QUARTERLY REVIEW: ANTITRUST IN BRAZIL

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HIGHLIGHTS

This Quarterly Review is prepared by **Advocacia José Del Chiaro**. Its main purpose is to provide an overview of major developments in competition policy in Brazil to foreign practitioners. For a complete review of all cases in Brazil, please subscribe to our bi-weekly bulletin.

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Merger Review

CADE adopts new method for calculating gun jumping fines

In early October CADE agreed to settle another gun jumping case (or failure to observe the mandatory stand-still obligation in merger reviews)[1]. In August, three companies entered into consent decrees with CADE agreeing to pay fines for gun jumping violations (see our Quarterly Review 2018, vol. 3). Now, Smaff Group and Enzo Group agreed to pay a fine of BRL 700,000 (around US$ 180,000) for failing to get pre-merger clearance for two mergers carried in 2015 and 2016.

In August, Commissioners had expressed concerns with the lack of objective parameters for establishing fines in gun jumping cases and some of them defended the need for specific rules to be release. In light of such concerns, CADE's Tribunal now adopted a new method for calculating gun jumping fines that should serve as parameter for future cases.

The method comprises a formula based on (i) the value of the transaction; (ii) the number of days of delay to file; and (iii) the revenue obtained by the defendants. To find the total fine, the value of the transaction is multiplied by a percentage ranging from 10% to 40% established according to the average revenue obtained by the parties. The resulting sum is then multiplied by the number of days in delay. Finally, the resulting amount is divided by the maximum number of days in delay (1825 days, equivalent to the 5 years provided by the statute of limitations for merger review).

Cartel investigations

Uber does not promote collusion among drivers, says CADE's investigatory unit

In 2016, CADE opened a probe to investigate Uber for alleged anticompetitive practices[2]. According to the complaints, Uber promoted a collusion among its drives by fixing prices of rides hired via its app. The complaints also argued that Uber's prices were predatory and harmed its own drivers. While the predatory

[1] Administrative Proceeding no. 08700.010071/2015-20.
[2] Preparatory Proceeding no. 08700.008318/2016-29.

pricing allegation was quickly dismissed, the collusion accusation was assessed in more detail. According to CADE's investigatory unit, Uber's price fixing of rides via its app should be assessed through the lens of the following antitrust conducts: (i) hardcore cartel; (ii) hub-and-spoke cartel; and (iii) influencing the adoption of uniform commercial behaviors.

Firstly, CADE's investigatory unit dismissed the possibility of characterizing Uber as a hardcore cartel because the company is not a direct competitor of its drivers; Uber provides a platform for the drivers to offer their services to the end consumer, while the drivers offer paid private services of passengers' transportation.

On the other hand, the possibility of characterizing Uber as a hub-and-spoke cartel required a much closer analysis from the investigatory unit. The complaints provided evidence that Uber's drivers could "play" the company's algorithm by agreeing to turn off their apps at the same time, causing a price surge due to reduction in supply – Uber's algorithm establishes prices according to real-time relation between supply and demand of rides in a given location. In this case, Uber could be seen as promoting a hub-and-spoke cartel: Uber would be a "hub" facilitating cartels among the "spokes", its drivers. Nonetheless, CADE's investigatory unit decided to dismiss this claim of hub-and-spoke cartel as well. According to the unit, although agreements among drivers to turn off their apps at the same time and thus cause prices to surge characterizes cartel formation, there is no evidence that Uber participates in such agreements. Furthermore, the number of drivers offering services via Uber's app increased significantly after the denounces were presented in 2016, making it harder for drivers to carry out collusive practices.

Finally, CADE's investigatory unit dismissed claims that Uber influenced the adoption of uniform commercial behaviors by its drivers. Although the unit identified that Uber eliminates price competition among drivers by fixing ride prices via its algorithm, it pointed out that empirical surveys showed that Uber's entry in the Brazilian market reduced prices of private transportation. Furthermore, the unit highlighted that Uber faces competition from other ride sharing apps that employ algorithms to fix prices for their drivers as well (such as Cabify and 99Taxi).

Single-firm conduct investigations

CADE rules that lawsuits regarding data package protection for drugs do not characterize sham litigation nor misuse of IP rights

In 2010, Pró-Genéricos, an association of generic drugs manufacturers, filed a complaint against Danish pharmaceutical company Lundbeck[3-4]. According to the complaint, Lundbeck harmed competition by filing lawsuits that required the Brazilian food and drug administration agency (ANVISA) to cease relying on the company's data package to issue authorizations for generic drugs of an antidepressant named Lexapro. Pró-Genéricos argued that Lundbeck's lawsuits were a sham because the Brazilian Intellectual Property law does not award data package protection, so Lundbeck's had filed a baseless suit and misrepresented facts and claims to obtain an exclusionary injunction.

After years of investigation, CADE's Tribunal unanimously decided to close the probe in October. According to the Commissioners, Lundbeck's lawsuits were not a sham because the Brazilian IP statute is

[3] Administrative Process no. 08012.006377/2010-25.
[4] Our fim represented Lundbeck in this matter.

not clear on whether protection against unauthorized use should be awarded to data package of drugs. Thus, it would be possible to argue for different interpretations. Furthermore, Lundbeck's claims were upheld by courts, evidencing that they were not baseless, but rather a legitimate debate on legal interpretation. Additionally, CADE found that Lundbeck did not file a series of lawsuits with the potential of harming competition and there was no evidence that it misrepresented facts to courts.

Regarding the allegation of misuse of IP rights, CADE held that Lundbeck merely presented a legal dispute to courts to establish whether it has IP rights over its data package. Therefore, no misuse of IP rights with anticompetitive effects could be found in the company's conduct.

CADE reaffirms that exclusivity agreements may harm competition if employed by dominant firms

In October, CADE's Tribunal ruled that Unilever harmed competition by entering into exclusivity agreements with ice cream points of sale[5]. CADE began investigating Unilever and Nestlé in 2006 after a rival ice cream manufacturer filed a complaint arguing that the companies entered into exclusivity agreements with several ice cream sellers to exclude rivals via market foreclosure.

In its decision, CADE's Tribunal reaffirmed its understanding expressed in previous cases that exclusivity agreements may harm competition when employed by dominant players. CADE found that agreements requiring that freezers provided by the companies should be used exclusively for storing their products had a legitimate business justification. On the other hand, the agency considered that demanding sales and merchandising exclusivity in the points of sale produced anticompetitive effects not compensated by procompetitive justifications.

Although both Unilever and Nestlé entered into exclusivity agreements with ice cream sellers, CADE held that only Unilever should be fined because only Unilever held a dominant position (it held between 60% and 70% of the Brazilian market in 2005, while Nestlé's market share was lower than 20%). Therefore, different from other recent cases, in this matter CADE avoided speculating about collective dominance and held that only the dominant player's behavior was unlawful.

Institutional Developments

CADE publishes Guidelines on Antitrust Remedies in merger investigations

In October, CADE published its non-binding Guidelines on Antitrust Remedies. The Guidelines aim at consolidating and providing transparency to the agency's views about best practices for elaborating, assessing and monitoring antitrust remedies in merger investigations. The Guidelines present orientations drawn from CADE's case law and foreign agencies' experience. The original in Portuguese is available in this link.

A few highlights from the Guidelines are the following:

(i) overall, CADE favors structural relief (divestures of assets) over behavioral remedies, because they are easier to implement and to monitor, and more effective;

[5] Administrative Process no. 08012.007423/2006-27.

(ii) behavioral remedies are considered adequate for transactions comprising antitrust concerns related only to vertical integration, while concerns regarding high levels of horizontal concentration usually require structural relief;

(iii) behavioral remedies involving direct control of prices, quantities and quality of products should be used only in very exceptional circumstances;

(iv) in complex cases that require divesture of assets, it is a good practice to agree with an upfront buyer commitment (meaning commit to only consummate the transaction after the remedy package is negotiated). Also, the divestiture should be concluded in up to six months;

(v) the upfront buyer must be "effective", meaning that it must show economic capacity and know-how so as to be able to effectively compete with the merging parties;

(vi) CADE usually demands that the parties hire and pay for independent monitoring trustees to assess whether the antitrust remedies are duly implemented;

(vii) CADE may demand parties to hire a divestiture trustee in case they are unable to find a suitable buyer for the divested assets within the deadline established.

ABOUT ADVOCACIA JOSÉ 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 Brasilia, 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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