

QUARTERLY REVIEW: ANTITRUST IN BRAZIL

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HIGHLIGHTS

CADE considers new rules for gun jumping

Export cartels are subject to rule of reason analysis

Lawsuits filed by taxi associations against Uber are not sham litigation

New regulation on the access to documents submitted by leniency applicants

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Merger Review

CADE considers new rules for gun jumping proceedings

In early August, CADE entered into consent decrees related to three gun jumping investigations – or failure to observe the mandatory stand-still obligation in merger reviews. The defendants agreed to pay monetary contributions ranging from BRL 280,000 (roughly US\$ 75,000) to BRL 1,019 million (roughly US\$ 275,000) to enter the decrees.

While reviewing the consent proposals, CADE's Commissioners discussed two issues related to gun jumping investigations: (i) the lack of objective parameters for establishing fines and (ii) the separation of CADE's analysis into two separate proceedings, one to determine the gun jumping violation and the other to assess and clear the deal. According to some Commissioners, the segmentation of the analysis makes it difficult for CADE to consider the complexity of transactions and potential impacts on competition when establishing fines for gun jumping. Thus, parties that fail to get pre-merger clearance for simple transactions may end up paying the same fines as parties that failed to notify transactions that actually harmed competition.

As a result of such discussions, CADE's investigatory unit (SG) and the Department of Economic Studies (DEE) started to develop a new method for calculating fines in gun

jumping cases. CADE is also considering changing its internal rules to merge the analysis of gun jumping and of the competition aspects of the deal. Proposals for new rules regarding one or both these issues are expected to be presented until the end of 2018, but there are no formal proceedings nor fixed deadlines.

Cartel investigations

CADE's Tribunal: export cartels are subject to rule of reason analysis

In 2010, CADE opened a cartel investigation against American Natural Soda Ash Corporation – ANSAC and its affiliated companies (Tronox Alkali Wyoming, Tata Chemical Partners, Ciner Resources Corporation and Solvay Chemicals USA). ANSAC is an association of American soda ash exporters established under the Webb-Pomerene Act, which exempts exporters' associations from certain antitrust regulations. The

association provides logistic services, sets volumes of exports and negotiates with foreign clients under its own brand. ANSAC was established in 1984 and has exported soda ash to Brazilian clients for decades. It was thus considered an “export cartel”. Different from hardcore cartels, an export cartel carries its activities publicly and might be legal under specific provisions or authorizations within its country of origin.

CADE firstly clarified that being legally established under the law of its country of origin does not imply that an export association is exempt from antitrust liability in Brazil. Furthermore, CADE argued that under Brazilian law the agency has jurisdiction over acts that were carried out by foreign entities outside the Brazilian territory, provided that these acts resulted in effects inside Brazil. Thus, ANSAC could be liable for an antitrust violation since it characterizes an export cartel that sold products to Brazilian clients.

However, CADE established that export cartels are not subject to the per se analysis applicable to hardcore cartels. According to the agency, while hardcore cartels are presumed to cause only harm to competition, export cartels may be either (i) ancillary restraints that generate economic efficiencies or (ii) naked restraints that merely harm competition. Since export cartels may increase economic efficiency, they should be subject to a rule of reason analysis by antitrust agencies instead of being considered “per se” unlawful.

Relying upon a Technical Report drafted by the DEE, CADE found that ANSAC’s entry into the Brazilian market had unclear impacts on the volume of soda ash imported. In turn, prices paid by Brazilian clients fell since the association began selling soda ash. Furthermore, ANSAC alleged that it created economic efficiencies by reducing logistic costs and making economies of scale possible. CADE’s Tribunal decided to dismiss the case for lack of evidence of harm to competition.

Single-firm conduct

CADE rules that lawsuits filed by taxi associations against Uber do not characterize sham litigation

Uber’s entry in the Brazilian market by mid-2014 led to legal debates on whether its business model was lawful under Brazilian law. The growth in the ride-sharing app’s usage by consumers led also to demonstrations and even acts of physical violence by taxi drivers dissatisfied with what they understood as unfair competition. Amid an increase in conflicts in 2015, two university student associations filed a complaint against taxi associations before CADE. They alleged that taxi associations harmed competition by filing baseless lawsuits against Uber – the conduct known as “sham litigation” – and by threatening Uber’s drivers with violence. Uber itself later filed a complaint against the taxi associations, joining the probe initiated by the student associations.

In early July, CADE’s Tribunal ruled on the probe, unanimously deciding to clear the defendants. According to CADE, lawsuits filed by taxi associations when Uber entered the Brazilian market could not be characterized as completely baseless, since there was a legitimate debate on whether the app’s business model was lawful under Brazilian law at that time. The debate on Uber’s lawfulness was in fact only concluded in 2018 after a Federal Act regulated “paid private services of passenger transport”, a new model of paid transportation services. Therefore, irrespective of whether Uber’s entry into the Brazilian market was beneficial to competition or not, the lawsuits filed by taxi associations seeking to prohibit the company’s activities were not baseless and thus did not characterize sham litigation.

Regarding the threats and physical violence against Uber’s drivers, CADE recognized that creating a “hostile climate” may characterize an antitrust violation. The violent acts against Uber’s drivers perpetrated in some

occasions had the potential of causing anticompetitive effects, since they could make consumers afraid of using the company's services. However, CADE's Tribunal found no evidence linking the defendants to specific acts or threats that could lead to their conviction.

Institutional Developments

New regulation disciplining disclosure of documents obtained by CADE in leniency and settlement agreements enters into force

In early September, CADE issued a new regulation on the disclosure of documents submitted to support leniency agreements and settlement agreements (TCCs / equivalent to consent decrees). The regulation was subject to lengthy discussions on how to best balance two conflicting interests: (i) protecting the incentives for companies to sign leniency/settlement agreements with CADE and (ii) fostering private enforcement of antitrust law by cartel victims with damage claims. While immediately disclosing all documents submitted by leniency/settlement applicants could eliminate incentives for entering into such agreements, keeping all documents under secrecy for a long time could make damage recovery by cartel victims too difficult.

Thus, CADE issued a new regulation to reduce uncertainty as to which documents the agency shall disclose to the public and the timing of such disclosure. According to this regulation, the following rules shall apply to the documents submitted by leniency/settlement applicants:

- i. The 'History of Conduct' (document prepared by applicants explaining their participation in an antitrust conduct) shall remain confidential even after CADE's Tribunal issues its final ruling in the investigation. CADE will only disclose such document in the following situations: (a) in compliance with a court order or (b) if there is waiver from the applicants.
- ii. Documents submitted by applicants as evidence of an antitrust conduct (i.e. emails, tables, notes, receipts) shall be made public only after CADE's Tribunal issues its final ruling in the investigation.
- iii. Applicants may request that certain documents remain confidential even after CADE's Tribunal final ruling on the investigation. The request must show that these documents (i) contain trade secrets; (ii) comprise commercially sensitive information; (iii) are protected by tax/bank/industry secrecy; or (iv) were sealed by a court order. There is no fixed deadline for presenting such requests.

Finally, the regulation establishes that CADE may reduce fines and monetary contributions to be paid by companies that already compensated third parties for damages caused by their conduct. However, there are no specifications on how the agency shall calculate such reduction.

Although this new regulation only entered into force by mid-September 2018, it might be applicable to leniency/settlement agreements executed before this date, provided that the investigations are in progress. The Technical Report that explains the new regulation notes that CADE rejected a suggestion to expressly exclude from the new regulation's reach the agreements executed before it was enacted. The Report explains that CADE will verify on a case-by-case basis whether the regulation shall apply to leniency and settlement agreements signed before its release.

ABOUT ADVOCACIA DEL CHIARO

Advocacia José Del Chiaro is a leading Brazilian law firm working in Competition/Antitrust and Commercial Litigation. For almost three decades we have advised major national and multinational companies and worked closely with several international law firms, handling some of the country's most complex competition cases.

With offices in São Paulo and Brasília, we have a highly specialized team with vast experience in a wide range of matters and industries. Our practice has been recognized as top tier in Brazil by sources like Legal 500, Global Competition Review and Chambers Latin America.

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