Competition Law and Litigation

Leonor Cordovil | Daniel Athias

Distinguishing between misconduct infractions and competition violations in the Car Wash Operation

The importance of the Car Wash operation in fighting corruption is unquestionable, and its investigative ramifications, fostered by plea bargain agreements, are expanding to a wide range of public construction projects in the country (e.g., stadiums for the World Cup, urbanization of communities, highways and railways, water and irrigation infrastructure, among others). This importance, however, should not exempt it from constructive criticism, notably related to the lack of experience of some public authorities, and at times, the Judiciary itself, which results in breaches of constitutional procedural guarantees.

The Car Wash operation introduced a new phenomenon in Brazil. All areas of legal liability (civil, criminal, and administrative) have been activated simultaneously (theoretically guaranteeing full damage compensation). In previous cases (like Mensalão), the criminal liability was handled first, then the administrative, and lastly the civil. That alone is not problematic, but a great deal of attention must be paid to conflicts and overlaps.

Complications have arisen in the administrative area, where several laws use open definitions to determine what constitutes an administrative violation. A single act can be classified as multiple violations, allowing for investigation and sanctioning by multiple authorities.

A symbolic conduct that has the above mentioned effect is the cartel in public bids, whose pursuit strongly interests the Administrative Council for Economic Defense (CADE), the Federal Court of Accounts, the Public Prosecutor's Office, the Office of the General Controller, amongst others. It is precisely this point that we will address, since there is not proper scrutiny during the examination and a distinction of concepts, using open types by some public agents, which leads to confusion between misconduct infractions in public office (application of Public Misconduct Law n. 8.429/1992 -LIA) and competition (application of Antitrust Law n. 12.529/2011) violations.

Cade has already signed dozens of leniency agreements in cartel investigations of public bids arising from the Car Wash operation, which have reported and described alleged anticompetitive violations. Some of these agreements have already been made public, including the reports of

the collaborating agent, who describes the conduct in detail (in the document titled *History of Conduct*), while others are still pending disclosure. It should be noted that these agreements are only the gateway, without any guarantee of confirmation, of a discussion of exemption from the antitrust point of view. All allegations need to be confirmed in a long period of instruction by CADE. A leniency agreement with CADE is a simple initial request, dependent on evidence, which informs the government that the competition between economic agents has been harmed.

Despite the kick-start character of the agreements, many of them have been means to justifying the filing of administrative misconducts in public office suits. Public Misconduct is an act contrary to the basic principles of Public Administration. The objective of LIA is to gain morality in administration by punishing bad managers and those who give cause to illegality. Although they are dealt with in civil justice, the actions of Public Misconduct have a sanctioning[1] nature. An administrative act is sanctioned if flawed with dishonesty or a willful[2] misconduct by a public agent; this violates morality and administrative loyalty.

A basic principle of public misconduct is that not every illicit act will necessarily constitute an act that can be sanctioned by LIA. Despite the possibility that a competitive infringement has impacts on a public misconduct case, these infringements are not synonymous. Therefore, the extension of the competition violation to the public misconduct infraction is not automatic. Public misconduct acts have their own qualification and characteristics, and there must be the correct delimitation of its configuration (distinguishing it from the anticompetitive act).

One of these additional qualifications, in the case of cartels in public bids, relates to the need for the private agent to have a connection or interaction with a public agent in the context of the given event (public bid).

This is due to the fact that public agents are the main object of LIA (so much so that one cannot bring forth an action of public misconduct unless a public agent is also prosecuted).[3] LIA is extended to private individuals only to the extent that they have concurred with the public agent in the practice of the misconduct infraction, so that they are considered a participant and knowledgeable of the benefits that could be gained. There must be effective and willful interaction between public and private agents, because "acts of public misconduct can only be performed by public agents, with or without the cooperation of third parties."[4] In other words, a link to a public agent is required to hold the private agent accountable.

Nevertheless, in some cases, there is not much accuracy in the delimitation of which agents would have effectively practiced the dishonest acts, opting for the plaintiff to unrestrictedly include all

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[1] AgInt in AREsp 932.810/ES, Rel. Ministro Napoleão Nunes Maia Filho, judged on 20/09/2018, DJe 03/10/2018.
[2] REsp 1140544/MG, Rel. Ministra ELIANA CALMON, SEGUNDA TURMA, judged on 15/06/2010, DJe 22/06/2010
[3] "One cannot lose sight of the very reason for the administrative act of bad character that logically involves dishonest, ungraceful, and disloyal action by the public agent in conducting his activity" (AgRg in MS 16. 287/RJ - Monocratic Decision, Just. Herman Benjamin); and "The conduct of public agents, which constitutes the focus of LIA, is specifically guided by their functional duties and is independent from the accountability of the company that benefited from the misconduct." (REsp 896.044/PA, Justice Herman Benjamin, judged on 16/09/2010, DJe 19/04/2011).
[4] REsp 1405748/RJ, Reporting Justuce MARGA TESSLER (JUÍZA FEDERAL CONVOCADA DO TRF 4ª REGIÃO), Reporting Justice REGINA HELENA COSTA, PRIMEIRA TURMA, judged on 21/05/2015, DJe 17/08/2015.

of the companies reported in leniency agreements to CADE, as investigated, using these agreements as evidence to support their plea. That is, it uses LIA's open conduct definitions to compare competitive violations with public misconduct infractions.

Obviously, this must be refuted, since the aforementioned agreements, report a competitive violation and not an public misconduct infraction. It is up to the party to carry out a test to identify the public misconduct and its authors, under the risk of application of the Law of Abuse of Authority (Law No. 13.869/2019).

There is the possibility of overlapping laws, applicable to a certain act, but for this to happen, it is necessary to define the facts that authorize the application of these laws. In this sense, for example, CADE itself is explicit in stating that it is possible that an antitrust offence may fall within other administrative offences, such as administrative public misconduct. Nevertheless, "even if the practices of corruption and collusion are interconnected, they are autonomous violations, e.g. one is not a condition for the existence of the other, and it may exist in a completely independent manner."

In the absence of a correct delimitation of the facts authorizing the application of LIA for violations and competition agreements (and vice versa), such as the link to the public agent, the absence of just cause for the filing of the public misconduct action must be verified, thus safeguarding the constitutional procedural guarantees applicable to the processes of a sanctioning nature.

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