

Dominance

The regulation of dominant firm conduct
in 35 jurisdictions worldwide

2011

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The legislation applying specifically to the behaviour of dominant firms in Brazil is mainly Law No. 8,884/94. Articles 20 and 21 of Law No. 8,884/94 apply to general antitrust behaviour, including the abuse of dominant position (article 20, IV) and the attempt to achieve a dominant position in the relevant market by unjustified restrictions on competition (article 20, II). Law No. 8,884/94 presumes the existence of a dominant position when a company or economic group controls 20 per cent of the relevant market (article 20, paragraph 3). For specific sectors of the economy, Brazil's Administrative Council for Economic Defence (CADE) may consider a percentage other than 20 per cent in order to presume the existence of a dominant position (article 20, paragraph 3).

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

Yes. Article 20, II, and article 21 of Law No. 8,884/94 condemn the achievement of dominant position by unjustified restrictions on competition. There are two important things to note: conduct that leads to a dominant position based upon efficiencies is exempt from prohibition (article 20, paragraph 1); and the accumulation of market power by means of mergers and acquisitions is analysed under another provision of Law No. 8,884/94, article 54, which is aimed at preventing the formation of market power and has different kinds of remedies.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The object of the legislation is mainly economic. Law No. 8,884/94 is first and foremost concerned with the protection of consumers, free enterprise and open competition.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 20, II, refers to unilateral or combined conduct of non-dominant firms that seek to control a substantial share of the market. Exclusionary and exploitative conduct is included in these practices, as exemplified in several items of article 21.

5 Sector-specific control

Is dominance regulated according to sector?

No, it is not. Infrastructure sectors of the economy are in general subject to sector-specific rules which do not prevent the application of the provisions of antitrust law. Although controversial in some situations (the financial sector, for instance), CADE's jurisprudence interprets Law No. 8,884/94 (article 15) as extending its applicability to all regulated sectors.

An example that reinforces this interpretation took place in December 2008, when CADE and the Brazilian Central Bank (BCB) declared their position regarding mergers in the financial sector. The BCB would first analyse the effects of the merger focusing on systemic risk, and CADE would further analyse the specific antitrust effects.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Articles 20 and 21 apply to all industry sectors. In accordance with article 15, as interpreted by CADE, antitrust law is applicable concurrently with sector-specific rules.

7 Enforcement record

How frequently is the legislation used in practice?

Antitrust law is frequently and systematically applied to all industry sectors.

Since 1994, when Law No. 8,884/94 was published, the first practical impact was to increase awareness of the law itself, given that Brazil had been a closed economy with strong government intervention up to the early 1990s. At that point, the authorities focused on developing a strong system of review of mergers and acquisitions. This was achieved throughout the following years and, since 2003, antitrust enforcement has focused on the persecution of cartels.

There have been several cartel convictions with increasing fines, such as the aggregates and crushed rock cartel. This was the first case in which an antitrust dawn raid took place in Brazil (2003). In 2005 the companies were fined in amounts ranging between 15 and 20 per cent of their 2001 pre-tax revenues, with total fines in excess of 33 million reais. CADE also recently condemned more cartels such as the airlines cartel (2004), newspaper cartel (2005), pharmaceuticals cartel (2005), international vitamins cartel (2007 – the first international cartel to be sanctioned in Brazil) and the security services cartel (2007).

Authorities have also been focusing greatly on enhancing investigative methods and efficiency. The Secretariat of Economic Law of the Ministry of Justice (SDE), the body in charge of investigations, has recently increased cooperation with the federal police in order to jointly fight cartels, culminating in a formal cooperation agreement in December 2007. The use of dawn raids and telephone taps has

increased greatly in antitrust investigations. There were 19 dawn raids in 2006; 84 in 2007; and 57 up to October 2008. There are presently over 300 active investigations, more than 100 firm managers facing criminal cartel investigations, and 34 managers have been convicted (some of the cases are at present under appeal).

8 Economics

What is the role of economics in the application of the dominance provisions?

Antitrust law requires the application of the rule of reason to conclude whether there was any harm to competition and, therefore, condemn a practice. The analysis of the specific practice based on the rule of reason principle is carried out by weighing the anti-competitive effects against the possible benefits or efficiencies identified, to verify whether such benefits or efficiencies outweigh the anti-competitive effects and, therefore, enable the practice in question to be deemed acceptable. The quantification of such effects is mostly carried out by economists. CADE has recently begun a trend of considering hardcore cartel as per se offences, even though Brazilian antitrust law provides solely for the application of the rule of reason.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

According to article 15, the provisions of antitrust law are applicable to individuals and public or private companies, as well as to any individual or corporate association established de facto and de jure, and even to legal state monopolies. Furthermore, in Brazil cartels are also punishable by criminal fines or imprisonment from two to five years (Law No. 8,137/90).

10 Definition of dominance

How is dominance defined?

Article 20, paragraphs 2 and 3, defines dominance as the control of a substantial share of a relevant market. It presumes the existence of a dominant position when a company or economic group controls 20 per cent of the relevant market (article 20, paragraph 3). This percentage is subject to change by CADE for specific sectors of the economy.

11 Market definition

What is the test for market definition?

The test used for market definition in Brazil – as in many other jurisdictions – is the ‘hypothetical monopolist test’, which defines the relevant market as the smallest group of products (and the smallest geographic area) in which a supposed monopolist can provoke a small but significant and non-transitory increase in price. A relevant product market includes all products or services considered interchangeable by buyers because of their characteristics, prices and use. A relevant geographical market includes the area in which companies supply and demand products or services on sufficiently homogeneous competitive conditions in terms of prices, consumer preferences and characteristics of products and services.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

Article 20, paragraph 3 presumes dominant position from the control of more than 20 per cent of market share. CADE can establish other thresholds for different sectors of the economy.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

Article 20 prohibits any act that is in any way intended or otherwise able to produce anti-competitive effects, even if it is conducted by a collective agent (eg, an economic group or an undertaking between competitors) that holds a dominant position. In this regard, article 20, paragraphs 2 and 3, which define dominance, constantly refer to ‘a company or group of companies [...]’.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Article 20, paragraph 2 expressly refers to dominant purchasers, and there are no differences compared with the application of the law to dominant suppliers. Scrutiny of vertical restrictions antitrust analysis – the creation of mechanisms that exclude rivals, whether by increasing the entry barriers of potential competitors, increasing the costs for actual competitors, or increasing the concerted exercising of market power – is particularly applicable here.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

Antitrust law does not define abuse of market power, but article 21 lists examples of practices that could be considered as abuses of dominant positions. The case law defines ‘abuse’ as the power to raise prices above competition levels for a significant period of time.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article 20 covers both exploitative practices (as unfair trading conditions) and exclusionary conduct (such as predatory pricing or refusal to deal). The basic standard for determining the abuse is the anti-competitive effect on the market.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

The basic standard for determining the abuse is the anti-competitive effect on the market. It may be presumed that abuse will not produce anti-competitive effects if there is no dominant position. Nevertheless, article 20 also prohibits practices used by non-dominant firms that could harm competition, even in the absence of actual injuries such as unfair competition.

Abuse of a dominant position could also occur if the practice is aimed at monopolising a neighbouring market, such as tying.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Legislation does not provide exemptions to abuse of dominance. The only exemption literally expressed is applicable to monopolisation (achieving a dominant position), which applies when the achievement of market control is as a result of competitive efficiency.

Case law does provide a defence to abuse of dominance where there is a legitimate business justification for the conduct. In addition, the antitrust offence will only take place if the rule of reason

test indicates that the harmful effects to competition prevail against any beneficial effects.

Specific forms of abuse

19 Price and non-price discrimination

Discrimination is explicitly mentioned by article 21, XII. CADE Resolution No. 20/1999 expressly mentions that discrimination may or may not be unlawful, and that this conduct requires a specific analysis of its effects on each concrete case. In practice, discrimination will most likely be considered unlawful when it conceals other forms of abuse, such as refusals to deal, tying or predatory pricing. Vertically related practices become unlawful when discrimination is used to raise rivals' costs and, thus, restrict the market.

20 Exploitative prices or terms of supply

Exploitative prices and terms and conditions of supply are explicitly mentioned by article 20, III, and article 21, XI and XXIV as forms of abuse of dominant position.

21 Rebate schemes

Rebate schemes could raise antitrust concerns if associated with predatory pricing or exclusionary practices.

22 Predatory pricing

Predatory pricing is explicitly prohibited by article 21, XVIII. This involves a deliberate practice of pricing below the average variable cost, seeking to eliminate competitors, and being able to charge prices and yield profits that are closer to monopolistic levels (ie, capable of offsetting the losses resulting from selling below cost) after the exclusion of competitors.

23 Price squeezes

Price squeezes are analysed as a joint conduct of exploitative prices and predatory pricing. In vertically related industries, price squeezes can also cause possible foreclosure effects.

24 Refusals to deal and access to essential facilities

Refusals to deal and access to essential facilities under particular circumstances may constitute an abuse under article 20. CADE's jurisprudence defined abuse to be present when:

- the refusal of access is likely to eliminate all competition in the market;
- the access is indispensable for entering the market;
- the denial has no objective or reasonable justification;
- the competitor is unable, reasonably or in practice, to duplicate the essential facility; and
- providing access to the facility is unfeasible.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and similar contractual obligations can constitute violation of article 20 if they force competition by excluding or preventing competitors from access to the market, to foreclose. There is no threshold established by legislation above which the foreclosure is considered to be illegal. However, CADE case law considers the 20 per cent threshold for dominant position to be a general guideline.

Additionally, CADE case law – especially in the review of mergers and acquisitions – usually considers a five-year maximum for non-compete provisions.

26 Tying and leveraging

Tying and leveraging practices are unlawful because they result in market power weighting of different products, abusively increasing profits to the detriment of buyers and consumers, while 'blocking' the downstream segment (generally, of distribution) for actual and potential competitors (increase in barriers to entry).

27 Limiting production, markets or technical development

These practices can constitute a form of abuse of dominant position under article 20.

28 Abuse of intellectual property rights

Abuse of intellectual property rights is subject to specific legislation (Law No. 9,279/96) that prohibits abusive conduct and submits the intellectual rights to compulsory licence. The intersection between antitrust law and intellectual property rights law has, however, recently resulted in several cases in Brazil.

The general position of the SDE is that IP protection does not necessarily lead to dominance and, even if it does, this does not necessarily or automatically result in an antitrust infringement. The SDE understands that constant requests for IP extension in order to delay the entrance of competitors in the market may constitute sham litigation.

The intersection between IP and antitrust has resulted in some interesting recent cases. In the autoparts market, the SDE has recently ruled that actions taken by companies to protect autoparts design was simply the regular exercise of their rights, and dismissed an investigation. A similar situation occurred in the aluminium sections market.

29 Abuse of government process

As discussed in question 5, Law No. 8,884/94 is applicable to all regulated sectors; there is no antitrust immunity. This is especially relevant to cases of sham litigation, cases in which the requests to government bodies or the use of the judiciary are blatantly groundless and are actually aimed at interfering directly with the commercial relations of a competitor, resulting in damage to the market. SDE has had between two to four sham litigation cases per year since 2005. In the tachograph market, the SDE has recently recommended the condemnation of a company for sham litigation owing to an invitation to create a cartel in order to avoid the entrance of a competitor in the market.

If a regulatory agency approves a price standard to be followed, for instance, CADE might review the standard if it harms competition. Companies that followed the standard would not be punished in this situation.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Mergers and acquisitions are addressed in article 54 of Law No. 8,884/94, which submits any acts that may limit or otherwise restrain open competition or result in the control of relevant markets to CADE's approval.

31 Other types of abuse

Other types of abuse may fall under article 20 if they produce the anti-competitive effects that the law seeks to prevent.

Update and trends

Major reforms of Brazil's legislation are expected in the near future. In December 2008, the House of Representatives approved a draft bill providing for the restructuring of the Brazilian antitrust system. In 2010, the Senate approved the draft bill with several modifications. Due to those changes, the current draft bill is currently being reviewed again by the House of Representatives.

The institutional restructuring of the Brazilian antitrust system is aimed at increasing efficiency, better allocating human resources and avoiding duplicate work. The Competition Department of the SDE would be incorporated into CADE, becoming a Directorate-General, and would continue to investigate anti-competitive practices and provide non-binding opinions in merger reviews. CADE would continue to be an independent administrative tribunal, but would now accumulate – after the incorporation of the SDE – the responsibilities for investigating and judging cases. The mandates of CADE commissioners would change from the actual two-year once-renewable period to one four-year non-renewable mandate. The SEAE would receive a competition advocacy mandate.

Second, a pre-merger system would be introduced. At present, mergers and acquisitions may be filed to Brazilian antitrust authorities up to 15 working days after the signature of the first binding agreement between the parties. Note that, regardless of the draft bill, discussions regarding an electronic form for merger filings are already advanced. Additionally, there would be changes regarding merger notification criteria, with optimised thresholds regarding the actual importance of the transactions in Brazil, early termination for simple mergers, and the possibility of closing merger cases by settlement.

The bill follows the current tendency of giving more emphasis to economic considerations, since the bill itself creates the position of chief economist, who will be in charge of drafting economic opinions and studies, a function that does not currently exist. This will naturally result in making possible a more detailed and profound economic analysis of both concentration acts and administrative procedures.

Besides these two major changes, the bill also proposes expansion of the definition of restrictive practices to include additional practices.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Article 20 is directly applicable, since it constitutes public law and refers to constitutional individual rights. Article 20 can be invoked in court regardless of the submission to the regulatory authorities.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

Three government agencies are involved in antitrust analysis in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE) and the Administrative Council of Economic Defence (CADE). The SDE is the chief investigative body in matters related to anti-competitive practices. The SEAE has more general powers with respect to monitoring prices in the various sectors of the economy. CADE is the administrative tribunal, composed of seven commissioners, including a chairman, which makes the final judgment on both merger reviews and anti-competitive practices. The SDE and SEAE may undertake on-site inspections, search and seizure warrants, and wire-tapping (with a judicial order requested by the Office of the Attorney General). Recently, the SDE has implemented a task force involving the federal police and the Office of the Attorney General in order to fight cartels more effectively. Between 2003 and March 2009, 182 search and seizure warrants have been executed by the SDE. The Office of the Attorney General plays a special role as it is entitled to request judicial orders to conduct investigations, phone-tapping and searches and seizures.

34 Sanctions and remedies

What sanctions and remedies may they impose?

Article 23 allows CADE to impose fines of up to 30 per cent of the firm's annual turnover in the previous year. CADE can also order the offending undertaking to cease the infringement.

Article 53 permits CADE or the SDE to enter into an agreement with the defendant, at any phase of the proceeding, whereby the defendant undertakes to cease the conduct under investigation (the 'cease-and-desist commitment'). This agreement does not represent an admission as to the practice under investigation. The case is put on

hold while the commitment is duly complied with. If the conditions set out in the commitment are fully met the case is dismissed.

Since May 2007, due to a new rule, Brazilian antitrust authorities are able to initiate a cease-and-desist commitment even with companies accused of cartels, but in that case parties must pay a sum of money in order to obtain the commitment. The money is designated to a fund created in order to protect rights of general public interest. There is currently a heated discussion among the agencies regarding the need to admit guilt in order to obtain a cease-and-desist commitment in cartel cases. Even though CADE has already undertaken three commitments in cartel cases without requiring the admission of guilt, the SDE understands that the admission of guilt is necessary in order not to deteriorate the leniency programme in Brazil. According to the SDE, if there is no admission of guilt, companies will continue practising cartels and, if discovered, try to obtain a commitment with the authorities, minimising the incentives of making use of the Brazilian leniency programme.

According to article 52, CADE and the SDE also can adopt preventive measures (cease-and-desist orders) 'whenever there are signs or sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damage to the market, or that it may render the final outcome of the proceedings ineffective'.

The first punishment due to abuse of dominance by CADE was in the flat steel market cartel (1999), fining companies by over 50 million reais. After that, many other condemnations in other relevant markets were followed, such as the aggregates and crushed stone cartel (2005), in which companies were fined 15 to 20 per cent of the annual pre-tax revenue of each firm participating in the cartel, resulting in a total amount of over 50 million reais and the Square Iron Bar cartel (2005), in which CADE imposed fines of 7 per cent of the annual pre-tax revenue of the participating firms, totalling 345 million reais in fines. One of the participating firms was fined 245 million reais. More recently, CADE imposed fines of 15 to 20 per cent of the annual pre-tax revenue of each firm participating in the cartel of aggregates ('cement industry') case (2005), and fines of 10 to 20 per cent of the pre-tax revenues of each participating firm in the vitamin cartel (2007), totalling 17.7 million reais.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

A contract that violates antitrust provisions is unenforceable.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Article 20 can be enforced by clients, consumers or competitors in private suits before judicial courts. They can also provoke prosecution by the antitrust agencies.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Article 29 of the antitrust law permits injured parties to defend their individual or general public interests in court by way of antitrust measures and the awarding of losses and damages suffered in connection therewith. This is irrespective of the corresponding administrative proceedings, which shall not be stayed in view of the court action.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The cartel of aggregates 'cement industry' case, which was decided by CADE in late 2005, with fines of between 15 and 20 per cent of pre-tax revenues, is a high-profile and relatively recent dominance case. It was the first case in which the authorities used dawn raids. The vitamin cartel, decided in 2007 with fines of between 10 and 20 per cent of pre-tax revenues, is also relevant because it was the first Brazilian case on international cartels. Additionally, in 2009, a major brewery was fined 2 per cent of its pre-tax revenue for abuse of dominant position due to the use of a customer loyalty programme similar to airline frequent flyer and other mileage programmes. Most recently, in 2010, the cartel of industrial gases was fined by CADE with fines of up to 25 per cent of pre-tax revenues.

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