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SANCTIONS IN ANTITRUST CASES

Contribution by Brazil

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SANCTIONS IN ANTITRUST CASES IN BRAZIL: CADE'S PERSPECTIVE

-- Brazil --

1. With the entry into force of the Brazilian new Competition Law (Law 12.529/2011) CADE has at its disposal an improved legal framework for fighting anticompetitive behavior. Law 12.529/2011 combines a fine balance between criteria and rules for applying sanctions against anticompetitive practices and alternative measures to prevent loopholes that might benefit wrongdoers and harm competition. With the aim to deter infractions against the economic order, sanctions constitute an indispensable tool to maintain a healthy competitive environment.

2. The present contribution approaches i) CADE's competencies and criteria when imposing sanctions against anticompetitive conducts; ii) the legal framework for setting fines, which are the most usual kind of sanction within the Brazilian context; and iii) the alternative set of sanctions foreseen in the Brazilian Law to deal with anticompetitive behavior.

1. CADE's legal competence and criteria for applying sanctions

3. CADE's Administrative Tribunal is responsible for judging anticompetitive conducts after the Council's General Superintendence has investigated and issued an opinion on the matter.¹ Article 45 prescribes to CADE several considerations when applying sanctions. They include i) the seriousness of the conduct, ii) the good faith of the defendant, iii) the benefits derived from the wrongdoing, iv) the accomplishment of the wrongdoing, v) its possible effects upon CADE's jurisdiction, vi) its negative effects, vii) the defendant's economic situation and, finally, viii) if it was a repeated offense.²

4. CADE's legal competence for judging anticompetitive conducts and applying sanctions is restricted to the administrative sphere, being criminal and civil sanctions analyzed and judged within other institutions. At the criminal level, the Judiciary may impose sanctions on individuals due to anticompetitive conducts. The penalties may include the payment of criminal fines or imprisonment from two to five years. In the civil sphere, on the other hand, the Judiciary may condemn companies and individuals found guilty of a cartel to compensate damages caused to the victims of the infringement.³

¹ The legal basis to impose fines for cartel conduct is Title V, Chapter 3, Articles 37 to 45, of the Brazilian Competition Law which states: i) that the parties responsible for the infringement of antitrust legislation are subject to fines; ii) the fine range that can be imposed; and iii) the conditions that may aggravate or mitigate the fine imposed.

² It is worth noting that, according to Article 37, recidivism may double the fines applied.

³ Private lawsuits conducted by individuals and companies that are harmed by anticompetitive conducts also bolster the sanctions for infractions against the economic order. On the other hand, private lawsuits against companies or individuals involved in anticompetitive conducts may reduce such agents' incentives to apply for the authority's Leniency Program, since the authority cannot ensure the immunity for applicants in leniency agreements regarding collusive conducts in other scopes than the criminal and administrative spheres. Although CADE's Leniency Program does not require its applicants to compensate consumers that were harmed by anticompetitive behavior, it does not deny consumers the right to sue the aforementioned applicants in the civil sphere.

5. This division, however, does not compromise the relevance of the sanctions applied against anticompetitive conducts. In fact, by means of technical cooperation agreements, CADE has managed to develop a resilient partnership with public authorities that deal with anticompetitive conducts in other spheres than the administrative one, in order to facilitate the information flow regarding specific cases and adjust the sanctions imposed to provide an adequate incentive.

6. The Competition Law has also brought other significant improvements to address anticompetitive conducts. Articles 33 and 34 state that companies that are part of a broader economic group may also be accountable for infractions perpetrated by their sister companies. By allowing CADE to disregard alleged wrongdoers' legal personality in specific cases, the new Competition Law enlarges the legal framework within which the antitrust authority may punish infractions against the economic order according to its investigative findings.⁴

2. Fines and their limits

7. As mentioned previously, the usual punishment for anticompetitive conducts is the imposition of fines. CADE is entitled to determine and impose fines according to the Brazilian Law applying them to both companies and individuals involved in infractions against the economic order. The framework for determining the amount of fines ranges from 0.1% to 20% of the company's turnover in the affected economic sector, concerning the fiscal year preceding the beginning of the administrative proceeding. If it is not possible to use the turnover to estimate the amount to be payed, the competition authority may apply fines ranging from BRL 50 000 (Brazilian reais) to BRL 2 billion.

8. In spite of the relevance of fines as conventional means to refrain collusion, there is an important debate regarding the dissuasive limits of a repressive stance against economic infractions.

9. In addition, compliance programs constitute a relevant tool for preventing wrongdoings and stimulating a corporate culture in accordance with the Law, thus complementing sanctions as means to deter anticompetitive conducts.

10. Settlement mechanisms also complement sanctions due to their deterrent character. The Competition Law provides two different kinds of agreements, namely leniency agreements⁵ and cease-and-desist agreements⁶, which foresee benefits for wrongdoers who collaborate with the antitrust enforcer by

⁴ According to Article 34, such cases include abuse of rights, abuse of power, violation of law, illegal act or fact, or violation of the bylaws or articles of association.

⁵ CADE's Leniency Program is foreseen on the Chapter VII of the Law 12.529/2011. According to this chapter, CADE's General Superintendence may extinguish wrongdoers' administrative sanctions or reduce them up to two thirds of the applicable sanction by means of the signature of leniency agreements. Such agreements, available only for one applicant per case, entail the signatory's commitment to collaborate with CADE, providing information and documents concerning the anticompetitive conduct reported at the signature of the agreement or previously under investigation. For more information: CADE's Antitrust Leniency Program (2016). Retrieved from: <http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf> on 10.14.16.

⁶ CADE's cease-and-desist agreements provide additional incentives for companies or individuals involved in anticompetitive conducts that were not able to sign a leniency agreement. In cartel cases, in order to sign this type of agreement, companies or individuals allegedly involved in infractions need to confess their participation in such conducts. There is also the implementation of reductions for pecuniary contributions that may vary according to the degree of collaboration and the order of the signature of the agreement. For more information: CADE's draft Guidelines for cease and desist agreements for cartel cases. Retrieved from http://en.cade.gov.br/topics/publications/guidelines/guidelines_tcc.pdf on 10.14.16.

reporting anticompetitive conducts and ceasing their involvement on such acts. Antitrust efforts aimed exclusively at retributive effects during the imposition of fines when - and if - a company or individual is caught do not suffice. In practice, economic agents acting rationally tend to price such risk as any other ordinary risk of their economic activity. Due to this reason, most countries have expanded the range of sanctions against anticompetitive conducts beyond the imposition of fines, combining prison sentences or other restrictive measures.

3. Alternative Measures

11. In order to address the limits of fines as a mechanism for law enforcement, the Brazilian Competition Law foresees alternative sanctions to anticompetitive conducts, which can be imposed solely or as complementary incentives against anticompetitive conducts.

12. Article 38 sets a wide set of measures, which may generate diffuse or targeted incentives according to the concrete case. For instance, the authority has powers to impose the publication of an excerpt of its decision in a newspaper at the expense of the company. Depending on the case, CADE may also impose divestments, the transfer of corporate control, sale of assets and even the partial interruption of activity.

13. Within the specific context of public bids, CADE has at its disposal additional incentives to curtail collusive conducts. The authority is entitled by the law to forbid companies from requesting loans from public institutions and from taking part in public bids in the federal, state and local spheres for a period up to five years.

4. Conclusion

14. The Brazilian Competition Law provides CADE several measures to promote antitrust enforcement. Although fines are the usual sanction within the Brazilian jurisprudence, alternative measures and other preemptive mechanisms such as compliance programs for firms play an important role by bolstering the incentives for both companies and individuals to refrain the practice of anticompetitive conducts. In fact, more than expanding the types of sanctions available with the purpose of impeding the 'pricing' of risks, antitrust authorities' sentences should also be combined with compliance incentives and settlement mechanisms. Considering this, the Brazilian legal framework provides CADE with the means to mitigate anticompetitive practices, thus fostering a competitive environment in Brazil.