Antitrust Law and Litigation

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CADE and Judicialization: merits analysis

The merits of CADE's decisions, obviously and necessarily, can and should be appreciated by the Judiciary

In June 2019, Informative No. 942 from the Federal Supreme Court (STF) highlighted Minister Luiz Fux's monocratic decision, referring to RE 1.083.955/DF, which denied the possibility of considering the merits of a decision given by the Administrative Council for Economic Defense - CADE (i.e.: administrative act). This decision, whose core was the non-fulfillment of eligibility criteria of the extraordinary appeal, emphasizes that the Judiciary is only allowed to analyze administrative acts "*when such act is illegal or abusive*", understanding that there was "*regularity of the administrative proceeding that had imposed (...) the conviction.*"

The origin of the case consists of a decision issued by CADE that, following the vote of the former Commissioner Roberto Pfeiffer, convicted both the Sindicato do Comércio Varejista de Derivados de Petróleo do Distrito Federal (Sindipetro/DF) and retailer fuel chains for alleged infringement of the economic order.[1] As the defendants were unreconciled, they filed a lawsuit (No. 0012731-72.2005.4.01.3400) against CADE. This lawsuit led to a sentence that upheld the claims, in which the magistrate of the first instance misread the infringement against the economic order, declaring it nonexistent, regarding its merits.

CADE appealed; and the 6th Panel of the Federal Regional Court of the First Region (TRF1) granted the appeal on 07/09/2012 by a unanimous vote, following the vote of the Federal Judge and Rapporteur Marcelo Dolzany da Costa. The summary states the following, "*This guideline of the reasoning of the sentence evidently hurt the theme, whose dimensions are unique to management.*"

[1] The alleged conduct was the action of the parties in lobbying for the approval of legislative proposals, concerning their sector, which would have the effect of restricting the entry of new competitors. CADE has already dealt with this conduct on other occasions, with no negative position of the authority on the subject. There is even an express indication of its legality, which is found in the following quote: "*there is no doubt that this restriction is socially undesirable as it implies in restrictions on the competition, without any benefit to society, except for the owners of gas stations. However, I understand that these actions, though objectionable from an ethical point of view because they aim to benefit themselves in detriment of the consumers; they are legal (...)",* vote of former Commissioner Polyanna Ferreira Silva Vilanova - Administrative Proceeding No.08700.000625 / 2014-08.

The conducting vote also states, "*To attribute diverse qualification to uncontroversial facts - in this case, the authors' performance and union in repressing the entry of new distributors into the retail market to the detriment of free competition - is to deny the valued judgment that the legislator was entrusted with a body of plural composition and technical knowledge about the matter. If it was the judge examining the vulnerability of any other requirement (competence, finality, form, object, motivation), certainly the judicial control would be admissible. However, in the present case, what was seen was the complete substitution of one evaluative judgment for another.*"

Returning to the Supreme Court [the First Class - Ministers Luiz Fux, Marco Aurélio, Rosa Weber, and Alexandre de Moraes; excluding Minister Luis Roberto Barroso], after the filing of the Interlocutory Appeal, they deeply analyzed the case, expanding their understanding of the judicial control of administrative acts, yet also within the context of the impossibility of reviewing facts and evidence.[2] In general, the First Class' ruling defends the impossibility of the analysis of CADE's decision based on two points: (i) the matter would be complex, requiring specialized knowledge, with low judicial expertise to control political and technical choices, regarding economic regulation and its systemic effects; (ii) duty to defer to CADE's technical decisions and possible harmful consequences of control. Specifically, regarding CADE's analysis, the decision highlights a third point, - "*antitrust sanctions* (...) *depend on the consequences or negative repercussions of the analyzed market, and the identification of such anticompetitive effects requires expertise.*"

Several points of the STF's decision deserve criticism (obviously constructive), notably the allegation of lack of technical knowledge of the Judiciary (which could have been planted by technical assistants, regardless that this would not be a constitutionally valid justification, given the jurisdictional instability[3]) and consequentialist foundation[4] for non-intervention (it is not plausible to use this as the sole or decisive ground for a court decision, where this cannot be applied in an extreme manner in either way, whether or not allowing a certain legal decision, including by the existence of a constitutional legal system with guarantees to be observed).

In this situation, we have, regardless of the power-duty of the Judiciary in examining the complex competition theme here, "*low incentive from the Judiciary to review complex technical issues*" and "*deferential treatment given by the Judiciary to CADE*."[5] This brief article aims to highlight some of the reasons why the Judiciary can, and above all should, analyze the merits of CADE's decisions.

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[2] This remark is relevant inasmuch as an eventual discussion on legal qualification of facts may authorize a STF review.

[3] The competition matter is not the only complex matter analyzed by the Judiciary, which also addresses environmental issues, intellectual property, knowledge from traditional communities, bio-rights, health, etc. Specifically about health, a widely judicialized matter, the Judiciary often manifests itself on complex and macro-legal developments, such as impacts on the public budget, remedies still in the experimental phase, list of remedies approved by regulatory agencies, tragic choices and costs of rights, financial impacts on health plans, right to life and treatment, etc. (that is, issues related to public health policy, for example).

[4] Denounced by Luis Fernando Schuartz as, "*any theoretical program or any attitude that explicitly or indirectly implicitly proposes to condition the legal adequacy of a particular judgment's assessment of the consequences associated with it and its alternatives.*" *Consequencialismo jurídico, racionalidade decisória e malandragem*, in MACEDO JR, Ronaldo Porto & BARBIERI, Catarina H. Cortada. Direito e Interpretação: racionalidades e instituições. São Paulo: Saraiva, 2011, p. 383 e 384.

[5] RIBAS, Guilherme Favaro Corvo. *Processo Administrativo de Investigação de Cartel*. Singular, São Paulo, 2016, p. 196.

The difficulties of the Judiciary and the complexity of competition law cannot be impeded for antitrust issues to be satisfaction analyzed (especially because it is a sanctioning process).

GROUNDS

The first ground to be highlighted is the principle of the non-obviation of judicial control on administrative decisions, taken from item XXXV of article 5 of the Constitution, "*The law shall not exclude from the appreciation of the Judiciary an injury or threat to the law.*" *Moreover, article 47 of Law 12.529/2011 establishes that, "Those harmed by themselves or by the legitimate persons referred to in article 82 of Law No. 8.078 from September 11, 1990, may go to court, in defense of their homogeneous individual or individual interests, for the cessation of practices that constitute an infringement of the economic order, as well as receive compensation for losses and damages suffered, regardless of the investigation or administrative proceeding, which will not be suspended due to the filing of the action.*"

On one hand, the law cannot create obstacles to the appreciation of the Judiciary, yet on the other hand, there is a law expressly allowing the performance of the Judiciary, without limitation of merit, independently or parallel to the performance of CADE. Therefore, there is no reason to prevent the merits appreciation of CADE's rulings by the Judiciary. The Judiciary should not fail to appreciate the matter, by claiming lack of knowledge. It would be like not analyzing the merits of the requirement of a tax in tributary matters because the taxing authority has more complete knowledge of these subjects. In other words, CADE does not have a monopoly on the application of competition law, and it is possible to seek the Judiciary directly. This has already happened before, though in a small amount.

In the present case, this inescapability has some peculiarities. As CADE is an autarchy (article 4 of Law no. 12.529/2011), it cannot rebel against judicial control, as Odete Medauar explains, "*Municipalities are subject to jurisdictional control, the same content as that which is exercised over the authorities and bodies of the direct administration.*"[6] Moreover, it must be borne in mind that when we refer to "merits" in this article, what one wants to focus on is "merits" in the sense that civil proceedings give it, being the basis and motivation of a decision like CADE's. Within the particularities exposed here, there is the characteristic of administrative acts of not making *res judicata*, and the Public Administration not being in charge of an analysis of the regularity of its own act. In this sense, "*the Administration cannot make judgments with force of res judicata, because nobody can judge and be the party judged at the same time.*"[7] Thus, the fact that the Administration is both , the judge and the party being judged at the same time, though different individuals represent it in different positions, is a succinct reason why the merits of CADE's decisions in this case should be reviewed by the Judiciary.

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[6] *Direito Administrativo Moderno*. Belo Horizonte: Fórum, 2018, p. 64.

[7] GERAIGE NETO, Zaiden. *O Princípio da Inafastabilidade do Controle Jurisdicional*. RT: São Paulo, 2003, p. 47.

The second ground is the characterization of the administrative proceeding conducted by CADE as a sanctioning administrative process, given the insertion of administrative matters in criminal matters, which go from administrative to criminal (and vice versa), with overlapping of matters between the two spheres, which implies relevant consequences. Helena Lobo da Costa presents this approach by highlighting the "*simple fact that both sectors work with the sanctions on individuals, an activity which by its very nature requires legitimation, limitation, warranties, and its own procedures*."[8] There is also the obvious principle of legality, which we do not present here as a separate ground. However, a case in which CADE has obligations to fulfill and so many principles to observe (especially because of such a principle) cannot have its merit subtracted from the examination of the Judiciary.

The fact that it is a sanctioning administrative proceeding cannot be left blank. If there is an infringement against the economic order, there is clearly a conviction, which is usually pecuniary but may also constitute an obligation to do or not to do something. One wonders why a company that suffers sanctions (so

The third ground is the necessary applicability of the dual degree of jurisdiction, albeit between administrative and judicial instances, "*the principle of double degree jurisdiction is based on the possibility that the first-degree decision is unfair or wrong; therefore the need to allow reform in an appeal.*"[9] Thus, the need to review an instance still exists and remains institutionalized in our system This means that the law takes into account the possible human fallibility and points to correction, where appropriate. If CADE's ruling, in its procedural part, can be reviewed, as stated in the decisions commented, then why not admit a merit review? Why not see if CADE decides in a single instance and if the lack of possible remedies against their merit decisions cannot simply eliminate the review.

CONCLUSION

It is left for us to conclude that the merits of CADE's decisions, obviously and necessarily, can and should be appreciated by the Judiciary. In practice, if CADE condemns one or more companies for alleged infringements of the economic order, the reason for these condemnations, i.e. the merit of the decision, is subject to judicial review.

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[8] *A Proximidade entre Direito Administrativo Sancionador e Direito Penal*. In: BLAZECK, Luiz Maurício Souza; MARZAGÃO JÚNIOR, Laerte Idalino. (org.) Direito Administrativo Sancionador. São Paulo: Quartier Latin, 2014, p. 112.
[9] CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pelegrini; DINAMARCO, Cândido Rangel. Teoria Geral do Processo. São Paulo: Malheiros, 2012, p. 83.