Competition Law in Brazil: You Should Take It Seriously

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The International Competition Network - ICN - mentions that more than one hundred countries around the world have a competition law. Brazil is one of these countries. In fact, we have had a competition law since the early 60’s. However, for decades the excessive control of the market by the Brazilian government, among other factors, left the enforcement of the Brazilian law weaker than would be expected. The Brazilian market was opened in the 90’s and Brazil enacted a new competition law in 1994. Since then, enforcement of the competition rules in Brazil has developed very fast and now there is no doubt that Brazil already represents a concern in the agenda of all businesspeople doing business in the country.

As in many other jurisdictions, Brazil has control over the market structure through merger control and illegal conducts’ repression. Both aspects are applicable to foreign entities and individuals due to the fact that the Brazilian law applies to all acts that may affect the Brazilian market no matter where it takes place.

The Administrative Council for Economic Defense (CADE) is the decision-making authority in Brazil in charge of the enforcement of the Brazilian Competition Act. CADE is supported by two secretariats, the Secretariat of Economic Monitoring (SEAE), of the Ministry of Economy, and the Secretariat of Economic Law (SDE), of the Ministry of Justice. These three bodies together are known as the Brazilian System of Competition Defense (SBDC).

SEAE focuses its analysis mainly on the economic aspects of the cases under SBDC’s review. On the other hand, SDE is more concerned with legal issues and is also the authority in charge of investigating competitive misconducts such as cartels. Both secretariats issue non-binding reports to CADE which then makes the final decision based on its own discretion.

The Brazilian Competition Act and its enforcement have improved in many aspects since its enactment in 1994. The new merger guidelines, the leniency (amnesty) program and the establishment of stronger investigative powers are some examples of Brazil’s current legal framework on competition enforcement. All these improvements have a direct impact on the marketplace and affects companies and businesspeople doing business in Brazil.

Merger control
In merger control cases, the Brazilian Competition Act provides for two thresholds to identify transactions that must be submitted to CADE’s approval. Notification is mandatory whenever a transaction involves companies (i) that hold a 20% or greater market share in a given relevant market; or (ii) that registered a gross revenue equal to or superior to R$400 million (approximately €133 million) in the previous fiscal year. The gross revenue criteria should be calculated based on the Brazilian revenue.

As there is no provision in the law regarding the minimum effect that a merger must have on the Brazilian market in order to be subject to review, this omission results several unnecessary notification of transactions with minor (if any) effects in Brazil - more than 95% of the transactions submitted to CADE’s analysis were approved unconditionally.

Nonetheless, CADE may block or condition its approval of any transaction submitted to its analysis. Generally, CADE has preferred to adopt alternative measures, such as structural or conduct conditions, instead of rejecting transactions. The blocking-decision that prevented Garoto’s acquisition by Nestle represented an important precedent in Brazilian case law, although it was subject to judicial reversion.

In fact, in 2008, CADE unanimously decided the unwinding of the Brazilian share of the transaction by which Owens Corning acquired the fibre glass strengtheners manufacturer, Compagnie de Saint Gobain. The acquisition was closed on February 2007 and it involved an amount of approximately $640 million. It was subject to the approval of regulatory authorities in Europe and the United States. This was the first time that CADE blocked an international transaction (ie. the Brazilian portion of it). Given the high concentration that the transaction could cause in some of the relevant markets in Brazil (over 90% in some cases), CADE unanimously blocked the transaction. According to CADE’s decision Owens Corning should (i) sell the units acquired in Brazil, (ii) hire, upon CADE’s approval, an independent company to evaluate the assets and conditions of payment; and (iii) hire, upon CADE’s approval, an independent company to monitor the selling process and identify potential purchasers.

Repression of illegal conducts
Additionally and maybe more important than the merger control, Brazil has drastically changed its focus to cartel persecution and other anticompetitive conducts in the last few years. Fines applied by CADE in such cases have increased significantly and many individuals have already been condemned in Brazil.

It is important to note that the decision on whether a certain practice is to be considered illegal shall be determined on a case-by-case basis.

For the repression of illegal or anticompetitive conducts SDE has powers to, with a judicial authorization, conduct seek and seizure procedures (down raids) to obtain direct evidence, such as objects, papers of any nature, commercial books, computers and files from the company or individual. Besides, SDE may request information from authorities and third parties, request hearings; in general, seek for evidence of the conduct by any means admitted by law.

The Brazilian Competition Act provides fines for the involved companies from 1% to 30% of their pre-tax gross revenue in the year before the initiation of the administrative proceeding. The company’s managers or employees, directly or indirectly involved in the conduct, may also be fined from 10% to 50% of the fine applied to the company. Whenever the fine cannot be defined considering the revenue criteria, for example, trade associations, the fines will be established between R$6 thousand and R$6 million.

Merger control decisions Jan 2004 - Jul 2009

Source: CADE
There are other penalties that may be applied by CADE, such as, for example, prohibition to deal with public financial entities and to pay fiscal debts in instalments, as well as prohibition to participate in bid promoted by the government for at least five years.

Thus, for individuals, including foreign citizens, the Brazilian legislation (specifically the Criminal Act) also provides for imprisonment penalties, which may vary from two to five years. It is also possible for SDE to request temporary or preventive imprisonment measures in order to preserve evidence.

**Temporary and preventive imprisonments, per year**

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<td>2008</td>
<td>50</td>
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**Source:** SDE

With regard to the conducts investigated by the Brazilian authorities, it is possible to verify that most of the cases initiated by SDE involve accusations of price related practices, such as predatory or abusive pricing. Although cartel does not represent the major quantity of cases (only 13.5% of the cases analyzed by SDE in the last year), it has been subject to unprecedented fines.

**Type of Conduct Analyzed by SDE at Administrative Proceedings in 2008**

- Discriminatory and/or exclusionary practices: 19.2%
- Cartel: 13.5%
- Predation: 3.8%
- Price abuse: 63.5%

**Source:** SDE

One of CADE’s recent most important decisions was the condemnation of AMBEBV (a major multinational brewer company) due to its fidelity program (Tô contigo). The program was considered abusive in view of AMBEBV’s dominant position. AMBEBV was penalized to the highest fine ever applied by CADE to a single company, it was fined to approximately R$350 million. In addition, CADE imposed (i) the immediate discontinuance of the fidelity program; (ii) the publishing of CADE’s decision in Brazilian major newspapers; and (iii) the register of the company in the National Registry of Consumer Defense.

Another important sector that is being analyzed by the Brazilian authorities is the payment card service. Currently, SDE is fighting against exclusivity in the payment card services market. It recently adopted injunctions against the major players with presence in Brazil to refrain them to maintain the exclusivity provisions provided in their agreements.

Although there are important actions being adopted by the Brazilian authorities in other kinds of violations, cartel is still the main target. This infringement is highly condemned by the international competition community since it significantly limits or even eliminates competition among competitors in order to increase profit through a monopolistic price. According to estimates of the Organization for Economic Co-operation and Development (OECD), cartel practices may result in price increases of 10% to 20%.

As mentioned before, the Brazilian authorities are showing themselves more rigorous in recent years. During the first ten years of the Competition Act, CADE used to keep the pecuniary penalties at the minimum provided in the law, which means, 1% of the gross revenue of the condemned companies. Nonetheless, CADE has recently changed its approach. In most recent cases, the fines applied to cartels reached 22.5% of the pre-tax gross revenue of the companies (ie. in the cartel in the sand extraction market).

A very visible case judged by CADE was the crushed stone cartel. The companies involved in the cartel were penalized in fines that reached 20% of their gross revenues. Thus, in view if their significant participation for the effectiveness of the cartel, the trade associations were condemned in more severe fines, that reached approximately R$300 thousand.

Another important decision was the case of the private security company’s cartel. This was CADE’s first decision involving a leniency program. CADE fined the companies to a total amount of, approximately, R$38 million. The trade associations and unions were each fined in an amount of R$160 thousand. Thus, the individuals involved in the conduct were fined to amounts that totalized approximately R$4.5 million.

If compared with the fines imposed by the European Commission or in the United States, the fines applied by the Brazilian authorities may be considered low. However, the significant increase of the penalties in recent years show Brazil’s effort to enforce competition rules in the country. Currently, there are more than 200 cartel cases under investigation by SDE and being judged by CADE, and the perspectives are only in the means of growth.

Not only are the penalties applied by the administrative authorities getting more rigorous, but also criminal prosecution. In the crushed stone cartel, for instance, the Public Prosecutor started criminal law suits against 17 officers involved in the illegal conduct. According to estimates from SDE, more than 100 individuals faced or are currently facing criminal prosecution in Brazil. Not only Brazilian citizens are subject to the Criminal Act, but also foreign persons can be criminally prosecuted in Brazil.

In this regard, Brazil is using international sources to catch foreign participants, for example, it has the possibility to use Interpol’s red notice.

Besides administrative and criminal penalties, Brazilian legislation also provides for civil liability of companies and individuals that could be subject to damage actions for the illicit conducts.

In view of this crescent effort from the authorities Brazilian companies and multinational companies doing business in Brazil are starting to be concerned on how to avoid penalties in this field.

The first measure, the preventive one, is the adoption of antitrust compliance. Compliance programs aim to educate employees on antitrust laws in order to avoid anticompetitive practices. An effective program shall not only introduce the rules of “good behaviour”, but also provide practical guidance for the employees’ day-by-day activities. It is worth mentioning that compliance programs can be approved by SDE. The Secretariat has enacted a regulation that provides minimum conditions for a program to be officially recognized by the Brazilian authorities. However, due to the strictness of the requirements only one entity had its compliance program approved by SDE so far, the Brazilian Association of Importers of Popular Products – ABIPP.

There are also options for companies that identify illegal practices and wish to avoid the penalties. The first one is to step forward and enter into leniency programs. This is a practice that is being encouraged by the Brazilian authorities. There are currently more than 10 leniency agreements being negotiated by SDE. A leniency program may provide not only administrative exemption, by also criminal immunity
Another opportunity to avoid administrative penalties is to enter into a Cease and Commitment Agreement. This is applicable in case the violation has already been discovered by the Brazilian authorities. By this agreement, the company agrees to cease the illegal conduct in change for the discontinuance of the investigation. In some cases, the authorities may impose a pecuniary contribution.

The Brazilian competition authorities are becoming more rigid and selective in enforcing the Competition Act. While in merger control it is focusing its resources in analyzing and imposing conditions to more relevant transactions, in conduct repression it is focusing in prosecution of those practices that are more harmful to the Brazilian market. In any case, Brazilian and foreign companies must nowadays give more attention to Brazilian competition rules in conducting its business. On one hand compliance to the law is recommended, on the other, leniency is to be kept in mind in case of non-compliance.

Ricardo Inglez de Souza is a partner of the Competition Practice Group at Demarest e Almeida and is also very active in the International Trade Practice and Product Liability Groups. He advises domestic and international clients in all competition law matters, including merger notifications, investigations on competition violations, leniency, compliance programs and distribution practices. He is an active member of the Competition/Antitrust Committee at the Brazilian Bar Association - OAB/SP, IBA, ForoCompetencia and other entities. He is also author of several articles and chapters published in specialized publications.

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1. Law No. 8,884, of June 11, 1994 (“Competition Act”).
2. Law No. 8,137, of December 27, 1990.