**Competition Law and Litigation**

*Mauro Grinberg* | *Lívia de Melo*

# WHAT ARE WE ACCUSED OF?

# The future of antitrust: two important procedural flaws in Brazilian Antitrust System and how to correct them

## INTRODUCTION

For the future of antitrust, the authors have two recommendations to adjust important procedural aspects regarding investigations of alleged anticompetitive practices conducted by Administrative Council for Economic Defense (CADE), the Brazilian antitrust agency. Both aim to ensure that the due process and legal certainty are faithfully enforced by CADE's administrative proceeding, given, above all, its sanctioning character. It is important to remind at this point that this is the opinion of the authors and not of the office of which they are members or of the organizations to which they cooperate.

The first recommendation concerns the need for relevant market and market power definitions, even in cases of horizontal restraints. As it will be detailed in Section II, the authors disagree with CADE recent case law, which consolidated that any horizontal restraint is illegal *per se*, and that the definition of relevant market is unnecessary, given that the mere demonstration of conduct's materiality is sufficient for conviction of the companies allegedly involved. The absence of market analysis restricts the right of full defense, since economic players without market power are unable to generate negative effects to the market. At the very least, the measurement of market power must be weighed for dosimetry of penalties.

In turn, the second recommendation is intrinsically linked to the first one. In the previous paragraph, the authors explain that the relevant market should be delimited so that the defendant can fully exercise the right for defense; now the authors highlight the relevance of the procedural moment for delimiting the object. According to the rule of process stabilization, after a given procedural moment the litigious object needs to stabilize and it is no longer possible to change

it. As it will explain in Section III, to provide an effective due process, it is essential that the object of the investigation is previously set, in order to guarantee the defendant full knowledge of the object of the process and the legal effects resulting from the decision[1].

In the next Sections, the authors present their understanding and their best recommendations for adapting these procedural aspects to the due legal process.

## II. The need for relevant market and market power definitions to guarantee the right of defense

In a hypothetical market in which there are three competitors, an arrangement between two of the competitors, each one having 10% of the market, may be considered neutral from the point of view of antitrust effects, even if only potential; the conduct may be even procompetitive in order to better face the third competitor having 80% of the same market. Although it is a horizontal agreement, this conduct is unable to generate anti-competitive impacts and may even generate efficiencies for the market, as lower prices and greater innovation or products. Unlike hard core cartels, an alleged collusion such as this cannot result in the elimination of competition, in the market domain or in an arbitrary increase in profits, excluding the application of article 36, I, of Law 12,529 / 2011 (hereinafter called "Antitrust Law" or "LDC") and, more importantly, of paragraph 4 of article 173 of Brazilian Federal Constitution. Thus, how could such conduct be deemed anticompetitive?

For CADE, it may be and it may lead to high fines, mainly because CADE has created a tradition of defining the relevant market based on the participants of the horizontal restraints, independently of their market shares and regardless of how many competitors can be found outside of the alleged conduct. Or even worse. CADE´s Tribunal has already decided that it is not necessary to define the relevant market or measure the market power because the sheer demonstration of such conduct is enough to prove the potential damages of the unlawful activity[2]. This is the first flaw the authors want to forward in this article.

CADE understands that cartels do not require a more detailed economic analysis, since the net social cost is inherent in such conduct. However, what this article intends to demonstrate is that the definition of the relevant market is a necessary condition for the effectiveness of the right to a fair hearing, in any and all analysis of anticompetitive conduct, not only in cases that investigate unilateral practices. Furthermore, without defining the relevant market, no accusation of violation of free competition is supported. This procedural flaw must be corrected because

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[1] TUCCI, José Rogério Cruz e. A causa petendi no Processo Civil, 2ª ed., São Paulo, Revista dos Tribunais, 2001, p. 192.
[2] Administrative Proceeding No. 08012.004472/2000-12, vote of Reporting Commissioner Frazão, on October, 2014; Administrative Proceeding No. 08012.004039/2001-68, vote of Reporting Commissioner Frazão, on May, 2013; Administrative Proceeding No. 0801.006923/2002-18, vote of Reporting Commissioner Veríssimo, on February, 2013; Administrative Proceeding No. 08012.002127/02-14, vote of Reporting Commissioner Prado, on July, 2005; Administrative Proceeding No. 08700.004617/2013-41, vote of Reporting Commissioner Resende, on July 2019; Administrative Proceeding No. 08012.006043/2008-37, opinion of CADE's General Attorney, on March, 2020.

judicial reviews are starting to pop up, annulling CADE's decisions that failed to fulfill the due process.

We have seen, in the recent past, convictions in horizontal restraints without any scrutiny of the relevant market. For instance, in Brazil, gas stations are obliged by the regulatory authority to publicize their prices in huge billboards, which can lead to tacit parallelism between players, accommodating prices to the same level. However, the parallelism is not necessarily related to an anticompetitive contact between competitors to set prices or to the exchange of competitively sensitive information with the intention of dividing the market.

But what can be done about it, besides showing that this is a flaw? The Brazilian Civil Procedure Code (CPC), which can be used in the administrative proceedings in CADE in given circumstances – except for direct law specifications – provides some clues that can easily be followed.

In fact, article 319, III of CPC establishes, as a condition of the initial petition, the exposition of *"the fact and the legal reasons of the case"*. Additionally, article 36, I, of LDC says that a legal violation, to be considered as that, must, among others, *"limit, distort or in any way damage free competition or free initiative"*. Combining the two, we can conclude that the final technical note of administrative inquiry – perfectly equivalent to the initial petition, according to article 69 of LDC[3] – must clearly demonstrate how a specific conduct can cause any harm to competition.

At this point it must be remembered that Brazil is a civil law country and, at that, heir of Iberian tradition, which is very formal. This means, to our purpose here, that we are guided by laws that go to (as much as possible) many details. We do not have some abstractions that are very used in common law. Also, the jurisprudence, although important, has its limits, and a Judge can always go against some former decision, even knowing that it may be overruled by a Superior Court. Taking the example of Supremo Tribunal Federal (STF) (the Brazilian equivalent to the Supreme Court), Justices usually issue interim measures that may last for years and they do it individually. An important point is that, although strange to Brazilian law, the concepts of rule of reason and per ser rule are largely used by CADE, although the Judiciary is very skeptic about it. Such rules are not found either in our laws or in our legal tradition. As a consequence, we cannot just say that a cartel always harms the market, independently of a thorough analysis; we must demonstrate that such harm exists.

So, one point to start correcting such procedural flaw is to establish the need to prove not only that there was a collusion but also that it harmed (even if only potentially) competition in some way. So, in the 80/10/10 hypothetical above mentioned, a collusion may have happened but with no harm to competition. In fact, what kind of harm to competition has this 80-10-10 example can cause? What competition are we talking about? This means that we must define, as narrowly as possible and/or feasible, the relevant market. The result of the definition will lead to

[3] Art. 69. The administrative proceeding, a contradictory procedure, aims to guarantee the right of a full defense regarding the conclusions of the administrative inquiry, the final technical note of which, in accordance with CADE's rules, constitutes the opening petition.

the market and the competition we are talking about. Some questions must be answered, mainly: who are the participants of the collusion? These participants of the collusion can impose prices and conditions to the competitors? What are the market shares? Are there other influences of one over the others? What is the regional outreach of every competitor?

The answers to these questions are different from market to market. But it is very important to know if a certain collusion really harms the competition or has no effect. According to Brazilian law, a violation to the Antitrust Law must bear some kind of harm to competition, even if only potential; otherwise it is a harmless collusion and, having no effect on competition, has no relevance to the antitrust discussion.

So, it is possible to correct the first flaw by defining the relevant market, even if this correction may sound (and maybe it is) somewhat childish.

## III. Delimitation of the object and stabilization of the procedure: applicability to CADE's punitive administrative proceedings

The correction of the second flaw is connected to article 357, II and IV, of CPC: *"(...) the Judge must adopt measures to organize the file": "limit the factual questions about which the evidence can be produced (...)"* and *"limit the legal issues which are relevant for the decision on the merits"*. Translating this article into Antitrust Law, we must only change "Judge" for "General-Superintendence (SG)" – which is CADE´s investigative body – and it is possible to see how the obligation arises. As we can see, this flaw is the lack of a definitive accusation against the defendant.

Here it is clear that, when the SG has to limit the legal issues that are to be under discussion in the case, CADE is fixing the terms in which the defendants are allowed to present arguments and evidence. No changes are supposed to happen from this moment on, even if and when the SG understands that there are other arguments. These new arguments may be used in a new case but not in the same case in which the SG, acting according to the law, has already made clear what are the points to be considered in the file and no other point is allowed anymore. If these news arguments are included in the same case, the SG should reopen the deadline to submit a new defense, so that the defendants can amend their arguments and evidence.

It is the rule of stabilization of the procedure that is based on the public interest, *"which must respond in a certain and definite manner to the provocation in the author's request. A legislative system that would freely allow the alteration of the elements of the action would generate instability in the jurisdictional provision and, consequently, in the legal relations in general"*[4] . In this way, the stability of the procedure is rooted in the legal certainty itself. Pure civil law!

In addition to the public interest, the stability of the object of the process is also closely related to the right to a fair trial, ensured by article 5, LV, of Brazilian Federal Constitution, which

[4] GRECO FILHO, Vicente. Direito processual civil brasileiro, II, São Paulo, Saraiva, 1984, p. 57.

provides that "*plaintiffs, in judicial or administrative proceedings, and defendants in general are guaranteed the right of defense and to a fair trial, with the means inherent to it*". So that there is an effective right of defense, it is essential that the object of the claim is previously set, in order to guarantee the defendant full knowledge of the object of the process and the legal effects resulting from the decision.

This non-allowance of new points for discussion on the merits is valid not only for the defendant but also for CADE, although CADE seldom understand it this way. CADE here has two roles, which may seem – and in a way they are – opposite: as a public attorney (opening the case and following it), who basically accuses the defendant of some antitrust misconduct and as a Judge of first instance deciding that there is or there is not such misconduct. It is fair to say that LDC allows CADE, either through SG or via its Tribunal, to use two hats.

The rule of process stability is consolidated in the Brazilian civil procedural system, which provides that once the lawsuit has been filed and the defendant is notified, there is a stabilization of the contested object, which can no longer be changed by the plaintiff without the defendant's consent (article 329 of CPC).[5] This rule is also present in the Brazilian criminal procedure that, although it grants the Judge the possibility to modify the legal definition of the facts presented by the plaintiff, does not allow the amendment of the description of the fact contained in the complaint, under the terms of article 383 of the Criminal Procedure Code (CPP). If at the end of the probative phase there is a new 'legal definition of the fact' due to new facts or other elements not contained in the initial claim, there must be a new complaint and, of course, a new possibility of submitting a defense. As stated by BADARÓ, *"the object of the claim [...] must remain unchanged throughout the process [...]. If the process serves to verify the claim, the sentence [...] must confirm or refute the claim [...] and cannot be based on or take into account something different, which is not part of the complaint"*. [6]Again, pure civil law!

Naturally, the rule of process stabilization is also applicable to CADE's punitive administrative proceedings. Since legal certainty and right of defense and right to a fair hearing are equally valid and applicable to the administrative proceedings, it is imperative that the object of the process – delimited in the technical note for the initiation of the administrative proceeding – remains stable; and, if it does not remain, then another technical note must be issued to ensure the opportunity to present a defense and to provide that evidence production is reopened.

So, the correction of the second flaw is easy: SG must just follow the law and limit, in the beginning of the investigation, what are the issues at discussion and follow such definition without allowing exceptions. This means that not only the accusation cannot be changed but also the arguments for discussions.

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[5] THEODORO JR., Humberto. Estabilização da demanda no novo Código de Processo Civil, in: Revista de Processo, 2017, p. 195–204.

[6] BADARÓ, Gustavo Henrique, Correlação entre acusação e sentença, 3ª ed., São Paulo, Revista dos Tribunais, 2013, p. 81.

## IV. CONCLUSION

The authors used these two flaws because they have easy corrections under the existing laws and there is no need, in order to correct them, to create something new because the legal system already gives us the solutions. The authors hope to have addressed the future of antitrust by correcting these flaws.

In short, the initiation of the administrative proceeding delimits the charges – including the relevant market definition – that are levied on the defendants and, consequently, the burden of allegation and evidence. Therefore, admitting the simple fact that the prosecuting authority may bring new facts to the proceeding, after the presentation of defenses and the analysis of evidence, disregards the Brazilian procedural system and violates the constitutional right of defense.

## V. Bibliography

BADARÓ, Gustavo Henrique, Correlação entre acusação e sentença, 3ª ed., São Paulo, in: Revista dos Tribunais, 2013.

GRECO FILHO, Vicente. Direito processual civil brasileiro, II, São Paulo, Saraiva, 1984.

THEODORO JR., Humberto. Estabilização da demanda no novo Código de Processo Civil, in: Revista de Processo, 2017.

TUCCI, José Rogério Cruz e. A causa petendi no Processo Civil, 2ª ed., São Paulo, in: Revista dos Tribunais, 200