Competition Law

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Regulatory Abuse and Competition

The unnecessity to consider regulatory abuse as an independent infringement

Bill 6.517 of December 2019, authored by the illustrious congressional representative Jerônimo Goergen (PP-RS), aims to amend Law 12,529/2011 – hereinafter referred to as the Competition Law or simply LDC – to add the type of infraction called abuse of regulatory power. This article aims at commenting about the aforementioned Bill. We have abstracted the great controversy that sets competition and regulation at opposing ends.

Indeed, art. 36 of the LDC establishes, "the acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of guilt, even if not achieved." The following are the effects in items I to IV – "to limit, restrain, or in any way injure free competition or free initiative," "to control the relevant market of goods or services," "to arbitrarily increase profits," and "to exercise a dominant position abusively."

The Bill under analysis aims to add item V, "to exercise the power to regulate in an abusive manner or edit infralegal normative acts." Moreover, it adds to the illustrative list in the 3rd paragraph of the same article, item XX, "to edit an infralegal normative act that unjustifiably creates barriers to market entry or distorts or in any way eliminates competition."

Initially, we will address whether or not this legislative amendment is necessary. What has to be verified is whether CADE, as the competition authority, already has the competence that this amendment aims to give CADE through a Bill. In fact, art. 31 of the LDC sets forth explicitly, the following: "This Law applies to individuals or legal entities of public or private law (...)."This wording makes it clear that any regulatory agency, such as a legal person governed by public law, is subject to the LDC and, consequently, its application by CADE.

In Chapter III of Law 13,848/2019, we see where it deals with the "interaction between the regulatory and antitrust agencies" in the 1st paragraph of art. 26, "The antitrust agencies are responsible for the application of the Competition Law in regulated sectors, entrusting in them the analysis of the concentration acts, as well as the initiation and instruction of administrative proceedings for the investigation of infractions against the economic order."

A rigorous analysis of the aforementioned provision would point to the lack of foresight of decision-making competence, however, it may be deemed implicit, since it is already in the specific law and states nothing of the contrary. Furthermore, art. 27 establishes, "When the regulatory agency, in performance of its duties, is aware that it may configure infractions against the economic order, it should communicate this immediately to the antitrust agencies to take the appropriate measures." It is clear that the decision is CADE's responsibility and not that of the regulatory agencies, even if there is no specific mention of this point in the law.

However, the Bill is based on the wording of art. 4 of Law 13,874/2019. It explains, "It is the duty of the public administration and other entities that are bound by this Law, in the exercise of regulation of public norms belonging to the legislation on which this Law is concerned, except in strict fulfilment of the explicit provisions of the law, avoid the abuse of unduly regulatory power (...)." It goes on to explain nine specific situations, among them, "create market reserves through favoring, in regulation, economic, or professional group, to the detriment of other competitors" and "write statements that prevent new national or foreign competitors from entering the market."

The Bill is based on the wording of art. 4 of Law 13,874/2019 that created a new type of infraction against the economic order, which is lacking, however, still being in accordance with the idea of the Bill - the punitive framework. Although, we understand that there has never been a lack of punitive framework for CADE, regardless of what the article says. Furthermore, the Bill greatly decreases the scaling and punitive capacity of CADE, in fact.

Effectively, paragraphs 5 and 6, which were added by the Bill to art. 36 of the LDC, make it clear that by keeping them in the LDC, it is for the purpose of punishment; only item VII of art. 38 – "any other act or measure required to eliminate harmful effects to the economic order" – removed the other items from the possible punishments, especially the fines. Clearly, the judicial measure to be promoted by the Federal Attorney's Office at CADE remains, or better said, as a rule of thumb, the punishment will be judicialized, and therefore, CADE will always have to go to the Judiciary.

For this reason, we believe that, in addition to being unnecessary to consider the abuse of regulatory power as an independent infringement, the Bill in question diminishes Cade's punitive capacity.

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