**2.8 CRITERIA RELATED TO THE IMBALANCE IN THE POSITION OF THE PARTIES**

1. The criteria for capturing the relative position between the parties or a possible imbalance in the bilateral relationship derive from the civil law discipline of the protection of consensus, which comes into antitrust with the aim of preserving interaction between buyers and sellers (at least initially).

1. Thus, administrative precedents must consider, as indicated above, the **long duration of vertical contracts** (such as distribution, franchise and technology transfer), exclusivity clauses, unilateral imposition of clauses not usually accepted or used under normal competitive conditions or in symmetrical markets, technological lock-in, essential facilities, contractual barriers to entry, use of rights obtained through fraud, abuse of bargaining power against a dependent party and asymmetry of information.
2. The evaluation of such elements as criteria derives more from a jurisprudential construction than from positive law or from *softlaw*. As can be seen in the cases mentioned in both association contracts and conduct in commercial agreements and commercial contracts in general, the analysis starts with an examination of the restrictive *ratio* of the contractual clauses, commercial practices, and an assessment of the behavior of the parties throughout the contractual relationship, especially in long-term vertical relationships. For example, the prohibition of supplying essential inputs or facilities unjustifiably or blocking access to new technology and innovation markets, even if in the future, *ab initio*, implies a wrongful act regardless of fault.
	1. **OTHER CRITERIA AND CONSIDERATIONS**
3. Indeed, there are peculiarities to each commercial contract and especially to new business models and sectors, such as oil, supplementary healthcare, the pharmaceutical industry, the automotive industry, banks and digital platforms, etc. In this sense, legal transactions in sectors that are sensitive due to merger levels and a certain standardization of business models characterized by the **high bargaining power of one of the parties** and the **widespread use of adhesion contracts**, such as distribution, franchises, shopping malls, supplementary healthcare and digital technology, end up taking into account these peculiarities recognized by case law in order to mitigate the autonomy of will and protect consensus through the use of specific criteria based on an **analysis of the dominant party’s level of interference in the subordinate party’s business**.
4. The question of analysis at the level of interference is relevant because it can allow the subtraction of future opportunities not only with civil impact (such as, for example, emergent damages, loss of profit and loss of a chance[[96]](#footnote-96)) but effectively a **barrier to entry** into new **product markets**, and more than that, **technology markets** and, above all, the **dynamic innovation markets**. Thus, this category of parameters, which could effectively be used as criteria, applies to future and potential commercial relationships (see the Monsanto-Bayer intellectual property license agreement).
5. In this sense, case law has considered potential commercial relationships or those in the making, especially in cases of refusal to contract and exclusivities that imply an early renunciation of business, with an impact on civil liability in the form of articles 186, 187 and 927 of the Civil Code (in relation to unlawful acts, abuse of rights and civil liability).
6. Even though the standard of proof for **loss of a chance** is more lenient than that of civil liability, for the purposes of investigating competition offenses, the determinants of the market and its structure depend to a large extent on the demonstration of objective data and economic evaluations, studies or technical opinions, both studies carried out by CADE’s Department of Economic Studies and those submitted by the parties.
7. Another relevant element is the scarcity of official data on a large number of sectors and markets, so it is often up to the parties to produce statistical and econometric data on the markets under analysis and, of course, the various economic opinions shall be issued on this basis. In fact, the efforts to apply the standard lack access to sources of information on the determination of the products, services, technologies and innovation examined, the substitutability between them, the study of the elasticity of supply and demand between products and services, the logic of business methods, contracts and their clauses and, finally, the analysis of the negative and positive externalities of the competitive impacts.
8. This is one of the facts that make other sources of information relevant, such as the participation of players as assistants or “*amicus curiae”* in the process, collaboration with other federal agencies (without disregarding entities and bodies from other spheres of public power) and public consultations in accordance with the law of procedures at the federal level.
9. This is why sectoral or benchmarking studies are used, including cooperation between CADE and other agencies, including public consultations and working groups with stakeholders, as occurred in the case of telecommunications and was recently requested by the parties in supplementary health cases, in the form of article 33 of the Administrative Procedure Law at the federal level (Law number 9.279, of January 29, 1999).
10. There is some debate about the **discretion of the administrative authorities** responsible for applying the rules. The discussion is about whether, and to what extent, judicial review of the Administration’s acts in antitrust matters is possible. In what appears to be a challenge to limit review, the literature has constructed a hybrid figure of difficult intent, so called, “technical discretion” that would exist supposedly marked by objective criteria, administrative precedents and subsequent avoid judicial control over decisions taken under the auspices of the technical executive power. However, there is an academic consensus in the field of administrative law that this is not a **classic discretionary** (administrative) **act** and, therefore, it remains to be classified as a **binding administrative act**, i.e. subject to judicial review.
11. In this sense, it is reiterated here that review of CADE’s decisions is possible because it is a “binding administrative act” (unlike discretionary administrative acts, which do **not** merit judicial review in Brazilian law). For example, it is not uncommon for convictions for abuse of a dominant position, or in horizontal agreements, by CADE’s Administrative Court to be received by the Federal Courts and Federal Regional Courts[[97]](#footnote-97) (jurisdiction as to the person, since CADE is a federal authority). There are cases of collective actions (public civil actions) in defense of diffuse, collective or individual homogeneous interests to be reformed or ratified. The same can happen in complaints of unilateral conduct regarding abuse of a dominant position and, especially, abuse of economic dependence. If so, the same path can be followed in reverse by victims who, when reporting anti-competitive conduct, have their investigation request rejected by the CADE.
12. Even so, the STF, as a constitutional court, seems to want to limit the review of regulatory and competition decisions by the courts due to the alleged lack of preparation of judges in the face of the sophistication of the technical matter. The 2019 decision was heavily criticized by academic and professional circles due to the binding nature of CADE's decisions. However, there is no sign of peace or unified understanding on the horizon.
13. All Brazilian federal courts have territorial jurisdiction, both in terms of person and subject matter. Even so, CADE has an overwhelming victory rate of around 73%[[98]](#footnote-98). In these cases, most reviews concern the standard of proof or the inability to defend oneself, and rarely delve into the merits themselves. Of course, the nature of the decision under review affects the results. CADE's decisions on structure and conduct have specific characteristics, as do those on agreements or breaches of Cease-and-Desist agreements[[99]](#footnote-99) or performance commitments.
14. The impact of the review on precedents is then discussed. General statistics usually show a low rate of reform of case decisions, but that doesn’t mean that judicial precedents are irrelevant[[100]](#footnote-100). Along these lines, there is no limits towards the merits to a federal judge. So, if the Administrative Court eventually decides, for example, on an administrative process based on “giving meaning” or criteria more inspired by a particular school of antitrust thought, such as the “Chicago consensus” or even the nuancing effect of Post-Chicago thought, it would not prevent, by hypothesis, a particular Federal Regional Court (such as that of the 2nd Region) from making a decision based on a system of prohibitions and exemptions, for example) from basing its decision on interpreting positive law according to the integrating function of civil law or even on the basis of the German civil dogmatics of the Frankfurt School, based on a system of prohibitions and exemptions (the economic analysis of compensations is used to justify exemptions) that is possibly more suited to the civil logic of the Brazilian system. This inflection begins to emerge in cases of asymmetric markets, for example in certain competitive environments of the new economy and in public health matters.
15. In addition, there may also be a judicial solution arising from the systemic interpretation of the Brazilian legal system. In this context, an inflection in the curve of understandings in antitrust matters in Brazil is underway. The first signs of a broad review are in the “gestation” of the regulation of digital platforms[[101]](#footnote-101), which, due to the structural asymmetry of the respective relevant markets, should imply changes in the criteria for analysis and control, as well as institutional improvements and the organization chart of the Administrative Council for Economic Defense (CADE)[[102]](#footnote-102).

**3 - ABUSE OF RELATIVE MARKET POWER**

1. With regard to the logic of the restrictions, it is worth mentioning the assessment of the “*ratio”* of abusive conduct (or similar concept) in the **exercise of bargaining power** in the assessment of **illegal acts** or whether the mere **imbalance of power** and **economic dependence** would be sufficient for legal regulation.
2. The Brazilian jurisprudence, based on the interpretation of the dogmatic category of **abuse of rights** (art. 187 of the Civil Code) or, maybe, **misuse**, requires the demonstration of **effective abusive conduct**, with the **mere imbalance of power not being sufficient**, although it is a **necessary condition**. By transposing the common law criterion into the prevailing interpretation at CADE, we arrive at a situation in which, for the purposes of competitive analysis, the imbalance of bargaining power needs to be accompanied by **concrete conduct** (a **restriction** created by **contract** or by the **abusive exercise of rights**) that generates **anti-competitive effects** (**exploitative or exclusionary**), in accordance with §3 of art. 36 of LDC. Even so, there is plenty of room in the literature for an interpretation that recognizes economic dependence as an autonomous offense, based on the very literalness of item III.
3. Thus, the requirement of abusive conduct for abuse of a relative dominant position, the identity of the dogmatic starting point lies in the category of abuse of rights. This raises the legal question of whether the category of abuse of economic dependence is the same as or different from abuse of a dominant position.
4. Although they are identical from the point of view of the conceptual dogmatic genealogy of the abuse of rights and, in this line, both effects may be similar with regard to the **protection of consensus** (as well as the general regime of essential elements and nullities), they differ to some extent with regard to factual requirements and effects.
5. The abusive conduct in the context of relative market power can occur **without there being dominance in the relevant market** (even if it arises in the context of other conduct among a series of agreements and also acts), which distinguishes it conceptually from abuse of a dominant position. The LDC admits, for example, illegal conduct based on item III of §3 of art. 36 (arbitrary increase in profits), even without dominance (see the Box3 Video Case).
6. The conduct tends to be observed and assessed more from the perspective of the bilateral relationship (asymmetry of bargaining power) than from the structure of the market as a whole, even though in an environment of verticalization and merger of conglomerate power, it can have a strong impact on other upstream and downstream markets. Therefore, it is no coincidence that patent license agreements (and other types of technology transfer agreements) with interference by the relative dominant company in the management of the subordinate company tend to be treated as associative agreements also examined in the context of ex-ante control of structures (despite the recent change in the *soft law* restricting the legal obligation to notify ex-ante only to horizontal associative agreements, without prejudice to ex-post control of vertical restrictions such as conduct).
7. One could therefore ask whether the restriction of competition is necessary to characterize abuse in antitrust matter. In fact, the answer would be yes, even though the restriction could be **potential or indirect**. In this sense, the analysis considers the effects of the conduct on the market and the capacity to harm free competition beyond the relevant market, in accordance with article 36 of LDC, not only in the product or service markets, but also in **the technology and innovation markets**.
8. In this sense, for e.g., closing a market or imposing entry barriers on third parties through contracts with dependent companies can be interpreted as a competitive restriction, even if practiced by agents without formal dominance[[103]](#footnote-103).
9. The definition of abusive conduct is examined in terms of exploitative and exclusionary behavior. The positive law in the heading of Article 36 includes as many exploitative conducts (e.g. arbitrary increase in profits) as it does exclusionary conducts (e.g. preventing access to distribution channels or inputs, injunctions, sham litigation, etc.) in the respective list of examples in paragraph 3 of the same article. CADE considers these two categories when assessing relative market power.
10. The most frequent abusive conducts involve restrictions that make it possible to influence the decision-making process of the subordinate business company, contractual exclusivities, refusal to contract, imposition of abusive clauses in adhesion contracts, predatory pricing (even if it depends on abuse of an isolated or joint dominant position), abusive and/or discriminatory pricing and barriers to entry for competitors via distribution channels. Such practices are common in sectors such as beverage distribution, telecommunications, supplementary health and franchising.
11. As can be seen from the precedents in Brazilian practice, cases of abuse of bargaining power with exclusive restraints have predominated in CADE’s decisions - albeit less significantly than in mergers and cartels - especially in **asymmetric sectors**, with an **oligopolistic structure** and **long-term contracts**. However, there are also precedents involving arbitrary profit increases and economic exploitation of dependent parties, which constitute exploitative abuse.
12. In fact, there are infringements directly related to the price formation process, infringements for abusive or discriminatory pricing practices, but more common are cases linked to restrictions that undermine the freedom to undertake, such as contractual clauses, barriers to entry, refusals to contract and vertical restrictions that may somehow **affect competition structurally** (like the gate keepers related to the digital plataforms markets) or through bargaining power.
13. In this sense, in cases such as Monsanto-Bayer, the contractual restriction that **prevents the development of competing technologies** has motivated the determination to **withdraw the restrictive clauses of the intellectual property license agreement** - that is, it not only covers existing commercial relationships, but also potential or future ones.
14. Thus, CADE’s case law recognizes that unilateral abusive conduct can occur during existing contractual relationships, but also in the unjustified refusal to initiate or renew contracts, especially when there is **economic dependence** or a **lack of viable alternatives**.
15. Despite possible discrepancies in the literature, the role of voluntary negotiation between the parties in this context is absolutely relevant. The unilateral imposition of conditions is the counter element to the abuse of bargaining power, as, for example, occurs between health plans and doctors and health professionals in general.
16. In this sense, the existence of formally negotiated clauses does not in itself rule out the possibility of abuse. CADE and the Judiciary analyze real contractual freedom, considering power asymmetries and the effective capacity of one of the parties to influence the content of the contract. The so-called “objective good faith” and the “social function of the contract” (arts. 421 and 422 of CC) are the guiding principles of the analysis.
17. The **remedies** are a vital tool of antitrust control. The antitrust notion of “**remedies**” includes the imposition of obligations to do or not to do, alteration of contractual clauses, deconstruction of acts, fines, unbundling, cease-and-desist order and, in some cases, restoration of the economic balance of the relationship, or even the **compulsory licensing** **of patents** and **divestitures**. Depending on the instance, they can be applied by CADE, the Judiciary or even sectoral regulatory agencies.
18. The judiciary has greater scope to review abusive clauses, based on the “social function of the contract” and objective “good faith”, and can declare nullities or impose corrective obligations. CADE, on the other hand, acts mainly in the repressive and sanctioning sphere, although it may decide on divestment as a structural solution in the absence or impossibility of effective behavioral solutions, imposing **structural remedies, in addition to behavioral remedies, in its administrative competence.**
19. As can be seen from the precedents, there are situations in which mandatory clauses have been introduced via ex ante regulation to deal with **relative market power and economic dependence**. Firstly, the obligation to notify a certain category of technology transfer contracts not only for the purposes of registration with the INPI, but also as associative agreements and the inclusion of other commercial contracts (representation, distribution, etc.) as a merger act was a social control initiative *ex-ante*.) as an act of merger was an initiative of social control *ex-ante*, although later altered by CADE’s Guidelines for horizontal agreements changed this panorama, without, however, removing the social control of conducts *ex-post*.
20. On the sectoral regulation side, some regulated sectors, such as the supplementary health sector (ANS), telecommunications (ANATEL) and energy (ANEEL), have regulation *ex ante* with mandatory clauses in contracts, precisely to mitigate the abuse of economic power in relations between asymmetric agents, such as operators and service providers. Similarly, the Ministry of Justice’s National Consumer Defense Secretariat (SENACON-MJ) includes mandatory clauses or can alter contracts through preventive measures (injunctions) and the imposition of fines.
21. The **UNIDAS case (Administrative Proceeding No. 08012.002381/2004-76)** stands as a landmark in Brazilian competition law for illustrating the practical effects of **economic dependence**, even though the formal legal classification adopted by CADE was that of a horizontal agreement.
22. In this case, UNIDAS — the association of self-managed health plan operators — was found to have coordinated the imposition of the **CBHPM fee table** on affiliated physicians. By collectively fixing remuneration levels, the association constrained doctors to accept **artificially depressed fees**, significantly below those prevailing in the open market for non-accredited physicians.
23. While CADE’s decision formally framed the conduct as a **buyers’ cartel** (horizontal collusion among health plan operators), the underlying reality was that **physicians were left with no viable alternative but to accept the imposed terms**, given the market power and collective organization of UNIDAS. This situation closely resembles what comparative law systems — such as German and French competition law — explicitly describe as an **abuse of economic dependence**: a context where a weaker party is compelled to accept unfavorable contractual conditions due to the lack of realistic alternatives.
24. Thus, the UNIDAS decision reveals how, even in the absence of explicit statutory recognition of “relative dominance” in Brazilian law, CADE’s enforcement indirectly captured the essence of abuse of economic dependence. The ruling acknowledged that the bargaining disparity between physicians and the association of health plans could produce competitive harm analogous to that arising from unilateral dominance.
25. In fact, the LDC (Law 12.529/2011) provides for administrative fines to be imposed by CADE even when there is no dominant position, as long as one of the conducts set out in §3 of art. 36 takes place, such as arbitrary increase in profits or practices that harm free competition.
26. Judicial and administrative precedents show differences between remedies ordered by courts and administrative bodies[[104]](#footnote-104). CADE tends to apply the administrative sanctions and competition remedies typical of antitrust law, such as fines and cease-and-desist orders, with the possibility of cease-and-desist commitments. On the judicial side, the courts can review contractual clauses, determine compensation and apply specific measures based on civil or consumer law. The spheres can be complementary, not mutually exclusive.

**4. OVERALL ASSESSMENT AND CONCLUSION**

1. The Brazilian experience shows that the concept of relative market power and the abuse of economic dependence have a basis in positive law, although their practical application still faces conceptual and interpretative challenges.
2. The Law on the Defense of Competition, especially in its caput and §3 of article 36, provides a legal basis for the repression of abusive conduct even without the presence of a formal dominant position, opening up space for more comprehensive action in line with the reality of asymmetric markets.
3. CADE’s jurisprudence, although timid at times, has already recognized the importance of **bargaining power** and **economic dependence** not only a behavior problem but it also may provide **structural factors** in the configuration of anti-competitive practices[[105]](#footnote-105). The judiciary, in turn, has been receptive to the analysis of the **social function of contracts** and the principle of objective **good faith**, which reinforces the possibility of complementary action between the antitrust and contractual systems.
4. However, challenges remain. The scarcity of express rulings on abuse of economic dependency indicates the need for greater institutional and methodological maturity on the part of the authorities. Furthermore, there is a latent tension between interpretations.
5. Therefore, there are a number of precedents that recognize the phenomenon in vertical relations carried out in asymmetric markets, even if eventually, not always, the authority uses this *nomen ius* expressly.

1. Thus, notoriously asymmetrical markets (cf. technical notes, economic studies by CADE’s economic studies department (DEE) and relevant precedents [[106]](#footnote-106)) such as the supplementary health sector, with **high and** **growing vertical integration**, and conclude that these phenomena **tend to harm free competition** insofar as this structure can generate vertical closure effects, preventing service providers from signing contracts with other operators or entering the market independently.
2. Thus, despite the apparent alignment of a significant part of CADE’s decisions with some criteria partially interpreted in the light of some principles of the so-called “Chicago Consensus”[[107]](#footnote-107), structurally **asymmetric markets** tend to project the results of **distortions** onto restrictive conduct made possible by **abuse of bargaining power**, i.e. behavior that tends not to occur in environments of practicable competition.
3. Indeed, whatever the alignment with one or other school of antitrust thought, when dependence results in the inability to compete to the disadvantage of the subordinate, especially due to **barriers to entry** created by the **imposition of legal** or **contractual exclusivity restrictions** (exercise of the abuse of bargaining power) with room for retaliation by exclusion, even if through the application of other institutes or categories with a different *nomen ius* (abuse of market power, exclusionary vertical restrictions, market closure, etc.) **antitrust law must act**.
4. Yes, there are cases in Brazil - specific and extremely sensitive - in which the structural asymmetry of the market, especially in sectors such as supplementary health, has been analyzed from the point of view of the abuse of economic dependence or similar conduct, leading to decisions against companies that, although they were not dominant in the market as a whole, exercised abusive bargaining power over dependent agents, especially when this resulted in impediments to competition.
5. However, explicit convictions for “abuse of economic dependence” are still rare and generally don’t come with this nomenclature, since CADE seems to avoid this direct framing so far. But there are decisions that **recognize abuse of bargaining power or exclusionary practices motivated by contractual dependence**, especially when there are vertical restrictions that eliminate competitors and/or allow the dominant company to influence the management of the subordinate company.

Collaboration with other organizations. Sham Litigation. In view of the above requests, on September 6, 2012, the General Superintendence (SG) sent Official Letter No. 4311/2012 to ANVISA (SEI 0000560, fl. 2053), requesting a full copy of the records of the administrative process that granted registration to the medicines Hemosev and Foslamer, as well as information on the opinions issued by the Agency. On the same date, Official Letter No. 4241/2012 (SEI 0000560, fols. 2055-2056), sent to the Ministry of Health, requesting information on Contract Termination Statement No. 12/2012.

See both ANVISA (SEI 0000563 and 0004904, fols. 2090 - 2121 and fl. 2283) and the Ministry of Health (SEI 0000563, fols. 2067-2087) provided the information requested.

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1. Brazilian National Reporter in the LIDC Congress 9-12 October 2025, Vienna. PhD in law, Universidad de Santiago de Compostela (Spain) and Universidade de São Paulo (Brazil). Professor at the National Law College of the Federal University of Rio de Janeiro. Prior President of the Competition Defense Commission CDCOR of the Brazilian Bar Association (Section of the State of Rio de Janeiro). Attorney-at-law and founding partner of **De Lima Assafim e Advogados Associados (DLA)**, Rio de Janeiro (Brazil). **contato@delimaassafim.adv.br****.**  [↑](#footnote-ref-1)
2. Professor Gisele Ramos Fonseca Trigo and Professor João Guilherme de Lima Assafim, both partners at DLA, the paralegal at DLA Bruna Queiroz and practitioner at DLA Mariana Marquesam Martins collaborated on this work. [↑](#footnote-ref-2)
3. Which, according to Robert Bork, was one of the purposes of antitrust proposed by congressmen in the legislative process that led to the creation of the Sherman Act in 1890. Antitrust Policy and the Concept of a Competitive Process, 1990. According to professor Bork, the goals of the antitrust in the legislative debates should not be reduced merely to outcomes such as low prices or immediate consumer benefits, but rather to ensuring that market participants can engage in transactions under conditions of open rivalry and free choice. This focus on process highlights that competition is valuable not only for its efficiency outcomes, but also because it structures the bargaining relationship between firms and consumers in a way that maintains fairness and prevents artificial restraints. [↑](#footnote-ref-3)
4. Indeed, I recognize that there is no socio-economic justification for the use of adhesion contracts in typically mercantile relationships. The situation is aggravated when the seller's bargaining power is so great that it allows the seller to ignore any consideration from the buyer, i.e. it's take it or leave it (see the relevant markets for brokerage, consultancy and investment intermediation services in the financial market, and the contracts between health plan operators and medical service providers, for example). Since adhesion contracts are essential to the functioning of legal traffic in consumer relations, on the one hand, and in the commercial sphere, on the other, they designate a situation in which there is no interaction between buyers and sellers due to the dominant bargaining power of one party over the other. The result of a contract without the negotiation or subjective phase is the high cost or setting of prices at higher levels (and/or under less favorable conditions for the buyer or seller, depending on the position of the dominant and subordinate) than would be the case if bargaining power were balanced. In certain jurisdictions, the lack of consensus would give rise to the nullity of the respective contract - insofar as consensus is what creates an objective legal relationship between the parties in civil law -. The argument, for example, of the sellers of raw materials or of an essential facility who usually impose conditions and price is that there would be no imposition because the buyer can decide not to buy. This, however, without presenting a solution to the shortage. The shortage implies even more serious externalities in relevant markets for health, pharmaceutical products and essential technologies, especially in vertical restraints in the relevant markets for infrastructure, raw materials, technology and innovation. [↑](#footnote-ref-4)
5. See art. 421 of the Civil Code. Freedom of contract shall be exercised within the limits of the social function of the contract. [(Edited by Law No. 13.874, of 2019)](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13874.htm#art7) (<https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm> ). In literature see LETE DEL RÍO, José Manuel, Derecho de Obligaciones, Madrid, Tecnos, 1998. pp. 24-27.   [↑](#footnote-ref-5)
6. See BARLETTA, Fabiana Rodrigues. *Revisão Contratual no Código Civil e no Código de Defesa do Consumidor* (Contractual Revision in the Civil Code and in the Consumer Defense Code), Indaiatuba (São Paulo), Foco, 2020. pp. XII and ss. in The economic freedom law originating in Provisional Measure number 881 arises as an attempt to remove the crisis of the autonomy of will for commercial contracts. However, the change in outlook has some impact, but it is not significant. Contrary to what is expected, **it may imply an increase in intervention, because if the state cannot limit or take away the freedom to undertake (as a faculty, a subjective right of every Brazilian citizen), even less can the monopolist or dominant party do so, which demands more intervention, not less**. "*Such Provisional Measure* (the Economic Freedom Act)*, with regard to contractual revision, may mean that there is no incentive to renegotiate on equitable levels, although, in the event that the contracting parties are free to proceed on their own, the possibility of revision remains unchanged. (...) Therefore, it cannot reduce the contractual revision, determined externally to the contracting parties, by the independence of the Judiciary by applying the solidary, egalitarian and democratic Constitution, in accordance with the normative commands contained in its fundamental principles, as well as for historical and everyday reasons. It was the need to adapt contracts to more balanced levels than those existing at the time of the agreement that gave rise to contractual injury; Likewise, the change in circumstances subsequent to the negotiation led to the clause* rebus sic standibus *and the possibility of revising the contract, mitigating the rule of* pacta sunt servanda". [↑](#footnote-ref-6)
7. See the Economic Freedom Law, [**LAW No. 13.874, of September 20, 2019**](http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viw_Identificacao/lei%2013.874-2019?OpenDocument)**.**  [↑](#footnote-ref-7)
8. This category of illegal acts has repercussions outside Europe. Thus, the literature indicates that [*V*]*several major jurisdictions in Asia, including Japan, Korea and Taiwan, have competition law provisions that provide for abuse of superior bargaining position, which corresponds to abuse of economic dependence.* For example: *[Abuse of economic dependence, also known as abuse of superior bargaining position (ASBP), is a legal concept that addresses a situation in which one party to a transaction, who is in a position of relative strength in relation to the other, abuses that position. Unlike abusive conduct by dominant companies, prohibited by provisions such as Article 102 TFEU, abuse of economic dependence does not require a dominant position in any market. Instead, it requires some kind of superior position in relation to the counterparty to a transaction and aims to protect the weaker party from abuse of that position by the party in the superior position.* Vassili Moussis, Atsushi Yamada, Abuse of Economic Dependence, Competition Law Dictionary, Concurrences, Art. N° 86372. See <https://www-concurrences-com.translate.goog/en/dictionary/abuse-of-economic-dependence?_x_tr_sl=en&_x_tr_tl=pt&_x_tr_hl=pt&_x_tr_pto=tc#auteur> [↑](#footnote-ref-8)
9. Insofar as this is the case, in principle, in vertical relations between non-competitors, there tends to be no detour of customers or, if there is, this occurs in specific situations of vertical integration involving conglomerate power or closure of verticalized markets, or, on the side of unilateral conduct, for example, abuse of a joint dominant position. [↑](#footnote-ref-9)
10. Cf. art. 195 of the Industrial Property Law, Law no. 9.279, of May 14, 1996. The repression of unfair competition is provided for in a legal provision which, in protecting the competitor's private interest, can be applied, for example, in the event of the detour of customers as a result of damage imposed on the victim of an infringement against the economic order by another competitor or in the detour of customers from a subordinate party to a subsidiary of the dominant party. [↑](#footnote-ref-10)
11. This legal provision was born with the same text as article 20 of Law no. 8.884, of June 11, 1994, the previous antitrust law. The approval of this law was a social demand to reform the National System for the Defense of Competition, mainly as a result of the monetary stability achieved by the Real plan. The Real Plan created a kind of currency conversion index called the Real Unit of Value based on the exchange rate of the US dollar in cruzeiro (the old currency), which gave rise to the Real currency with parity with the dollar. With monetary stability, it became possible to regulate the price formation process based on the defense of free competition. [↑](#footnote-ref-11)
12. Schmidtchen, Dieter, "Zur Beziehung zwichen dem Recht geistingen Eigentums und dem Wettbwerbsrecht - eine ökonomisch Analyse" in LANGE, K.W., LIPPEL, D. und OHLY, A. (herausgegeben von), Geistiges Eigentum und Wettbewerb, Mohr Siebeck, 2009, pp. 27-52. [↑](#footnote-ref-12)
13. DREXL, Josef. "Is there more economic approach to intellectual property and competition law?", pp. 34 and ss. In fact, at this point the literature already seems to differ from CADE's Brazilian administrative practice to some extent, specifically because of the importance it gives to the competition aspects of intellectual property rights, highlighting, for example, the pharmaceutical industry and software production. In these cases, economic dependence and the imbalance of bargaining power, if they imply restrictions on free competition or the free movement of goods and services, would fall within the scope of Article 101.1 of TFEU (and possibly other legal provisions). See also Andrade, José Maria Arruda. "Reflections on the 'more economic approach' in European competition law". [↑](#footnote-ref-13)
14. The original text in Portuguese language is: “.*..limitar ou de qualquer forma falsear a livre concorrência*”. Indeed, the brazilian legal text is literalistic closer to the article 101 of the TFUE rather than to the section 1 of the Sherman Act. [↑](#footnote-ref-14)
15. Models based on less intervention used in countries with less concentrated economies, from the point of view of the public interest, tend to be unworkable in market failures. "*In such a reality, antitrust and particularly a (neo) structuralist view of antitrust gain enormous relevance. It is, therefore, the opposite of the minimalist-moralist vision of the "Chicago consensus", which not coincidentally comes from the doctrine of the countries of the northern hemisphere. In this (neo-structuralist) view, the belief in the need for a more incisive antitrust law that is able to deal with the specific problems of the monopolized economies of countries with a colonial past leads to the creation and recognition of schools of thought of their own, based on the sociological-economic tradition of each region*." See Salomão Filho, Calixto. "Evolution or Involution of Antitrust Law" in: Pfeifer and Campilongo (Org.), Evolução do Antitruste no Brasil. Singular, São Paulo, 2018. Pp. 211-2019. [↑](#footnote-ref-15)
16. Cf. the text of article 36 of the LD, its *§2*states:[P]*a dominant position arises whenever a company or group of companies is capable to unilaterally or in a coordinated manner alter market conditions or when it controls 20% (twenty percent) or more of the relevant market, and this percentage may be altered by Cade for specific sectors of the economy*.   [↑](#footnote-ref-16)
17. Forgioni, *op. cit.*  [↑](#footnote-ref-17)
18. ***Art. 187*** thus establishes*"The holder of a right who, when exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs, also commits an unlawful act."* [↑](#footnote-ref-18)
19. The discipline of unlawful acts and abuse of rights may change and imply a more robust discipline of lege ferenda. Although the current Civil Code of 2002 already classifies the abuse of rights as an unlawful act, the new draft bill reinforces the prohibition of the abusive exercise of rights. See draft Bill No. 4 of 2025. [↑](#footnote-ref-19)
20. According to art. 422 of the Brazilian Civil Code "*Contractors are obliged to observe, both in the conclusion of the contract and in its execution, principles of probity and good faith."* [↑](#footnote-ref-20)
21. Cf. art. 421-A.  *Civil and business contracts are presumed to be equal and symmetrical until the presence of concrete elements that justify the removal of this presumption, with the exception of the legal regimes provided for in special laws, also guaranteeing that:*[*(Included by Law No. 13,874, of 2019)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13874.htm#art7)

*I - the negotiating parties may establish objective parameters for the interpretation of negotiating clauses and their review or termination assumptions;*[*(Included by Law No. 13,874, of 2019)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13874.htm#art7)

*II - the allocation of risks defined by the parties must be respected and observed; and*[*(Included by Law No. 13,874, of 2019)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13874.htm#art7)

*III - contractual revision shall only take place on an exceptional and limited basis.*[*(Included by Law No. 13,874, of 2019)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13874.htm#art7) [↑](#footnote-ref-21)
22. ALBA, Isabel Espin. [Clause " rebus sic stantibus" e interpretación de los: ¿Y si viene otra crisis?](https://www.amazon.com.br/Cl%C3%A1usula-rebus-stantibus-interpretaci%C3%B3n-contratos/dp/8429021981/ref%3Dsr_1_7?dib=eyJ2IjoiMSJ9.Ay2JhmhV1ftZRRzHBdQsNdFX0eB-uB4uvxe4nDxlUv2QoD6XUTOtyNYLalxJBbg3tPt-h_SONx3-gR2h58_uejwZMkrFn1HoKY-tpJohBsFrGUF7nIa1Mmj7kOUmdHaZ4kwzKBgglAH3U5FvoKXirxw7tj_acgskhwZEuo5lrkn2yFEh-bAUhBl-MRaxUcGqoBK39Qv-j2tvmjVAi1Xs1mv3O33AUVzQIikkfd9XKtU.v-vwtu_qGYNtQYSgEs4tIqNJZ8_G7I50zwRyetdvSxs&dib_tag=se&qid=1729283698&refinements=p_27%3AIsabel+Esp%C3%ADn+Alba&s=books&sr=1-7), Madrid, Reus, 2020. [↑](#footnote-ref-22)
23. See art. 170 of the Federative Republic of Brazil Constitution (CRFB). [↑](#footnote-ref-23)
24. Art. 1o  This Law structures the Brazilian Competition Defense System - SBDC and provides for the prevention and repression of infractions against the economic order, guided by the constitutional dictates of freedom of initiative, free competition, social function of property, consumer protection and repression of the abuse of economic power.   [↑](#footnote-ref-24)
25. See the sole paragraph of article 1 of LDC. "*Sole paragraph.  The community is the owner of the legal assets protected by this Law."* [↑](#footnote-ref-25)
26. According to the Consumer Defense Code, unfair terms are provided for in its respective art. 51 of Law no. 8.078/1990.

*Art. 51. Null and void, among other things, contractual clauses relating to the supply of products and services, those that:*

*I - precludes, exonerates or mitigates the supplier's liability for defects of any kind in the products and services or imply a waiver or disposition of rights. In consumer relations between the supplier and the legal entity consumer, compensation may be limited in justifiable situations;*

*II - denies the consumer the option of reimbursing the amount already paid, in the cases provided for in this code;*

*III - transfers liability to third parties;*

*IV - establishes obligations that are considered unfair, abusive, place the consumer at an unreasonable disadvantage, or are incompatible with good faith or equity;*

*V - (Vetoed);*

*VI - establishes an inversion of the burden of proof to the detriment of the consumer;*

*VII - determines the compulsory use of arbitration;*

*VIII - imposes a representative to conclude or carry out another legal transaction for the consumer;*

*IX - leaves the supplier with the option of concluding or not the contract, although forcing the consumer;*

*X - allows the supplier, directly or indirectly, to unilaterally vary the price;*

*XI - authorizes the supplier to unilaterally cancel the contract, without consumer having the same right;*

*XII - obliges consumer to reimburse the costs of collecting their obligation, without them having the same right against the supplier;*

*XIII - authorizes the supplier to unilaterally modify the content or quality of the contract after it has been concluded;*

*XIV - violates or enables the violation of environmental standards;*

*XV - are in disagreement with the consumer protection system;*

*XVI - make it possible to waive the right to compensation for necessary improvements.*

*XVII - conditions or limits in any way access to the bodies of the Judiciary;*[*(Included by Law No. 14.181, of 2021)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2021/Lei/L14181.htm#art1)

*XVIII - establishes grace periods in the event of non-payment of monthly installments or prevent the consumer's rights and means of payment from being fully re-established once the default has been cleared or an agreement has been reached with creditors;*[*(Included by Law No. 14.181, of 2021)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2021/Lei/L14181.htm#art1)

*XIX - (VETOED).*[*(Included by Law No. 14,181, of 2021)*](https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2021/Lei/L14181.htm#art1)

*§ Paragraph 1. An advantage is presumed to be exaggerated, among other cases, those that:*

*I - offends the fundamental principles of the legal system to which it belongs;*

*II - restricts fundamental rights or obligations inherent in the nature of the contract, in such a way as to threaten its purpose or contractual balance;*

*III - are excessively onerous for the consumer, considering the nature and content of the contract, the interests of the parties and other circumstances peculiar to the case.*

*§ Paragraph 2. The nullity of an unfair contractual term shall not invalidate the contract, except where its absence, despite efforts at integration, results in an excessive burden on either party.*

*§ Paragraph 3 (Vetoed).*

*§ Paragraph 4 - Any consumer or entity representing them may request the Public Prosecutor's Office to file the appropriate action to declare the nullity of a contractual clause that contradicts the provisions of this code or in any way fails to ensure a fair balance between the rights and obligations of the parties."* [↑](#footnote-ref-26)
27. See art. 51 of the brazilian Consumer Defense Code (CDC). [↑](#footnote-ref-27)
28. In any case, the volume of cases of unilateral conduct and/or vertical restrictions is substantially lower in relation to mergers and horizontal agreements. [↑](#footnote-ref-28)
29. See ASSAFIM, João Marcelo de Lima. Technology Transfer in Brazil: Industrial Property Competition and Contractual Aspects, Rio de Janeiro, Lúmen Júris, 2010. [↑](#footnote-ref-29)
30. ASSAFIM, J. M. L. and CARDOSO JR, L. E. Q. Competition law and right to dignity: unavailable public interest and federal jurisdiction / The Future of Antitrust. In. Priscila Brolio Gonçalves. (Coord.). Washington, Ed. Singular, 2020 p. 428-434. [↑](#footnote-ref-30)
31. SALOMÃO FILHO, cit. [↑](#footnote-ref-31)
32. See the Technical Note of the Competition Defense Commission CDCOR of the Brazilian Bar Association (Section of the State of Rio de Janeiro) issued in response to the Public Call for Subsidies of the Ministry of Finance of the Federative Republic of Brazil for the purpose of regulating digital platforms. NT concludes that regulation of digital platforms is necessary. However, as this is a competitive phenomenon, it must be conducted in collaboration by a group of government bodies (Ministry of Finance, National Consumer Protection Secretariat of the Ministry of Justice, National Data Protection Agency and National Telecommunications Agency) under the leadership of CADE, which must make institutional adjustments, including the creation of a new or second General Superintendence to investigate cases relating to digital platforms. [↑](#footnote-ref-32)
33. ASSAFIM, João Marcelo de Lima (chairman). *TECHNICAL NOTE FROM THE STUDY COMMITTEE FOR SUBSIDY APPROVAL: ECONOMIC AND COMPETITIVE ASPECTS OF DIGITAL PLATFORMS - CDCOR - OAB/RJ, 2024.*  CDCOR was able to count on the collaboration of its members: Fernando Naegele, Gisele Ramos Fonseca Trigo, Gustavo Flausino Coelho, João Marcelo de Lima Assafim, José Gabriel Assis de Almeida and Lucas Caminha. *"This is CDCOR's Technical Note regarding the taking of Technical Subsidies on the Regulation of Digital Platforms. Given the above, it would not be necessary to create a new body, with CADE retaining the power to regulate digital platforms economically and competitively. Even with CADE in this regard, some improvements to its structure and analysis criteria are recommended. The first would be the establishment of a specific coordination in CADE's GS for the competitive regulation of digital platforms, for the sake of the necessary technical development, taking advantage of the antitrust body's existing institutional competence, both for behavioral and structural solutions. Secondly, considering CADE's cross-cutting role, the implementation of regulatory collaboration/coordination mechanisms with other relevant bodies, jointly, namely:*

*(i) ANPD, due to the relevant role played by personal data in the operation of digital platforms;*

*(ii) the Ministries of Science and Technology and Finance, for collaboration between the entities to help improve the work of the antitrust body and the respective ministries;*

*(iii) a possible entity appointed for the general regulation of digital platforms, to develop the technique and understanding of the players in the sector and their particularities;*

*(iv) SENACON due to the common objective of protecting the collective or individual homogeneous interest of the consumer and conduct that may affect other values, such as the right to information; and*

*(v) ANATEL, to collaborate on regulatory matters concerning telecommunications.*

*As an improvement to this model, the creation of an institutional legal environment of active cooperation between the government entities and bodies involved does not imply a denial of jurisdiction.*

 [↑](#footnote-ref-33)
34. The social environment, Brazilian citizens and foreigners domiciled in Brazil (see art. 5 caput), who are part of the so-called economic order, are also holders of the "right to development." In this sense, the CRFB regulates the right to development in its articles 5 (caput and item XXIX), 218 and 219 (among others). Recently, the wording of the articles relating to the "right to development" was changed by Constitutional Amendment number 85, of February 26, 2015, published in the Official Gazette of February 27, 2015 (republished in the Official Gazette of March 3, 2015). This EC impacts on the text of the Innovation Law, amended by Law 13.243 of January 11, 2016. In this sense, the economic order, governed by article 170 of the Federal Constitution, provides constitutional protection for free enterprise (the right to access markets) and free competition (social control that frees markets from monopolies), deserves protection and its defense is an important element in the fight for development, insofar as it allows for the institution of tools to deconcentrate the fruits of economic growth and, therefore, one of the vectors for guaranteeing the equitable distribution of results. [↑](#footnote-ref-34)
35. The Antitrust Paradox: A Policy at War with Itself. In: **KONRAD, G. F. (Ed.)** *Antitrust and the Economy: A Reader*. Chicago: University of Chicago Press, 1990. p. 1-15. Crane, Daniel A. "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy." Antitrust L. J. 79, no. 3 (2014): 835-53 [↑](#footnote-ref-35)
36. MUSSI, Luiz Daniel Rodrigues Haj. **Abuse of economic dependence in inter-company distribution contracts**. 2007. Dissertation (Master's) - University of São Paulo, São Paulo, 2007. . Accessed at: 05 Aug. 2025. [↑](#footnote-ref-36)
37. "*The Administrative Council for Economic Defense (Cade) and the National Institute of Industrial Property (INPI) signed a cooperation agreement (ACT) to exchange technical subsidies and strengthen the relationship between the two institutions. The document was signed on Wednesday (13/06) by the presidents of the two authorities, Alexandre Barreto (Cade) and Luiz Otávio Pimentel (INPI), before the Administrative Court's judgment session. With the signing of the ACT, CADE and INPI undertake to provide technical support for the analysis of administrative proceedings and to exchange information, knowledge, data and documents, safeguarding the confidentiality of the information, as well as carrying out studies, events and seminars on the relations and interfaces between intellectual property and antitrust."* View <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-e-inpi-celebram-acordo-de-cooperacao-tecnica> [↑](#footnote-ref-37)
38. *Naturally, this premise has a direct impact on the interpretation of business contracts. With the level of information that entrepreneurs have when signing these contracts, the duties, obligations and, above all, the risks distributed in them must be analyzed with the firmness that the business world demands. For this reason, the general rule is to give preference to what is strictly established in the contract, without any derogation from pacta sunt servanda. However, the logic of parity and symmetry of information is not always verified in the relationships established between entrepreneurs. In the contemporary world, the market is constantly developing new and intricate relationship networks, with horizontal and vertical integrations in various formats and between market players of different types and levels of sophistication. Examples include the large e-commerce conglomerates,*

*such as Amazon and Alibaba. These companies make their online platform available to small, medium and large producers and traders all over the world. By simple business logic, you wouldn't expect Amazon and Alibaba to be able to negotiate individually with each of the merchants who want to use their base. They couldn't, and that's not really the case. For this reason, the two companies impose the conditions for the provision of services on their counterparts.* [↑](#footnote-ref-38)
39. ASSAFIM, João Marcelo de Lima. *Transferência de Tecnologia no Brasil: Aspectos Contratuais e Concorenciais de Propriedade Industrial* (Technology Transfer in Brazil: Industrial Property Competition and Contractual Aspects), Rio de Janeiro, Lúmen Júris, 2010. [↑](#footnote-ref-39)
40. BOTANA AGRA, Manuel.  Exclusive licenses on plant varieties are not necessarily incompatible with Article 85-1 of the EEC Treaty. ADI, (8)1982, pp. 427-430.  [↑](#footnote-ref-40)
41. As occurs in asymmetric recognition markets due to the large volume of merger acts, as, for example, occurs in the supplementary health and brokerage markets in the financial market. [↑](#footnote-ref-41)
42. FORGIONI, PAULA. *Os Fundamentos do Antitruste* (The foundations of antitrust). 4th ed. São Paulo: RT, 2010, p. 62. [↑](#footnote-ref-42)
43. FORGIONI, P. *op. cit*., p. 62. [↑](#footnote-ref-43)
44. BRIETZKE, Paul H. BORK, Robert. The Antitrust Paradox: A Policy at War with Itself. Valparaiso University Law Review, v. 13, n. 2, p. 403-421, 2011. [↑](#footnote-ref-44)
45. Vide Salomão Filho, Calixto. "Evolution or Involution of Antitrust Law" in: Pfeifer and Campilongo (Org.), Evolução do Antitruste no Brasil. Singular, São Paulo, 2018. Pp. 211-2019.

 [↑](#footnote-ref-45)
46. See the IP license received as structure (merger) no. 08700.004957/2013-72, Plaintiffs Monsanto do Brasil Ltda. and Bayer S.A. "*SENTENCE: Merger. Operation carried out in Brazil. Ordinary Rite. Operation that falls under items II and VI of art. 90 of Law no. 12.529/2011. Monsanto granted Bayer a license to develop, test, produce and commercialize in Brazil varieties of swede seeds containing Intacta RR2 and PRO technology, which gives plants both tolerance to the herbicide glyphosate and resistance to insects. Hypothesis of subsumption provided for in art. 88 of Law no. 12.520/2011 and Interministerial Ordinance 994/2012 - billing. Agriculture, Agricultural Research and Development and Seeds and Seedlings. Possible horizontal overlap. Vertical integration. Opinion of the General Superintendence for not knowing. Decision to acknowledge. Approval conditional on adaptation of contract clauses*".

BOTANA AGRA, Manuel.  *Las licencias exclusivas sobre obtenciones vegetales no son necesariamente inconciliables con el artículo 85-1 del Tratado de la CEE*. ADI, (8)1982, pp. 427-430.  [↑](#footnote-ref-46)
47. See Rappi v. IFood case. 08700.004588/2020-47 [Brazilian Services and Information](https://www.gov.br/cade/pt-br/assuntos/noticias/cade-impede-ifood-de-celebrar-novos-contratos-de-exclusividade-com-restaurantes?utm_source=chatgpt.com).

This process gave rise to the preventive measure (injunction) of March 10, 2021, which prohibited iFood from signing new exclusivity contracts with client restaurants and allowed only a one-year limit for existing contracts, until the final decision of the case [↑](#footnote-ref-47)
48. The following mergers are worth mentioning: Case No. 08700.006781/2024‑46. [↑](#footnote-ref-48)
49. The operation involving the associative contract between Amil (health plan operator) and Dasa (clinical analysis laboratory network) was processed under Case No. 08700.006781/2024‑46. CADE's General Superintendence approved this operation without restrictions in December 2024. [↑](#footnote-ref-49)
50. "As of December 31, 2021, CADE has issued decisions on 285 mergers involving the health insurance, hospital and diagnostic medicine services markets.". <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/DOI/Cadernos-do-Cade_AC-saude-suplementar_DOI_10.52896_dee.cc1.022.pdf> [↑](#footnote-ref-50)
51. See representation at SENACON-MJ for block de-accreditation of health service providers No 08012.001178/2024-26. [↑](#footnote-ref-51)
52. This phenomenon reverberates in consumer law. SENACON opened ADMINISTRATIVE PROCEEDING No. 08012.001178/2024-26 with a view to assessing the impact of OPS conduct, which now allegedly act as *gatekeepers* of the supplementary health markets (discrediting doctors, hospitals and laboratories, exposing consumers to scarcity and cost). Let's take a look at the reasoning behind the PA opening.

"*Market Monitoring Procedure. A significant increase in unilateral cancellations/rescissions of health insurance contracts. Precedent 608 of STJ. Operators claim that they comply with the provisions of Law No. 9.656/98 and the regulations of the National Supplementary Health Agency. ANS claims competence to legislate and supervise the sector. Possible affront to the guarantees provided for in the Consumer Defense Code (CDC), a higher education and principle standard. Completion of market monitoring with submission to the General Coordination of Technical Consulting and Administrative Sanctions (CGCTSA)*." *As a result, the Ministry of Justice notified 17 (seventeen) operators and 4 (four) health insurance associations to inform them about the unilateral termination of contracts with consumers, and the de-accreditation of doctors and hospitals. In this sense, the overwhelming majority of operators (OPS) confess to the mass de-accreditation of doctors and hospitals. A large catalog of operators has recognized the discrediting of doctors and hospitals.* [↑](#footnote-ref-52)
53. There is a relevant factual issue. As a result of the National Supplementary Health Agency's price regulation in consumer relations, providers have stopped offering individual contracts and instead offer almost exclusively

 corporate contracts. Thus, consumers must create a company or join an association to obtain a collective contract. [↑](#footnote-ref-53)
54. ANDREI and ROSO, Economic dependence **and its approach in jurisprudence,**  Revista de Direito Mercantil. 2020. **Acessado em versão eletrônica:** [**https://revistas.usp.br/rdm/article/view/133716**](https://revistas.usp.br/rdm/article/view/133716) **.** The author states that:*Business relations are not always between economic agents who are equally informed or have the same economic power. In many of these situations, the price and the formalized contractual terms are not sufficient adjustment mechanisms*.  [↑](#footnote-ref-54)
55. SALGADO, Lúcia Helena, MOTTA, Ronaldo Seroa. Regulatory Milestones in Brazil - What has been done and what remains to be done: IPEA 2004. [↑](#footnote-ref-55)
56. ##  [Melo, Luís Carlos Moriconi de](https://lume.ufrgs.br/discover?filtertype=author&filter_relational_operator=equals&filter=Melo,%20Lu%25C3%25ADs%20Carlos%20Moriconi%20de). Information asymmetry based on the regulation of the supplementary health market in Brazil: theories and evidence. Porto Alegre. UFRS. 2016. "*The objective of this dissertation was to analyze the health insurance market in Brazil and evaluate the regulations of the National Health Agency - ANS, regulatory agency, in the context of the theory of asymmetric information. Therefore, we used the theory of asymmetric information through the problems of adverse selection and moral hazard in order to analyze the regulatory problems. Also data and theoretical of the health insurance market benchmarks in Brazil, especially in relation to regulation and its implications were raised. The literature review of this work indicates that several studies have demonstrated the presence of asymmetric information in the supplementary health market. The economic evaluation of four ANS legislative resolutions also corroborates with this evidence and explains the presence of adverse selection and moral hazard evidenced in the literature. This paper concludes that the regulation of the market has failed, as regards the reduction of market failures, specifically with respect to information asymmetry, where their presence has become more pronounced with their constant interventions, compromising the sustainability of the market and reducing the level of economic welfare*."

 [↑](#footnote-ref-56)
57. The case number of the Monsanto and Bayer case is . The intellectual property license agreement for plant varieties and related technologies was examined as a merger. However, other situations, such as the ANFAPE (National Association of Auto Parts Manufacturers) case against Volkswagen, FIAT and Ford, regarding the use of industrial designs to obtain exclusivity in the secondary and tertiary markets, were dismissed by CADE for "lack of evidence", from the perspective of analyzing conduct in vertical businesses. The **PA No. 08012.002673/2007-51** had been closed as an investigation by the General Superintendence, despite the opinion of the Public Prosecutor's Office to the contrary and, after a voluntary appeal by the representative (claimant), the investigation was opened. [↑](#footnote-ref-57)
58. GRAU-KUNTZ, Karin. Industrial Property and Competition Law: Paths for the Promotion and Development of the Public Interest, International Seminar 200 years of Intellectual Property in Brazil, Panel V, Ministry of Foreign Affairs - MRE (of the Federative Republic of Brazil), Brasilia, 2009. In agreement with this author, we understand that this faculty can mean a *bunker* of defense against competitors. So let's see: "*The exclusive right can be used by its holder as a "shield" against competition*." *This "shield effect", we know, is not a mere consequence of the exclusive right, but rather an essential mechanism of exclusivity. So, we must ask: to what extent will its holder be able to enforce this "shield" mechanism on the market?*" [↑](#footnote-ref-58)
59. SULIVVAN, L. A.; GRIMES, W.S. The Law of Antitrust: In the Integrated Handbook, in: GRIMES, W. S., ***When do Frenchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism***, 65 Antitrust L.J. 105, 1996.

FORGIONI, Paula A., Distribution Contract. 3.ed. São Paulo: Revista dos Tribunais, 2014. pp 260 and ss. [↑](#footnote-ref-59)
60. See the literal text of article 173 of the CRFB. *Art. 173. Except in the cases provided for in this Constitution, the direct exploitation of economic activity by the State shall only be permitted when nec*

*ssential to the imperatives of national security or the relevant collective interest, as defined by law.*

*~~§1 The public company, the mixed-capital company and other entities that exploit economic activity are subject to the legal regime proper to private companies, including with regard to labor and tax obligations~~.*

*§ Paragraph 1 The law shall establish the legal status of public companies, mixed-capital companies and their subsidiaries that carry out economic activities involving the production or sale of goods or the provision of services, providing for the following:*[*(Redação dada pela Emenda Constitucional nº 19, de 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*I - its social function and forms of supervision by the State and society;*[*(Included by Constitutional Amendment No. 19, of 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*II - subjection to the legal regime proper to private companies, including civil, commercial, labor and tax rights and obligations;*[*(Included by Constitutional Amendment No. 19 of 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*III - bidding and contracting for works, services, purchases and disposals, observing the principles of public administration;*[*(Included by Constitutional Amendment No. 19 of 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*IV - the constitution and functioning of management and supervisory boards, with the participation of minority shareholders;*[*(Included by Constitutional Amendment no. 19, of 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*V - the terms of office, performance assessment and liability of directors.*[*(Included by Constitutional Amendment No. 19, of 1998)*](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc19.htm#art22)

*§ Paragraph 2 Public companies and mixed-capital companies may not enjoy tax privileges not extended to those in the private sector.*

*§ Paragraph 3 The law shall regulate the public company's relations with the state and society.*

***§ Paragraph 4 The law shall repress the abuse of economic power aimed at dominating markets, eliminating competition and arbitrarily increasing profits.***

*§ Paragraph 5 The law, without prejudice to the individual liability of the directors of the legal entity, shall establish its liability, subjecting it to the punishments compatible with its nature, in acts committed against the economic and financial order and against the popular economy.* [↑](#footnote-ref-60)
61. See case Jornal ODIA and Jornal do Brasil versus Infoglobo (Administrative Process [08012.003064/2005-58](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcXHQ2d98vqR34A6Fla0mpt5VZ_v4sR9K2iMOly0aRu_-)). According to the official government publication *"Infoglobo Comunicações e Participações S/A will have to adjust the policy of discounts offered to advertisers who contract advertising space in the newspapers O Globo, Extra and Expresso da Informação, controlled by the company. As the rules being adopted could limit competition in the printed newspaper market in the state of Rio de Janeiro, the Administrative Council for Economic Defense - Cade ordered on Wednesday (28/8) the cessation of practices with possible anti-competitive effects.

Infoglobo may not offer discounts related to the amount of money the advertiser allocates to contracting advertising space offered in the printed newspapers O Globo, Extra and Expresso da Informação. It is also forbidden to grant discounts that, when contracting advertising in Infoglobo's three newspapers, imply a lower value than that stipulated for advertising in just one of these vehicles. The obligations were signed through a Cessation Commitment Agreement (TCC). The agreement also provides for Infoglobo to pay R$1.94 million as a pecuniary contribution.

With the TCC, CADE's objective is to immediately cease the conduct investigated in Administrative Proceeding*[*08012.003064/2005-58*](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcXHQ2d98vqR34A6Fla0mpt5VZ_v4sR9K2iMOly0aRu_-)*, which investigates alleged abuse of a dominant position by Infoglobo to exclude competitors from the advertising market in printed newspapers.

The case began in 2005 following a complaint by the Jornal do Brasil and O Dia media outlets. According to the accusations, the anti-competitive practice adopted by Infoglobo consisted of imposing exclusivity on the purchase of advertising space; granting discounts conditional on the purchase of advertising space in more than one newspaper published by the Globo group; granting differentiated conditions for the dissemination of advertising on free-to-air television, due to the fact that Rede Globo de Televisão belongs to the same economic group as the defendant; marketing the Extra newspaper at a price below cost to readers; and providing advertising space below cost in Extra.

In 2012, the Ministry of Justice's Secretariat for Economic Law (SDE) concluded that "the discounts related to the percentage of the advertising budget allocated to Infoglobo's newspapers" and "the discounts related to contracting advertising space" constituted violations of the economic order, and recommended that the company be condemned.

SDE also concluded that the market affected by the conduct under investigation is highly unstable, among other reasons because of the competitive pressure that other media exert on printed newspapers. In addition, companies face difficulties in maintaining their operations, which can lead some players to leave the market, as happened with one of the whistleblowers, Jornal do Brasil. The investigation pointed out that, as this is a sensitive market, any anti-competitive practice that affects it could have irreversible effects, making the conditions for the survival of companies in this segment even more critical.

At the time of the events in question, Infoglobo controlled more than 70% of the circulation of newspapers in the city of Rio de Janeiro. "This leads to a worsening of the harmful potential of the conduct under investigation, since, practiced by an agent who has undeniable market power, it has the capacity to significantly affect the conditions of competition in the sector, thus reinforcing the need for the agreements signed by the Administration to take on a preventive nature to prevent similar situations from being avoided," concluded the reporting counselor of the case, Ana Frazão.*" Vide:[*https://www.gov.br/cade/pt-br/assuntos/noticias/cade-determina-fim-de-pratica-que-poderia-afetar-mercado-de-jornais-impressos*](https://www.gov.br/cade/pt-br/assuntos/noticias/cade-determina-fim-de-pratica-que-poderia-afetar-mercado-de-jornais-impressos) *.* [↑](#footnote-ref-61)
62. *OAB-RJ's Competition Defense Commission has produced a technical note on the regulation of digital platforms in 2024. The note aims to discuss the impact of these platforms on the market and the need for regulation to ensure fair competition and protect consumers and other stakeholders. View* the news at [*https://webadvocacy.com.br/2024/09/28/a-comissao-de-defesa-da-concorrencia-da-oab-rj-aborda-regulacao-das-plataformas-digitais-em-nota-tecnica/*](https://webadvocacy.com.br/2024/09/28/a-comissao-de-defesa-da-concorrencia-da-oab-rj-aborda-regulacao-das-plataformas-digitais-em-nota-tecnica/) *. The original document in the technical note is available at* [*https://webadvocacy.com.br/wp-content/uploads/2024/09/contribuicoes-a-ABRJ-tomada-de-subsidios.pdf*](https://webadvocacy.com.br/wp-content/uploads/2024/09/contribuicoes-a-ABRJ-tomada-de-subsidios.pdf) [↑](#footnote-ref-62)
63. The technical note from the OAB-RJ Competition Commission states: "*The merger seems to be so great or high that, according to the literature and regulation in other countries, the creation of behavioral remedies does not seem to be enough, thus requiring a package of structural solutions. In this context, prohibitions for dominant platforms in market failures cannot be less than prohibitions per se, since even the hypothesis of applying economic criteria in static analysis (such as the HHI - Herfindahl Hirschman Index -, for example), in competition by price, would reveal the ineffectiveness of the competition rule in the face of a monopoly that is virtually insoluble and immune to competition by overcoming it in certain collaborative arrangements in the field of applied research with a view to radical innovation (landmark invention), as, for example, can occur, in theory, in collaborative research arrangements in the field of artificial intelligence. These collaborations at the same time which can be beneficial in generating a safe and ethical environment, on the other hand, can imply the creation of proprietary standards (patrimonially attributed) apt to allow conduct and agreements susceptible to curb innovation and impose monopoly prices in the future*." [↑](#footnote-ref-63)
64. PROCON stands for Consumer Protection and Defense Program. Its nature is that of a public administrative body that works to defend consumer rights, monitoring the market, advising people on consumer issues, receiving complaints, mediating disputes between consumers and businesses, and applying administrative sanctions when consumer protection laws are violated. [↑](#footnote-ref-64)
65. Vide: <https://esaj.tjsp.jus.br/pastadigital/abrirDocumentoEdt.do?nuProcesso=011530349.2006.8.26.0100&cdProcesso=2SZX6E0H30000&cdForo=100&baseIndice=INDDS&nmAlias=PG5JMDS&tpOrigem=2&flOrigem=P&cdServico=190101&ticket=fDp%2Bi94RZh5fopwTZCljnco7DbaRQP0ciU9v3jTQY9CCy4IUZbNOKN4F0xYudKlvzjnBFj%2BqlVUv3BGgy5jQfX01dlp92%2BGHI0iHgKWVoS2vkQg%2Fd2Uzp%2BGny%2BKR%2BYOwE4ZYwx65w7OX4pS93VVORsBZpiHhBJhukReAZVN0TXLT5xLC%2Bl7YWqFsBQcY0A4oOtB5P1Ka6G%2BR7zn1kzFYodk6Rh%2BxNxToC17ibpKSts%2FYu49DAPxJNwwzABgEYzfwKqtGBc5Q6fnZwWvXdROW4mdzl7p5lGm1s3xPWlRfd04%3D>, accessed 25.5.2016). [↑](#footnote-ref-65)
66. ***Summary***

*SPECIAL APPEAL. CIVIL, CIVIL PROCEDURE AND COMMERCIAL. COMMERCIAL REPRESENTATION AND****DISTRIBUTION CONTRACT****. COMPUTER EQUIPMENT.
INDEMNIFICATION ACTION. 1. VIOLATION OF ARTS. 489 and 1.022 of CPC. OMISSION AND DENIAL OF JUDICIAL SERVICE. NO OCCURRENCE. COURT THAT HAS RULED ON ALL THE ISSUES RELEVANT TO THE RESOLUTION OF THE DISPUTE. 2. VIOLATION OF THE PRINCIPLE OF CONGRUENCE OR ADHERENCE. NO CONFIGURATION. THE REQUEST THAT SHOULD NOT BE ANALYZED ONLY FROM THE CHAPTER OF THE INITIAL PETITION , BUT FROM THE ISSUES PRESENTED BY THE PARTIES. LOGICAL-SYSTEMATIC INTERPRETATION. 3. LIMITATION OF LIABILITY CLAUSE LEGALITY. RECOGNITION.****DOMINANT POSITION OF THE SUPPLIER THAT DOES NOT PREVENT THE DISTRIBUTOR, WHICH WAS ALSO A LARGE COMPANY, FROM KNOWING AND UNDERSTANDING THE CLAUSE. DOLLUSION IN THE ELABORATION OF THE ITEM.*** *LACK OF PROOF. FOREIGN CURRENCY BOND. ADMISSIBILITY. CONVERSION ON PAYMENT. 4. FINE 1.026 §2 OF CPC. FITNESS. PROTELATORY EMBARGOES. SPECIAL APPEAL PARTIALLY
PROVIDED.* ***Ruling*** *Proceeding with the judgment, having overcome the preliminary extra petita judgment, following the votes of Mr. Justice Marco Aurélio Bellizze and Ms. Minister Nancy Andrighi, the Ministers of the Third Panel of the Superior Court of Justice agreed, by majority, to partially grant the special appeal, according to the vote of Mr. Andrighi. Justice Moura Ribeiro, who shall deliver the judgment.
The following voted against Justices Ricardo Villas Bôas Cueva (President) and Humberto Martins. They voted with Mr. MINISTER MOURA RIBEIRO Justices Marco Aurélio Bellizze and Nancy Andrighi.* [↑](#footnote-ref-66)
67. The *decision* determines that the analysis of the case requires a combination of the rules of the **Code of Civil Procedure of 2015**, especially arts. 322, §2º, 490, 492 and 1.026, §2º, which regulate the interpretation of the request, the limits of the sentence and the consequences of filing a motion for clarification with a delaying character. At the same time, the provisions of  **Defense of Competition Law (Law No. 12.529/2011)**apply, notably art. 36, items III and IV, which define acts that limit, distort or harm free competition as violations of the economic order, and also arts. 9, II, 37 and 38, which structure the administrative procedure before CADE. In the field of private law,  **Civil Code of 2002** (arts. 408, 416, sole paragraph, 421, sole paragraph, and 421-A, as amended by Law No. 13,874/2019) establishes the discipline of contractual clauses, the limits of the autonomy of will and the binding force of contracts, in line with the principles of objective good faith and social function. This combination of rules shows that, although freedom of contract prevails, it must be exercised in accordance with the economic order and the limits of competition. The case law of the **Superior Court of Justice** provides relevant interpretative support. In **AgInt no AREsp 2317324-SP** and in **AgInt no REsp 2026725-PA**, the Court reinforced the need for a logical-systematic interpretation of the claims and reaffirmed the validity of obligations agreed in foreign currency, with the exception of conversion at the time of payment. Already in judgments such as  **AgInt nos EDcl no REsp 2017292-SP**, o **AgInt nos EDcl nos EDcl no REsp 1744970-SP** and  **EDcl nos EDcl no AgInt no AREsp 1610240-SP**, the Court delimited the application of the fine for protelatory motions for clarification, emphasizing the prohibition of abusive use of the process. In turn, in **REsp 936741-GO**, in a paradigmatic vote, the understanding was consolidated that business contracts must be interpreted in line with the principles of private autonomy and the binding force of agreements, without prejudice to the application of limits of public order and competition.

Thus, integration between the legal provisions and the precedents demonstrates that the analysis of disputes involving business contracts and possible practices of abuse of economic dependence must simultaneously consider the **effectiveness of private contracts** and the **limits imposed by competition law**, guaranteeing a balance between business freedom and the preservation of the economic order. [↑](#footnote-ref-67)
68. **GRAU, Eros Roberto.** The Economic Order in the 1988 Constitution. 17. ed. São Paulo: Malheiros, 2015. FORGIONI, op. cit., SALOMÃO FILHO, op. cit. [↑](#footnote-ref-68)
69. SALOMÃO FILHO, op. cit. [↑](#footnote-ref-69)
70. MAFRA, R. *Contratos de colaboração e o direito da concorrência: critérios da legalidade da colaboração entre concorrentes* (Collaborative contracts and competition law: criteria for the legality of collaboration between competitors). Lumen Juris, 2023. "*In merger act no. 08700.008736/2012-92, CADE's General Superintendence determined that a collaboration contract was being examined which provided for the joint provision of services by two independent economic agents. Although the parties requested not to be informed of the operation, the Superintendence accepted the understanding expressed by ProCADE, which opined that the operation should be informed mainly due to the* ***exclusive relationship that the agreement would generate.***" We emphasize. [↑](#footnote-ref-70)
71. MAFRA, R. *Contratos de colaboração e o direito da concorrência: critérios da legalidade da colaboração entre concorrentes* (Collaborative contracts and competition law: criteria for the legality of collaboration between competitors). Lumen Juris, 2023. [↑](#footnote-ref-71)
72. See technical note CDCOR OAB-RJ. [↑](#footnote-ref-72)
73. SALOMÃO FILHO, op. cit. [↑](#footnote-ref-73)
74. See MAFRA, cit. [↑](#footnote-ref-74)
75. The CADE Resolution No. 10/2014 regulates the mandatory notification of *associative agreements* to the Brazilian antitrust authority. Notification is required when the agreement (i) establishes a lasting joint enterprise between independent firms for at least two years; (ii) involves risk- or profit-sharing; and (iii) entails market overlap such that: **(a) in horizontal relationships, the parties jointly hold 20% or more of the relevant market; or (b) in vertical relationships, at least one party holds 30% or more of the relevant market involved.** The Resolution thus extends merger control to contractual structures that may replicate the effects of joint ventures, ensuring that cooperative agreements with significant competitive impact are subject to prior review. [↑](#footnote-ref-75)
76. This guidelines has been criticized by part of the literature. Krein, J. (2023). Contratos Associativos: na contramão da lei nº 12.529/11. *Revista Do IBRAC*, (1), 299–328. Recuperado de <https://revista.ibrac.org.br/revista/article/view/68> [↑](#footnote-ref-76)
77. See MAFRA, op. cit., p. 41. [↑](#footnote-ref-77)
78. 4*. Antitrust law prohibits a company in a dominant position from refusing to sell a*

*goods or provide a service under normal payment conditions in accordance with custom and practice*

*commercial. It is also forbidden to make the sale of one asset conditional on the purchase of another,*

*unless justified by the rule of reason. In this case, any refusal to license*

*essential patent justifies CADE's action, since it is a matter affecting the System*

*Brazilian Competition Defense.* Voluntary Appeal No. 08700.010219/2024-17

Appellants: Motorola Mobility Comércio de Produtos Eletrônicos Ltda. and Lenovo Tecnologia Brasil Ltda. Defendant: Telefonaktiebolaget L.M. Ericsson. [↑](#footnote-ref-78)
79. *THOSE* GENERAL PRINCIPLES OF ECONOMIC ACTIVITY. Art. 170. The economic order, based on valuing human work and free enterprise, aims to ensure a dignified existence for all, in accordance with the dictates of social justice, subject to the following principles: I - national sovereignty II - private property; III - social function of property; IV - free competition; V - consumer protection; VI - defense of the environment, including through differentiated treatment according to the environmental impact of the products and services and their processes of elaboration and provision;         [(Redaction given by Constitutional Amendment no. 42, of 19.12.2003)](https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc42.htm#art1) [↑](#footnote-ref-79)
80. *Transforms the Administrative Council for Economic Defense - CADE into an autarchy, provides for the prevention and repression of infractions against the economic order and makes other provisions.* [↑](#footnote-ref-80)
81. With the exponential increase in the activity of digital platforms - especially the so-called "big techs" (Google, Meta, Amazon, Apple, Microsoft) - there is growing concern about issues of **economic dependence**, competition, content moderation and impact on markets and audiences. In response, Brazil has made progress on several legislative fronts to address these challenges. [↑](#footnote-ref-81)
82. Thus, regarding the form *ad solemnitatem* see the literal reproduction of the provisions of paragraph 3 of article 88 of LDC. "*Art. 88.  The parties involved in the operation will submit to CADE acts of economic merger in which, cumulatively: (...) § 3o* ***Acts that fall under the provisions of caput this article cannot be consummated until they have been assessed, under the terms of this article and the procedure set out in Chapter II of Title VI of this Law, under penalty of nullity****, and a pecuniary fine of not less than R$ 60.000.00 (sixty thousand reais) or more than R$ 60,000,000.00 (sixty million reais), to be applied under the terms of the regulations, without prejudice to the opening of administrative proceedings, under the terms of art. 69 of this Law."* [↑](#footnote-ref-82)
83. The associative agreements in the form of Resolution 17 of the Administrative Council for Economic Defense regulate the cases of notification of associative agreements provided for in item IV of article 90 of Law 12.5291/11, in addition to revoking CADE Resolution No. 10. *"According to the Resolution, any contracts with a duration of two years or more that establish a common enterprise for the exploitation of economic activity are considered associative."* [↑](#footnote-ref-83)
84. In the case of digital platforms, the conclusions point *mutatis mutandis* in the same direction: *All of the countries in this survey considered that the provision of their competition laws are able to handle competitive relations on the Internet, including the number of reports that concluded that there is no need for changes in the legislation.* [add quote] [↑](#footnote-ref-84)
85. See Motorola Mobility Comércio de Produtos Eletrônicos Ltda. and Lenovo Tecnologia Brasil Ltda., Voluntary Appeal no. 08700.010219/2024-17 regarding SEP (standard essential patents) for 5G technology. [↑](#footnote-ref-85)
86. Albeit with different treatments and different results. In the Monsanto Bayer case, the patent license agreement was treated as an associative agreement approved with restrictions. In the ANFAP v VW, FCA and FORD case, the antitrust authority closed the conduct case for lack of evidence of antitrust violations. [↑](#footnote-ref-86)
87. ###  UNIDAS case - Association for the standardization of medical fees. **Administrative Procedure (AP):** **08012.002381/2004‑76. As the represented party** União Nacional das Instituições de Autogestão em Saúde (**UNIDAS**) has been investigated for **anti-competitive conduct, regarding the** collective setting of medical fees by means of the CBHPM table and boycott of operators that did not accommodate the stipulated values, configuring a minimum price table and abuse of bargaining power over doctors. **The conclusion was to** convict and impose a fine for the anti-competitive practice. These excerpts show that, although CADE applied the **analysis by object** - condemning the practice of collective tariffs -, there was also explicit recognition of the ****disparity of power**** or ****dependence**** of doctors vis-à-vis UNIDAS, which was considered relevant to the antitrust injunction. As an additional context, it is worth highlighting the change in understanding in 2018. In this regard, it is worth noting that, in a subsequent case involving UNIDAS**(PA 08012.000758/2003‑71, known as the “Unidas Case”)**, there was a partial change in understanding, as the rapporteur for the case,**Cons. Cristiane Alkmin**, voted for the **filing** based on the lack of proof of **dominant position**, a different line of interpretation from the one previously adopted. The rapporteur's vote, however, was defeated - the majority upheld the **analysis by object** and the conviction.

 [↑](#footnote-ref-87)
88. See the Ambev case, which discriminated between distributors, the Unidas case, the association of health plans, the purpose of which was to increase bargaining power against doctors. In fact, there are situations in which the criteria for analyzing abuse of a dominant position and relative abuse of a dominant position are similar. [↑](#footnote-ref-88)
89. See CDCOR Report over Regulation of the Digital Platforms, p.2. [↑](#footnote-ref-89)
90. See the Box 3 Video case on abuse cccof copyright in a television program, in the case number PA **08012.004283/2000-40.** [↑](#footnote-ref-90)
91. This is the PA **08012.004283/2000-40**, initiated following a representation by the Chamber of Deputies' Commission for the Defense of Consumers, the Environment and Minorities, against Box 3 Vídeo e Publicidade (producer of the "Shop Tour" program in São Paulo) and Léo Produções Publicidade Ltda. (producer of the "Shop Tour" program in Campinas). The purpose of the case was to investigate possible **abuse of the right of petition with a competitive impact**, since the companies had filed numerous lawsuits based on supposedly non-existent copyrights, with the aim of preventing similar programs from being broadcast.  [↑](#footnote-ref-91)
92. In **2019**, the **Confederação Nacional das Revendas Ambev e das Empresas de Logística da Distribuição (Confenar)**filed a complaint with CADE, claiming that Ambev imposed such rigid commercial policies - such as setting the product mix, controlling prices, stocks and margins - that it made it impossible for distributors to be autonomous. This creates a scenario of **economic dependence** and **competitive pressure** undue pressure. [↑](#footnote-ref-92)
93. See Voluntary Appeal No. 08700.010219/2024-17 . The case was brought to CADE by a complaint from Motorola Mobility Comércio de Produtos Eletrônicos Ltda. and Lenovo Tecnologia Brasil Ltda. against Erisson regarding essential patents in the 5G technology market. The administrative process had been closed by the SG due to lack of evidence and was the subject of a voluntary appeal, which was closed after the parties reached an agreement. However, CADE initiated a new investigation ex-officio. [↑](#footnote-ref-93)
94. See BOX 3 Video in Brazil and, in Europe, the Magill Case. [↑](#footnote-ref-94)
95. CADE. Essential Patents" - which presents a detailed analysis of **Standard Essential Patents (SEPs)** in Brazil and on the international stage. Brasilia. 2025. Patents and technological standards play crucial and interdependent roles in the process of technological innovation. "*A patent grants an exclusive right to an inventor over a new invention (product or process) for a limited period; in exchange for this right, the inventor must publicly disclose the technical details of his invention. Patents are important for technological development for several reasons: they encourage investment in innovation; patent registrations constitute a vast repository of technical knowledge; they facilitate the commercialization of technologies; they represent a competitive advantage for the companies that hold them. Technological standards (or standards) establish a set of technical specifications or requirements for products, processes or services. They are crucial for technological development, especially in high-tech sectors, because they allow products and systems from different manufacturers to communicate and work together efficiently (interoperability); reduce production costs; speed up the adoption of new technologies; facilitate the entry of new companies that will develop products on a common technological basis, rather than trying to develop products with their own technologies.*

*At the intersection between patents and standards are the so-called standard essential patents (SEP), a patent that protects a technology deemed necessary to implement a certain technological standard. While patents encourage creation, standards guarantee interoperability and the widespread adoption of innovations. However, the intersection between patents and standards, especially in the case of standard-essential patents (SEPs), raises important debates about the balance between exclusivity and access. The owner of an essential patent has the certainty that all developers of a product using a certain standard to which the patented technology is essential will have to license their technology, which guarantees them an advantageous negotiating position. Given this crucial nature, SEP holders generally undertake to license their patents on fair, reasonable and non-discriminatory (FRAND) terms.* This excerpt comes from the full study in PDF format (as a technical note), which is available on CADE's website.

Parte superior do formulário

Parte inferior do formulário [↑](#footnote-ref-95)
96. "*It should also be noted that "the theory of the loss of a chance is a*

*French jurisprudential evolution and aims to lighten the burden of proof of causality, the*

*responsibility of the victim, between the fault and the damage" (CASTRO, 2005, p. 191).*

*Incidentally, the loss of a chance depends on whether the victim has*

*possessed a legitimate expectation of attaining any right. In reality, this is a loss of*

*an opportunity, caused by the unlawful act of a third party. In this case, "opportunity, as*

*indemnifiable element, implies the loss or frustration of an expectation or probability"*

*(VENOSA, 2008, p. 293)."* ROSA, Sibély Suzena.**COMPENSATION IN THE EVENT OF LOSS OF CHANCE, IN THE LIGHT OF THE CASE LAW OF THE COURT OF JUSTICE OF SANTA CATARINA. CEJUR/TJSC Magazine: *Jurisdiction. 2016. The summary indicates: "****The theory of compensation in case of loss of a chance, that comes from the French law, deals with cases that compensates the loss of a reasonable opportunity. This is a recent subject in doctrine and jurisprudence in Brazil, so that their interpretation is still setting and have been treated according to specific cases, since these are not a simple hypothetical damage. So, set the situation of a loss opportunity, the criterion for aprecciate damages shall be reasonably fixed according to the lost chance*." [↑](#footnote-ref-96)
97. ASSAFIM, J. M. L. and CARDOSO JR, L. E. Q. Competition law and right to dignity: unavailable public interest and federal jurisdiction / The Future of Antitrust. In. Priscila Brolio Gonçalves. (Coord.). Washington, Ed. Singular, 2020 p. 428-434. [↑](#footnote-ref-97)
98. CADE. *TCC na Lei nº 12.529/11 – Principais cláusulas utilizadas pelo CADE nos Termos de Compromisso de Cessação de Conduta*. Brasília: CADE, 2021. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/TCC%20na%20Lei%20n%C2%BA%2012.52911/TCC%20na%20Lei%20n%C2%BA%2012.529-11.pdf> [↑](#footnote-ref-98)
99. An empirical study conducted at CADE reviewed **349 Cease-and-Desist Agreements (Termos de Compromisso de Cessação – TCCs)** signed between 2012 and 2019 under Brazil’s Antitrust Law (Law No. 12,529/2011). The report identified the most frequent clauses — such as pecuniary contributions, obligations to cease or refrain from conduct, and monitoring mechanisms — and emphasized the need for greater standardization to enhance predictability and transparency in CADE’s settlement practice. According to an OECD report (2019), approximately **73% of judicial decisions upheld CADE’s rulings** — either fully or partially. This means that in roughly **seven out of ten cases**, the Brazilian competition authority’s decisions were confirmed by the Federal Courts, while only about **27% were reversed or modified**. This high rate of judicial deference underscores CADE’s institutional credibility and the robustness of its antitrust enforcement. [↑](#footnote-ref-99)
100. *Em precedente de 2019, o STF enfrentou discussão sobre os limites da revisão judicial de decisões proferidas pelo CADE - Conselho Administrativo de Defesa Econômica. No julgamento do AgR no RE 1.083.955/DF1, o dever de deferência do Judiciário às decisões administrativas foi realçado em razão da "falta de expertise e capacidade institucional de tribunais para decidir sobre intervenções regulatórias" e da "possibilidade de a revisão judicial ensejar efeitos sistêmicos nocivos à coerência e dinâmica regulatória administrativa". Esse julgamento, contudo, não afastou a possibilidade de revisão das decisões do regulador quando demonstrada ilegalidade ou abusividade.*

*Para a Suprema Corte, a autocontenção do Judiciário busca manter o equilíbrio institucional e a repartição de poderes. Além disso, é inerente à regulação econômica algum espaço interpretativo sobre conceitos jurídicos indeterminados, desde que a arquitetura institucional e o desenvolvimento jurisprudencial das agências confiram segurança jurídica. Por isso a ênfase da decisão na "expertise técnica" e "capacidade institucional do CADE em questões de regulação econômica", suplantando a suposta inaptidão judicial para avaliar "questões policêntricas de efeitos acentuadamente complexos" e que exigem "prognósticos especializados".*

*Vale notar que o referido precedente do STF, considerado paradigmático, foi criticado por parte da comunidade jurídica, que se focou na natureza vinculante dos atos administrativos do CADE, por consequência passível de controle jurisdicional. Por sua vez, argumentos favoráveis se escoraram na lógica do desenho institucional2, na questão da tempestividade do enforcement público e na aplicação de uma adaptação da Chevron doctrine*. Vide <https://www.migalhas.com.br/depeso/411060/deferencia-judicial-as-decisoes-do-cade> [↑](#footnote-ref-100)
101. See the Technical Note of the Competition Defense Commission CDCOR of the Brazilian Bar Association (Section of the State of Rio de Janeiro) issued in response to the Public Call for Subsidies of the Ministry of Finance of the Federative Republic of Brazil for the purpose of regulating digital platforms. NT concludes that regulation of digital platforms is necessary. However, since this is a competitive phenomenon, it must be conducted in collaboration by a group of government bodies (Ministry of Finance, National Secretariat for the Defense of Consumers of the Ministry of Justice, Agência Nacional de Proteção de Dados and Agência Nacional de Telecomunicações) under the leadership of CADE which, to do so, must make institutional adjustments, including the creation of a new or second General Superintendence to investigate cases relating to digital platforms. [↑](#footnote-ref-101)
102. ASSAFIM, João Marcelo de Lima (chairman). *TECHNICAL NOTE FROM THE SUBSIDY STUDY COMMISSION: ECONOMIC AND COMPETITION ASPECTS OF DIGITAL PLATFORMS - CDCOR - OAB/RJ, 2024.*  CDCOR was able to count on the collaboration of its members: Fernando Naegele, Gisele Ramos Fonseca Trigo, Gustavo Flausino Coelho, João Marcelo de Lima Assafim, José Gabriel Assis de Almeida and Lucas Caminha. *"This is CDCOR's Technical Note on Technical Subsidies on the Regulation of Digital Platforms. Given the above, it would not be necessary to create a new body, with CADE retaining the power to regulate digital platforms economically and competitively. Even with CADE in this regard, some improvements to its structure and analysis criteria are recommended. The first would be the establishment of a specific coordination in CADE's GS for the competitive regulation of digital platforms, for the sake of the necessary technical development, taking advantage of the antitrust body's existing institutional competence, both for behavioral and structural solutions. Secondly, considering CADE's cross-cutting role, the implementation of regulatory collaboration/coordination mechanisms with other relevant bodies, jointly, namely:*

*(i) ANPD, due to the relevant role played by personal data in the operation of digital platforms;*

*(ii) the Ministries of Science and Technology and Finance, for collaboration between the entities to help improve the work of the antitrust body and the respective ministries;*

*(iii) a possible entity appointed for the general regulation of digital platforms, to develop the technique and understanding of the players in the sector and their particularities;*

*(iv) SENACON due to the common objective of protecting the collective or individual homogeneous interest of the consumer and conduct that may affect other values, such as the right to information; and*

*(v) ANATEL, to collaborate on regulatory matters concerning telecommunications.*

*As an improvement to this model, the creation of an institutional legal environment of active cooperation between the government entities and bodies involved does not imply a denial of jurisdiction.*

 [↑](#footnote-ref-102)
103. Ambev and White Martins (Processo Administrativo no. 08012.009888/2003-70) cases. In 2010, CADE found that White Martins, together with other industrial gas producers (Air Liquide, Air Products, Linde/Aga, and IBG), engaged in a cartel involving **price fixing, market division, and bid-rigging** in the supply of industrial and medical gases. CADE imposed a record fine on White Martins — equal to **50% of its 2003 turnover, amounting to approximately BRL 2.2 billion (around 407 mi USD)** — the highest penalty ever applied by the Brazilian authority at that time.

Subsequently, the **Federal Regional Court of the 1st Region (TRF-1)** upheld CADE’s decision, specifically confirming White Martins’ liability for **açambarcamento** (hoarding or excessive acquisition of carbon dioxide), a practice designed to restrict competitors’ access to essential inputs. This judicial confirmation reinforced both the factual findings and the sanctioning approach adopted by CADE. [↑](#footnote-ref-103)
104. *Art. 37.  The commission of an infringement of the economic order subjects those responsible to the following penalties:*

*I - in the case of a company, a fine of 0.1% (one tenth of a percent) to 20% (twenty percent) of the value of the company's, group's or conglomerate's gross revenue obtained in the last financial year prior to the initiation of the administrative process, in the field of business activity in which the infraction occurred, which will never be less than the advantage gained, when it is possible to estimate it;*

*II - in the case of other individuals or legal entities governed by public or private law, as well as any associations of entities or people constituted in fact or in law, even temporarily, with or without legal personality, who do not carry out business activity, and it is not possible to use the criterion of the value of gross sales, the fine shall be between R$ 50,000.00 (fifty thousand reais) and R$ 2,000,000,000.00 (two billion reais);*

*III - in the case of an administrator, directly or indirectly responsible for the infraction committed, when their fault or willful misconduct is proven, a fine of 1% (one percent) to 20% (twenty percent) of that applied to the company, in the case provided for in item I of caput this article, or to legal persons or entities, in the cases provided for in item II of caput this article.*

*§ Paragraph 1o  In the event of a repeat offence, the fines imposed shall be doubled.*

*§ Paragraph 2o  In calculating the amount of the fine referred to in item I of caput this article, CADE may consider the total turnover of the company or group of companies, when it does not have the turnover value in the field of business activity in which the infringement occurred, defined by CADE, or when it is presented incompletely and/or not demonstrated in an unequivocal and suitable manner.*

*Art. 38.  Without prejudice to the penalties set out in art. 37 of this Law, when the seriousness of the facts or the general public interest so require, the following penalties may be imposed, alone or cumulatively:*

*I - the publication, on half a page and at the offender's expense, in a newspaper indicated in the decision, of an extract of the condemnatory decision, for 2 (two) consecutive days, from 1 (one) to 3 (three) consecutive weeks;*

*II - a ban on contracting with official financial institutions and taking part in tenders for acquisitions, disposals, works and services, public service concessions, in the federal, state, municipal and Federal District public administration, as well as in indirect administration entities, for a period of not less than 5 (five) years;*

*III - the registration of the offender in the National Consumer Protection Register;*

*IV - the recommendation to the competent public bodies that:*

*a) a compulsory license is granted for an intellectual property right held by the infringer, when the infringement is related to the use of that right;*

*b) the offender is not granted an installment payment of federal taxes owed by him or to cancel, in whole or in part, tax incentives or public subsidies;*

*V - the spin-off of a company, transfer of corporate control, sale of assets or partial cessation of activity;*

*VI - a ban on exercising trade in their own name or as a representative of a legal entity, for a period of up to 5 (five) years; and*

*VII - any other act or measure necessary to eliminate harmful effects on the economic order.* [↑](#footnote-ref-104)
105. As illustrated by the cases of Ambev, Nestlé/Garoto and antitrust analysis of franchise contract clauses. [↑](#footnote-ref-105)
106. See Case No. 08012.009988/2011-77. SG/CADE, in its technical note, clearly demonstrates the fact that the supplementary health market in Brazil is highly verticalized, with great bargaining power of health plan operators vis-à-vis their s. uppliers of medical services, notably hospitals, laboratories, clinics, professionals and, especially, doctors. points out that the Brazilian supplementary health market **is highly verticalized**, with great bargaining power between operators and medical service providers (hospitals, laboratories, clinics and professionals). The following excerpt from the UnitedHealth / Amil merger is worth reproducing: "The asymmetry of information, the market power of operators and the lack of real contracting alternatives generates a **significant economic dependence of service providers**, making it difficult for them to act autonomously in the market." [↑](#footnote-ref-106)
107. Partially addressed because the high structural merger of Brazilian markets, the statute of limitations, the insignificance of private damages compared to fines paid to the state, and the absence of punitive damages in Brazilian law, among other elements—such as the role of federal judges in enforcement—prevent the application of the US system as conceived in its country of origin. [↑](#footnote-ref-107)