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in 37 jurisdictions worldwide

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Getting the Deal Through is delighted to publish the fully revised and updated 10th anniversary edition of *Dominance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 37 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Brazil

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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. 12,529/11, the new antitrust law published in Brazil on 1 December 2011, which entered into force on 29 May 2012. Specifically, article 36, II, IV, and paragraph 2 of Law No. 12,529/11 apply to general antitrust behaviour, including the abuse of a dominant position (article 36, IV) and the attempt to achieve a dominant position in the relevant market by unjustified restrictions on competition. Law No. 12,529/11 presumes the existence of a dominant position when a company or economic group controls at least 20 per cent of the relevant market (article 36, paragraph 2). 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 36, end of paragraph 2).

2 Non-dominant to dominant firm

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

Yes. Article 36, II, of Law No. 12,529/11 condemns the achievement of a dominant position by the control of relevant market of goods or services. There are two important things to note: conduct that leads to a dominant position based upon efficiencies is exempt from prohibition (article 36, paragraph 1); and the accumulation of market power by means of mergers and acquisitions is analysed under another provision of Law No. 12,529/11, article 88, 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. 12,529/11 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 36, II of Law No. 12,529/11 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 in paragraph 3 of article 36.

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 that do not prevent the application of the provisions of antitrust law. Although controversial in some situations (the financial sector, for instance), CADE's case law interprets Law No. 12,529/11 (article 31) as extending its applicability to all regulated sectors.

6 Status of sector-specific provisions

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

Article 36 applies to all industry sectors. In accordance with article 31, 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 the former antitrust law (Law No. 8,884/94) was published, the first practical effect was to increase awareness of the law itself, given that Brazil had been a planned 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, from 2003 to today, antitrust enforcement has focused on the pursuing of cartels.

There have been several cartel convictions with increasing fines, such as the *Aggregates and Crushed Rock* cartel. This was the first case of an antitrust dawn raid 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. Additionally, in the past years CADE has condemned several cartels such as the *Airlines* cartel (2004), *Newspapers* cartel (2005), *Pharmaceuticals* cartel (2005), *International Vitamins* cartel (2007 – the first international cartel to be sanctioned in Brazil) and the *Security Services* cartel (2007). In 2010, CADE condemned the cartel of industrial gases and fined companies up to 1.7 billion reais, one of the highest fines in the world in an antitrust case.

In 2012 CADE has conitnued to strike, condemning several cartels, such as the *Hydrogen Peroxide* cartel, fining companies up to 150 million reais; the *Gas Station* cartel; and the *Bakeries and Bread* cartel, among others. The fines applied by CADE in 2012 amount to 170 million reais.

Authorities have also been focusing greatly on enhancing investigative methods and efficiency. The former Secretariat of Economic Law of the Ministry of Justice (SDE), at that time in charge of

investigations, 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. Even though the number of dawn raids has decreased in the past two years – two in 2011 and four in 2012 – most investigations still awaiting a decision date back to 2007 and 2008.

Even with the recent advent of a new antitrust law, Brazilian authorities have declared they are still focused on the fight against cartels, especially considering that Brazil will host the World Cup in 2014 and the Olympic Games in 2016, which will demand several infrastructure changes and investments.

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 conduct. 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 a Department of Economic Studies in charge of preparing economic opinions and market studies.

CADE has recently begun a trend of considering hard-core cartels 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 31, the provisions of the 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 and imprisonment from two to five years and a fine (article 4, Law No. 8,137/90).

10 Definition of dominance

How is dominance defined?

Article 36, paragraph 2, 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. 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 36, paragraph 2, presumes dominant position from the control of more than 20 per cent of market share. As mentioned above, 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 36 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 that holds a dominant position (eg, an economic group or an undertaking between competitors). In this regard, article 36, paragraph 2, which defines dominance, expressly refers 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?

The legislation also applies to dominant purchasers and there is no difference if compared with the application of the law to dominant suppliers. It is worth mentioning that antitrust analysis by scrutiny of vertical restraints – namely, 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.

Revoked Law 8,884/94 expressly mentioned that a company holds a dominant position if at any time it controls a substantial part of the relevant market as a purchaser, a supplier, an intermediary or a financer of a product (article 20, paragraph 2). There is no equivalent to this express rule in law currently in force.

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 36, paragraph 3, 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 36 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. It is worth mentioning that the practice of exclusivity is not explicitly mentioned, but it can be the object of investigation and punishment under article 36, since its list of anti-competitive practices is merely illustrative.

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 36 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 specifically provided 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 hypothetical beneficial effects.

Specific forms of abuse

19 Price and non-price discrimination

Discrimination is explicitly mentioned by article 36, paragraph 3, X, Law 12,529/11. 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 36, II, and article 36, paragraph 3, IX, 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 36, paragraph 3, XV. 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 36. CADE's case law 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 36 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 36.

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 Brazilian antitrust authorities 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 former SDE already understood 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 cases. In the past, regarding the auto parts market, the former SDE has ruled that actions taken by companies to protect auto parts design was simply the regular exercise of their rights, and dismissed an investigation. A similar situation occurred in the aluminium sections market. On the other hand, in the *Auto Parts* case, CADE did not agree with the former SDE's conclusions and determined that the SDE should continue the investigation under an administrative procedure that is currently continuing. The investigation is presently being carried out by the General Superintendence of CADE, the agency that has incorporated the functions of the former SDE since the new antitrust law entered into force.

29 Abuse of government process

As discussed in question 5, Law No. 12,529/11 is applicable to all regulated sectors; there is no antitrust immunity. This is particularly relevant to cases of sham litigation, 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. The Brazilian antitrust authorities have had between two and four sham litigation cases per year since 2005. In the tachograph market, CADE has condemned 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 and fined the company 1 per cent of its annual pre-tax revenue, totalling 10 million reais.

Update and trends

As mentioned in this chapter, Brazil has a new antitrust law that has been in force since 29 May 2012. This law has brought significant changes regarding the structure of the bodies in charge of antitrust defence in Brazil and authorities are still adapting to the new environment and framework. Despite not being the focus of this chapter, it is worth mentioning that the timeline of merger filings have changed drastically since Brazil, due to the new law, moved to a pre-merger review system. The thresholds of filings have also changed and Brazilian authorities are expecting a significant reduction in the volume of filings. There are no shifts of emphasis in the enforcement practice so far. Even with the new antitrust framework, we understand that CADE will continue to focus on anti-competitive practices (especially cartels).

Regarding regulatory agencies, if for example, an agency sets a price standard, CADE might review the standard if it harms competition. Companies that followed the standard would not be punished in this situation in order to preserve the principle of legal certainty.

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

Mergers and acquisitions are addressed in article 88 of Law No. 12,529/11, which submits any acts that may limit or otherwise hinder 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 36 if they produce the anti-competitive effects that the law seeks to prevent.

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 36 is directly applicable, since it constitutes public law and refers to constitutional individual rights. Article 36 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?

Before Law No. 12,529/11, three government agencies were involved in antitrust analysis in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the former SDE and CADE. The SDE was the chief investigative body in matters related to anti-competitive practices. The SEAE had more general powers with respect to monitoring prices in the various sectors of the economy. CADE was the administrative tribunal, composed of seven commissioners, including a chairman, which made the final judgment on both merger reviews and anti-competitive practices.

Once Law No. 12,529/11 entered into force, the structure of the authorities responsible for enforcement was modified. The Economic Department of SDE was incorporated by CADE and no longer exists as an independent body. CADE now has a General Superintendence (equivalent to the SDE in the previous structure), an Administrative Tribunal (equivalent to the Council's structure today), and a Department of Economic Studies. The SEAE has a role of promoting antitrust awareness among both Brazilian authorities and wider society, but does not have any investigative powers since the new law entered into force.

Regarding the powers of investigation, the General Superintendence has the power to undertake on-site inspections, search and seizure warrants and wire-tapping (with a judicial order requested by the Office of the Attorney General).

34 Sanctions and remedies

What sanctions and remedies may they impose?

Article 37 allows CADE to impose fines that vary from 0.1 per cent to 20 per cent of the firm's annual turnover in its branch of business activity in the previous year of the anti-competitive practice. It is relevant to note that the taxes are not excluded from the basis for calculating the fines.

Article 85 permits CADE 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). If this occurs during an investigation into dominance, the agreement will not be taken to condone 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, because of a new rule, Brazilian antitrust authorities were able to accept entering into cease-and-desist commitments even with companies accused of cartels, but in that case parties must pay a sum of money and admit to the practice under investigation, in order to obtain the commitment. The money is designated to a fund created to protect matters of general public interest.

According to article 84, CADE and the General Superintendency can also 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 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 33 million reais. Sanctions were also imposed on 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 (the *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. In 2010, CADE condemned the *Industrial Gases* cartel and imposed fines of between 10 per cent and 50 per cent (in this case, to a recidivist company). In this case, one of the companies was fined in 1.7 billion reais, one of the highest fines in the world in an antitrust case. At the time of writing, no company has yet been fined for cartel activity under the rules of the new antitrust law.

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 36 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 47 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 aggregate cartel in the *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 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 a dominant position due to the use of a customer loyalty programme similar to airline frequent flyer and other mileage programmes. In 2010, CADE fined the *Industrial Gases* cartel up to 25 per cent of pre-tax revenues. Most recently, on January, 2013, a producer of vehicle equipment was fined 1 per cent of its pre-tax revenue for abuse of a dominant position due to resale price maintenance.

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