Organisation for Economic Co-operation and Development

DAF/COMP/WD(2019)51

Unclassified

English - Or. English

17 May 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Competition Issues in Labour Markets – Note by Brazil

5 June 2019

This document reproduces a written contribution from Brazil submitted for Item 4 of the 131st OECD Competition committee meeting on 5-7 June 2019.

More documents related to this discussion can be found at

http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm

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JT03447606

Brazil[1]

1. Antitrust authorities have rarely addressed the formation of monopsony power in the labor markets. Historically, Law No 8,884 / 94, derogated by Law No 12,529 / 11, provided for the possibility of signing a Statement of Performance Commitment (TCD in its acronym in Portuguese) considering "changes in the level of employment".”[2].

2. The Secretariat for Competition Advocacy and Competitiveness (SEAE in its acronym in Portuguese) is not aware of a major empirical study in Brazil about the real effects of concentration in the labor markets[3]. Although the Brazilian 1988 Federal Constitution states, in its article 1(iv), the free initiative and the value of the human workforce as two of the fundamental pillars of the Brazilian Democracy, the Brazilian Antitrust Law (Law No. 12,529/2011) makes no express nor special reference to the labor markets or to level of employment in the analysis of economic concentration (concentration acts under the very language of the Antitrust Law).

3. In Brazil, the antitrust analysis of the labor markets can be addressed in, at least, three ways: (1) preventive: when monopsonies may be formed due to concentration; (2) repressive: through the control of anticompetitive behavior, like wage fixing cartels; and by (3) advocacy tools: the creation of preventive and awareness-raising mechanisms about the effects of restricting competition in the labor market.

1. PROPOSAL OF A GUIDELINE:

4. According to the international experience, which was incorporated in the Brazilian Antitrust culture since Law No 8,884/94 was enacted, guidelines happen to be very effective tools both for enforcers and society in the best enforcement of Competition Policy. As such, a special guideline targeting concentration and behavior in (and related to) labor markets seems to be also effective both for antitrust and social purposes.

5. The following topics should be covered by a labor antitrust guideline in Brazil:

1. employers should inform and train employees with HR responsibilities to understand the fundamentals of antitrust law;
2. employers shall not enter into written or verbal agreements on remuneration (or other employment-related terms) or recruitment of employees with professionals from competing enterprises;
3. when sharing confidential employee information, when there is a transaction that results in economic concentration, companies should consider using a third party

[1] This written contribution has had an inestimable support from Professor Juliana Domingues (University of São Paulo – Ribeirão Preto Law School).

[2] Performance commitments were provided for in Paragraph 1, art. 58 of Law No 8,884 / 94: "Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances."

[3] Recent studies about labor markets in Brazil: DOMINGUES; RIVERA; SOUZA (2019a) and DOMINGUES; RIVERA E SOUZA (2019b).

(neutral agent) to manage data exchange, anonymize data (by presenting them by position or aggregate), and limit access to such data or information;

4. companies should ensure that the non-competition provisions in the transaction documents are business fit and reasonable in duration and scope.

2. JUSTIFICATION

6. There are merger cases in Brazil that resulted in the strength of employers, but with no relevant antitrust implication[4]. In the past, we had excessive use of non-compete clauses analyzed by the antitrust authorities (the modification and exclusion of non-compete clauses was one of the most popular remedies applied in Brazil under the 8884/94[5])**.**

7. Although the Antitrust Law does not expressly address labor issues, CADE has recognized its strategic importance for competition in some precedents and guidelines. In its Guide to Antitrust Remedies, launched in October 2018, CADE holds key employees as one of the assets necessary for the effectiveness of the remedy to be applied in Merger Control Agreement (ACC). The Guide to Antitrust Remedies points out that "it is important to have references to the transfer of key personnel[6] [...], factors that may be crucial for the success of a new player in certain relevant markets.[7]" (CADE, 2018, p. 24)

8. Trade associations and unions are historically held by antitrust authorities as ideal locus for cartels. Studies and empirical data indicate that unions and associations are ideal environments for the exchange of competitively sensitive information (such as pricing), and systematization of collusion practices (SDE, DPDE, 2009). Therefore, they should also be scrutinized for possible arrangements to harm or potentially affect the labor markets.

9. The unduly restriction of the salaries and mobility by a powerful employer (or a group of employers holding economic power) can be antitrust violations. As long as the

[4] In 2000, an agreement was celebrated between CADE and the Ministry of Labor and Employment. It was a partnership agreement to evaluate the retraining programs for workers aimed at cases of job loss related to mergers. Example: Due to Concentration Act No. 080012.005846 / 99-12 (merger between Antarctica and Brahma), the programs of qualification and professional relocation developed and presented to workers dismissed due to the restructuring from the company has been submitted to the Secretariat for Public Employment Policies (Ministry of Labor and Employment). The TCD clause did not oblige AMBEV to "[...] retain or reinstate employees and to guarantee the employment of other employees to other companies but to make every effort to increase the likelihood that the redundant employee will be re-employed" (CADE, 2007, p. 49).

[5] CABRAL, Patricia Semensato. *Remédios em Atos de Concentração: uma análise da prática do CADE.* 2014.

[6] The Guide defines as key personnel "*staff and managers, who are part or are permanently and independently requested in the operation of the divested business, and who hold key customer and supplier contacts or have specific skills and know-how pertaining to R&D, IT, production, logistics, which are essential for the competitiveness of the business being divested. The acquirer shall be permitted to enter into work contracts in place of the Requesters*". (CADE, 2018, p. 23)

[7] According to the terms of the Guide, "empty-shell" would be the divestment of assets that do not include the necessary human resources, i.e. when employees do not wish to be transferred from the company or when labor legislation prevents them. See CADE, 2018, p. 56-57.

employer (or its economic group) is aware of it, they can avoid infractions to the economic order[8].

10. Antitrust violations in the labor market can be performed either through contractual (non-competition clauses) or non-contractual means (collusive behavior like agreements between employers to harm employees). The non-compete clauses, though generally allowed[9], should be analyzed upon their potential to restrict the mobility in the relevant labor market. In Brazil, cases involving wage-fixing or non-soliciting agreements (also known as "no-poach agreements"), can be held as antitrust offenses under the Brazilian antitrust legislation.[10]

11. A best practice guideline, as recently developed in the US by the DOJ / FTC (Antitrust Guidance for HR Professionals), is essential to the awareness of potential offenses arising from agreements between employers (whether in the same relevant market or not) that result in a reduction in the salaries of employees.

12. A set of soft rules and best practices organized in a Guide should also comprise the exchange of sensitive information involving the labor relationship (wages, terms, and conditions, set of benefits, among others). The exchange of confidential information is critical in very concentrated markets for hiring (that is, markets with very few alternatives of employers). Sometimes the mere exchange of information in that context can trigger the Law for an antitrust offense (Law. 12.529 art. 36, § 3º, II).

13. In this regard, SEAE is developing a best practice guide for HR addressing the following topics:

1. Wage Fixing Cartels, even if they do not reach the exact salary value, can be considered as an antitrust offense.[11]

   Rationale: The "wage-fixing cartels" are the result of information exchanges, agreements or even joint negotiation of employers' associations, aiming at the standardization of the remuneration paid to employees. This conduct especially affected temporary workers, who, in theory, would have greater mobility between employers. For the most part, the behavior also hindered the temporary work agencies that intermediated the professionals and eventual employers.[12].

[8] The exchange of sensitive information or combination of non-contracting can trigger the Antitrust Law (Law 12529/2011).

[9] See. AC no 08012.009079/2008-72 AC no 08012.001230/2007-43 AC no 08012.011611/2007-31 AC no 08012.007852/2008-66 AC no 08012.009323/2006-11 AC no 08012.005881/2008-93 AC no 08012.012251/2007-94 AC no 08012.011212/2008-51 AC no 08012.014612/2007-37 AC no 08012.000167/1998-11.

Brazilian Antitrust Law forbids the acts that “have as an objective or may have the following effects (i) to limit, restrain or, in any way, injure free competition or free initiative; (ii) to control the relevant market of goods or services; (iii) to arbitrarily increase profits; and (iv) to exercise a dominant position abusively” (article 36).

[11] Cf: U.S. DOJ; FTC, 2016, p. 3.

[12] DOMINGUES, J.O.; RIVERA, A. A. L M.; SOUZA, N. M. S. **O improvável encontro entre o Direito Trabalhista e o Direito Antitruste.** Prêmio IBRAC-TIM 2018. Revista do IBRAC, Volume 24 - Número 2 - 201, 2019.

2. "No-poach Agreements", “no-soliciting”, "no-poach" or "cold-calling", i.e. agreements not to hire competitors’ employees in the same or in neighboring "relevant labor market" (even if they are not competitors in the product dimension) may be an antitrust infraction.[13] [14]

   Reasonability: This type of agreement, when inserted in a context of concentration, is not a per se offense. Based on Brazilian case law we may find reasonable justification[15]. The clause may be valid if it is ancillary to the sale of the company for instance. In this case, it must be justified by the reasonableness of the scope and duration (more qualified and strategic professionals for the companies, in a certain period of time, for example). It is recommended that non-contracting arrangements within the context of merger should be limited in duration (such as completion of due diligence to a stipulated period after the consummation of the business), and within its scope, always with reasonable justification.

3. Non-competition clauses in employment contracts should comply with: the Brazilian labor rules (from the values in the Brazilian 1988 Federal Constitution, to the Brazilian Labor laws); and CADE rules and case law. Additionally, they must be narrowed, transparent, rational, and comprise adequate financial compensation to the employee during the period of work limitation.

4. Considering the asymmetric information in some relationships between employers and employees, the following situations should be avoided: (i) imposition of the clause on the employee in adhesion contracts[16]; (ii) prejudicial writing with the employees' lack of understanding of the terms of the non-competition agreements and their implications; (iv) imposition of terms exceeding labor law and working conventions[17].

   Rationale: The aspects listed above denote a clear asymmetry of information between employees and employers in their contractual relations. A guide must mitigate the elaboration of unenforceable clauses with the purpose of coercion of

[13] “*an individual likely is breaking the antitrust laws if he or she agrees with individual(s) at another company to refuse to solicit or hire that other company’s employees*”. U.S. DOJ; FTC, 2016, p. 3.

[14] No-poach can be implemented in different ways, such as i) no job offer, ii) monitoring and transfer of information on job vacancies, iii) no counterproposal of offers, and iv) adverse selection and recruiting an employee from a competitor. These situations have been identified in typical cases involving high-tech companies: cases generically titled "high-tech employees (See. *United States v. Adobe Systems, Inc., et al.*). Cf. U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 2011) preventing companies from hiring employees from one another. Such claims do not require that the products or services offered by the companies compete with each other, but only that the agreements result in a decrease in the career opportunities of high technology professionals, impacting on their salaries / wages in an unreasonable manner (Cf. LINDSAY, STILSON e BERNHARD, 2016, p. 6. Cf. DOMINGUES; RIVERA; SOUZA, 2019a.). The no-poach agreements may also be included in the context of a franchise agreement (See. *Eichorn v. AT&T*, de 2001 and DOMINGUES; RIVERA; SOUZA, 2019b).

[15] For example: do not hire professionals for a defined period after a divestiture.

[16] Adhesion contracts are very specific types of contracts under Brazilian legislation where consumers or employees have no chance to change any term or condition provided by the contract.

[17] See. CLT and WHITE HOUSE, 2016.

the employee - avoiding its mobility - supposedly uninformed of the illegality. This situation may generate anti-competitive effects[18].

5. Companies should not exchange information about their policy of recruiting employees and / or wages and other benefits[19]. Exchanges of information are considered lawful if they fulfill certain conditions, that is when: (i) they are performed by a neutral third party; (ii) involve old data; (iii) there is an aggregation of the information to protect the identity of the sources; (iv) there are sufficient aggregate sources to prevent competitors from being able to identify the particular source of each information; (v) related to a due diligence prior to an act of concentration (a merger), with prior precautions to gun jumping[20].

6. Regarding item 5 (v) above, it is considered that the impediment of sharing information does not affect the right of companies to gather information about target companies in mergers and acquisitions, provided that due diligence is taken to share of information, avoiding gun jumping. Such sharing is even expected, since the buyer needs to have access to the costs with target company employees.

7. The exchange of sensitive information on terms and conditions of work can, therefore, violate the Antitrust Law when it is used by employers to harm or potentially harm employees. A hypothesis of harm is to lower wages and other work conditions (like health insurance, transport benefits).[21]

3. CONCLUSION

14. In order to address these challenges, the Secretariat for Competition Advocacy and Competitiveness is preparing a Labor Antitrust Guideline in order to raise awareness of certain behaviors that can negatively affect the competitive environment. The justifications presented are steering the preparation of the Guideline and the dialogue with stakeholders, so as to have an instrument that addresses this competition policy challenge, while preserving the autonomy of companies and free markets.

[18] Cf. ERNST, 2018, p. 1; BISHARA, MARTIN, THOMAS, 2015, p. 1–51. See also DOMINGUES, RIVERA, SOUZA, 2019a.

[19] Examples: health insurance, parking, food allowance, housing allowance, transport assistance, among others. “The information requested by the clean team to the companies' employees has to be restricted to what is strictly necessary for the operation. That means that the clean team or the executive committee must not analyze any data on other activities performed by the companies. CADE. Guidelines for the analysis of previous consummation of merger transactions, 2016, p. 11. In general, competitively-sensitive information (therefore deservers of parties’ special attention) is specific (e.g. non-aggregated) and directly related to the performance of the economic agents’ core business. Such information may contain specific data about: […] f) employees’ wages;” CADE. Guidelines for the analysis of previous consummation of merger transactions, 2016, p. 17.

[20] “Clean team members may contact employees of the merging companies, but they may not disclose information of one company to another. If some clean team members are employees of the companies, they should request and receive information only from their own company. It is recommended that such employees work exclusively in the clean team or have it as a priority.” CADE. Guidelines for the analysis of previous consummation of merger transactions, 2016, p. 10.

[21] Cf. U.S. DOJ; FTC, 2016.

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