

The 5th anniversary years of Brazilian Antitrust Law: *quo vadis?*

I. Introduction

Yesterday we celebrated the 5th anniversary of the Law 12,529/2011 (Brazilian Antitrust Law),¹ which revoked the Law 8,884/1994, after nearly 18 years in effect. The Law 12,529/2011 reframed the Brazilian Competition Defense System (SBDC) and gave rise to material and procedural changes to the Brazilian competition framework. The Brazilian antitrust policy – and society – have benefitted from those changes, which, in turn, paved the way to a pattern aligned with the main international jurisdictions.²

II. Main Developments at a glance

One of the most relevant innovations of the “new” Brazilian Antitrust Law was in the area of merger controls, since Brazil has introduced the pre-merger control system, the prevailing standard in almost all the jurisdictions. Gun jumping has been the centerpiece of business community discussions. The companies have been showing an attentive behavior towards prudent measures to avoid the premature consummation of the transaction.

One may recall the hesitancy of the economic agents as to the new statute, showing concerns about timing for analysis and potential hindrance of business dynamics. This worry, like so many others, has faded with practice. In that sense, one should check the statistics³ of the Administrative Council for Economic Defense (CADE, in its acronym in Portuguese) to attest that, in general, the Brazilian antitrust authority has seamlessly fulfilled the legal term for analysis of merger filing (notably the fast-track ones). The hard work of the Department of Economic Studies (DEE, in its acronym in Portuguese) and of the General Superintendence facilitates the carrying out of instructions and analysis of more complex cases by the Commissioners in CADE`s Tribunal.

In the anticompetitive conducts arena, in line with international efforts, CADE has prioritized its tools to fight against cartels, the most perverse anticompetitive conduct that has constantly gained sophisticated flavors, sometimes generating cross-border effects. Given recent and paradigmatic investigations underway in the national sphere, the tendency is to see a heightened interplay between antitrust law and other areas (e.g., corruption, money laundering etc.), primarily for purposes of investigating public procurement and bid rigging.

The antitrust authority has invested in mechanisms to improve its Leniency Program and Settlement Program – Cease and Desist Agreement (TCC, in its acronym in Portuguese) –, and the outcome has been a great success,⁴ although there are still important points that should

1 English version available at: <http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>. Accessed on May 12, 2017.

2 The Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade – IBRAC has published a book (in English) to celebrate the 5th anniversary of the Brazilian Antitrust Law. More information is available at: <http://www.ibrac.org.br/livros.htm>. Accessed on May 12, 2017.

3 CADE`s 2016 balance (Portuguese version) is available at: <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf>. Accessed on May 12, 2017. Additional statistics are available at: <http://cadenumeros.cade.gov.br/QvAJAXZfc/opedoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qww&host=QVS%40srv004q6774&anonymous=true>.

4 The seeking for leniency has been quite rampant. For reference purposes, from 2015 to 2016, there have been an increase of approximately 510% with respect to the seeking for leniency agreements. The Car Wash Operation (*Operação Lava Jato*) has played a significant role on this and has been observed in an attentively manner by authorities and practitioners from overseas. One states that the Car Wash Operation might entail a turning point in terms of corporate compliance culture in Brazil. There have been increasing efforts throughout the country to incentivize the cooperation amongst the competent authorities and the business community so as to achieve fruitful results in terms of a genuine compliance with the laws.

be perfected. Undoubtedly, the mentioned Programs are crucial in aiding the authority in the fight against cartels. In addition, CADE has modern investigative techniques and econometric screenings for cracking down on collusive practices, noticing an emphasis in search and seizure operations.

With the aim of truly disseminating a sense of compliance within Brazilian society, thereby giving rise to the (needed) transformation of corporate culture in favor of ethics and integrity, CADE has engaged itself in the elaboration of guidelines,⁵ always accompanied by a clear and assertive dialogue with the community through public consultation, with high-level contributions that allowed an increase in terms of predictability and legal certainty. CADE has also issued new resolutions and revisited certain understandings in order to modernize and improve the discussions.

Another important area in which one could verify that CADE has taken great strides is in relation to partnerships – both in international level with other agencies,⁶ solidifying the projection of Brazilian jurisdiction globally (CADE is in fact one of the most notorious and closely agency observed by its peers), and in local level with other institutions, e.g., Federal Prosecution Office. Surely those interactions have enabled the combination of efforts in the best interests of investigations.

Moreover, a special agenda for spreading the rules of free competition is competition advocacy. In particular, this is an agenda of utmost significance when one recollects the country's background, marked by a history of strong state intervention. The advocacy role has been successfully perceived, whether within the scope of the Secretariat for Economic Monitoring (SEAE, in its acronym in Portuguese) or CADE, or within the academy, civil institutions, think tanks, etc.

III. Quick Balance

Against this succinct backdrop, our opinion is that the merit of Brazilian competition policy is due to, amongst other factors, the confidence and legitimacy achieved by the SBDC. Of course this was not random, nor built in a vacuum, overnight. The success is the result of the dedication and uninterrupted commitment of a body of qualified professionals over time. Certainly, the exchange of experiences with society and the transparent attitude contributed to this outcome. The antitrust authority is an example of an institution that has been immune from external pressures, responding to challenges with intelligence and technicality. The praising and awards obtained internationally⁷ by CADE translate a model of performance that works and inspires other agencies.

Bottom line the balance would be no other than envisioning a positive and multifactorial agenda carried by the SBDC over these 5 years. The learning curve during this period was exponential. The institutional memory and the legacy of CADE are assets that contribute to the development of the country. Knowing how to properly explore the "toolbox" in its favor,

5 CADE's guidelines (in English) on Gun Jumping, Antitrust Compliance Programs, Antitrust Leniency Program and Cease and Desist Agreement for cartel cases are available at: http://en.cade.gov.br/cade_english/topics/publications/publications/guidelines. Accessed on May 12, 2017.

6 For example, one can see the CADE's international agenda of 2016, available at: <http://en.cade.gov.br/international-calendar>. Accessed on May 12, 2017. Also, one can notice some CADE's bilateral cooperation, available at: http://en.cade.gov.br/topics/bilateral_cooperation/. Accessed on May 12, 2017.

7 By way of reference, in a ceremony held in March this year in Washington, D.C., under the context of the Global Competition Review Award, CADE was awarded for the third time as the best antitrust agency in the Americas (2016). Moreover, CADE took the first place in the Antitrust Writing Awards promoted by Concurrences (Most Innovative Soft Law – Concerted Practices Category by virtue of CADE's guidelines on Cease and Desist Agreement for cartel cases). CADE was also mentioned as one of the most efficient antitrust authorities in the world during the World Economic Forum this year.

calibrating incentives, is a key part for CADE to ensure a healthy competitive environment in Brazil, always in the light of its trajectory and the choices in terms of public policy.

IV. Quo vadis?

Envisioning some thoughts for the future, the rule of thumb stresses that caution is never too much: CADE must act with care and without euphoria. There are many challenges on the path ahead that require a weighed and responsive debate before implementation, including a desirable interdisciplinary approach to other areas.

Generally speaking, some dilemmas rapidly emerge, such as, for instance, strategies to reconcile public and private enforcement with respect to private action; the rise of the big data and its impacts for the antitrust policy, also pointing out the emergence of algorithms and whether they could jeopardize competition when it comes to the effects of algorithms on the ability to influence coordinate activities;⁸ challenges of corporate law as regards minority shareholdings, noticing nuanced debates linked to dominant influence and relevant influence from the competitive standpoint; interconnections between intellectual property and antitrust, exploring the abuse of trademarks, patents and impacts on innovation; gray zones in the frontier of competition and arbitration; credible remedies on merger control vis-à-vis markets that escape from traditional logic; equalize institutional initiatives amongst institutions of Public Administration; improve the international agenda for investigations and so on.

All in all, the applause to the SBDC is absolutely deserved. Nonetheless, self-criticism is always a powerful weapon for avoiding paralysis, which, in our view, over these 5 years, has been far from affecting the Brazilian antitrust policy. In this context, we hope that the strength of the trajectory illuminates the paths and allow a coherent advance in the history of the institution.

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⁸ See, for instance, the brand new Antitrust Chronicle published by Competition Policy International with insightful thoughts on big data, algorithms, artificial intelligence and so on. Available at: <https://www.competitionpolicyinternational.com/antitrust-chronicle-the-algorithms-have-landed/>. Accessed on: May 16, 2017.