Sustainability in Brazilian and EU Antitrust Enforcement – Where Do We Stand?

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There are moments in history in which the movements of the political, social and economic conjuncture intertwine in a way that leads entire societies to civilizing exhaustion. When this occurs and the limited effectiveness of routine escape measures is evident, the structural dimensions of our fractures are exposed. Nowadays, many authors, mainly economists, including those with neoclassical thoughts, have pointed their finger at a common cause of our malaise: the concentration of economic power. And antitrust is the basis for tackling that – it is the job of antitrust enforcers to ensure free competition is protected, structural barriers to competition are removed, and anticompetitive behavior is prohibited. Undistorted competition is the basis for a "democratic" free economy in which everybody has a fair chance to strive and the will of the majority, rather than of a powerful few, succeeds.

While most developed economies and societies believe that striving for growth is beneficial, the common sentiment is that everybody should play by the rules, and those with immense economic power may actually need to be subject to special rules. So, we see an increasing consensus that competition enforcers need special legislative and enforcement tools to tackle excessive economic power and anticompetitive conduct that cannot be framed in traditional antitrust terms. Apart from considering the introduction of new tools, such as the European Commission is currently proposing, we also see increasing skepticism against mergers that consolidate industries. For example, in the Dow/DuPont merger, the European Commission strongly suggested that past consolidation had led to reduced innovation efforts and output, and that further concentration would once again be detrimental to competition regarding innovation, and hence the development of new products coming to market that could help tackle a major societal challenge of the future: feeding an ever-growing population.

All of these considerations are part of a discussion on whether competition enforcement in the narrower sense is vigorous enough, or needs new tools to tackle risks to undistorted competition in free markets, such as tools to intervene against conduct before companies become dominant and markets tip in their favor, to tackle self-preferencing in companies with a strong position across several markets, new thresholds, theories of harm, and/or remedies to tackle mergers that are suspected of being anticompetitive (where proving that suspicion with the traditional tools and available data seems too difficult).

But the debate does not stop there. A new age of increasing nationalism and industrial policy has arrived that, on the one hand, suggests that some countries unfairly support "domestic" companies and provide them with an unfair competitive advantage in increasingly global markets, such as the European debate about whether the European Commission should allow seemingly anticompetitive mergers to go ahead in order to create "European champions," and increased efforts to intervene against foreign subsides, as well as the EU's and its members states' increased scrutiny of foreign direct investments, especially to avoid opportunistic acquisitions taking advantage of financially strained European companies, and to prevent the exodus of key European technologies and capabilities. The "European champions" debate in particular has raised the broader question of whether "non-competition" considerations, in this case industrial policy considerations, should be taken into account during competition assessments and proceedings. Some countries, such as Germany, have opted for separate dedicated tools – the competition authority reviews mergers solely on competition grounds, and the Federal Minister of Economic Affairs can overrule a merger veto based on industrial policy considerations. He or she bears the political responsibility for that decision, while the competition authority is only responsible for proper competition-based assessments.

But there is another societal challenge that raises the same systemic question: climate change and sustainability. Many industries are working hard to reach the Paris agreement climate goals, but with simultaneous population and economic growth, and therefore increasing demand for certain products, that is becoming ever more challenging. For example, due to global population growth and expansion of the middle class, it is expected that demand for chemicals and materials will quadruple by 2050. No company can address these challenges alone. Industry-wide approaches and collaborations are required, and some have already been initiated — such as the World Economic Forum's initiative on Collaborative Innovation for Low-Carbon Emitting Technologies in the Chemical Industry. Here, many companies have called for more guidance on what they consider much needed collaboration for a greater good, but some of these initiatives are inconceivable without at least some restrictive effects on competition. Again, the question arises of whether public non-competition objectives should be taken into account in the competition authorities' and courts' assessments of mergers and competitor collaborations.

Doing so of course entails important risks. If we start introducing one type of public policy goal due to its overarching importance, where do we draw the line? Take employment considerations: do we let anticompetitive mergers go through and make the sacrifice of consumers paying more in return for the hope of saving jobs by enabling a combined company to survive better than two smaller independent companies?

Of course, the main concern is that the introduction of considerations such as tackling inequality, improvement of working conditions and income, increasing of competitiveness in international trade and, finally, the achievement of environmental goals, would cause problems of all kinds, particularly the question of how to balance these interests with those of undistorted competition in specific cases. We would thus be threatening the minimal degree of stability and predictability that antitrust is supposed to have. Added to this is the fact that these agendas would tend to make the already weakened mechanisms of international convergence unfeasible, in addition to imposing on competition authorities the resolution of dilemmas between policies and public objectives. This last dimension gains even more prominence in jurisdictions in which the competition authority has the last word on business concentration acts, as is the case in Brazil.

This may take place basically in two ways: (i) in the first scenario, antitrust would assimilate concerns of inequality, sustainability, and international trade through traditional effects analysis parameters, based on the primacy of consumer welfare as a guiding principle and on the use of industrial organization tools as a method for measurement; (ii) in the second scenario, it starts with a more critical view of the current parameters and seeks to include new values to be considered in the analysis of business practices. This second scenario has recently gained strength and has been shifting the tectonic plates of antitrust, static since the 1980s. This is because there are serious doubts about whether the way in which the potential effects of business strategies on consumer welfare has been applied by the authorities over the past 40 years may have helped "bring water to the mill" of concentration of power and income.

These two movements, with an emphasis on the second, raise a series of concerns about the loss of antitrust organicity, either due to the challenges arising from the conciliation — or overlapping — of equally legitimate interests, or by the replacement of a recognized and rigorous analytic method from the economic point of view for something that is still not very palpable and remains muddied by rhetorical considerations the weight of various principles.

Both paths raise substantial dilemmas. We may come across situations in which a given business strategy, despite leading to a welfare increase for consumers through price reductions and/or increased supply of a good, has negative impacts from an environmental or social point of view. The reverse may also occur: a business strategy may enable social or environmental gains and simultaneously result in price increases for the consumers.

The authorities may explain their parameters of analysis by referring to regulatory standards considered by other public policies, using behavioral economics tools to identify consumer biases, or even through guidelines that organize the formatting of theories of damage based on something other than price. It is noted that, depending on the quality variable that one wants to evaluate, relying on principiological references based on the Hayekian idea of competition as a discovery process may not be the best way forward, especially when we must deal with environmental issues in which, often, the way to reach high levels of compliance is through standardization of practices, not through diversification.

Some such initiatives have already been implemented in Europe with regard to the possibility of making feasible agreements between competitors to achieve the Green Deal objectives — and the efforts placed therein are certainly the best developed in this regard, which is why they deserve more attention.

In this context, one of the ways to pursue the objectives of the Green Deal refers to state action through legislative procedures. A second way concerns the activity of the private sector, which may be better suited to address these issues, especially because companies have more specific knowledge and experience required to identify the precise and necessary actions for sustainable development. However, individual companies cannot bring about systemic changes unilaterally, especially in markets where consumers are not sensitive to sustainability. Cooperation is therefore a key factor.

With this background in mind, it is worth covering how the European Commission and the Brazilian antitrust authority have looked at this topic so far and what measures, if any, have been taken to address the issue of sustainability in antitrust enforcement.

The European Commission

The European Commission and its members states have made active efforts to promote a clearer scenario regarding the possibility of companies to enter into agreements in order to achieve Green Deal objectives. Among such objectives, international and supranational organizations have set very ambitious goals, such as making the European Union CO_2-neutral by 2050. For the purposes of achieving these goals, it is important that there are paradigm shifts, given that several issues related to business patterns in several sectors need to be adapted or even reinvented.

It is evident that companies may individually pursue sustainability goals, but significant social changes depend on collective efforts. Thus, the cooperation between companies for the implementation of sustainable activities has been increasingly important.

Initiatives to promote sustainable development are essentially based on three different scenarios: (i) “self-regulation initiatives” between companies to establish sectorial self-control, which normally occurs through the exchange of information; (ii) “technology

advancement initiatives," in which companies enter into agreements to introduce a technology or system in a sector by way of a joint investment; and (iii) "product replacement initiatives" in order to replace or introduce new products to achieve a certain sustainability goal, such as enhancing animal welfare, for example.

The European Commission's guideline on horizontal cooperation agreements has a specific chapter on environmental agreements, although it has not been improved by the Commission since 2011. The guidelines contain only two explicit references to arrangements that foster sustainability goals - which are limited to environmental issues and do not include other dimensions of sustainability (e.g. animal welfare) — and refer to sustainability initiatives related to standards performance or access to a specific mark of quality, although there are other forms of agreement that can be much more efficient in protecting the environment.

In other words, agreements that aim to promote greater sustainability will face a dilemma in which loose targets for complying with standards will not be sufficient to considerably advance sustainable development, while stringent obligations established in common agreements between companies may be seen as a restriction on freedom of choice and a breach of Article 101 (1) of the Treaty on the Functioning of the European Union ("TFEU").

Still within the European context, the Dutch competition authority ("Authority for Consumers & Markets") took an important step in relation to the provision of guidelines related to agreements between competitors aimed at sustainable development. In July 2020, the authority published a first version of the guide on "sustainability agreements," containing guidelines related to just such a form of cooperation.

It is worth noting that the European Court of Justice ("CJE") has for years understood that certain restrictions on competition may not breach the TFEU if the conduct serves a legitimate public interest objective, and if its restrictive effects are "inherent" and proportional to the pursuit of said objective. The Court developed this case law in the *Albany* and *Wouters* cases, and confirmed this understanding in 2014 in the "*FNV Kunsten*" case, including explicitly stating that its Albany case law was not limited to a finite list of specific social policy objectives.

Regardless of these precedents, the CJE states that Article 101 of the TFEU must be interpreted in a joint and consistent manner with the other objectives set out in the European Union Treaties. These objectives include several topics related to environmental protection, sustainable development, animal welfare, and public health.

The Brazilian Antitrust Authority

As for Brazil, even though the Administrative Council for Economic Defense ("CADE") has been attentive to the initiatives carried out by the European Commission and EU member states in relation to topics involving sustainability and environmental agreements, no guidelines on the matter have been issued at this time. In general, the Brazilian antitrust authority has analyzed transactions that raise sustainability goals (such as the creation of business associations and associative agreements) under the usual terms and standards set forth by Law No. 12,529/2011.

In March 2014, for instance, CADE approved a transaction concerning the creation of Jogue Limpo Institute, which aimed at bringing together manufacturers and importers of

lubricating oil who carry out activities concerning environmental protection and sustainable development. At the time the authority did not point to specific efficiencies related to environmental sustainability as a result of the transaction in order to ground its clearance. More recently, in March 2018, CADE had the opportunity to analyze the expansion of the scope of said Institute, but stated that notification was not deemed mandatory under Brazilian competition rules, given that the companies entering into the agreement would not share risks and outcomes as a result of the agreement. Once again, the authority did not analyze specific environmental aspects related to the cooperation agreement, and reviewed the transaction under the usual competition perspective.

In 2017, CADE highlighted certain relevant aspects that should be taken into consideration when analyzing whether to approve a transaction. After approving the controlling acquisition of Vale Fertilizantes by The Mosaic Company, the Municipality of Patrocínio/MG sent a notification to CADE requesting the suspension of the approval, arguing that Vale Fertilizantes did not have the environmental license to operate. In response to this notification, CADE refused to suspend the approval and indicated that "the authority's decision is limited to aspects relating to the defense of competition, not carrying out an analysis [...] based on tax, labor or environmental criteria, for example. Thus, any issues related to Environmental Licensing are only analyzed under the perspective of the defense of competition and its impact on the end consumer."

Challenges Ahead – Aiming for Predictability

As the case-law shows, addressing the competitive effects of sustainability initiatives and trying to weigh them against "non-competition goals" such as environmental benefits raises both systemic and technical challenges. While there are ways to introduce such balancing mechanisms to the current state of antitrust laws, more work is needed. The more these public goals can be formulated and quantified in line with traditional economic competition assessments, the more predictability will be achieved, and the less emotional the debate will become.

From an EU perspective, it is of great importance that the European Commission provides clear guidelines on this matter, and does not leave this topic to be developed by the competition authorities of each country individually. As indicated in the Dutch draft guidelines, the effects of sustainability often do not stop at national borders and, in this context, the European Commission seems to have understood the relevance of its role in terms of the growth of sustainable development in Europe.

In May 2020 the Commission published the so-called "Farm to Fork Strategy," which emphasizes the importance of having a sustainable food production system and invites society and Parliament to join the debate. In October 2020, while attending a conference that discussed competition and sustainability, Commissioner Margrethe Vestager promised to provide "specific advice" on the matter and, more recently, announced a conference and a call for contributions on how to synthesize competition policy with the pursuit of the Green Deal objectives, which have taken place now.

It is important for the European Commission to move forward with the drafting of the guidelines that concern horizontal cooperation agreements in order to include guidelines that deal with agreements between competitors whose goals are the sustainable development of a market. If the idea is to promote a greater number of sustainable initiatives, it is essential to have clear guidelines related to the application of antitrust

legislation in these cases. Any adverse or uncertain scenario will, in fact, inhibit initiatives among competitors, causing doubts on the effectiveness of the objectives established in the Green Deal.

In the same line, it is important that CADE provides guidelines on topics involving the limits and possibilities of cooperation between companies with regard to initiatives focused on sustainable development. Lack of guidance and relevant discussions on the matter inhibits companies from moving forward with any business strategy concerning such projects. In a country such as Brazil, where the potential value of sustainable sources if very relevant, this topic is not just important for the antitrust authority, but for the economic development of the country as a whole.

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