

**The Effects of the Use of a Hybrid Approach to Competition Law in the Regulation of
Market Power: the Case of Brazil**

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Declaration

The work presented in this thesis is my own.

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Abstract

The Effects of the Use of a Hybrid Approach to Competition Law in the Regulation of Market Power Control: the Case of Brazil

The Brazilian competition law and policy are inspired by the EU and US competition law models and incorporate different aspects of these systems, such as the rule of reason and the concept of abuse of dominance. Based on the analysis of competition cases and in-depth interviews with members of the Brazilian competition authority, the research examines how the authority has dealt with the differences between the EU and the US models when applying its competition law. It identifies the ways in which the authority seeks to adjust its competition system to the particularities of a large developing country, in terms of legislation, economy, culture and institutional framework. The research also analyses the way in which the current competition legislation was intended to give flexibility to the competition authority but at the same time has produced the potential for inconsistencies in its enforcement.

The study reveals differences between the formal provisions of the competition law and the manner in which it is applied. In addition, the research argues that the application of diverging concepts drawn from the EU and US models have resulted at times in incoherence in relation to issues such as the definition of the relevant market, the concepts of dominance and abuse, as well as the dissimilar treatment of specific offences. With regards to the latter, the findings suggest that there is a need to address institutional problems, such as the shortage of administrative personnel, political interference, inadequate training and a lack of an 'institutional memory'. Possible solutions discussed include the publication of guidelines and

authoritative decisions to restate the law, improvements in training and funding, as well as proposals for administrative and legal reform.

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List of Abbreviations

ANATEL - Brazilian National Telecommunication Agency (Agência Nacional de Telecomunicações)

BRIC - Brazil, Russia, India and China

BCPS - Brazilian Competition Policy System

CADE - Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica)

COJ - Court of Justice of the European Union

CRT - Celular CRT SA

CUT - Worker's Central Union (Central Única dos Trabalhadores)

DECOM/MICT - Department for Commercial Defence of the Ministry of Industry, Commerce and Tourism (Departamento de Defesa Comercial do Ministério da Indústria, Comércio e Turismo)

DAS - High Level Management and Advising Staff (Direção e Assessoramento Superior)

Directv - TVA Sistema de Televisão and Directv

Discussion Paper - DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses

DOJ – US Department of Justice

DPDC - Department of Consumer Protection and Defence (Departamento de Proteção e Defesa do Consumidor)

DPDE - Department of Economic Protection and Defence (Departamento de Proteção e Defesa Econômica)

EC Guidance - Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings

EC Notice - Commission's notice on the definition of the relevant market for the purposes of Community competition law

EEC -European Economic Community

FDI - Foreign Direct Investment

FTC- US Federal Trade Commission

IBGE - Brazilian Institute for Geography and Statistics (Instituto Brasileiro de Geografia e Estatística)

ICC - International Chamber of Commerce

Iguatemi – Condomínio Shopping Center Iguatemi

Labnew - Labnew Indústria e Comércio Ltda

MATEC - Matel Tecnologia de Informática SA

Oi Internet - Telemar Norte Leste SA

Power-Tech - Power-Tech Teleinformática Ltda

PT- Workers Party (Partido dos Trabalhadores)

R\$ - Brazilian Real

SCP - Structure-Conduct-Performance

SDE - Secretariat of Economic Law (Secretaria de Direito Econômico)

SEAE - Secretariat for Economic Monitoring (Secretaria de Acompanhamento Econômico)

SSNIP - Small but significant and non-transitory increase in price

Specialists - Specialists in Public Policy and Management

TBA - TBA Informatics

Telemar - Telemar Internet Ltda

Telemar Group - Telemar and Oi Internet

TFEU - Treaty on the Functioning of the European Union

TV Globo - TV Globo Ltda and TV Globo São Paulo Ltda

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1. Introduction

Many jurisdictions have developed models of competition law over the past decades. Developing countries have mainly enacted competition laws that draw on the experience of the most successful competition law models, notably the US and the EU. Brazil is an example of this global trend,¹ as it has developed a hybrid system of competition law which is largely inspired by the experience of the EU and the US. The Brazilian competition law establishes a system of regulation that combines an administrative and judicial enforcement system since 1942 which was inspired by the US.² Moreover, it prescribes criminal and administrative sanctions for cartel prohibitions, being inspired by the US legislation as well. However, it has elements that could be said to be inspired by the EU, such as the prohibition of abuse of dominance and the concern with market entry and harm to competitors. The interpretation of the law has also been inspired by the US and the EU as the Brazilian competition authority looks at how certain concepts, e.g. the definition of the relevant market, are dealt with by the competition authorities and courts in both sides of the Atlantic. In terms of application of the law, the hybrid system is also evident as the Brazilian competition authority usually looks at how cases are decided in the US and the EU, adopts the rule of reason, whilst at the same time imposes special responsibilities over dominant firms. Nonetheless, the Brazilian competition law system also has its own peculiarities; for instance, it prohibits all kinds of anti-competitive acts or conduct under only one article, namely article 20 of Law 8,884/94, and it adopts a higher market share than the US and the EU when applying the SSNIP³ test.⁴

¹ For instance, the People's Republic of China has sought inspiration from EU competition law as well as American antitrust expertise when drafting the 2007 Anti-monopoly Law.

² See Shieber, *Abusos Do Poder Economico; Direito e Experiencia Antitruste No Brasil e Nos E. U. A*, 17.

³ Small but Significant and Non Transitory Increase in Prices. On the SSNIP test see p. 123.

⁴ See p. 126.

In contrast with other BRIC⁵ countries, Brazil has had a comprehensive competition law in place for over 16 years,⁶ as well as a specialised competition authority,⁷ which has resulted in a more consistent and mature system of competition law and policy at legal, institutional and political levels.

In common with other BRIC countries, Brazil is earning a reputation as one of the emerging economic powers of the 21st century. A number of factors are responsible for this development, including the strategic economic policies and market reforms undertaken over the past two decades, President Lula's international popularity and the ability of the Brazilian economy to avoid the meltdown of the recent global economic crisis. The future hosting of major international events such as the 2014 World Cup and the 2016 Rio Olympics exemplify Brazil's increasing international influence.

However, there are still many challenges that Brazil will face over the coming decades in order to become a successful world economic power, especially in regards to the social well-being of its population. Although Brazil is a functioning western democracy governed by the rule of law, a vast divide between the rich and poor remains. This is the case in terms of education, income and social opportunities. This vast discrepancy has resulted in the emergence of parallel societies. For instance, first-time visitors to a metropolis such as São Paulo or Rio de Janeiro are often surprised to find Brazilians living in luxury apartments or villas enjoying a higher standard of living than most Americans and Europeans. In addition,

⁵ BRIC is an acronym created by John O'Neill from Goldman Sachs in 2001 to refer to the emerging economies of Brazil, Russia, India and China. Since 2009 the BRIC countries have yearly summits. See Houlton, "First BRIC summit concludes." See also Reuters, "Communique from BRIC summit in Brasilia."

⁶ Brazil, *Law n. 8,884 of 11 June of 1994*.

⁷ Composed of the Secretariat for Economic Monitoring (SEAE), the Secretariat of Economic Law (SDE) and the Administrative Council for Economic Defence (CADE). See section 2.4.

there is an emerging middle class that is seeking to achieve the Brazilian version of the American dream, whilst less fortunate Brazilians live in a state of socioeconomic segregation in favelas, or shantytowns, where living conditions are comparable to the poorest countries of the developing world. While such a vast social inequality is undesirable *per se*, it also results in other socioeconomic problems that affect the Brazilian population as a whole, such as high levels of violence, organised crime, drug trafficking and political corruption.

On the one hand, direct government intervention through taxation and the provision of public services is a key factor in reducing gross income inequalities and resultant socioeconomic problems. On the other hand, competition law and policy has a potentially useful role in helping to address some of these concerns by enhancing competitiveness and efficiencies in the market. A market economy accompanied with effective competition allows economic development and social well-being. Although competition law is not a ‘magic bullet’ that would solve all of Brazil’s social problems, it can contribute to raise standards of living by increasing efficiencies and allowing access to better and cheaper products and services.

In recent times, most notably under the presidency of Luiz Inácio Lula da Silva, Brazil has been under the international spotlight as the ‘up-and-coming’ economic power of the 21st century. The Brazilian market is also becoming more attractive for multinationals due to Brazil’s economic growth, large population,⁸ emerging middle class and current ranking as the seventh largest economy in terms of GDP.⁹ Brazilian competition law has a global relevance. In fact, many decisions of the Administrative Council for Economic Defence

⁸ Estimated to be circa 200 million as of 2010, which ranks Brazil fifth in terms of population after the People’s Republic of China, India, USA and Indonesia. See Ministério do Planejamento, Orçamento e Gestão, “IBGE: Instituto Brasileiro de Geografia e Estatística.”

⁹ As of 2010, Brazil is ranked 7th in terms of GDP after the US, Japan, the People’s Republic of China, Germany, France, the UK and Italy. See *Ibid.*

(CADE)¹⁰ discussed in this research concern multinationals or Brazilian companies with considerable commercial interest overseas. This fact underpins the significance of the current reform of Brazilian competition law,¹¹ the need to promote legal certainty and foreign direct investment (FDI), and the central theme of this research; namely the hybrid nature of the Brazilian system of competition law and the direction where its policy is heading towards.

It could be argued that one of the most important points of divergence between the US and EU models of competition law concerns their approach to market power;¹² that is, the offences of monopolisation or attempt to monopolise pursuant to Section 2 of the Sherman Act and abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU). Much research has been undertaken in respect of the similarities and differences in the approach of the competition authorities in the US and the EU.¹³ Many authors have compared the two systems when examining specific types of conduct¹⁴ and others have dedicated books on the antitrust regulation in both sides of the Atlantic.¹⁵ Some studies have also examined the use of the rule of reason and *per se* rule in the EU and the US,

¹⁰ CADE is the body of the competition authority responsible for deciding competition law matters. See section 2.4.3.

¹¹ A Competition bill is currently in the National Congress. When enacted, it will replace Law 8,884/94. See section 2.3.4.

¹² See e.g. Fox, “The Market Power Element of Abuse of Dominance-Parallels and Differences in Attitudes-US and EU.”

¹³ See e.g. Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?.” Varney, “Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness.” De Smet, “The Diametrically Opposed Principles of US and EU Antitrust Policy.”

¹⁴ See e.g. Areeda and Hovenkamp, *Antitrust law an analysis of antitrust principles and their application*. Fox, Sullivan, and Peritz, *Cases and materials on U.S. antitrust in global context*. Jones and Sufrin, *EC Competition Law*. Whish, *Competition law*.

¹⁵ See e.g. Léveque and Shelanski, *Antitrust and regulation in the EU and US legal and economic perspectives*. Elhauge and Geradin, *Global competition law and economics*. Marsden, *Handbook of research in trans-Atlantic antitrust*. Slot and McDonnell, *Procedure and enforcement in E.C. and U.S. competition law proceedings of the Leiden Europa Instituut seminar on user-friendly competition law*. Colino, *Vertical agreements and competition law a comparative study of the EU and US regimes*.

the proof of effects, as well as the role of efficiency defences and objective justifications.¹⁶ The changes in the interpretation of competition rules in the EU and the US have also been subject of study, especially by economic schools of thought.¹⁷ This thesis identifies some of the elements that are relevant for understanding the main differences and similarities between these competition law models and proposes a structure for the study of these elements.

Such structure is used in this research to examine the Brazilian competition law and policy. With regards to the study of Brazilian competition law and policy, most of the academic research to date concerns mergers¹⁸ and cartels.¹⁹ Moreover, there have not been many studies on the role of consumers in competition law,²⁰ on the social function of property and the abuse of economic power²¹ and on institutional issues concerning the Brazilian competition authority.²²

¹⁶ See e.g. Posner, “The rule of reason and the economic approach: reflections on the Sylvania decision.” Carrier, “The rule of reason: an empirical update for the 21st century.” Piraino, “Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis.” Roeller, “The year 2005 at DG competition: The trend towards a more effects-based approach.” Petit, “From Formalism to Effects? The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC.” Albers-Llorens, “The role of objective justification and efficiencies in the application of Article 82 EC.” Balto, “Proof of competitive effects in monopolization cases: a response to Professor Muris.”

¹⁷ See e.g. Crane, “Chicago, Post-Chicago, and Neo-Chicago.” Connor, “Did the competitive regime switch in the 1980s?.” Brodley, “Post-Chicago Economics and Workable Legal Policy.” Sullivan, “Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World.” Piraino, “Reconciling the Harvard and Chicago schools: A new antitrust approach for the 21st century.” Easterbrook, “The Chicago School and Exclusionary Conduct.” Fox, “The Efficiency Paradox.” Fox, “We Protect Competition, You Protect Competitors.”

¹⁸ See e.g. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. I. Oliveira and Rodas, *Direito e Economia da Concorrência*, chap. V. Forgioni, *Os Fundamentos do Antitruste*. Botta, “Fostering Competition Culture in the Emerging Economies: The Brazilian Experience.”

¹⁹ See e.g. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. III. Oliveira and Rodas, *Direito e Economia da Concorrência*, chap. II. De Araujo, Pugliese, and Castillo, “European Union and Brazil: Leniency in Cartel Cases - Achievements and Shortcomings.” Forgioni, *Os Fundamentos do Antitruste*, chap. VII.

²⁰ See e.g. Carpena, *O Consumidor no Direito da Concorrência*. Goldberg, *Poder de Compra e Política Antitruste*.

²¹ See e.g. Lopes, *Empresa e Propriedade: função social e abuso de poder econômico*.

²² See e.g. Ramin, *As Instituições Brasileiras de Defesa da Concorrência*. Bello, *Autonomia Frustrada: o Cade e o poder econômico*.

In relation to abuse of dominance in Brazil, very little has been researched to date. Oliveira and Fujiwara²³ provide an overview of competition policy in Brazil, but no assessment of abuse of dominance was undertaken. Moreover, Oliveira and Rodas²⁴ only deal with some aspects of vertical restraints and predatory pricing and to date there has not been a thorough analysis of the body of the case-law. These authors only deal with the case-law in an appendix where a small number of case extracts are transcribed, unfortunately without an in-depth analysis. One of the very few authors who have undertaken a broad study of competition law in Brazil is Forgioni,²⁵ who summarised the US, EU and Brazilian competition laws and explained the historic development of competition law in these jurisdictions. However, her work follows a deductive approach and there is no in-depth examination of the Brazilian case-law. Forgioni also used the same approach in a book dedicated to vertical restraints in the US, EU and Brazil,²⁶ which deals with abuse of dominance and cartels. Other authors have also dealt with aspects of abuse of dominance, but none have pursued their studies on the elements of abuse.²⁷ Franceschini is the only author who has published case-law books on competition law in Brazil.²⁸ However, his books do not deal with some of the decisions that were considered by the interviewees as leading cases, nor contain cases decided after 2003. Moreover, differently from what one would expect, the works of Franceschini do not contain an analysis of the cases. Finally, Philip Marsden²⁹ has

²³ See Oliveira and Fujiwara, “Competition Policy in Developing Economies: The Case of Brazil.”

²⁴ See Oliveira and Rodas, *Direito e Economia da Concorrência*, chap. III, IV.

²⁵ See Forgioni, *Os Fundamentos do Antitruste*.

²⁶ See Forgioni, *Direito Concorrencial e Restrições Verticais*.

²⁷ See e.g. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. II. Rocha et al., *A Lei Antitruste - 10 anos de combate ao abuso de poder*.

²⁸ See Franceschini, *Direito da concorrência: case law*. Franceschini, *Jurisprudência do CADE de 1962 a 2003*. Franceschini, *Lei da concorrência conforme interpretada pelo CADE*.

²⁹ See Marsden, *Handbook of research in trans-Atlantic antitrust*.

discussed some aspects of abuse of dominance in Brazil, including some cases on abuse, such as *MATEC*.³⁰

Given the relatively limited nature of the research to date which analyses the development of Brazilian competition law, this work seeks to provide an original contribution to this emerging field as the first study which combines the use of in-depth interviews, case-law analysis and a literature review to examine the effects of the hybrid approach to competition law and policy in Brazil with respect to abuse of dominance.

The provisions of the Brazilian competition law create relatively extensive and broad legal norms and allow considerable interpretative discretion to the competition authority. In addition, the hybrid nature of Brazilian competition law and policy results in an application of the law that rests between the poles of the EU and US models. On the one hand, this can be justified on the grounds that Law 8,884/94 was enacted during a period of considerable socioeconomic change. On the other hand, this phenomenon results in potential inconsistencies in the way that competition law is interpreted and applied.

The aim of this research is to examine how a hybrid approach to competition law and policy in Brazil affects the doctrine on abuse of dominance with respect to: (i) the legal text; (ii) its interpretation; (iii) its application by the competition authority.

A wide scope of legal, economic, social and political issues could be studied when analysing the Brazilian hybrid model of competition law. However, the central focus of this research is

³⁰ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*. See section 5.2.

limited to the regulation of market power, i.e. abuse of dominance and monopolisation from a legal perspective. Moreover, although the abuse of dominance practised by state-owned enterprises is a very interesting subject of study, especially considering the fact that Brazil has gone through a strong period of privatisation in the past two decades, due to word limitations this thesis will not deal with this matter.

The research follows an inductive methodology. The theoretical framework for the work has been accumulated from information gathered from academic literature, case analysis and twenty in-depth interviews. The research analysed the most significant cases involving abuse of dominance. It is important to note that Brazil does not have a system of case-law reporting as in England and Wales. Brazilian decisions can be found on-line in CADE's database, but it does not contain a complete body of case-law. In order to ensure a good sample of abuse of dominance cases, in addition to keyword searches, the following search criteria was used: minutes of judgments, cases contained in Brazilian competition law publications and cases which, in the opinion of Councillors and other members of the Brazilian Competition Policy System (BCPS),³¹ were the most relevant. More information on the case analysis conducted in this research can be found in the appendix.

The interviews included former and current Councillors and assistants of Councillors of the CADE, the General Advocate and three Advocates of the CADE, members of the SDE and the SEAE, as well as Brazilian and UK lawyers. This triangulated methodology used a qualitative analysis which offered the best opportunity to understand the underlying competition policy in the analysis of abuse of dominance in Brazil. The views of those

³¹ The BCPS is composed of the CADE, the SDE and the SEAE. See p. 51.

directly involved in the investigations and decisions were fundamental to fully understand the decisions examined. In order to maintain the anonymity of the interviewees, it was not possible to state whether the interviewee was a current or former member of the competition authority. The use of interviews also minimised the risk of imposing the researcher's own assumptions or expectations when analysing the case-law or when constructing explanations for the reasons behind certain decisions or actions. More detailed information on the methodology can be found in the appendix.

The first chapter of the research provides a historical, legal and institutional framework of Brazilian competition law and policy. The development of competition law and policy in Brazil is placed within a historical context to better understand how the current competition system has come into being. The current structure of Brazilian competition law and the role of the competition authority are explained whilst highlighting proposed reforms, such as the competition bill that is expected to be enacted in the near future.

Chapter two explores some of the key aspects of convergence and divergence between the US and the EU in respect of the regulation of market power. It is not intended to provide a summary of the regulations and policies in these respective jurisdictions; rather, it provides a framework to assist the comparative analysis of this research. Therefore, it highlights similarities and differences between the US and the EU in respect to the use of the rule of reason, the *per se* approach and the role of efficiencies as defences or objective justifications.

Chapter three examines the elements of abuse of dominance in Brazil. The goals of Brazilian competition policy are analysed in the light of the legislative purpose of Law 8,884/94 and the views of interviewees. The definition of the relevant market is explained by identifying

the elements taken into consideration by the legal reasoning of the competition authority. Further issues are also discussed, such as the legal threshold for presuming dominance, as well as barriers to entry and collective dominance. The final part of chapter three analyses the elements for configuring an abuse of dominance in Brazil, including the adoption of the rule of reason and the special responsibilities doctrine.

Chapter four analyses the approach of the competition authority in respect of some non-pricing conduct, namely exclusive dealing, tying arrangements and refusing to deal. Various leading decisions of the CADE are analysed to demonstrate the influence of the US and the EU models. The underlying theme of chapter four is based on the premise that the development of a predictable, coherent and relatively uniform interpretation of competition law is essential for ensuring the emergence of an efficient and effective system of competition law in Brazil.

The final chapter explores how pricing conduct is examined and adjudicated by the Brazilian competition authority. The offences of predatory pricing and price discrimination are studied in greater detail. Although chapter five focuses on exclusionary offences, for completeness, excessive pricing, which can be exclusionary but is mainly exploitative, is also discussed.

2. Chapter One - The Historical, Legal and Institutional Framework of Competition Law and Policy in Brazil

2.1 Introduction

This chapter offers a historical, legal and institutional framework of competition law and policy in Brazil. It is not intended to explore these elements in detail; rather, it seeks to provide the foundation for a better understanding of the current system of competition law and policy in Brazil.

The historical section explains how the economy of Brazil has been characterised by governmental protectionism and market concentration since the colonial era and how the market structure is changing since the privatisations and the opening up of the economy to international trade in the 1990s, after two decades of dictatorship and economic instability. This historical aspect underpins the concerns of policy-makers when the current competition law 8,884 was enacted in 1994 and the reasons why many Brazilian markets are still characterised by monopolies and oligopolies.

This historical background also helps to explain the importance of the constitutional principles contained in Law 8,884/94 and why the Consumer Code of 1990 already contained provisions against abusive conduct. The Consumer Code will be studied only in relation to these provisions, as the consumer protection authority can find some forms infringements that correspond to abuse of dominance based on the consumer code. Further, the most relevant Articles of competition law for the purpose of this research are analysed in order to give the necessary background information for comparisons with the US and EU models and to better comprehend the development of the Brazilian case-law. Such analysis will include the study

of the relevant changes in the control of abuse of dominance by the competition bill, given that it contains examples of how the hybrid approach is developing in Brazil. For instance, at the same time that it reaffirms the prohibition of abuses by dominant firms, it formally adopts the use of the rule of reason in the analysis of competition law cases. Moreover, it removes abusive prices from the non-exhaustive list of prohibitions confirming what, as will be seen in this research, is already the understanding of members of the competition authority in Brazil.

Finally, the structure of the BCPS will be studied. Achievements of the Brazilian competition authority are highlighted, as well as areas for improvement. More specifically, the final part of this chapter explores issues such as the chronic shortage and high turnover of staff, the short term of office of Councillors, the inadequate training of Specialists in Public Policy and Management (Specialists), and the problems relating to the effectiveness of the competition authority's decisions under the current system of judicial review. The analysis of the issues related to the institutional framework of the competition authority is fundamental given that many of its shortcomings are factors that at times lead to inconsistent decisions or the incorrect use of foreign concepts.

2.2 The Historical Development of Competition Law in Brazil

2.2.1 The Colonial Era of Competition Law in Brazil

During the colonial period, which was from 1500³² to 1822,³³ the issue of free competition was insignificant in Brazil. The Brazilian economy reflected the workings of Portuguese colonial rule, which put in place what became known as ‘bilateral monopoly’. This consisted of a double monopoly possessed by Portugal, as it was the sole and direct importer, as well as the sole owner of Brazil’s precious export industry. Nevertheless, in the seventeenth and eighteenth centuries, it became possible to observe the emergence of public concern with what would be considered nowadays as matters relating to competition law.³⁴ For instance, the exclusive privileges granted by the Portuguese Crown to chartered companies began to be seen as harmful to freedom of trade and economic development. As a result, sectors of the population rebelled against these privileges. The main concerns were the imposition of excessive monopolistic prices of products for domestic consumption, as well as the artificial depreciation of Brazilian exports.

In 1808 the Portuguese Royal Family sought refuge in Brazil when Napoleon’s army occupied Portugal. This signalled a change to the prior colonial policy towards Brazil. As a result of political necessity, the colonial ports became accessible to allied powers, among them, Great Britain. Moreover, there were domestic reforms to support the Portuguese Crown; the Brazilian Bank was founded and concessions gave greater freedom to the manufacturing sector. However, these reforms did not amount to a substantial emergence of

³² The year representing the discovery of Brazil by Pedro Álvares Cabral.

³³ This is the year of the independence of Brazil from Portugal.

³⁴ See Forgioni, *Os Fundamentos do Antitruste*, 08.

competitive industries, given that the domestic economy was still at an early stage of development and local industries could not cope with foreign competition from industrial countries.³⁵ Most manufactured products were imported and the authorities lacked a policy to develop national industries in the private and public sectors.

Napoleon's defeat marked the end of exile of the Portuguese Crown, which attempted in the 1820s to re-establish the previous bilateral monopoly over the Brazilian economy and international trade, as well as greater Portuguese control over the colony. This fuelled political movements in favour of greater economic and political autonomy, which culminated in the independence of Brazil in 1822.

³⁵ Ibid., 103.

2.2.2 Competition after the independence of Brazil in 1822

Following the proclamation of independence in 1822, Brazil's first constitution was drafted in a political environment characterised by the conflict between radical and conservative groups. In order to safeguard his position, Brazil's first post-colonial leader, Emperor Pedro I, appointed supporters of his position and political views to the constitutional assembly. This resulted in the conservative character of the Constitution of 1824, which formally enshrined the powers of the Emperor. Nonetheless, there were areas of compromise, given that economic provisions of the constitution were inspired by the *laissez-faire* principles of 19th century economic liberalism, as the constitution protected citizens' private property and economic freedom.³⁶

The Empire of Brazil came to an end in 1889 by way of a *coup d'état*, resulting in the birth of the Old Republic, i.e. the United States of Brazil, with the enactment of the Constitution of 1891. This new constitutional era adopted a republican form of government inspired by the United States of America. The previous liberal provisions of the Constitution of 1824 were strengthened by limiting State intervention in the private sector and prohibiting limitations to private property.³⁷

Both constitutions of 1824 and 1891 limited the intervention of the State in the private sector. Indeed, irrespective of substantial changes to the Brazilian State, i.e. from an Empire to a Republic, from an economic and ideological perspective the Brazilian constitutions were

³⁶ See Brazil, *Politic Constitution of the Empire of Brazil*, Article 179.

³⁷ See Brazil, *Constitution of the United States of Brazil 1937*, Article 72.

inspired by liberal economic principles which enshrined the protection of private property and freedom of enterprise.

2.2.3 The increase of State Interventionism

The Old Republic came to an end as a result of a military coup in 1930, followed by a brief interim democratic government under the leadership of President Getúlio Vargas, who sought to implement interventionist policies following the great depression. In 1934, a new constitution was enacted which protected economic freedoms. However, their protection was conditioned by the principles of justice and the national interest.³⁸ During this period, the previous liberal regime was put into question and governmental intervention in the economy was legitimised.³⁹ Indeed, during the great depression of the 1930s, the intervention of the Brazilian government in the economy was not solely limited to correcting market imperfections; instead, the government went one step further by directly managing strategic sectors in the economy.

Steven Topik explains that Brazil had always had an interventionist State, even if previous constitutions were inspired by the liberal tradition. Indeed, Brazil's interventionist character can be evidenced even before the great depression. In his words:

...well before the disruption of the export economy in 1929, the Brazilian State was one of the most interventionists in Latin America. It owned two-thirds of the country's railways, its largest shipping line, major ports, its largest commercial bank, savings bank, and three of its wealthiest mortgage banks. (...) [T]he State acted relatively independently from the forces of civil society...⁴⁰

³⁸ Brazil, *Constitution of the United States of Brazil 1934*, Article 115.

³⁹ *Ibid.*, Article 116.

⁴⁰ Topik, *The Political Economy of the Brazilian State, 1889-1930*, 01.

In 1937, a new constitution which departed from the previous liberal model was enacted. It ensured that public intervention could take place under certain conditions, whilst providing wide governmental discretionary powers. Public intervention was legitimised not solely to correct market imperfections but also to protect and promote the national interest.⁴¹

The Constitution of 1937 prescribed the enactment of subordinate laws to punish crimes against the popular economy. Consequently, Decree 869/38 was enacted in the following year,⁴² being the precursor of Law 8,884/94 and the first law relating to competition in Brazil as it regulated conduct, such as agreements to arbitrarily increase profits and attempts to dominate the market. Decree 869/38 was also enacted with the aim of countering the abuse of economic power of foreign enterprises in order to protect consumers and to allow the emergence of national industries.⁴³ Thus, the historic emergence of competition law in Brazil was not ideologically linked to economic liberalism as in the US, because it did not have the overriding aim of protecting free enterprise and the freedom to compete. However, according to the Consultants of the Federal Republic at the time, the Sherman and Clayton Acts did serve of inspiration for the actual draft of Decree 869/38.⁴⁴

Decree 869/38 was followed by the enactment of Decree 7,666/45 during a period when nationalism was strong as a result of the populist policies of President Getúlio Vargas. The latter decree was instrumental for protecting the national economy, as well as consumers,

⁴¹ Brazil, *Constitution of the United States of Brazil 1937*, Article 135.

⁴² Brazil, *Law Decree n. 869/38*.

⁴³ See Forgioni, *Os Fundamentos do Antitruste*, 114.

⁴⁴ Shieber, *Abusos Do Poder Economico; Direito e Experiencia Antitruste No Brasil e Nos E. U. A*, 17-18.

against the abuse of foreign economic power. However, it was in force only for three months, as President Getúlio Vargas was ousted from office by a military coup in 1945.

The change of government in 1945 also resulted in the enactment of the Constitution of 1946, which provided, for the first time, a general provision regarding the abuse of economic power: ‘The law will repress any form of abuse of economic power, inclusive the unions or groups of individual or social enterprises, no matter their nature, which intend to dominate the national markets, eliminate competition and increase their profits arbitrarily’.⁴⁵ Notwithstanding such constitutional provision, it was not until 1962, with Law 4,137, that a competition law was enacted. Nevertheless, this law failed to modernise Brazilian competition law, as it was still conceived as a means to pursue protectionist policies.

Interventionism intensified during the period of military rule which lasted until 1985 and competition law continued to be conceived as an instrument to protect the interests of the State and the political *status quo*.⁴⁶ During this period, other constitutional texts were enacted, namely the Constitutions of 1967 and 1969. Their provisions in relation to the economy were very similar to those of the Constitution of 1946, as the subjugation of the economic power was considered a constitutional matter.⁴⁷

From an economic perspective, during the early 1970s Brazil was one of the fastest growing economies in the world. However, its growth resulted largely from uncompetitive companies that were heavily subsidised by the federal government. Following the oil crisis of 1973,

⁴⁵ Brazil, *Constitution of the United States of Brazil 1946*, Article 148.

⁴⁶ Ramin, *As Instituições Brasileiras de Defesa da Concorrência*, 26.

⁴⁷ The provisions related to the repression of economic power can be found in articles 157 and 160 of the Federal Constitutions of 1967 and 1969, respectively.

economic growth declined and interventionism came to be regarded as a means to improve socioeconomic welfare. As a result, monopolies were tolerated to the point that at the end of the military dictatorship in 1985, Brazil had many monopolised markets and its economy was suffering as a result of high levels of inflation.

2.2.4 The Transitional Period of Competition Law in Brazil

After decades of military rule, in 1985 Brazil implemented a gradual shift to democracy under the tutelage of the military leaders.⁴⁸ This process culminated in the enactment of the Federal Constitution of 1988, which remains in force and signalled a departure from the previous regime. It expressly enunciates freedom of enterprise as a principle of the economic order, whilst subordinating it to the achievement of social justice and a dignified life to the population.⁴⁹

Article 173, paragraph 4 of the Constitution states that ‘...the law will repress the abuse of economic power which has the object of controlling the markets, eliminating competition and increasing profits arbitrarily’.⁵⁰ These provisions demonstrate a special concern with arbitrary increase of profits and consumer protection, as there were high levels of inflation at the time in which the Federal Constitution was enacted. Moreover, given that Brazil had experienced two decades of military dictatorship and large industries played a part in supporting the military, the Constitution was intended to protect society from abuses from the private as well as public sector.

Political reforms were matched with policies that promoted economic liberalisation during the 1980s and 1990s. The first democratically elected President following military rule, Fernando Collor de Mello,⁵¹ sought to open up the market to foreign companies whilst privatising state-owned enterprises. The previous import substitution policy was banished and

⁴⁸ See *Political Transition and Democratic Consolidation*, 11.

⁴⁹ Brazil, *Federal Constitution of 1988*, Article 170.

⁵⁰ *Ibid.* Article 173, para. 4.

⁵¹ Fernando Collor de Mello was elected in 1989.

import tariffs were reduced. Moreover, prices were no longer set by the government. Therefore, national companies became exposed to international competition, particularly from multinationals.

To facilitate the aforementioned economic and political transition, Law 8,158 was enacted in 1991 with the intent to allow the government to intervene preventively in relation to economic conduct that could harm the economic order.⁵² However, even after the enactment of Law 8,884/94 the CADE did not play a relevant role in the maintenance and enhancement of competition in the market.

⁵² Forgioni, *Os Fundamentos do Antitruste*, 29.

2.2.5 Modern Socioeconomic and Political Changes in Brazil and Competition Law

In 1990, President Collor announced measures to liberalise the economy further and reduce inflation, as well as increasing imports, investment and competitiveness. The ‘Collor Plans’, whose primary objectives were to open up the country to imports and privatise many state-owned enterprises, were implemented. However, the application of these economic plans was not successful as they caused disruption in production, distribution and sales, whilst the drop in inflation rates was merely a temporary one. Moreover, in 1992 Fernando Collor de Mello was impeached following serious accusations of corruption.

The presidency of Brazil after the impeachment of Collor de Mello went to the then vice-president Itamar Franco. He was in favour of liberal reforms to modernise the economy; however, he was also a strong critic of privatising state-owned enterprises. Fernando Henrique Cardoso, who later became President, was the Minister of Finance during Itamar Franco’s presidency. In 1994, Fernando Henrique Cardoso introduced the Real Plan which ended hyperinflation in Brazil and has laid the foundation for Brazil’s current economic success. As a result, Fernando Henrique Cardoso was elected President of Brazil for two consecutive terms between January 1995 and January 2003.

In 1994, when the current competition law was enacted, Fernando Henrique Cardoso was implementing a policy of privatisation to achieve economic stability and prosperity.⁵³ The wealth and stability generated by the Real Plan was much welcomed. However, it was accompanied by many social concerns that persist to this day, such as the growing gap

⁵³ See Kinzo and Dunkerley, *Brazil since 1985: politics, economy and society*, 112.

between the rich and poor, criminality, as well as the worsening of basic public services and education. As a result of this discontent, in the elections of 2003, a left-wing politician was elected for the first time in Brazil's modern history. Luiz Inácio Lula da Silva, commonly known as Lula, had campaigned strongly on a platform of social change. President Lula was re-elected in 2006, extending his term until January 2011. It is generally accepted that the main reason for Lula's rise to power when he was first elected was the existence of a general desire among Brazilians for social change, especially in relation to the growing gap between the rich and poor.

Prior to his presidency, Lula headed the Steel Workers' Union and was a co-founder of the Worker's Central Union (CUT),⁵⁴ a trade association representing various workers' unions. The CUT is widely considered to be the main supporter and political arm of Lula's political party, namely the Workers Party (PT).⁵⁵ Even though the latter is a left-wing socialist party, prior to the 2003 election it remodelled itself as a non-revolutionary, moderate political movement in order to gain wider public appeal. Therefore, commentators have stated that in effect, Lula's policies represent a continuation of the economic reforms formulated in Fernando Henrique Cardoso's government, which are predominantly liberal in nature.⁵⁶

Foreign policy has experienced a greater change than economic policy. In addition to forging greater economic links with controversial left-leaning Latin American countries, such as Bolivia, Venezuela and Cuba, Brazil has acted more defensively in trade negotiations

⁵⁴ CUT is the acronym for Central Única dos Trabalhadores.

⁵⁵ PT is the acronym for Partido dos Trabalhadores.

⁵⁶ See *Political Economy of Brazil*.

involving the United States.⁵⁷ Lula has also sought to strengthen commercial links with the European Union and developing countries, including various Portuguese-speaking countries in Africa⁵⁸ and other BRIC countries.⁵⁹ The consequence of this shift in foreign policy is that Brazil is asserting its international presence, reducing its historical dependence on the United States and becoming more integrated into the global economy.

At a regional level, Lula's policies reflect an effort to promote Brazil's regional leadership, as well as the economic integration and cooperation of Latin American states by promoting regional causes, including the *Mercosur* agreement,⁶⁰ a regional economic block founded in 1991 by Argentina, Brazil, Paraguay and Uruguay, which has been modelled on the European Community and currently consists of most Latin American countries as associated members or observers. Lula's policy of fostering closer relations within Latin America resulted in an increase of more than 100% of Brazilian exports to other South American partners.⁶¹

Nevertheless, although Brazil has strengthened its links with the EU and other developing countries whilst reducing its previous dependency on the United States, the latter still represents its biggest trade partner.⁶² Therefore, it ought to be acknowledged that while

⁵⁷ For instance, Brazil has resisted the American attempts to set a firm date for the creation of the Free Trade Area of the Americas given that the US refused to give free access to Brazil's agricultural products. Its posture played an important role in the failure of the negotiations. See e.g. "Latin decision."

⁵⁸ Brazil has shown a growing interest in Africa. For instance, in 2010 it launched an international TV channel in Portuguese that is broadcasted in African countries. See e.g. BBC News, "Brazil launches international TV station for Africa."

⁵⁹ Among other actions to increase its commercial links with BRIC countries, Brazil has hosted the second BRIC summit in 2010. See e.g. Reuters, "Communique from BRIC summit in Brasilia."

⁶⁰ Mercosur stands for Mercado Comun del Sur, or Southern Common Market. It is a Regional Trade Agreement created in 1991. See Mercosul, "Mercosul - Portal Oficial."

⁶¹ Rádio Nacional, "Lula: exportações para a América do Sul praticamente dobraram em 30 meses de governo."

⁶² Risen, "Brazil is a Bright Spot for U.S. Exports," 31.

Lula's presidency does represent a shift from its predecessor,⁶³ in substantial terms there has not been a dramatic rupture given that Brazil, being a large western democracy, shares many common interests with the US.

The aforementioned changes in Brazilian foreign and economic policies can be felt in the current developments of Brazilian competition law and policy. As will be discussed further in this work, the US model continues to be the most influential. However, in recent years there has been a shift in favour of the EU model, as well as a desire by Brazilian policy-makers to develop a model which is particularly suited to the specific demands of Brazil.

⁶³ In accordance with Susan Kaufman Purcell: 'Since the inauguration of Fernando Henrique Cardoso as president of Brazil on January 1, 1995, relations between the United States and Brazil have become particularly cooperative and constructive'. Purcell and Roett, *Brazil under Cardoso*, 89.

2.3 The Brazilian Competition Law Framework

The competition law framework in Brazil could be understood as: (1) the relevant constitutional provisions which protect competition and legitimate governmental intervention and regulation; (2) fifteen competition related laws,⁶⁴ the most relevant being Law 8,884/94; (3) three decrees;⁶⁵ (4) twenty-nine directives;⁶⁶ (5) seventeen resolutions;⁶⁷ (6) one normative instruction,⁶⁸ and (7) the body of Brazilian case-law and administrative decisions, which are merely persuasive given that Brazil is a civil law jurisdiction which lacks the common law doctrine of *stare decisis*.

Of the above, the most relevant and authoritative legal documents for the purpose of this research are the Federal Constitution of 1988 and Law 8,884/94. The former enunciates the guiding principles for legitimising and interpreting competition law, whilst the latter represents Brazil's comprehensive competition law which, although has elements of the US and EU competition legislation, such as the existence of criminal sanctions for cartels and the prohibition of abuse of dominance, was not intentionally designed to be a hybrid law or to be used in a hybrid system⁶⁹ of competition law. The following sections will focus in particular

⁶⁴ See CADE, "Leis."

⁶⁵ A decree refers to any decision or resolution taken by a person or institution, through which especial powers to judge, decide or determine something is given. See CADE, "Decretos."

⁶⁶ A directive is a document or normative act of a public authority which contains instructions concerning the application of laws or regulations or any other determination of its competence, being obligatory to its subordinates. See CADE, "Portarias."

⁶⁷ A resolution is the act through which the public authority makes a decision, commands or establishes a measure. It is an act taken under the authority's competence and is not subject to the approval of any other power. See CADE, "Resoluções."

⁶⁸ A normative instruction refers to an act that complements the legal text to which it refers to, without modifying or innovating. See CADE, "Instrução Normativa."

⁶⁹ System is meant to refer not only to the legal text, but to the interpretation given to it by the competition authority and application of the law.

on both of these legislative texts, as well as the Brazilian Consumer Code⁷⁰ in order to understand the *nexus* between competition and consumer policies in Brazil.

⁷⁰ Brazil, *Law n. 8,078 of 11 September 1990*.

2.3.1 The Federal Constitution of 1988

Title VII of the Federal Constitution deals with the economic order. Its most significant chapters for the purpose of this research are: Chapter I on the principles of the economic activity; Chapter II on urban policy; Chapter III on agricultural and agrarian reform policy and Chapter IV on the financial and economic order.⁷¹ The most relevant provisions for this research are Articles 170 and 173. According to the latter the law ‘...shall repress the abuse of economic power with the aim to dominate markets, to eliminate competition, and to arbitrary increase profits’.⁷² This provision legitimises the government’s power to regulate the process of competition.

The wording of Article 170(IV) makes competition a constitutionally protected interest as it prescribes the protection of the economic order. It reads as follows:

The economic order, founded on the valorisation of human labour and on free enterprise, has the goal of ensuring a dignified life, in accordance with the rule of social justice, observed the following principles: I – national sovereignty; II – private property; III – social function of property; IV – free competition; V – protection of consumers; VI – protection of the environment, including the use of differential treatment in accordance with the impact caused by the products and services and the processes used in its production and performance; VII – reduction of social and regional inequality; VIII – search for full employment; IX – Favourable treatment to

⁷¹ See CADE, “Constituição.”

⁷² Brazil, *Federal Constitution of 1988*, Article 173, para. 4.

small companies constituted under Brazilian laws and which have their headquarters and administration in the country.⁷³

According to the competition authority in *Poliiolefinas*,⁷⁴ the free market economy was chosen as the most suitable system for the national economy under the Federal Constitution of 1988, given that it establishes the freedom of enterprise as its underlying principle. However, economic freedom is not absolute as it is conditioned on the need to protect free competition pursuant to Article 170(IV).⁷⁵ Moreover, given that the freedom of enterprise protects private economic interests and limits the role of the State, the direct or indirect intervention of the latter in the economy is not absolute. Only where the private sector is unable to provide a public service or to correct market failures will direct State intervention be legitimate.⁷⁶ Indirect intervention via regulation or competition law enforcement would be legitimate only when freedom of enterprise or free competition are harmed or threatened.

The principle of national sovereignty is the first element of the economic order under Article 170(I). This provision legitimises the State's authority to intervene in the market under specific circumstances. However, such powers are not unlimited as they are subject to the protection of free competition and private property pursuant to Article 170(II) and (IV).

Article 170(III) protects the social function of property. The theory of the social function of propriety, which has also influenced many European constitutional texts, was originally

⁷³ CADE, "Constituição."

⁷⁴ *Poliiolefinas SA et al.* - 0054/1995, vote of Councillor Gesner Oliveira.

⁷⁵ Brazil, *Federal Constitution of 1988*, Article 170(IV).

⁷⁶ *Poliiolefinas SA et al.* - 0054/1995, vote of Councillor Gerner de Oliveira.

formulated by Auguste Comte in *Système de politique positive*.⁷⁷ Auguste Comte's thoughts have been very influential,⁷⁸ particularly in Brazil; even the motto *Ordem e Progresso*⁷⁹ in the national flag was inspired by his statement '*L'amour pour principe et l'ordre pour base; le progrès pour but*'.⁸⁰ The social function of property plays an important constitutional role as it is not only protected under Article 170(III), but also under Article 5(XXIII).⁸¹ Nevertheless, when applying Brazilian competition law, the social function of property needs to be balanced with other constitutional principles, such as private property and freedom of enterprise.⁸² In the analysis of abuse of dominance cases, the concept of social function of property is usually linked to the concept of special responsibilities of dominant firms, i.e. those firms who are dominant should act not only in their self interest but in the interest of society as a whole.⁸³

The last relevant constitutionally protected interest is the protection of consumers pursuant to Article 170(V). This is particularly important due to the fact that Brazil is a developing country with a considerable number of uninformed and vulnerable consumers. Further, markets tend to be concentrated, so the socioeconomic conditions tend to facilitate abuse by large firms. Moreover, competition law offences in a developing country that lacks an

⁷⁷ See Comte, *Système de politique positive ou, Traité de sociologie d'Auguste Comte*. However, Pierre Marie Nicolas Léon Duguit, a leading French scholar of administrative law, developed and perfected the theory. See e.g. Duguit, *Le droit social, le droit individuel et la transformation de l'état conférences faites à l'École des hautes études sociales*.

⁷⁸ See Lopes, *Empresa e Propriedade: função social e abuso de poder econômico*.

⁷⁹ Order and Progress.

⁸⁰ Love as a principle and order as the basis; progress as the goal.

⁸¹ 'Everybody is equal before the law, without distinction of any nature, ensuring Brazilians and foreigners residing in this country the inviolability of the right to life, freedom, equality, safety and property, in the following terms: (...) the property will achieve its social function. Brazil, *Federal Constitution of 1988*, Article 5(XXIII).

⁸² See p. 35.

⁸³ See p. 165.

effective welfare redistribution system may cause an increase in prices resulting in poorer members of society being unable to afford basic provisions.

2.3.2 Law 8,078/90: the Brazilian Consumer Code

Law 8,078/90,⁸⁴ known as the Consumer Code, is a comprehensive legislation that deals with consumer protection. The Consumer Code's first provision declares that its overriding purpose is the protection of public order and social interest, pursuant to the Constitutional principles of consumer protection under Article 5(XXXII) and Article 170(V) of the Federal Constitution of 1988.

Article 4 of the Consumer Code stresses the need to achieve a reduction or suppression of all abuses in the consumer market, including those resulting from unfair competition. Article 39 of the Consumer Code contains a non-exhaustive though extensive list of abusive conduct, including competition law related offences, such as tie-in sales and refusal to supply.⁸⁵ These specific offences are also prohibited under Law 8,884/94.

In regards to overlapping prohibitions between the Consumer Code and Law 8,884/94, although they offer a double level of protection against abusive conduct, this results at times in conflicts and confusion in respect to which institution should enforce them and how. This lack of clarity was alluded to by a member of the competition authority:

I remember that there was a case which went to the court of appeal about the possibility of PROCON [a consumer protection agency] to apply fines based on Law

⁸⁴ Brazil, *Law n. 8,078 of 11 September 1990*.

⁸⁵ 'It is prohibited to the supplier of products or services, amongst other abusive practices to: I – Condition the supply of a product or service to the purchase of another, or impose, without a good cause, its purchase to quantitative limits. II – refuse to cope with the demand in the exact measure of its stock availability and, as well, in conformity with common practices; (...) V – request from the consumer gains manifestly excessive; (...) IV – Refuse to supply goods or services directly to who is willing to buy them with immediate payment, except for the cases of intermediation regulated by special laws'. *Ibid.*, Article 39.

8,884/94 and the court stated that PROCON could apply the fine. (...) I believe that there should be more coordination among the different bodies to avoid two organisations fining companies for the same behaviour.

Indeed, it was stated by one member of the CADE that ‘...when there is dominance, the matter should be taken care of by the competition authority because it has an impact on competition, but where there is no dominance, consumer protection organisations should deal with it’. This solution applies to abuse of dominance offences; it represents a practical compromise as the competition authority could refer cases to consumer protection agencies when it determines that the undertaking lacks dominance but there may be nonetheless harm to consumers. In fact, in cases where consumers are harmed, but competition is not, the CADE does not apply Law 8,884/94. However, consumer protection agencies do not refrain from acting when there is harm for both consumers and competition. The criteria of the existence of dominance could assist in drawing the line between the agencies and avoid overlapping decisions or an incorrect application of competition law.

2.3.3 Law 8,884/94: Brazil's Competition Law

Law 8,884/94 represents Brazil's first comprehensive competition law. It contains a general section that works as a guide to its interpretation together with provisions to regulate specific conduct. Article 1 of Law 8,884/94 establishes as its general purpose:

[T]he prevention and repression of infringements to the economic order, being guided by the constitutional principles of freedom of enterprise, open competition, social function of property, protection of consumers and the repression to the abuse of the economic power.⁸⁶

Law 8,884/94 seeks to implement many of the key constitutional principles in accordance with Article 173, paragraph 4 of the Constitution of 1988, which states that '...the law will repress the abuse of economic power which has the object of controlling markets, eliminating competition and increasing profits arbitrarily'.⁸⁷ Article 173, paragraph 4 legitimises the power of the government to regulate competition via the enactment and enforcement of competition legislation.

Articles 20 and 21 represent the most important provisions of Law 8,884/94. On the one hand, the drafting of these provisions demonstrate that Law 8,884/94 has a hybrid regulatory structure, being influenced by both EU and US models of competition law. On the other hand, they also demonstrate characteristics that are unique to the Brazilian system.

⁸⁶ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 1.

⁸⁷ Brazil, *Constitution of the Empire of Brazil of 1824*, Article 173, para.4.

The following sections will examine Articles 20 and 21, as well as Articles 54 and 58 of Law 8,884/94 in order to ascertain the admissible justifications to a conduct. This will be followed by observations of the regulatory approach in relation to abuse of dominance adopted in the competition bill, which is currently in the process of deliberation in the Brazilian Congress and is expected to replace Law 8,884/94.

2.3.3.1 Article 20 of Law 8,884/94

In contrast with the EU and the US competition legislation, Law 8,884/94 contemplates horizontal, vertical, unilateral and joint practices all under a single provision, namely Article 20. Indeed, any act or conduct, irrespective of being unilateral or multilateral, which has as its object or is capable of restraining competition, is considered an offence.⁸⁸

One difference between the US and Brazilian competition laws regards the fact that whilst Section 2 of the Sherman Act refers to the prohibition to monopolise, Article 20(IV) of Law 8,884/94 prohibits the *abuse* of market control, which is similar to the prohibition of an abuse of dominance pursuant to Article 102 TFEU. Moreover, paragraph 2 of Article 20 prohibits abuses by a company or a group of companies; this is similar to Article 102 TFEU which states that an abuse of a dominant position could be carried out by one or more undertakings. Therefore, in both jurisdictions, the concept of collective dominance is expressly contemplated in the legislation. Conversely in the US, although collective dominance is recognised, it not expressed in the Sherman Act in the same way as in the EU and Brazil.⁸⁹

The prohibition to ‘limit, restrain or in any way injure open competition or free enterprise’ under Article 20(I), highlights a special concern held by Brazilian legislators with regards to market entry. On the one hand, the inclusion of this provision is likely to result from the need to protect the principle of ‘free competition’ pursuant to Article 170(IV) of the Federal Constitution of 1988.⁹⁰ On the other hand, the particular concern given to market entry is best

⁸⁸ Rosenberg and Nolasco, “Competitive streak,” 49.

⁸⁹ See p. 143.

⁹⁰ See section 2.3.1.

understood when looking at the historical events during the course of the drafting and enactment of Law 8,884/94. Between the late 1980s and early 1990s Brazil was in a state of social and economic transition. Many public industries were privatised with the aim of promoting enterprise and revitalising the economy after decades of economic stagnation.

The *proviso* in Article 20 ‘Notwithstanding malicious intent’ means that the undertaking’s intention is immaterial. Therefore, from a formal analysis of Brazilian competition law, the potential effects of the conduct play a central role. This is different to the US, where only the wilful acquisition of a monopoly through unfair means is prohibited.⁹¹

Article 20(II) contains a general prohibition concerning ‘...the control of a relevant market of a certain product or service’. At the same time, Article 20(IV) prohibits the *abuse* of market control as well, so it would appear as though the latter prohibition is redundant, given that the mere control of the market would already be forbidden under Article 20(II). However, paragraph 1 of Article 20 states that ‘...the achievement of market control as a result of competitive efficiency does not entail an occurrence of the offence provided for in item II...’ Therefore, Article 20(II) does not contain an absolute prohibition of market control, but rather a prohibition conditional on justifications pursuant to Paragraph 1 of Article 20. When both of these provisions are analysed in unison, it appears to reveal a particular concern in terms of the concentration of market power which does not result in efficiencies. This specific concern regarding the inefficient concentration of market power could be explained by the fact that Brazil has had concentrated markets throughout its history.

⁹¹ See p. 153.

2.3.3.2 Article 21 of Law 8,884/94

Article 21 of Law 8,884/94 contains a long but non-exhaustive list of practices that are deemed to constitute violations of the economic order to the extent that they result or may result in an offence under Article 20.⁹²

The reason for adopting a non-exhaustive list could be that, during the drafting of the law, Brazil was undergoing a process of economic transition. Markets were opened up to international trade; there was a monetary stabilisation plan, and many state-owned enterprises were privatised.⁹³ Therefore, the legislator appears to have intended to allow a level of flexibility in the drafting of Article 21, given that at the time it would have been difficult to anticipate the full effects of economic reforms and the development of competition law in Brazil. The legislative style adopted in respect of Article 21 appears to have given flexibility to the enforcement of Article 20, allowing the competition authority a wide level of discretion to develop competition law and policy in a fast changing and dynamic environment, whilst the listing of 24 different offences offered guidance to judges, practitioners and firms on what would be likely to be deemed a violation of the economic order.

Article 21(VII) prohibits dominant firms ‘...to require or grant exclusivity in mass media advertisements’. Initially, it might be difficult to understand why such a specific prohibition was drafted in relation to the mass media sector. However, the reason for this might be that

⁹² See section 2.3.3.1.

⁹³ See section 2.2.5.

there was only one major aerial TV broadcaster in Brazil, namely TV Globo,⁹⁴ which unlike major broadcasters in Europe, such as the BBC in the UK or RAI in Italy, is not a public entity. Article 21(VII) applies to situations where a broadcaster enters into exclusivity agreements in respect of advertisements, which may potentially breach the provisions of Article 20. This would be the case if they resulted in the creation of artificial barriers to entry in the market for competitors which are not party to the exclusivity agreements. The special concern with market access may be justified by the concentrated structure of the mass media sector in Brazil.

The fact that Article 21 contains a long list of acts which could constitute a violation to the economic order results in the inclusion of behaviour which does not fit within the traditional scope of competition law. Article 21(XV) and (XVII) of the Brazilian competition law demonstrate this by providing acts which could be deemed to fall within the scope of unfair competition, rather than competition law.⁹⁵ Article 21(XV) forbids undertakings ‘...to destroy, render unfit for use or take possession of raw materials, intermediary or finished products, as well as destroy, render unfit for use or constrain the operation of any equipment intended to manufacture, distribute or transport them’, whilst Article 21(XVII) contains a similar prohibition in relation to the agricultural sector as it forbids the ‘... abandonment or destruction of crops or harvests, without proven good cause’. These two provisions regulate unfair practices which are deemed relevant under Law 8,884/94 as they have the potential of harming competitors and consumers, given that prices would increase due to a reduction in

⁹⁴ TV Globo continues to be sole major broadcaster in Brazil as it had a 73.5% market share in relation aerial TV advertisement sector in 2009. See Jimenez, “Globo fatura R\$ 7 bilhões em 2009.”

⁹⁵ Unfair competition regards unfair trade practices, such as the deceive use of a similar sign to a trade mark of another firm, harming its reputation. It is concerned with harm caused to competitors, differing from competition law which is concerned with the process of competition and the harm caused to consumers. See Henning-Bodewig, *Unfair Competition Law*, 7.

supply. The particular attention given to the harm of agricultural production in Article 21(XVII) appears justified in a country such as Brazil, where the agricultural sector has significant economic importance and a shortage of agricultural commodities would result in disproportionate harm to disadvantaged sections of the population. However, it could be argued that these provisions would sit better within an unfair competition law. Unfortunately, Brazil does not have a comprehensive unfair competition law. Moreover, only some aspects of unfair competition are present under chapter six of the Industrial Property Law 9,279 which was enacted two years after Law 8,884/94.

In addition to the aforementioned socioeconomic reasons that explain the inclusion of Article 21(XV) and (XVII) in Law 8,884/94, these prohibitions might have been included due to the political priority of reducing the rising level of inflation of industrial and agricultural commodities during the drafting of Law 8,884/94.⁹⁶

In fact, Article 21(XXIV) prohibits charging excessive prices and seems to reflect the concern of Brazilian legislators with protecting consumers and controlling the rate of inflation. Indeed, the period between the mid 1980s and early 1990s witnessed soaring levels of inflation. The denomination of the Brazilian currency changed many times as a result of uncontrollable levels of devaluation. In accordance with the Brazilian Institute for Geography and Statistics (IBGE),⁹⁷ Brazil had an average annual inflation rate of 330% in the 1980s which increased to 764% between 1990 and 1994.

⁹⁶ See section 2.2.5.

⁹⁷ Instituto Brasileiro de Geografia e Estatística, “Economic statistics.”

During the 1990s, Brazil implemented the Real Plan under the economic leadership of President Cardoso.⁹⁸ Under this package of legal and economic reforms, there was a final change in currency denomination when the current Brazilian Real (R\$) was adopted in 1994. This was accompanied by economic measures to control the rate of inflation. The Real Plan has proven to be effective at fighting inflation and achieving greater stability: between 1995 and 2000 the average annual rate of inflation was 8.6%; this figure decreased gradually to 7.2% between 2001 and 2007, and more recently to 5.9% and 4.31% in 2008 and 2009 respectively.

The above data and the magnitude of the Real Plan demonstrate how the control of inflation was at the top of the political agenda when Law 8,884/94 was enacted in 1994. Therefore, this could have had an influence over the legislators when drafting Law 8,884/94 and adding to it Article 21(XXIV), which prohibits deliberately increasing prices. The successful reduction of inflation by other governmental policies may also be a reason for the competition authority to have avoided, since its enactment, the enforcement of Article 21(XXIV), which is not be present in the competition bill which is set to replace Law 8,884/94.

Article 21(XIX) contains another provision that does not fall within the typical scope of competition law. It forbids ‘...to import any assets below cost from an exporting country other than those signatories of the GATT Anti-Dumping and Subsidies Codes’. The inclusion of anti-dumping provisions in Law 8,884/94 has been criticised in Brazil, as competition law

⁹⁸ See p. 23.

and anti-dumping law serve different purposes.⁹⁹ The inclusion of this prohibition could be explained by the fact that Brazil enacted anti-dumping legislation one year after the enactment of Law 8,884/94.¹⁰⁰ Therefore, the Brazilian legislator sought to eliminate a lacuna by widening the scope of competition law; the political justification for this could be that imports increased considerably in Brazil during the 1990s and the anti-dumping law serves the primary purpose of protecting local companies against below cost imports.

The amalgamation of anti-dumping and competition law provisions under the current regulatory framework has resulted in counterproductive consequences at an institutional level. Anti-dumping cases where the country of origin is not a member of the WTO are still dealt with by the competition authority. Conversely, cases where the country of origin is a WTO member fall within the administrative competence of the Ministry of Industry, Commerce and Tourism. The existence of this division of competence at an institutional level remains difficult to justify and it will be subject to reform by the competition bill.¹⁰¹

⁹⁹ In accordance with Professors Oliveira and Rodas, both ex-Presidents of the CADE during 1996-2000 and 2000-2004 respectively, ‘...in contrast with antidumping, which aims primarily at protecting the domestic industry, the concern of actions against predatory pricing is the welfare of consumers’. Oliveira and Rodas, *Direito e Economia da Concorrência*, 74.

¹⁰⁰ The Brazilian antidumping legislation consists of Law 9,019/95 and Decree 1,602/95.

¹⁰¹ See section 2.3.4.

2.3.4 The competition bill 3,937/04

Bill 3,937/04, hereinafter the competition bill, was initially proposed in 2004 and its current draft results from its merger with another bill proposed by the government in 2005.¹⁰² The competition bill is currently in the final phase of debate in the Brazilian Congress and is expected to be promulgated into law sometime between 2010 and 2011; therefore it ought to be noted that further alterations or proposals could be made. This section discusses some changes to the current provisions on abuse of dominance under Law 8,884/94 as of September 2010.

Article 1 of the competition bill establishes that the goal of competition law is the prevention and repression of infringements to the economic order. It is guided by the constitutional principles of freedom of enterprise, open competition, social function of property, protection of consumers and repression of abuse of economic power. Therefore, its drafting mirrors Article 1 of Law 8,884/94.¹⁰³

In regards to the rule of reason,¹⁰⁴ the competition bill states, in its preamble, as follows:

...the rule of reason will be used in the analysis of potentially anti-competitive conduct and these will not be prohibited if they promote economic efficiency and consumer welfare which cannot be achieved using less restrictive or harmful means to competition, compensating the restrictions caused to competition and producing

¹⁰² The merged bill is the competition bill 5,877/2005 which was proposed by the Executive Power.

¹⁰³ See, p. 35.

¹⁰⁴ See section 3.1.2.

benefits that are divided among the participants in the conduct, as well as consumers.¹⁰⁵

This is the first time that the use of the rule of reason becomes part of the competition legislation in Brazil. It seems to reflect what the interviewees revealed as being already the understanding among members of the competition authority i.e. that the analysis of conduct in Brazil must follow the rule of reason, even if this concept is interpreted in a quite different way when compared to the US rule of reason.¹⁰⁶

Although the competition bill refers to anti-competitive conduct, in reality this provision has to be understood together with Article 88 of the competition bill for the approval of mergers which also guides the analysis of abuse of dominance. The equivalent of Article 88 of the competition bill is Article 54 of Law 8,884/94. Both of these provisions refer to the conditions necessary for approving mergers. However, these criteria seem to be followed in the analysis of conduct as well. In fact, the analysis of the potential effects on competition, considering the elements above, constitutes the Brazilian rule of reason. In interviews, a member of the competition authority stated: ‘We look at Article 54 when analysing a conduct; we have to respect it’. This view was shared by other members of the competition authority. However, there is no obligation imposed by the law on the competition authority to use the efficiencies analysis of mergers to abuse of dominance. In fact, Article 54 regards acts that may restrict competition and therefore must be notified to CADE for authorisation. This would not include abuse of dominance cases. Nevertheless, the lack of guidelines on the enforcement of abuse of dominance may have resulted in members of the competition

¹⁰⁵ Cadoca, *Competition Bill n. 3,937/04*, 1.

¹⁰⁶ On the US concept of rule of reason see section 3.1.2.

authority seeking guidance from other sections of the law, including Article 54, which was tailored for merger control. Such analysis, in the view of many interviewees, means that the rule of reason is respected. Therefore, the use of the rule of reason in Brazil would be referred to as the analysis of the conduct which takes into account its possible effects whilst respecting the conditions of Article 54 of Law 8,884/94, or Article 88 of the competition bill, i.e. an analysis which seeks to ensure that: (1) the conduct will result in efficiencies that will benefit participating undertakings and consumers alike; (2) that efficiencies cannot be achieved by less anti-competitive means, and (3) competition is not eliminated in the relevant market.

Articles 20 and 21 of Law 8,884/94 have been merged into a single provision of the competition bill, namely Article 36. The reason for this change to the regulatory structure is that Article 20 represented a general provision regulating cartels, mergers and abuse of dominance whereas Article 21 contained only examples of prohibitions.¹⁰⁷ From a substantive point-of-view, this does not represent a significant change, given that the content of Article 36 resembles the terms of Articles 20 and 21.

The provisions of Article 20 of Law 8,884/94¹⁰⁸ remain largely unaltered in the current draft of Article 36 of the competition bill, except for the definition of dominance. Article 20 contains a rebuttable presumption of dominance for firms with a market share greater than 20%. The current draft of the competition bill recognises that such market share threshold is not sufficient in itself to give rise to a presumption of dominance. According to the bill, dominance is presupposed when a firm or group of firms is capable of changing market

¹⁰⁷ Cadoca, *Competition Bill n. 3,937/04*.

¹⁰⁸ See section 2.3.3.1.

conditions unilaterally or coordinately *or* when a firm controls 20% or more of the relevant market, although the competition law and the bill state that this market share threshold can be changed by the CADE to specific sectors of the economy.¹⁰⁹

In practice, the interpretation of many members of the competition authority has departed from the formal understanding of the rebuttable presumption under Article 20 of Law 8,884/94, as many regard the 20% market share threshold as more of a safe harbour rather than a presumption of dominance.¹¹⁰ The competition bill does not go as far as expressly creating a safe harbour and the presumption of dominance based upon a 20% market share threshold remains. Therefore, it could be argued that the Brazilian legislator lost an opportunity to express in the law the existence of a safe harbour that already exists in practice.

The competition bill also proposes changes to the list of examples of offences of Article 21 of Law 8,884/94. Paragraph 3 of Article 36 of the competition bill contains 20 prohibitions which replace the previous 24 offences under Article 21. The list of prohibitions remains non-exhaustive and their applicability would be conditional to the extent that they are capable of harming competition in accordance with the main section of Article 36; this is similar to the current interaction between Articles 20 and 21 of Law 8,884/94.

¹⁰⁹ See Cadoca, *Competition Bill n. 3,937/04* Article 36, para. 1.

¹¹⁰ See section 4.4.

Article 36(3)(I) of the competition bill has merged Clauses (I),¹¹¹ (III),¹¹² (VIII)¹¹³ and (XX)¹¹⁴ of Article 21 of Law 8,884/94. This improves the drafting structure of the cartel prohibition by making it clearer. It now would prohibit the following:

...to agree, collude, manipulate or set with a competitor, in any form:

- a) prices of goods or services offered individually;
- b) the production or sales of a limited quantity of goods or a limited volume or frequency of services;
- c) the apportion of parts or segments of an actual or potential market of goods or services via, among other things, the distribution of clients, suppliers, regions or periods; and
- d) prices, conditions, advantages or abstentions in public procurements.

Some of the prohibitions under Article 21 have been abandoned under the current draft of Article 36 of the competition bill. For instance, Article 21(XVII) which prohibits ‘...to abandon or cause abandonment or destruction of crops or harvests, without a proven good cause’¹¹⁵ has been removed because it was too specific and did not have a clear link with the protection of competition. As stated above, the inclusion of Article 21(XVII) in Law 8,884/94 probably resulted from a considerable political concern with countering inflation.¹¹⁶

¹¹¹ Article 21(I) forbids ‘...to set or offer in any way - in collusion with competitors - prices and conditions for the sale of a certain product or service; Brazil, *Law n. 8,884 of 11 June of 1994*.

¹¹² Article 21(III) forbids ‘...to apportion markets for finished or semi-finished products or services, or for supply sources of raw materials or intermediary products; Ibid.

¹¹³ Article 21(VIII) forbids ‘...to agree in advance on prices or advantages in public or administrative biddings; Ibid.

¹¹⁴ Article 21(XX) forbids ‘...to discontinue or greatly reduce production, without proven good cause; Ibid.

¹¹⁵ Ibid. Article 21(XVII).

¹¹⁶ See p. 40.

Therefore, the abandonment of this prohibition appears appropriate as the Brazilian economy has become more stable and the levels of inflation have decreased over the past decade.¹¹⁷

Article 21(XXIV),¹¹⁸ which prohibits excessive prices or unjustified increase in prices, is another prohibition of Article 21 that is not present in Article 36(3) of the competition bill. However, this prohibition has not been wholly abandoned as the list of prohibited offences under Article 36 of the competition bill is non-exhaustive. Nevertheless, it is unlikely that the competition authority will find an undertaking in breach of competition law for setting abusive prices, as it has never, to date, found a firm liable for abusive pricing and most Councillors believe that it is not an offence, but a symptom of market dysfunctions. Such view conforms to the US understanding of abusive pricing.¹¹⁹

Article 21(XIX),¹²⁰ which incorporated aspects of anti-dumping law into the Brazilian competition law, has also been abandoned under the current draft of the competition bill. This proposed reform is welcomed in the light of the issues discussed above.¹²¹ The anti-dumping law is utilised for defending local companies against imported products sold cheaper than in the country of origin. Thus, it serves a different purpose from competition law, whose primary aim is to protect the process of competition. Therefore, CADE's competence in respect to anti-dumping will cease and the Ministry of Industry, Commerce and Tourism should become the sole competent institution.

¹¹⁷ See section 2.3.3.2.

¹¹⁸ Article 21(XXIV) forbids '...to impose abusive prices, or unreasonably increase the price of a product or service. Brazil, *Law n. 8,884 of 11 June of 1994*.

¹¹⁹ See section 6.4.

¹²⁰ Brazil, *Law n. 8,884 of 11 June of 1994* Article 21(XIX) forbids '...to import any assets below cost from an exporting country other than those signatories of the GATT Antidumping and Subsidies Codes'.

¹²¹ See p. 42.

Some of the provisions of Article 36 of the competition bill represent a novelty in relation to Article 21 of Law 8,884/94. Article 36(3)(XIX) prohibits ‘...to demand or concede exclusivity, including territorial exclusivity, of the distribution of goods or services’.¹²² This prohibition is likely to result from the development of CADE’s body of authority in relation to exclusivity arrangements, particularly in respect to abuse of dominance cases.¹²³ In addition, this provision also prohibits ‘...to exercise or explore abusively industrial, intellectual technological or brand rights’. The latter prohibition demonstrates an understanding by Brazilian policy-makers of the anti-competitive effects that can result from the abuse of intellectual property rights.¹²⁴ Owners of intellectual property rights, such as copyrights or patents, are allowed to preclude their use or enjoyment by competitors; however, this right may be abused in a manner that harms competition. For instance, this would be the case if IP rights are refused as part of a strategy to exclude competitors rather than compete on the merits.

At an institutional level, the competition bill also contains many proposals to reform the plurality of institutions forming the BCPS. These are examined in further detail below and demonstrate the importance of issues discussed herein, such as the training of the new personnel and the future direction of Brazilian competition law and policy.¹²⁵

¹²² Cadoca, *Competition Bill n. 3,937/04*, Article 36(3)(XIX).

¹²³ Exclusivity is one of the most frequent prohibited abuses by the competition authority. See section 5.4.

¹²⁴ For an in-depth analysis of the interaction between IP rights and competition law, see Anderman, *EC Competition Law & Intellectual Property Rights*.

¹²⁵ See section 2.4.

2.4 Institutions

At an institutional level, the BCPS is composed of three bodies: (1) the Secretariat of Economic Law (SDE), which is responsible for investigations, preparing the initial procedural documentation and statements of cases for the prosecution. Its opinions are non-binding and it is also responsible for competition advocacy;¹²⁶ (2) the Secretariat for Economic Monitoring (SEAE) is responsible for investigations, mainly in concentration cases, preparing the initial procedural documentation and statements of cases for the prosecution. Its opinions are also non-binding and it is also responsible for competition advocacy;¹²⁷ and (3) the Administrative Council for Economic Defence (CADE), which is a federal independent agency, competent to judge, as the last administrative instance, competition law administrative cases.¹²⁸

The Brazilian Competition Policy System (BCPS) has been a denomination widely adopted when referring to the plurality of Brazilian regulators. However, according to Oliveira and Rodas, ‘system’ is not the most suitable term for qualifying the current institutional arrangement, given that it would presuppose a certain logic or order, which is not compatible with the approach adopted by the government in the creation of a plurality of competition authorities over the past decades.¹²⁹ The term ‘system’ would imply that the three aforementioned institutions form an integrated functioning whole, which is not always the case in practice. Indeed, the term BCPS is often mockingly referred to by Brazilian practitioners as ‘the three competition counters’.

¹²⁶ SDE is the acronym for Secretaria de Direito Econômico. See section 2.4.1.

¹²⁷ SEAE is the acronym for Secretaria de Acompanhamento Econômico. See section 2.4.2.

¹²⁸ CADE is the acronym for Conselho Administrativo de Defesa Econômica. See section 2.4.3.

¹²⁹ See Oliveira and Rodas, *Direito e Economia da Concorrência*, 23.

The plurality of the separate institutions that form the BCPS has been regarded in the interviews as a problem in need of reform by many Councillors of the CADE, not only because it is alleged to be in a state of disorganisation at the operational level when conducting investigations or proceedings, but also in respect of competition advocacy. For instance, according to one Councillor: ‘If we want to create conferences, etc., we need people from the three organisations and this is much more difficult than if there was only one’.

Under the current draft of the competition bill,¹³⁰ it is expected that the BCPS will be composed of two institutions: (1) SEAE, and (2) CADE, as the role of the SDE will become incorporated into the CADE. Nevertheless, the institutional reforms proposed do not go as far as creating a sole competition law regulator.

The current draft of the competition bill will also result in many administrative and procedural reforms which are needed to improve the operational effectiveness of the BCPS.¹³¹ Of these, one of the most significant will be the increase in the number of qualified personnel in the competition authority, which will amount to two hundred professionals. This number is currently less than one hundred, a figure that has been criticised for being too low.¹³²

¹³⁰ See section 2.3.4.

¹³¹ Examples of the efforts in this sense are: the creation of a fast track procedure by the CADE and the creation of guidelines for the analysis of mergers and acquisitions by the SDE and the SEAE.

¹³² See OECD and Interamerican Development Bank, “Brazil - Peer Review of Competition Law and Policy,” 9. The size of the Brazilian competition authority can also be considered small when compared, for instance, with the Italian competition authority, which has 277 staff members (see Autorità Garante della Concorrenza e del Mercato. ‘Struttura e Organizzazione, available at <http://www.agcm.it/struttura-e-organizzazione.html> accessed 01/02/2011.) for a country that is much smaller in terms of territory and population.

2.4.1 The Secretariat of Economic Law - SDE

The SDE is part of the Ministry of Justice, which is part of the Executive power. It is headed by a Secretary who is appointed by the Ministry of Justice and composed of two administrative bodies: (1) the Department of Economic Protection and Defence (DPDE),¹³³ which has the role of conducting investigations, preparing the initial procedural documentation and statements of case for prosecution, supplying non-binding opinions, as well as being responsible for competition advocacy; (2) the Department of Consumer Protection and Defence (DPDC),¹³⁴ which has the role of coordinating consumer protection policy at national level.

Of the administrative bodies of the SDE, the DPDE is the most relevant in relation to competition law as it is responsible for investigating competition law offences. All formal complaints, referrals and representations are made to the SDE and even those made through the website of the SEAE are forwarded to the SDE.

The DPDE is divided into administrative bodies, known as Coordinations, in accordance with the scope of their work, namely: the Coordination for Legal Matters;¹³⁵ the Coordination for the Analysis of Offences in the Agricultural and Industrial Sectors;¹³⁶ the Coordination for the Analysis of Offences in the Service and Infrastructure Sectors;¹³⁷ the Coordination for the Analysis in the Public Procurement Sector;¹³⁸ and the Coordination for Market Control.¹³⁹

¹³³ DPDE is the acronym for Departamento de Proteção e Defesa Econômica.

¹³⁴ DPDC is the acronym for Departamento de Proteção e Defesa do Consumidor.

¹³⁵ Coordenação-Geral de Assuntos Jurídicos. See SDE, “Estrutura.”

¹³⁶ Coordenação-Geral de Análise de Infrações dos Setores de Agricultura e Indústria. See Ibid.

¹³⁷ Coordenação-Geral de Análise de Infrações dos Setores de Serviço e Infra-estrutura. See Ibid.

¹³⁸ Coordenação-Geral de Análise de Infrações no Setor de Compras Públicas. See Ibid.

As of October 2009, the DPDE was composed of 32 qualified professionals and 27 administrative personnel.¹⁴⁰ Most have passed open competitions, albeit some were appointed by the Ministry of Justice. The number of professionals working at the SDE was considered insufficient by the 2010 OECD Peer Review¹⁴¹ and there is a reform proposal to increase the number of ‘Gestores’, i.e. Specialists in Public Policy and Management (Specialists), not only at the SDE, but also in the other bodies of the competition authority.

According to one member of the competition authority, the Secretary of the SDE has the final decision as to whether or not a conduct is investigated. Although the Secretary of the SDE is appointed by the Ministry of Justice, one interviewee stated that ‘...interference from the Ministry of Justice is unlikely to happen in practice. Competition issues are of low priority for the Minister, given that he has more important and urgent matters to deal with, such as human rights issues’. Therefore, there is no apparent concern with the political intervention of the Ministry of Justice on competition policy. Nevertheless, it was pointed-out that ‘...the system places power in the hands of only a few persons in the SDE, so you begin to depend on the personal will of these persons’.

The latter criticism concerned the fact that currently the CADE is reliant on the SDE as the former adjudicates decisions whilst the SDE is responsible for the investigatory and preliminary phases. When enacted, the competition bill will reform the institutional structure of the BCPS and will incorporate the SDE into the CADE’s structure. Nevertheless, it was argued by one member of the competition authority that:

¹³⁹ Coordenação-Geral de Controle de Mercado. See Ibid.

¹⁴⁰ OECD and Interamerican Development Bank, “Competition Law and Policy in Brazil: a peer review,” 37.

¹⁴¹ See Ibid., 43.

The new law will not help it at all: it concentrates the decision power in the hands of the General Superintendent of the CADE, who is the Secretary of the SDE today. This person will not be subordinated directly to the Ministry of Justice, because it will have a mandate, but this will not reduce the issue of the concentration of the decision to investigate or not in the hands of one person. For instance, if they appoint a superintendent that believes that the priority is to fight predatory pricing of medicines, then that is what will be done, even if CADE believes that this is not an issue for competition at all.

Many interviewees stated that the separation of the SDE from the CADE is positive for the due process of competition law, because it ensures an independent investigation and impartial decisions. However, others declared that such a division poses a disadvantage: ‘...it leaves in the hands of the SDE, who does not judge, the choice of priorities. The CADE has no power to impose priorities to the SDE, so the latter establishes an agenda that the CADE has to follow. This results in great difficulties to create a consistent policy’.

Many interviewees confirmed that the SDE had improved over the past years. However, there was much criticism in respect of the amount of time that investigations take. In the words of one member of the competition authority: ‘...the investigation sometimes takes too long in the SDE so it becomes difficult to analyse the conduct since it happened a long time ago and the market conditions have changed considerably’.

This issue is related to the lack of sufficient personnel and has impacted on the development of competition law.¹⁴² For instance, in 2008 the CADE heard *Celular CTR*,¹⁴³ which dealt with exclusive agreements in the mobile phone sector. The claimant company, Telet SA, is a mobile phone operator that brought a complaint to the BCPS in respect of the exclusivity agreements between the defendant company, Celular CRT SA (CRT), and distributors situated in the State of Rio Grande do Sul. It was alleged that the exclusivity agreements were implemented by CRT to create unjustified difficulties for its competitors, as well as to raise barriers to entry in respect of distribution channels in the mobile phone sector. The defendant company submitted a successful defence, stating that there were other distribution channels available for competitors. The presiding Councillor, Luis Fernando Rigato Vasconcellos, declared that the exclusivity agreements resulted in indirect negative effects on consumers and direct negative effects on retailers. However, the delay in the investigations resulted in an awkward situation, as the findings revealed that the harm to competition did not materialise. Councillors were faced with the decision of whether to find liable a firm whose past conduct had the potential to harm competition, although it did not actually occur.¹⁴⁴ The conduct was found to be legitimate because other companies managed to emerge in the market by finding alternative distribution channels. However it is questionable whether the outcome would have been the same if the decision had not been delivered seven years after the complaint. The CADE had the advantage of hindsight when finding that other distribution channels were available and there was no potential harm to competition, notwithstanding the fact that the use of alternative channels by CRT's competitors may not have been foreseeable when the

¹⁴² See section 2.4.3.1.

¹⁴³ *Telet SA v Celular CRT SA - 53500.000502/2001*.

¹⁴⁴ According to Article 20 of Law 8,884/94, a conduct that harms competition is prohibited independently of the intention of the firm, even if the effects have not been achieved. See *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10*.

exclusivity agreements were put into place. A paradox perhaps emerges from *Celular CRT*, i.e. the delay in the investigations may have resulted in the right decision being achieved.

In addition to circumstances similar to the one described above that occurred due to delays in the SDE's investigations, according to one member of the competition authority, '...there are and there were many cases prescribed because the SDE does not do anything about it', i.e. procedures are barred due to the expiration of the statutory limitation periods.

Another general criticism of the SDE that came to light during the interviews is that '...sometimes the SDE makes procedural mistakes resulting in the impossibility of finding the undertaking liable'. The judgments of the CADE can be appealed to the courts. Appellants generally base their applications on procedural or substantive grounds. However, the courts are unlikely to challenge the latter as the CADE has greater competence and knowledge of competition law, so the procedural issues are more likely to give rise to a reversal of a decision of the CADE, even if the breaches of procedure were committed by the SDE during initial investigations.

A specific criticism of the SDE concerns its treatment of cartel complaints and investigations. Members of the BCPS as well as Brazilian legal professionals acknowledged that enforcement against cartels was effective. However, the vast majority had reservations concerning the effectiveness of the SDE in regards to abuse of dominance, due to the limited human resources available to undertake more complex investigations. This factor is supported by statements of interviewees at the competition authority; for instance, it was mentioned that '...the SDE focuses on cartels because, since they are almost a *per se* conduct, they are easier to prove than unilateral conduct, which requires a refined analysis'.

Therefore, the SDE has been criticised for giving priority to cartel investigations. In the words of one member of the competition authority: ‘This prioritisation became so important that it resulted in all the rest being neglected’ and ‘We know that there are far too many abuses taking place in the market that we do not catch’. Another member went as far as to state the following:

Now we have a policy that is concerned with cartels. In my view it focuses on it too much. In a country like Brazil, you have markets that are extremely concentrated - and this is historic: in Brazil there was first the monopoly, and then the creation of the State - cartels may not be the most harmful conduct. In markets where there are companies with a market share greater than 50%, there is no tendency of cartelisation, because dominant companies do not need to create cartels to achieve their goals. Why would AmBev, which has a 70% market share, engage in a cartel? It does not need to do so.

In the view of one Councillor of the CADE, part of the problem could be alleviated by the creation of regional offices of the BCPS which could take care of the simpler competition law issues, such as small-scale cartels and allow more significant cases to be dealt by the CADE, such as abuse of dominance or large-scale cartels. ‘The small cartels are harmful and have to be caught, but having such a small structure as the one we have today, it is better to catch the steel cartel or the petrochemical cartel, or the industrial gases cartel, not the small ones’. The issue therefore is that, as explained previously,¹⁴⁵ for historical reasons Brazil has many concentrated markets and the competition authority should arguably concentrate its resources

¹⁴⁵ See section 2.2.

on abuse of dominance and large-scale cartels, leaving to smaller, regional offices, cases involving practices that have a much more limited effect in economic as well as geographic terms.

The SDE's neglect of abuse of dominance cases in favour of combating cartels was a major issue of concern for most interviewees. In the view of one member of the competition authority, 'To me there is only one explanation for the SDE's behaviour: fighting cartels is something that is faster and is more immediate. If someone opens a fridge they believe that the light is a spot light and start immediately giving interviews'.

It could be argued that the SDE gives priority to combating cartels due to the media attention that cartel cases generate as the public opinion is against collusion. However, this could also be positive, as the exposure in the mass media of the enforcement of competition law plays an important role in competition law advocacy, which is crucial in a developing country such as Brazil, given that although the general population appreciate economic freedom, most are ignorant of the role of competition law in society. However, media attention may not be the sole reason for the neglect of abuse of dominance by the SDE.

It is expected that the enactment of the competition bill will allow the SDE to devote greater attention to abuse of dominance complaints. A member of the competition authority stated that '...when the competition bill is approved, the SDE [which will be incorporated into the CADE] will have more professional staff and hopefully they will use some of them to create specialised departments to monitor the markets'. In the view of another member of the competition authority: '...markets are not monitored in Brazil, so to catch an abuse it has to be either really obvious or there has to be a complaint'. Indeed, the lack of technical expertise

and professional administrative staff to allow the SDE to monitor the market effectively was one of the main reasons given for the neglect of abuse of dominance in Brazil. Therefore, the new competition law may result in an increase of competition law enforcement against unilateral conduct after the institutional reforms are implemented.

2.4.2 The Secretariat for Economic Monitoring - SEAE

The Secretariat for Economic Monitoring is an institution which forms part of the Ministry of Finance. Its role in competition law enforcement includes the investigation of merger cases and the supply of non-binding opinions. It also has an important role in promoting competition policy in other governmental organisations, especially in relation to regulated sectors.¹⁴⁶

The institutional mandate of the SEAE results in a competence overlap between the SEAE and the SDE. The existence of two distinct institutions with investigatory powers was justified during the interviews by members of the BCPS on the grounds that the SEAE's sphere of expertise is more centred on economics, whilst that of the SDE is more legalistic.

Directive n. 33¹⁴⁷ was enacted by the SEAE and the SDE to reduce the overlap between these two institutions. As a result, the SEAE currently focuses on mergers and acquisitions and the SDE on conduct cases. Under the current regime, the SDE notifies the SEAE when it initiates an administrative case, as the SEAE can provide an opinion on its merits.¹⁴⁸

The institutional mandate of the SEAE is wider than competition law and policy as it is involved in the regulation of other sectors, such as games and prizes, energy, transport, media, and health. Its role in the BCPS is limited to two specific areas, namely conduct and mergers. In terms of human resources, the SEAE is composed of a total of around 22

¹⁴⁶ See SEAE, "Secretaria de Acompanhamento Econômico - SEAE."

¹⁴⁷ SDE/SEAE, "Directive n. 33 of 4 January 2006."

¹⁴⁸ There is no legal obligation for the SEAE to emit an opinion. However, according to the interviews, when the SEAE does not to emit an opinion, it tends to inform SDE about it to avoid wasting time waiting for possible opinions.

professional and administrative staff;¹⁴⁹ half are appointed and the remainder are employed via open competition.¹⁵⁰

One issue that assumes particular importance to the approach undertaken in the analysis of competition law cases is the training of members of the competition authority. It was stated by one member of the competition authority that in the SEAE and the SDE ‘...the staff has a strong American influence because many members have had links with the US through their education. We all know the US and EU theories, but there is a tendency to look at the US because of specialisation courses that have been undertaken’. This issue assumes even greater relevance when considering that the number of personnel staff in the BCPS will be increased to 200 professionals. Therefore, the future approach of the competition authority to abuse of dominance will depend in great part on how and where members of the staff will be trained.

Although to a much lesser extent than the SDE, the SEAE was also criticised by interviewees for not being proactive in the enforcement of competition law, as well as for undertaking poor and slow investigations at times. With the enactment of the competition bill, the SEAE will be responsible for competition advocacy.¹⁵¹ Nevertheless, it will still hold investigative powers. It is hoped, by some interviewees, that the SEAE will become more proactive given that under the current draft of the competition bill, its personnel will be increased as well.

¹⁴⁹ A total of 15 that are based in Rio de Janeiro the remainder 7 in Brasilia.

¹⁵⁰ The figures are based on data provided by members of the competition authority. These figures are very different from those announced in the recent OECD Peer Review. According to the latter, in 2009 SEAE had 78 professionals and 72 support staff. See OECD and Interamerican Development Bank, “Competition Law and Policy in Brazil: a peer review,” 48. The reason for such discrepancy is probably due to the fact that members of the SEAE that work in competition matters can request support from other Specialists within SEAE, so they might have included their peers in the numbers given to the OECD.

¹⁵¹ See Cadoca, *Competition Bill n. 3,937/04*, 3.

2.4.3 The Administrative Council for Economic Defence – CADE

The Administrative Council for Economic Defence was created by Law 8,884/94 as an independent federal agency with competence to judge, as the last administrative instance, cases investigated by the SDE or the SEAE which have originated from complaints or from their own initiative.¹⁵² The CADE also has a role in competition advocacy, pursuant to Article 7(XVIII) of Law 8,884/94, which states that the CADE must educate the population in respect of the forms of offences to competition law.

The Judging Council is composed of seven Councillors, one of whom is the President of the CADE. The decisions are always taken in a plenary session, i.e., every Councillor has a vote. The decisions are made by absolute majority, with the presence of at least five Councillors and the President has a casting vote.¹⁵³ Dissenting votes are allowed and published.

CADE was considered by most of the interviewees, including legal practitioners in the private sector, as a model for other administrative organisations. Many interviewees highlighted that it is transparent, in contrast with most other institutions in Brazil. In the words of one competition lawyer:

The CADE is one of the most transparent public organisations that we have in Brazil.

It is an organisation that tries to do things technically right. I see the CADE in a positive light, especially when compared with other regulatory agencies. For instance,

¹⁵² Decree 7,666/45 created the Administrative Commission for Economic Defence, which was the predecessor of the current Administrative Council for Economic Defence. Both these institutions share the acronym CADE, but they represent different institutions and existed in different times.

¹⁵³ See Brazil, *Law n. 8,884 of 11 June of 1994*, Articles 8(II) and 49.

the ANATEL [the National Regulatory Agency for Telecommunications] is a disaster in the sense that you cannot even have access to your own case. I can see a growing respect in society for the CADE. It was not like this before; the CADE has improved. I think that the CADE is in the right track and I believe that [other] lawyers share my views.

The aforementioned comments on CADE's transparency and technical ability were mentioned by other interviewees. For instance, another Brazilian lawyer stated that the CADE was one of the few administrative bodies in Brazil that could be considered technically competent: '...whether you agree with the terms of the decisions or not is another matter; but one cannot neglect that it is a technical decision based on technical know-how'.

Although the CADE represents a model for other Brazilian institutions, as well as to other competition authorities in developing countries, there are many aspects that are in need of reform to improve its effectiveness. This is particularly the case in relation to its shortage of staff and administrative resources. Indeed, a member of the BCPS declared that 'the CADE's infrastructure is very small, so it does not have enough personnel to develop strategies'. Some of the deficiencies of the competition authority that are particularly relevant for the CADE will be discussed below.

2.4.3.1 Shortage of administrative staff

There are around 34 professional employees in the CADE:¹⁵⁴ 24 Specialists in Public Policy and Management and several DAS,¹⁵⁵ which are fiduciary administrative appointees with the role of assisting the seven Councillors.

According to one member of the competition authority, ‘[i]f you add all the professional staff of the CADE, the SDE and the SEAE, you will have circa 100-110 professionals. This figure is too little and creates administrative difficulties’. Given that there are no regional offices of the CADE to deal with cases of a regional magnitude, together with the fact that the CADE is an understaffed institution, it could be reasonably argued that it has managed to make the most of its limited resources.¹⁵⁶

Many members of the CADE are aware of the need to follow the developments in the markets and to become more proactive. However, the small number of personnel makes it difficult to enforce competition law effectively. As stated by one Councillor:

The CADE has recently created some sector-specific groups of personnel responsible for regulation, economics and so on. However, the groups are formed by people that

¹⁵⁴ As stated by members of the CADE in August 2009. However, the OECD’s Peer review states that there is a total of 49 professionals in CADE. See OECD and Interamerican Development Bank, “Competition Law and Policy in Brazil: a peer review,” 48. These apparent higher figures probably include administrative staff and Councillors, and therefore are not different from those provided in August 2009.

¹⁵⁵ DAS is the acronym for Direção e Assessoramento Superior or ‘High Level Management and Advising’. There are seven grade levels of DAS and the lower level grade is used to hire non-permanent personnel and to supplement the salaries of permanent employees.

¹⁵⁶ The small number of members of the BCPS was also considered insufficient by the OECD Peer Review, even considering the higher staff numbers declared to the OECD, and the efforts of the Brazilian competition authority have been praised in the review. See OECD and Interamerican Development Bank, “Competition Law and Policy in Brazil: a peer review,” 74.

work in the chambers; therefore, they lack the time to participate in the groups effectively. There should be groups to follow at least the main ten sectors of the economy in order to follow the history of the sectors and to know recent developments. This would be better than just getting an economic model and applying it to a case without being fully familiar with the specific sector. With the competition bill, if it is enacted, there will be 200 professionals in the competition authority, so this may become possible.

The current draft of the competition bill seeks to remedy this shortcoming by providing an increase of professional administrative staff at the BCPS to a total of 200.¹⁵⁷ The increase of professional staff, coupled with adequate training, is likely to result in a more proactive competition authority and in better quality of investigations and decisions. Another problematic aspect that may be improved by an increase in personnel regards the *ex-post facto* analysis of competition law of cases involving complaints for potential harm.¹⁵⁸ In addition, it will allow the BCPS to dedicate part of its staff to carry out studies and gain greater knowledge of the impact of its decisions, allowing them to learn from the past and to formulate a coherent competition policy. As affirmed by one Councillor:

Currently there is no serious study on the effectiveness of the CADE's decisions. There is no study, for instance, on the consequences of the merger of AmBev which was approved a decade ago,¹⁵⁹ even though AmBev has been the object of many complaints of abuse of dominance over the past years.

¹⁵⁷ See Cadoca, *Competition Bill n. 3,937/04*, 50.

¹⁵⁸ See *Telet SA v Celular CRT SA - 53500.000502/2001*.

¹⁵⁹ See Silva, *Companhia Antarctica Paulista/Companhia Cervejaria Brahma - 08012.005846/99-12*.

2.4.3.2 High turnover of personnel

Problems resulting from the shortage of administrative personnel are aggravated by the high rotation of the existing staff. This results in a lack of an ‘institutional memory’, which is faced by all institutions that form the BCPS; however, it may have a more harmful effect on the CADE, where the rotation of personnel appears to be extremely detrimental.¹⁶⁰

Previously, most of the professional staff would change at the end of a Councillors term of office. This issue was addressed in 2006 when the CADE created 27 permanent professional positions, although only 25 of them have been filled as of late 2009.¹⁶¹ Therefore, the positive effects of having professional administrative staff on a more permanent basis have not yet fully materialised. However, in the view of many members of the BCPS, this has resulted in a greater institutional memory, although, as stated by one member of the competition authority: ‘...there are still too many DAS staff.’¹⁶² This is not good for the development of a coherent policy. It becomes difficult to trace back the history of what has been done previously’. The particular concern in respect of the high numbers of DAS results from the fact that they are fiduciary administrative appointees which can be changed at any time. Given that many assist Councillors, it is common, for instance, for the DAS to change when a Councillor’s term of office comes to an end.

When asked about CADE’s case-law during the interviews, many members of the BCPS, including Councillors, stated that they could only talk about the cases which occurred during

¹⁶⁰ This issue was raised by many interviewees and is also part of OECD’s Peer Review. See OECD and Interamerican Development Bank, “Competition Law and Policy in Brazil: a peer review,” 47.

¹⁶¹ Ibid.

¹⁶² For the definition of DAS, see fn 155.

their term of office because, although they knew the views of previous Councillors, they had little knowledge about previous cases. It could be argued that this is irrelevant as Brazil is a civil law jurisdiction where the common law doctrine of binding precedent does not apply. However, the above finding raises concerns given that the lack of knowledge of previous decisions does not help the creation of a coherent body of case-law, which although not binding, is highly persuasive. Moreover, EU law in general is not subject to the doctrine of *stare decisis*; nonetheless EU institutions have sought to learn from the past in order to gradually develop a coherent competition policy.

Problems arising from the high rotation of personnel and the lack of institutional memory are worsened by the fact that there is no specific administrative career tailored to the BCPS. Permanent positions are usually awarded to Specialists who have passed an open competition. After succeeding in this, Specialists can move within various governmental institutions after two years of becoming members of an institution. Moreover, as revealed by some interviewees, the two year limit before transferring to another institution might not apply if the transfer concerns institutions within the same Ministry.

Although some Councillors confirmed that their assistants had some knowledge of competition policy developments before their terms started, a few interviewees suggested that even if permanent Specialists offer some institutional stability, they were not in themselves able to give a collective memory to the institution. This suggests that offering permanent positions is a positive step, but it is not a ‘magic bullet’ as it has to be accompanied with truly permanent positions to reduce the rotation of Specialists, as well as better record keeping, training and specialised public competitions.

2.4.3.3 Training

The professional training and development of the BCPS's administrative staff appears to be an issue of concern, as revealed during the interviews. These concerns were highlighted by a Councillor who stated that:

The training is 'on the job'. We do have training programmes, such as the FGV¹⁶³ specialisation programme, but sometimes individuals have already been working for a year or more before starting the course. The Specialists have received some general training during their preparation course for the national general competition, but specific training in relation to the competition authority is only one point in the whole syllabus. Also, the DAS do not receive any kind of prior training.

In addition, there are members of the administrative support staff that do not need to pass any selection process. The CADE contracts a third company to provide support staff, whose basic requirement is for applicants to have acquired secondary education. This issue was raised by an interviewee who stated that, although for certain types of support services there is no need for applicants to have a higher education, for certain positions a degree in Law or Economics would be beneficial.

Moreover, the fact that Specialists start working without any specific training is certainly a reason for concern. Practical experience is fundamental to fully understand the intricacies of the job; however, specialised in-house training on competition law and policy is essential to

¹⁶³ Fundação Getúlio Vargas is a reputed institution created in 1994 for the academic study of areas related to the development of Brazil. See "Fundação Getúlio Vargas."

master the fundamental issues and eliminate areas of practice where there is a shortage of skills.

There are specialised courses provided by FGV which are offered to members of CADE, SDE and SEAE. This ensures a similar and consistent knowledge among junior members of the institutions that form the BCPS. The cost of the course is fully covered by the government and it deals with competition law, economics of competition, econometrics and regulated markets. The existence of specialised training is encouraging. However, there are aspects of the courses which could be improved upon. According to some members of the competition authority, the courses consist of various seminars, i.e., speakers from various specialisations come to talk about specific issues. While these speakers offer a variety of perspectives that could prove beneficial in raising awareness of wider issues, a more uniform, didactic treatment of specific competition law issues, focused on aspects such as the development of Brazilian case-law, interpretative approaches and the regulatory framework could prove to be more useful, especially for junior staff.¹⁶⁴

In addition to the aforementioned specialisation courses, the Specialists also enjoy the opportunity of undertaking academic or professional courses in foreign jurisdictions. This may influence the competition policy outlook of Specialists. In fact, members of the BCPS stated that some professionals were more inclined towards one of the major models of competition law, namely the US or the EU, as a result of courses attended in these jurisdictions. The views of the professionals that deal with the day-to-day job are also important when taking into consideration that interviewees stated that some Councillors had a

¹⁶⁴ It was stated that some speakers would mention Brazilian cases, but others would not. Moreover, it was said that the course was very general and there were very few aspects that had been relevant for their practice.

reputation for being more pro-US whilst others were more pro-EU. Given that the personnel and resources for training will be increased considerably with the enactment of the competition bill, the issue of international training should not be underestimated, as it has the potential to shape the future development of Brazilian competition policy.

In addition to learning about the US and EU models of competition law, a training focused on the practical application of competition law by the CADE could foster the emergence of a more coherent and consistent Brazilian competition policy. This could serve as a point of reference for other developing countries. In fact, Brazil is not solely a receiver of technical assistance; it is becoming a provider as well.¹⁶⁵ It has shared its experience with other Latin American countries such as Argentina, Chile, El Salvador and Paraguay.¹⁶⁶ In addition, it is exporting its experience to countries outside Latin America. For instance, the Brazilian competition authority is working on an informal basis with the government of Angola to assist with the drafting of its competition law and with capacity building.¹⁶⁷ Therefore, the approach of the competition authority, which mixes concepts from the US and the EU, as well as considering Brazil's own peculiarities, may have an influence over the approach to competition law in other jurisdictions as well. This, in conjunction with the growing economic and political influence of Brazil in the global economy, highlights the importance of ensuring a coherent approach to competition law in Brazil.

Improvements in training could result in a clearer policy, especially in regards to abuse of dominance, which is an area where there is still lack of guidance on the enforcement of

¹⁶⁵ OECD and Interamerican Development Bank, "Competition Law and Policy in Brazil: a peer review," 50.

¹⁶⁶ *Ibid.*, 51.

¹⁶⁷ *Ibid.*

competition law. It emerged from interviews that the BCPS has made many efforts to clarify the application of competition law in relation to mergers and cartels through, for instance, the issuance of guidelines, studies and policy reports. However, effort needs to be made to clarify how unilateral conduct ought to be regulated. According to the view of one lawyer:

I do not believe that what could be deemed to constitute an abuse of economic power is clear. There are two red herrings that come to the mind of a Brazilian CEO when you mention the CADE or competition law: mergers and cartels. Abuse of dominance does not come into their minds at all.

It has also been affirmed by another competition lawyer that: ‘...there is a lack of knowledge in clients of what could be considered an abuse of dominance. (...) The term abuse of dominant position is not even in the mind of company officers of dominant undertakings’. Further improvements to the training of Specialists, combined with competition law advocacy and the drafting of guidelines on abuse of dominance could result in a greater understanding of abuse of dominance offences, as well as a clearer policy in this respect. In addition, an increased number of high-profile abuse of dominance decisions could serve an educational purpose. In the words of one lawyer: ‘Only solid decisions would make company directors think about abuse of dominance’. An example of the importance of solid decisions is the recent *AmBev*¹⁶⁸ judgment, which received considerable attention within the media and got practitioners, CEOs and society in general talking about abuse of dominance.

¹⁶⁸ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

2.4.3.4 Short terms of office of Councillors and the influence of the Executive

The short terms of office of Councillors contribute for the lack of ‘institutional memory’ mentioned above.¹⁶⁹ There are seven Councillors, one of them being the President of the Council. They exercise administrative adjudicative roles as quasi-judges and their decisions can be appealed to the courts.

Currently, Councillors are appointed by the President of the Republic and approved by the Senate; their term of office lasts for two years and can be extended for another two. This short term of office also applies to the Advocate General who is appointed by the President of the Republic under the nomination of the Ministry of Justice and is approved by the Senate. There is one Advocate General, who is assisted by three non appointed Advocates and do not have a determined term of office. In a similar vein to the Specialists, Advocates need to progress a national open competition and later opt to join the competition authority.

The Advocates have two roles. The first one is *ex ante*, guiding Councillors on legal aspects of the decisions, making sure that they respect legal principles, as well as informing the Councillors of what is likely to be accepted by the courts. For instance, if there is a similar decision that was rejected by the courts, the Advocate General will instruct Councillors to modify their decision to reduce the possibility of rejection by the courts. The Advocate General also holds informal meetings with Councillors to offer guidance in respect of how to best apply and interpret, especially when they are faced with a complex case.

¹⁶⁹ See p. 67.

The second role is *ex post*, which regards the judicial defence of the decision. The Advocates anticipate the matters that will be brought before the courts and prepare the defence, sometimes even before the companies ask for a judicial review of the decision in order to speed up the process.

The current draft of the competition bill addresses the issue of short terms of office, as Councillors and the Advocate General will have a four-year term without the possibility of having a second term. This will be an attempt to improve the ‘indirect’ interference that the Executive and the Legislative can have over Councillors in their first term of office.

In fact, the short duration of the term of office of Councillors and the Advocate General currently allows the Executive and the Legislative to exercise considerable influence over the BCPS. One Councillor stated the following:

The re-conduction for a second term is not linked to the fact that you had a good first term or not; it depends on political will. When the government clarifies its position on a certain case, this generates pressure on members of the CADE. There was one Councillor that stood by his decision in the polemic merger between Nestlé and Garoto just before the confirmation of his second term of office was due. His decision created much political pressure and it became clear that his term would not be extended.

Many members of the competition authority reiterated this incident during the interviews. According to another Councillor, the extension of the term of office of this Councillor was about to be confirmed by the Senate:

...but the politicians did not allow his name to go to the plenary session because he was one of the biggest supporters of the Nestlé-Garoto decision and politicians from the Federal State of Espírito Santo created many problems; this Councillor waited for four months for his term of office to be extended; as it did not happen, he decided to quit.

This does not seem to have been an isolated case, as another Councillor affirmed that:

When the merger of AmBev¹⁷⁰ was approved, the term of office of four Councillors was not confirmed. It was a very controversial period because there were complaints of corruption and articles on this issue appeared in major magazines.¹⁷¹ At the end, the Minister of Justice did not investigate any accusations but decided not to confirm the second term of office of anyone.

In fact, when the controversial merger between Brahma and Antartica (which created AmBev) was approved, it was said that the President of the CADE, Gesner Oliveira, had made an agreement with the Executive. He was said to have acted as the ‘right hand man’ of the Executive in the decision and that the CADE would benefit from supporting the Executive’s will by having its budget increased.¹⁷² Another Councillor stated that ‘[i]f the ruling party changes, it may well be that the President decides to change all the proposed nominees which are awaiting approval by the Senate, and so the Councillors may change’.

¹⁷⁰ Silva, *Companhia Antarctica Paulista/Companhia Cervejaria Brahma - 08012.005846/99-12*.

¹⁷¹ See, e.g. “O poderoso Cade sob suspeita.” See also Queiroz, “Deputado apresenta fita com suposto suborno no caso AmBev.”

¹⁷² Villela, R. et al. “Gesner quer cobrar a conta.”

According to one Councillor, the pressure exercised by the Executive over the BCPS is indirect:

I have never received a call from anyone asking me to vote in a particular manner. What does happen is someone calling you asking for information, but this is fair enough, since we are a public administrative body. We have not been directly elected. We have been appointed by the President, so he has the right to know why we decided in a certain way.

The fact that Brazil is a democratic State means that the political pressure is not as 'direct' as it may be in other BRIC countries, such as in China. However, the existence of an 'indirect' pressure could result in the danger of competition law becoming politicised, rather than being applied objectively; this certainly takes away part of the independence of some members of the CADE. The fact that a Councillor has been appointed by the President does not give the latter the right to supervise the BCPS by asking why a Councillor voted in a particular way.

Under Law 8,884/94, the CADE is instituted as an independent federal agency. Therefore, it could be rightfully argued that the President is subject to the law and should not interfere in any way. Although Councillors do not form part of the Judiciary, their independence is guaranteed by law. Their fixed terms of office, together with the political scrutiny that candidates receive before their appointments are approved, should invalidate the aforementioned statement that equates the President to a 'rightful supervisor' of Councillors.

The 'indirect' interference of the Executive over the BCPS runs contrary to constitutional principles of fair governance and the rule of law; this is particularly disturbing given that

Brazil is a western democratic State. The relevance of the existence of ‘indirect’ interference of the Executive over the BCPS may result in an approach that is not always based on legal certainty and may cause incoherent case analysis. The in-depth analysis of the effects on the policy of the BCPS due to the interference of the Executive is out of the scope of this thesis, but is an issue revealed by the interviews conducted in this research which deserves further studies. In any case, this matter is likely to be addressed with the enactment of the competition bill, which seeks to increase the independence of Councillors, as it provides longer terms of office without the possibility of re-appointments.

2.4.3.5 Judicial Review

Although the CADE is an administrative body, its Councillors enjoy a quasi-judicial role. This is because the Brazilian legal and administrative systems have been largely inspired by models from Continental Europe. The quasi-judicial role of Councillors is akin to that of *Conseillers* of the *Conseil d'État* in France.¹⁷³

According to the Federal Constitution of 1988, the law cannot prohibit judicial review.¹⁷⁴ Therefore, CADE's decisions are subject to judicial review. The Judiciary in Brazil is divided into Federal Justice and State Justice. The first is responsible for judging any cases where the Federal Union, its independent agencies, foundations and public companies are complainants or defendants, whereas the latter has a residual competence.¹⁷⁵ Both Federal and State Justice have first and second instances. For constitutional matters, appeals can be made to the Supreme Federal Court.

Article 64 of Law 8,884/94 states that the review of competition law decisions should be made at the first instance of the federal courts of the federal district of Brasilia or at the judicial district where the defendant is domiciled, at the discretion of the CADE.¹⁷⁶ The courts can review CADE's decision on procedural and substantive grounds. Therefore, the merits of the administrative decision are not out of bounds. In practice, a judge can overturn a decision of the CADE.

¹⁷³ See "Conseil d'État." <http://www.conseil-etat.fr/cde/en>.

¹⁷⁴ Brazil, *Federal Constitution of 1988*, Article 5(XXXV).

¹⁷⁵ *Ibid.*, Article 109.

¹⁷⁶ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 64.

The process of judicial review was considered to be far from perfect by most interviewees. The main concern appears to be the procedural delays involved. According to an Advocate, appeals to the courts occur in circa 85% of the cases where liability is held. When decisions are reviewed by the courts, they are sent to the first instance which allows for the possibility of having a subsequent appeal to the second instance, and in some cases it may even be possible to appeal to the third instance, i.e. to the Supreme Federal Court for constitutional matters. The administration of justice in general in Brazil is not very efficient and since appeals are allowed to the first instance courts, competition law cases follow the same slow procedures as cases presented for the first time to the courts. Moreover, parties have many procedural rights which are often abused and used as delaying tactics. Therefore, cases usually take many years to be decided by the courts.

As a result of these delays, Advocates in charge of defending CADE's decisions make a point of endeavouring to respond to judicial demands promptly. In the words of an Advocate: '...if a case takes two years to be judged instead of ten, we consider this a great achievement'. According to another Advocate:

Although the period to present the defence in a case is usually 60 days, the Advocates usually present it in three days or in one week in an attempt to guarantee celerity and ensure the credibility of the CADE before the courts. This is very important as the role of the Advocates is to be seen by the courts in a positive light.

According to the interviewees, the courts have the right to re-examine decisions. However, due to the complexities of the competition law, the scope of the review is generally limited. For instance, it is more likely for the courts to re-examine how certain terms were interpreted,

or if the procedure was in accordance with the law, rather than re-examining how the economic analysis was undertaken. Therefore, the courts tend to confirm the decisions of the CADE. In this sense, the main concern is not whether the courts reverse a decision; rather, it is whether long procedural delays result in the ineffectiveness of decisions. As confirmed by an Advocate: ‘...there is a temporal ineffectiveness, i.e., the courts may confirm CADE’s decision, but only after too many years’.

Another concern raised by members of the BCPS is that the courts grant too frequently interim relief which suspends the effectiveness of the decisions of the CADE by preserving the *status quo* pending trial. This concern is based on the premise that the courts often fail to take into consideration the wider interests at stake when reviewing competition law decisions. They prefer to maintain the *status quo* by restricting the scope of sanctions imposed by the CADE. In the view of one member of the competition authority: ‘[t]he courts usually maintain the *status quo*. This is dangerous because of the tendency of looking at the harm caused to the undertaking in question and neglecting the harm caused to consumers’. For instance, the CADE decided the *AmBev*¹⁷⁷ case in July 2009,¹⁷⁸ applying the highest fine for an abuse of dominance case in its history.¹⁷⁹ However, the effectiveness of the decision is likely to be felt only in a few years, given that the courts have granted interim relief, allowing AmBev not to pay the fine imposed by the CADE until the decision becomes *res judicata*.

¹⁷⁷ See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*.

¹⁷⁸ Lardim, “AmBev consegue suspender multa milionária.”

¹⁷⁹ See p. 259.

When questioned on the aforementioned concerns, although Lawyers tended to defend the right of judicial review, they also recognised that the administration of justice should be improved to limit the scope of reviews. In the words of one Lawyer:

Judges should not be able to put themselves in the place of seven Councillors and review the whole decision. However, I do not think that the judge should decide only on abstract legal matters either. He or she should be able to decide on the merits, but subject to restrictions.

Moreover, when CADE's decisions are reviewed, applicants can submit challenges based on facts as well as on points of law. For instance, applicants can contest proofs or statements of case, or simply submit a total denial of CADE's claims. In the words of an Advocate: 'Lawyers can contest the merit as well as the facts, but usually they challenge the admission of proofs. Lawyers many times lie and state that something did not happen, although they know that it did happen'. The latter statement could appear surprising to observers from a common law tradition. For example, Barristers or Solicitors in England & Wales are treated as officers of the court who cannot act dishonestly by deceiving the court.¹⁸⁰ In Brazil, professional conduct rules are different, as Lawyers are under the overriding obligation to act on the best interest of their clients, even if it results in deceiving the court.

A lack of competition law knowledge among members of the courts was also deemed to be a problem by interviewees. Most universities do not currently offer specific courses on competition law. Therefore, it is an area of law which is alien to most judges, some of whom

¹⁸⁰ United Kingdom Parliament, *Civil Procedure Rules 1998*, pt. 1, rule 1.

may consider the very existence of competition law provisions as unnecessary. This issue could be addressed by the creation of a specialised court within the Judiciary to review CADE's decisions. In the view of one Councillor:

...the Judiciary's structure is very slow and unworkable; because of this, today it is almost impossible to have a decent enforcement of CADE's decisions. A specialised court could be created, with the possibility of appealing to the second instance and the Supreme Court for violation of the law or constitution, similarly to what currently happens with the Labour Justice or the Military Justice.

The above reform proposal appears to be reasonable, given that specialised courts within the Judiciary would ensure the correct application of competition law and raise its standing or profile within the Brazilian legal system. However, it would involve high costs and many of the interviewees stated that it would be virtually impossible to convince the government to make such an investment.

The fact that CADE's decisions are reviewed by first instance judges, rather than by judges from within the higher hierarchy of the Judiciary was regarded by many interviewees to constitute a major problem and an obstacle to the effectiveness of the decisions. However, in order to be able to implement this suggested reform by providing the right to ask for a review of CADE's decisions to a second instance of the Judiciary,¹⁸¹ amendments to the Constitution would be needed. Moreover, this reform proposal raises wider political institutional issues. In the words of one Councillor: '...if the CADE asks for this [reform], then other national

¹⁸¹ The appeal to the second instance of the Federal Courts or the State Courts has been proposed by many interviewees.

agencies would ask for it as well and the reform would become politically impossible'. Another Councillor stated that '...we would like the decisions to be faster. Theoretically speaking, it may be a good idea, but it is not possible to implement such thing'.

One possible alternative would be to change the drafting of Article 97 of the competition bill, as it currently reflects the provisions of Article 64 of Law 8,884/94. The possibility of appealing to the court of the district where the defendant is domiciled should be removed. Thence, all the appeals would be made exclusively to the federal courts of the federal district of Brasilia. This would result in improvements in procedural terms, since there would be fewer delays in the federal courts. The quality of the decisions would be improved as well, given that the number of judges dealing with competition law would be limited and their knowledge of the matter would increase over time. One criticism that this solution might receive is that it would not be fair on defendants. However, this criticism appears to be unsubstantiated as the original the decision was held by the competition authority, which is also located in Brasilia.

The issues raised in this section are crucial for the effectiveness of CADE's decisions. Unfortunately, the competition bill does not address this matter and it appears that no law will do so in the near future. Advocates try their best to speed up the cases in court, but this is clearly not enough and requires reform.

2.5 Conclusion

Brazil has had an economy defined by governmental intervention, monopolies and highly concentrated markets since its colonial times. Following two decades of autocratic military dictatorships, a return to democratic rule occurred in 1985. Although this political transition was beneficial, the economic transition from a highly regulated market to a more liberal environment resulted in poor economic performance and high inflation rates.

From the early 1990s, the market underwent a series of reforms consisting of the privatisation of state-owned enterprises and the abandonment of many protectionist policies. To ensure greater economic stability and growth, the 1994 monetary stabilisation plan, commonly known as the Real Plan, introduced the current currency and successfully reduced the rate of inflation. In the same year, Law 8,884/94 was enacted and this constitutes the current competition law until the enactment of the competition bill in the near future.

Law 8,884/94 and the competition bill seek to reinforce the protection of constitutional principles, such as free enterprise, open competition, the social role of property and consumer welfare, as well as the restraint of abuses of economic power that result in harm to the economic order.

Given the special concern with economic stability and inflation, Law 8,884/94 reiterates many provisions that were already present in the Consumer Code of 1990, such as the prohibition of charging excessive prices. Although the CADE has distanced its approach from a literal interpretation of the law and Brazil no longer suffers from high levels of inflation, this has resulted in a style of competition law which is consumer oriented.

The most important provisions of Law 8,884/94 are Articles 20 and 21. These provisions are interconnected as the latter contains a non-exhaustive list of typified anti-competitive practices that are prohibited if they are capable of breaching Article 20.

The competition bill introduces some structural changes to the current regulatory system, such as the amalgamation of Articles 20 and 21 into a single provision. However, in terms of abuse of dominance, there will be no major regulatory reforms.

An analysis of the various institutions that constitute the BCPS indicated that, although many improvements have taken place and the competition authority has managed to make the most out of limited resources to develop the Brazilian competition law regime, there is still room for improvement, which explains the current deliberation of the competition bill. The institutions that form the BCPS suffer from a chronic shortage of staff which, in conjunction with the high rotation of personnel, harms the emergence of an 'institutional memory' and consequently, the creation of a consistent competition policy and coherent body of case-law. The competition bill aims to resolve this issue by increasing considerably the number of permanent administrative staff at the BCPS.

Another issue that the competition bill seeks to address is the erosion of the competition authority's independence from the Executive and Legislative by replacing the short renewable terms of office of Councillors with longer fixed terms of four years; thereby reducing the 'indirect' influence of the government on decisions. This object of reform is welcomed, given that Brazil is a democratic state with constitutional principles such as the separation of powers, good governance and the rule of law, so such interferences should not take place.

Interviews with members of the BCPS revealed that the training received by administrative staff, particularly by Specialists, is in need of reform. Training of a practical and theoretical nature should be offered to all members, particularly to those at a junior level. Moreover, training courses should give particular consideration to economic sectors, whilst offering an awareness of the main models of competition law, namely the US and the EU, without losing sight of the Brazilian system. This is of particular relevance to how the Brazilian competition law will be interpreted and applied in the future, since it was found that the training received does have an influence in how members of the staff perceive competition rules and with the enactment of the competition bill there will be many new professionals joining the competition authority.

Finally, many issues were revealed in respect to how judicial review is conducted, namely the ineffectiveness of CADE's decisions, the inexperience of the courts with competition law, as well as long procedural delays. There are many proposed reforms to resolve these issues, such as allowing appeals from the CADE directly to the second instance of the Judiciary, shortening procedures. However, this does not appear to be a viable solution at either a practical or theoretical level, as it would require an amendment of the Constitution and it does not solve the problem of the current lack of familiarity of competition law by the courts. Another proposed reform would be to create a specialised court or section to hear appeals from the BCPS. However, this would involve high costs and many of the interviewees stated that it would be virtually impossible to convince the government to make such investment. The issues concerning the current judicial review of CADE's decisions is not addressed by the competition bill, but it is of crucial importance for the effectiveness of the decisions.

A proposed reform concerns the removal of the possibility of appeal to the judicial district where the defendant is domiciled, thereby resulting in a single court to hear all appeals from the CADE, i.e. the federal courts of Brasilia. The advantages of such reform are twofold: firstly, proceedings would be conducted in a prompt and efficient manner; secondly, it would allow the courts to gain greater expertise in competition law. This proposal could be subject of criticism as it removes the general principle that the *forum* ought to be where the defendant is domiciled. However, it must be borne in mind that the original decision was held by the competition authority, which is also located in Brasilia, so this should not constitute a further burden on the defendant. In any case, in-depth research should be undertaken to find the best solution at an institutional, legal and political level.

3. Chapter Two - Monopoly Power Control in the EU and the US: Convergence and Divergence

This chapter discusses the approach of the US and the EU to monopoly power control. It is not intended to summarise all the regulations and policies in these jurisdictions; rather, it will offer a framework to assist a comparative analysis in the following chapters which discuss how monopoly power control is developing in Brazil. Accordingly, this chapter highlights the key aspects of monopoly power control in the US and the EU, as the comparative analysis of this research requires that the main differences and similarities between these jurisdictions are made clear.

It could be argued that the EU and the US pursue the same goal, i.e. the maintenance of competition for the benefit of consumers and society. The central focus of competition authorities and courts in these jurisdictions is not primarily aimed at protecting competitors; rather, the protection of the process of competition is the generally accepted aim of competition law. Therefore, it would be fair to expect a similar approach to abuse of dominance on both sides of the Atlantic. However, the EU and the US competition policies have developed differently.¹⁸² The American approach is generally less regulatory and takes a more *laissez-faire* stance in comparison to the EU. In fact, some important cases, such as *British Airways*¹⁸³ and *Microsoft*,¹⁸⁴ which involved the same parties and circumstances, have

¹⁸² For a discussion on the similar goals yet different approaches to competition law and policy in the US and the EU, see Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?”

¹⁸³ *British Airways plc v Commission of the European Communities - Case C-95/04. Virgin Atlantic Airways Limited v British Airways PLC.*

¹⁸⁴ *Microsoft Corp. v Commission of the European Communities - Case T-201/04. United States v Microsoft Corp*, vol. 87.

resulted in different outcomes, summarised by the clearance in the US and prohibition in the EU.

The divergent approaches of US and EU competition policies pose some questions, such as how different is the regulation of economic power in the US and the EU and how do these differences manifest in the antitrust analysis with respect to monopolisation and abuse of dominance offences in these jurisdictions.

Providing a definitive and comprehensive answer to the above questions is challenging, as there are many diverging opinions,¹⁸⁵ and would be beyond the scope of this research. This section on divergence and convergence is useful to better understand the development and direction of Brazilian competition law. Therefore, the following paragraphs will endeavour to shed some light in respect to the following central diverging elements between the US and EU models: (1) the *per se* rule and the rule of reason; (2) the requirement of proof of effects; (3) the roles of efficiency defences and objective justifications.

¹⁸⁵ See e.g. Fox, “We Protect Competition, You Protect Competitors.” De Smet, “The Diametrically Opposed Principles of US and EU Antitrust Policy.” Gal, “Monopoly pricing as an antitrust offense in the U.S. and the EC: two systems of belief about monopoly.”

3.1 *Per se* rule and the rule of reason

As revealed by the interviews, several members of the Brazilian competition authority were not certain about the meaning and differences between the *per se* rule and the rule of reason. Many believed that the *per se* rule was only used in the EU, while the rule of reason was only used in the US. As will be discussed below, there appears to be some misconception of these concepts in Brazil.

The US Supreme Court has stated that the rule of reason is the prevailing standard in antitrust analysis.¹⁸⁶ The fact that it is ‘prevailing’ implies that it is not the only standard used. Indeed, the *per se* rule is still present, although with a reduced scope. One of the justifications for the *per se* rule is that, with the development of the case-law, the competition authorities and courts can develop clear rules to enhance deterrence avoiding a rule of reason analysis which will result at times in mistakes due to the high costs that it involves.¹⁸⁷ The EU model adopts a forms-based, or quasi *per se* approach with respect to abuse of dominance. However, it has been suggested that the EU analysis is moving from a formalistic towards an effects-based approach,¹⁸⁸ i.e. closer to the rule of reason.

¹⁸⁶ See *Continental T. V., Inc. v GTE Sylvania*, vol. 433, bk. 49. However, according to Richard Posner, the rule of reason is rarely used to decide cases. See Posner, “The rule of reason and the economic approach: reflections on the Sylvania decision,” 14.

¹⁸⁷ Hylton, *Antitrust law economic theory and common law evolution*, 116.

¹⁸⁸ See e.g. Petit, “From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC,” 486-87.

3.1.1 Per se rule

The use of the *per se* rule in antitrust law originated in the United States. In 1958 the US Supreme Court stated in *Northern Pacific Railway* the concept and purpose of the *per se* rule:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.¹⁸⁹

Per se prohibitions result from the policy making of antitrust courts and agencies.¹⁹⁰ Conduct prohibited *per se* is that one which would be very likely to be prohibited when applying the rule of reason. Pragmatically, once identified, these types of conduct would be prohibited without the need to undertake an in-depth analysis under the rule of reason. In essence, the rule of reason is generally considered the opposite of the *per se* approach.¹⁹¹ When applying the rule of reason, the pro and anti competitive effects and efficiencies generated by the conduct are balanced.

The *per se* rule is similar in the US and the EU. In the latter, the European Commission, after examining the conduct's features, rather than its economic impact, determines if the dominant

¹⁸⁹ *Northern Pacific Railway Co. v United States*, vol. 356.

¹⁹⁰ See Black, *Conceptual foundations of antitrust*, 71.

¹⁹¹ Piraino, "Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis," 685.

undertaking's conduct is capable, by its own nature, of causing anti-competitive effects on the market and falling foul of competition law.¹⁹²

Adopting the *per se* approach offers many advantages, such as greater legal certainty, benefiting regulators and competitors alike, as well as lower enforcement costs. Moreover, it reduces the need for courts to make in-depth economic judgments which they are ill-equipped to do.¹⁹³ Notwithstanding these positive aspects, the adoption of a *per se* approach also has its drawbacks. For instance, there is a concern that economic freedom would be restricted and undertakings would be unfairly punished in cases where the conduct prohibited under the *per se* rule did not in fact generate anti-competitive effects, or worse, the conduct that prohibited could be pro-competitive. These scenarios represent 'type I' errors, or false positives.¹⁹⁴

Whilst EU competition law has many form-based prohibitions, in the US they play a secondary role in antitrust analysis.¹⁹⁵ In the US, antitrust enforcement relied frequently on *per se* rules until the 1960s, when criticism, especially from scholars of the Chicago school, influenced antitrust legal reasoning by giving prominence to economic considerations. As a result, the US approach moved towards the rule of reason.¹⁹⁶

¹⁹² See Petit, "From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC," 486.

¹⁹³ Black, *Conceptual foundations of antitrust*, 75-76.

¹⁹⁴ For a discussion regarding type I and II errors, see Polinsky and Shavell, "Legal Error, Litigation, and the Incentive to Obey the Law." Hylton, "Costly Litigation and Legal Error under Negligence."

¹⁹⁵ See Piraino, "Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis," 693-694.

¹⁹⁶ See Bork, R. H. (1966): *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Yale Law Journal, 75 (3), 373-475 in Christiansen and Kerber, "Competition Policy with Optimally Differentiated Rules Instead of 'Per se Rules vs. Rule of Reason,'" 3.

3.1.2 Rule of reason

Pursuant to the US antitrust analysis, the existence of actual or likely harm has to be demonstrated for a conduct to be deemed monopolistic. Such harm can be extremely difficult to prove under the rule of reason, reinforcing a liberal antitrust policy. A precursor to the rule of reason can be found in the reasoning of *Board of Trade of Chicago*,¹⁹⁷ a 1919 decision from the US Supreme Court which stated:

The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹⁹⁸

The rule of reason presents many benefits. Each case is assessed in relation to its individual merits and circumstances and the risk of type I errors is likely to be lower than when applying *per se* rules. In addition, supporters of the rule of reason state that type I errors are more detrimental to the market than type II errors.¹⁹⁹

Nevertheless, research conducted by Michael A. Carrier,²⁰⁰ who analysed antitrust cases judged by the US federal courts pursuant to the rule of reason from 1977 until 2009, raised concerns about the consequences of type II errors, i.e., false negatives. Carrier observed that

¹⁹⁷ *Chicago Board of Trade v United States*, vol. 246.

¹⁹⁸ *Ibid.*, 246:238.

¹⁹⁹ This was also the view of two interviewed Councillors of the CADE.

²⁰⁰ See Carrier, "The rule of reason: an empirical update for the 21st century," 827.

the US federal courts tend to follow a three-stage approach when applying the rule of reason: (1) the complainant will first have to show a significant anti-competitive effect; (2) if this is demonstrated, the burden of proof shifts to the defendant who then needs to show a legitimate pro-competitive justification; (3) if the defendant satisfies this burden, the complainant will need to prove that the alleged conduct is not reasonably necessary or that the goals of the defendant could be achieved by less restrictive means. Only then will the court balance pro and anti competitive effects.²⁰¹ Therefore, the rule of reason results in a higher standard of proof and, in contrast with what members of the Brazilian competition authority stated, it does not differ from the *per se* rule solely by the fact that efficiencies, harm and other elements of the market are taken into consideration.²⁰²

The standard and burden of proof differs considerably from the *per se* approach given that, when the rule of reason is adopted, the claimant has to show a significant actual or likely anti-competitive effect. If the defendant manages to provide a justification, the burden shifts back to the claimant and the standard of proof becomes even higher. This explains why the rule of reason results in a more *laissez-faire* enforcement of competition law as it becomes increasingly more difficult to find the defendant firm liable.²⁰³

When there are no actual effects, the competition authority or the claimant will need to be able to demonstrate that the effects are *likely* to take place and take into account the market

²⁰¹ See Ibid.

²⁰² According to one member of the BCPS, the rule of reason differs from the *per se* rule because ‘...it is a cost-benefits analysis’. Another interviewee stated that ‘When we mention the rule of reason, we mean something that is not a *per se* offence and that needs to be analysed methodically with reasonableness’. It was also noted by another interviewee that ‘...after defining the market you apply the rule of reason, i.e., you check the barriers to entry, rivalry in the market, etc’.

²⁰³ De Smet, “The Diametrically Opposed Principles of US and EU Antitrust Policy.”

power of the defendant and other market elements.²⁰⁴ This higher standard differentiates the US model from the EU model, as only in the latter the *risk* of elimination of effective competition has to be demonstrated.²⁰⁵ In this respect, the general standard of proof of the Brazilian rule of reason is closer to the EU model, since Article 21 of Law 8,884/94 prohibits any conduct to the extent that a dominant firm is *capable* of producing anti-competitive effects.²⁰⁶

A fact noted by Carrier²⁰⁷ that supports the view that the US rule of reason results in a *laissez-faire* competition policy is that courts tended to dismiss most claims on the first stage of the procedure. Between 1977 and 1999 84% of claims were dismissed in this first stage and only 4% of claims involved the last stage of reasoning, i.e., balancing pro and anti-competitive elements. Between 1999 and 2009 the figures were 97% and 2% respectively.²⁰⁸ When the rule of reason is adopted, according to statistics, claimants or prosecutors are overwhelmingly unsuccessful. Only one of the claims between 1999 and 2009 which managed to reach the balancing analysis was won by the claimant.²⁰⁹ In almost all rule of reason decisions the claimant failed to prove actual or likely anti-competitive effects. These effects can be demonstrated in one of two ways:

First (...) [the claimants] can show an actual adverse effect, such as an increase in price, reduction in output, or deterioration in quality. Second, they can show a potential adverse effect, as revealed by market power. (...) [Claimants] proving this

²⁰⁴ See Balto, “Proof of competitive effects in monopolization cases: a response to Professor Muris,” 317.

²⁰⁵ See Anderman, “Microsoft v Commission and the Interoperability Issue,” 396.

²⁰⁶ See section 2.3.

²⁰⁷ Carrier, “The rule of reason: an empirical update for the 21st century.”

²⁰⁸ *Ibid.*, 827-928.

²⁰⁹ Namely *United States v Visa U.S.A. Inc.*, vol. 344.

element must delineate relevant product and geographic markets and offer proof of the defendant's power in the markets.²¹⁰

Carrier's findings demonstrate that the burden and standard of proof in the rule of reason constitute a difficult obstacle for claimants and prosecutors to overcome in proceedings before American courts.²¹¹ It could be argued that, given such difficulties, there would be a lower number of vexatious claims in the US and claimants would gather a greater amount of evidence before initiating a claim.²¹² However, what appears to be clear is that the American rule of reason results in a considerably non-regulatory or *laissez-faire* approach, as only a negligible amount of abusive conduct resulted in liability. This may explain why the EU has shown resistance to adopt the rule of reason, as the essence of the EU competition law is aimed at achieving the goals set forth in the EU Treaties which imply a more regulatory approach.

²¹⁰ Carrier, "The rule of reason: an empirical update for the 21st century," 830.

²¹¹ See Carrier, "The rule of reason: an empirical update for the 21st century."

²¹² See Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence?," 10.

3.2 Proof of effects

On the one hand, one could argue that competition authorities should prohibit abusive conduct only in cases where it is possible to identify actual anti-competitive effects, i.e. where the conduct has materialised and resulted in harm to competition. On the other hand, it could be argued that competition law should not be concerned solely with effects; rather it should serve a ‘prophylactic purpose’ to deter attempts to commit offences.²¹³ If proof of actual effects was required, this ‘...would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts’.²¹⁴ The application of competition law would only occur *ex post facto*. This would be undesirable as the harm would have occurred, at times irreversibly.

In common with the EU and Brazil, it is clear that proof of actual anti-competitive effects is not a necessary requirement in the US. This was confirmed by the US Supreme Court in *American Tobacco*: ‘[n]either proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act’.²¹⁵

A link between the conduct and the acquisition and maintenance of the firm’s market power forms part of the legal analysis. Conduct of firms with market power should not pose ‘...restraints that are not reasonably “necessary” to competition on the merits and [should not]

²¹³ Balto, “Proof of competitive effects in monopolization cases: a response to Professor Muris,” 316.

²¹⁴ *Standard Oil Company v United States*, 221:310.

²¹⁵ *American Tobacco Co. v United States*, 328:809.

reasonably appear capable of making a significant contribution to creating or maintaining monopoly power'.²¹⁶

It should be noted that Section 2 of the Sherman Act '...does not condemn monopolies as such, [but] it is directed at unreasonably exclusionary conduct that would make more likely the future exercise of market power'.²¹⁷ Producing expert economic analysis to prove that anti-competitive effects are likely rather than probable is very expensive and laborious. The standard of proof would be therefore higher and the expert evidence would be based on hypothetical calculations.

Initially, one could assume that the EU adopts a similar approach to the US with respect to market power regulation. Both jurisdictions prohibit conduct that foreclose the market and have adverse effects on consumers. Moreover, the EC Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (EC Guidance) declares that conduct is prohibited if it hampers or eliminates '...effective access of actual or potential competitors to supplies or markets and (...) [are] likely to have an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form'.²¹⁸

From a literal interpretation of the Guidance one could assume that, in common with the US approach, the European Commission would require the proof of the *likely* anti-competitive

²¹⁶ Areeda and Hovenkamp, *Antitrust law an analysis of antitrust principles and their application*, 78.

²¹⁷ Balto, "Proof of competitive effects in monopolization cases: a response to Professor Muris," 313.

²¹⁸ European Commission, "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings," 19.

effects of the conduct. However, in *Microsoft*²¹⁹ the Commission stated that if the anti-competitive behaviour of Microsoft were to continue there would be:

...a serious risk that Microsoft will succeed in eliminating all effective competition in the work group server operating system market (...) [and] this would have a significant negative effect on its incentives to innovate as regards its client PC and work group server operating system products.²²⁰

The standard of proof required was a 'serious risk' of eliminating all effective competition. Therefore, the reasoning of the Commission reiterated the EU standard based on risk, which is easier to prove than the US standard based on the likely effects.

Microsoft argued that the Commission had to demonstrate that the elimination of competition was likely, rather than basing its decision on a serious risk. The General Court stated as follows:

For the purposes of application of Article 82 EC, the expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent,

²¹⁹ European Commission, "Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty," 725.

²²⁰ Ibid.

before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.²²¹

The General Court did not expressly clarify whether the standard of proof ought to be risk-based or likeliness-based. However, the reasoning of the decision implies that the standard for proving probable effects ought to be set at a lower level than in the US on the grounds that the Commission must not be prevented from acting by requiring that the effects were sufficiently imminent.

Moreover, the General Court stated ‘...that no effects-based analysis was required even though the Commission thought it should be’ and ‘...the Commission’s findings in the first stage of its reasoning are in themselves sufficient to establish that [foreclosure of competition as a] constituent element of abusive bundling is present in this case’.²²²

*Microsoft*²²³ follows the previous reasoning of *Michelin II*,²²⁴ where the court set a low standard of proof by declaring that ‘...it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect’.²²⁵ In the view of Professor Anderman, the General Court’s judgments enunciate a test to be applied in respect to Article 102 cases which are

²²¹ *Microsoft Corp. v Commission of the European Communities - Case T-201/04*, 10.

²²² *Ibid.*, 1058.

²²³ European Commission, “Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty,” 725.

²²⁴ *Manufacture française des pneumatiques Michelin v Commission*, vol. 2003, para. 12.

²²⁵ *Ibid.*

‘...not concerned with proof of effects, but rather with proof of conduct that *could possibly* produce effects. This is in line with previous ECJ case law on Art.82 EC’.²²⁶

The Brazilian competition authority generally follows a similar approach to the EU. The competition law 8,884/94 prohibits conduct that is *capable*, rather than *likely*, of producing anti-competitive effects. Pursuant to the provisions of Law 8,884/94, the competition authority only needs to prove the existence of a conduct that could potentially produce anti-competitive effects. Thus, the analysis of possible harm to consumers, under an impact-based approach does not necessarily mean that the Brazilian competition authority is under an obligation to prove the likely effects and the quantum of such harm.²²⁷

²²⁶ Anderman, “Microsoft v Commission and the Interoperability Issue,” 396.

²²⁷ See e.g. Bruzzone and Boccaccio, “Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix,” 469.

3.3 The role of efficiency defences and objective justifications

This section will deal with how efficiencies form part of the legal reasoning in the US as efficiency defences and in the EU as objective justifications in the analysis of abuse of dominance. When analysing a conduct pursuant to the US rule of reason, efficiencies play a role in the balancing of pro and anti competitive effects, in addition to forming a central part of the defence arguments. Therefore, a conduct that, under a preliminary analysis, meets all the legal requirements to constitute an antitrust offence could nonetheless be permitted if the defendant demonstrates that it results in economic efficiencies. In doing so, both the US competition authorities and courts demonstrate a belief that harm to competition can be outweighed by the benefits of efficiencies.

However, this policy may also result in a non-interventionist approach where very few practices are prohibited.²²⁸ Future developments of US antitrust law could mirror policy changes proposed by the Obama administration.²²⁹ The current political momentum in favour of regulation in the US may result in an approach where the intention of firms, as well as the potential harm to competition, could be given prominence over efficiency considerations.

If the EU were to take a similar approach to the US with respect to abuse of dominance, one would expect efficiencies to be treated as defences as in the American rule of reason and in common with the approach currently undertaken under Article 101 TFEU.

²²⁸ See Carrier, “The rule of reason: an empirical update for the 21st century,” 829-30.

²²⁹ See Obama, “Statement of Senator Barack Obama for the American Antitrust Institute.” See also Department of Justice, “Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard with Focus on the Impact of Exclusionary Conduct on Consumers.”

In the EU, there would be two possible types of defence: objective justifications and efficiency defences. Differently from efficiency defences, objective justifications are exemptions, as they refer ‘...to a form of reasoning that takes potentially unlawful behaviour outside the scope of a Treaty prohibition rather than finding a breach of the law first and then considering the application of a defence’.²³⁰ Objective justifications can be an objective necessity²³¹ or the need to meet competition.²³²

For an efficiency defence to the conduct of a dominant firm to be accepted, the defendant has to prove that: (1) economic efficiencies result from its conduct; (2) the conduct is indispensable in achieving such efficiencies; and (3) the conduct benefits consumers.²³³ Moreover, it is necessary to prove that ‘...competition in respect of a substantial part of the products concerned is not and will not be eliminated’.²³⁴ Thence, if an undertaking is ‘superdominant’, i.e., if it has a market share greater than 75% and there is almost no competition left in the market,²³⁵ it would be very difficult to argue successfully an efficiency defence as it is likely that the conduct would result in a significant market foreclosure.

The EC Guidance²³⁶ published in 2008 states that a dominant firm may justify its anti-competitive conduct ‘...on the ground of efficiencies that are sufficient to guarantee that no

²³⁰ Albors-Llorens, “The role of objective justification and efficiencies in the application of Article 82 EC,” 1755.

²³¹ When the conduct is ‘...necessary on the basis of factors external to the parties involved and in particular external to the dominant company’. European Commission, “DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses,” 78.

²³² When the conduct is ‘...a loss-minimizing reaction to competition from others’. Ibid.

²³³ Ibid., 85-90.

²³⁴ Ibid., 84(IV).

²³⁵ Ibid., 92.

²³⁶ European Commission, “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.”

net harm to consumers is likely to rise'.²³⁷ This would suggest a similar approach to the US analysis pursuant to the rule of reason where efficiencies are balanced with the harm to consumers and competition. Notwithstanding the interest of the Commission towards an effects-based approach that admits efficiency defences, the European courts do not yet appear to share this view, as the latter see efficiencies as objective justifications having the potential to exclude the alleged conduct from the application of competition law, rather than legitimising it.

The use of objective justifications in EU case-law involving abuse of dominance is a consolidated practice. In *Sirena*,²³⁸ the Court of Justice of the European Union (COJ) acknowledged the use of objective justifications. In *United Brands*,²³⁹ the COJ clarified that the objective justification requirement could be satisfied by the fact that a dominant firm is pursuing a legitimate commercial interest. However, if the actual purpose of the conduct is to strengthen the dominant's firm position, the justification should not be accepted. In fact, in *Hilti*²⁴⁰ the General Court reaffirmed the view that the purpose of the conduct could affect the satisfaction of the objective justification requirement, owing to the fact that the defendant's argument failed to show a genuine concern with the safety of its products.

The European courts have acknowledged that conduct could be objectively justified by the pursuit of legitimate commercial interests or where the harm was genuinely the result of causes external to the actions of the dominant firm, such as the shortage of a particular

²³⁷ *Ibid.*, 29.

²³⁸ *Sirena S.r.l. v Eda S.r.l. and others - Case 40-70*, para. 17.

²³⁹ *United Brands Company and United Brands Continental BV v Commission of the European Communities - Case 27/76*, para. 189.

²⁴⁰ *Hilti AG v Commission of the European Communities - Case T-30/89*, 108.

product.²⁴¹ There is not an exhaustive list of possible objective justifications, as they appear on a case by case basis; nevertheless, they will generally fall within these two main categories.

In some cases, the European courts have gone as far as acknowledging that efficiency arguments could satisfy objective justifications, albeit not as efficiency defences as suggested by the Commission. For instance, in *Microsoft*,²⁴² the General Court stated that the reduction of incentives to innovate as a result of the intervention should be dealt as objective justifications and not as efficiency defences.

...the court did not engage with the Commission's attempt to balance the possible negative impact of an order to supply on Microsoft's incentives to innovate and the positive impact on the whole industry including Microsoft. It contented itself with the conclusion that Microsoft had not made out an adequate case for objective justification. This suggests that the court will in future deal with arguments about pro-consumer efficiencies and incentives to innovate as an attempted objective justification.²⁴³

The fact that efficiencies are dealt with by the EU courts as objective justifications, rather than as defences, as is the case in the US, reduces their scope. Instead of accepting all arguments about efficiencies, there are a limited number of categories into which the efficiency arguments must fit. This differs from the US approach pursuant to the rule of

²⁴¹ See *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities - Case 77/77*, para. 23.

²⁴² *Microsoft Corp. v Commission of the European Communities - Case T-201/04*, 659.

²⁴³ Anderman, "Microsoft v Commission and the Interoperability Issue," 398.

reason, where pro and anti competitive effects are balanced, so a conduct that harms consumers or competition may be approved if the efficiency defence arguments are stronger.²⁴⁴

In the EU, once it is proven that there is a risk of elimination of effective competition and harm to consumers, it is highly unlikely that any justifications will be able to outweigh the anti-competitive effects of the conduct. It would be hard to successfully submit the applicability of objective justifications, as they would be rejected by the Commission and the courts in the EU.²⁴⁵

In terms of the burden of proof, in essence, the defendant has to come forward with evidence of justificatory efficiencies and the Commission either has to accept or disprove them in its response. In *Microsoft* the General Court stated that:

...although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC [now Article 102 TFEU] is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.²⁴⁶

²⁴⁴ See *Ibid.*

²⁴⁵ Ezrachi, *EC competition law an analytical guide to the leading cases*, 125.

²⁴⁶ *Microsoft Corp. v Commission of the European Communities - Case T-201/04*, 688.

As will be discussed in the following chapters, the Brazilian competition authority has not clarified whether the US efficiency defence or EU objective justification approaches ought to be adopted in Brazil. Nevertheless, it is possible to observe from the reasoning of case-law that its understanding is closer to the EU.²⁴⁷

In Brazil, the burden of proof falls initially on the competition authority to demonstrate the existence of a conduct of a dominant firm that, taking into account the market conditions, is capable of achieving anti-competitive effects. Then, the defendant is given the possibility of raising efficiencies and other justifications that could exempt the conduct from the application of competition law. These justifications will then be analysed by the competition authority in its response. However, in harmony with the provisions of Article 1 of Law 8,884/94,²⁴⁸ the defendant's argument will not succeed as a defence if market foreclosure and harm to consumers result from the conduct.

²⁴⁷ See chapters 5 and 6.

²⁴⁸ See p. 30.

3.4 Conclusion

The elements discussed in this section are not the only diverging aspects of the US and EU models of competition law. For instance, it has been argued that the American adversarial model of competition law enforcement, which is different to the EU administrative model, may have contributed to the caution in the US when assessing cases under Section 2 of the Sherman Act.²⁴⁹ According to this view, if there had not been private rights of action, i.e. legal grounds for initiating proceedings, or if the damage remedy was less punitive²⁵⁰ the American antitrust doctrine would probably have assumed a more ‘regulatory-oriented’ character.²⁵¹

Aspects which have influenced the development of the American and European competition policies, as well as their divergence and convergence, deserve in-depth and comprehensive investigation. However, for the purpose of this research, it has been worth highlighting the elements discussed in this section given that they are aspects that will assist the understanding of the development of the Brazilian competition policy.

Many of the elements of divergence between the US and the EU have resulted from the influence of liberal or more regulatory policies on the development of their respective systems of competition law. Indeed, the acceptance of efficiency defences, combined with the high standard of proof of actual or likely effects in the US appear to result from a *laissez-*

²⁴⁹ Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?,” 8.

²⁵⁰ E.g. if it was limited to the recovery of the actual damages, or if the enforcement of treble damages was optional.

²⁵¹ Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?,” 17.

faire ideology, which has led to a more conservative competition policy. Conversely in the EU, the need to prove the risk of elimination of competition, combined with the view of efficiencies as objective justifications allows for a more interventionist competition policy.²⁵² This places dominant firms in a larger liability zone in comparison to the US. These are considerations that should be borne in mind when assessing elements of convergence and divergence as well as the development of Brazilian competition law and policy.

It emerges from the analysis that there has been convergence between the EU and the US models, especially in recent years, on the treatment of certain types of conduct. A point of convergence is the will in both jurisdictions to protect the process of competition rather than competitors themselves.²⁵³ In order to do so, competition authorities look for evidence of an anti-competitive conduct that causes consumer harm before acting, embracing an effects-based analysis of the conduct. Both jurisdictions also adopt market shares as an aid to identify monopoly power, but also consider many other circumstances in the relevant market, such as the power of the firm to exclude competitors, entry barriers and so on.

However, there are still many areas where the US and the EU approaches to abusive conduct diverge and most of them seem to reflect a different philosophical understanding about the way in which the process of competition ought to be protected. For instance, in the EU it has been accepted that dominant firms have special responsibilities to avoid harming the process of competition,²⁵⁴ whilst in the US there are no such restraints.²⁵⁵

²⁵² See e.g. the approach of the General Court of the European Union in *Microsoft Corp. v Commission of the European Communities - Case T-201/04*.

²⁵³ Varney, "Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness," II, A.

²⁵⁴ See e.g. *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities - Case 322/81*, para. 57.

Finally, it emerged that in the US, efficiency defences are used to balance pro and anti competitive effects; this, combined with the high standard of proof of likely effects, seems to drive the adoption of a more conservative approach to antitrust. In the EU, by contrast, the need to prove the risk of elimination of competition, combined with the view of efficiencies as objective justifications allow for a competition policy that places dominant firms in a larger liability zone than in the US. These are aspects that influence or reflect the adoption of an apparently more ‘liberal’ approach to competition policy in the US.²⁵⁶ Nevertheless, such a ‘liberal’ approach is far from ‘set in stone’, especially considering the declared intention of the US Department of Justice (DOJ) to be tougher on monopolisation issues and recent political changes under the Obama administration.²⁵⁷

²⁵⁵ De Smet, “The Diametrically Opposed Principles of US and EU Antitrust Policy,” 357.

²⁵⁶ See *Ibid.*

²⁵⁷ See Department of Justice, “Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard with Focus on the Impact of Exclusionary Conduct on Consumers.”

4. Chapter Three - Market Power Control in Brazil

4.1 Introduction

Previous chapters have set the scene for an analysis of the Brazilian competition case-law and for a comparative analysis of the Brazilian competition law and policy with the US and EU approaches to abuse of dominance.

Chapter three explains how competition law is interpreted and applied in Brazil with respect to the establishment of market power. It explores how the BCPS has developed a policy shaped by the peculiarities of its legal system, economy and institutional framework. This chapter also discusses how the BCPS has sought to reconcile the different views of the EU and the US when enforcing its competition law. Brazil has also adopted a unique legal approach in regards to the constituent legal elements of abuse and the underlying philosophy for conceptualising market power. In order to identify the areas of influence of the US and EU models upon the approach of the Brazilian competition authority to dominance, as well as the peculiarities of the Brazilian application of the law, various decisions dealing with the control of market power are analysed.

Monopoly power, or dominance, is generally understood as a situation where an undertaking has enough economic power to behave independently from competitors and consumers in the market. Analysing the manner in which a country enforces its competition law in regards to abuse of dominance or market power may reveal the views of policy-makers on how the market should be regulated. In order to explain where the Brazilian competition policy is positioned in the spectrum of control of market power, consisting on the one hand of the more liberal American approach and on the other hand of the more regulatory approach of the

EU, this chapter analyses the constituent elements of dominance under Brazilian statute law and case-law.

The goals of the Brazilian competition policy are examined, from the legislative purpose behind the law to the view of members of the BCPS in relation to the future of competition policy in Brazil. Moreover, the definition of the relevant market is explained to identify the elements taken into consideration during the analysis of the market, as well as elements of convergence or divergence with the US and EU models. The Brazilian conceptualisation of dominance is assessed, highlighting misunderstandings created by the legal threshold of presumption of dominance, as well as the approach of the competition authority to collective dominance. This chapter also discusses the Brazilian rule of reason and the *per se* rule and explores the role of efficiencies and objective justifications. Finally, the concept of abuse is analysed, followed by a discussion on the special responsibilities of dominant firms.

4.2 The goals of competition policy

Law 8,884 of 1994 was enacted within the framework of the policies of the then President Itamar Franco²⁵⁸ as a means to fight inflation²⁵⁹ and support the monetary stabilisation plan.²⁶⁰ This differs from other jurisdictions, where competition law was enacted due to concerns with abuse of economic power. For instance, in the United States antitrust law²⁶¹ began in the late nineteenth century which was a period of industrialisation and considerable socioeconomic change, when powerful corporations were able to control emerging markets via the creation of trusts.²⁶² This practice was perceived to be against the public interest, as well as harmful to competition, to the existence of smaller firms, consumer welfare and to some extent, to the democratic process.²⁶³

In Brazil, the few years that followed the enactment of the law were characterised by a liberal approach of the competition authority and the Executive even interfered in CADE's enforcement of the law²⁶⁴ in an attempt to increase the competition authority's intervention in the economy. Under Gesner Oliveira's presidency of the CADE, between 1996 and 2000, the approach of the BCPS in formulating competition policy appeared to be largely in harmony with the neo-liberal stance of the President of the Republic, Fernando Henrique Cardoso.²⁶⁵ In fact, the CADE declared in 1997 that competition law and policy had the goal of

²⁵⁸ See Kinzo and Dunkerley, *Brazil since 1985: politics, economy and society*, 116.

²⁵⁹ See Bello, *Autonomia Frustrada: o Cade e o poder econômico*, 54.

²⁶⁰ See p. 30.

²⁶¹ In this research the terms 'antitrust law' and 'competition law' will be used interchangeably.

²⁶² Neale and Goyder, *The antitrust laws of the United States of America a study of competition enforced by law*, 15-21.

²⁶³ This explains why, in contrast with the EU, competition law is usually referred as antitrust law in the United States.

²⁶⁴ See Bello, *Autonomia Frustrada: o Cade e o poder econômico*.

²⁶⁵ For an analysis of the presidency of Gesner Oliveira, see *Ibid*.

stimulating the entry of new players into the market.²⁶⁶ This can be understood as the desire to counter the creation of entry barriers by private and public undertakings that prevented the entry of new players. This is significant from a historic perspective in light of the fact that a considerable number of multinationals were entering the Brazilian market at the time. Moreover, the CADE declared that the development of competition law in Brazil was founded on the promotion of competition which would lead to enhanced allocative and productive efficiencies and hence greater wealth for society as a whole. This policy aimed at promoting the entry of new players into the market, countering barriers to entry by eliminating the previous protectionist policies, import prohibitions and high import duties, which were obstacles to the efficient and autonomous functioning of markets.

The above stance against barriers to entry was in harmony with the liberalisation of the economy that was taking place in the 1990s. Nevertheless, there are still high barriers to entry in many markets in Brazil and the removal of these barriers is important for the development of the economy, as well as for the increase in foreign direct investment (FDI).²⁶⁷ In common with other BRIC countries, Brazil has attracted more FDI than many OECD countries in the recent years:²⁶⁸ almost 45,058 billion US dollars in 2008.²⁶⁹ Moreover, as a result of the growth of the Brazilian economy during the global economic recession, as well as the 2014 World Cup and the 2016 Rio Olympics, it could be expected that there will be further FDI growth in Brazil in the years to come. In this respect, as revealed by the interviews, members of the BCPS seem to be willing to demonstrate that competition rules are interpreted in Brazil

²⁶⁶ See Silva, *Companhia Antarctica Paulista/Companhia Cervejaria Brahma - 08012.005846/99-12*, 8-9.

²⁶⁷ See e.g. Estrin and Campos, "Entry and barriers to entry in emerging markets."

²⁶⁸ See OECD Public Affairs Division and OECD Public Affairs and Communication Directorate, "Policy brief: the social impact of foreign direct investment," 2.

²⁶⁹ In comparison, Japan's FDI in 2008 reached only 24,426 billion US dollars and India's FDI reached 41,544 billion US dollars. Unctad, "Major FDI Indicators."

in a similar manner to other major jurisdictions. Indeed, the interviews indicated that most members of the BCPS had the intention to formulate a policy that is in general harmony with the American and EU interpretations of competition law, thus reassuring multinationals that they will be judged under general principles of competition law. As one Councillor explained:

The first reason [for citing EU and US cases in CADE's decisions] is to give more authority to the decision, especially when dealing with situations that have not been decided previously by the CADE or if the cases are too old, in order to show that we are aligned to what is being done outside Brazil. The second reason is to make sure that we are treating a conduct in a similar fashion to other countries.

Nevertheless, it is worth noting that the majority of the interviewees believed that the CADE would create its own unique policy over the coming years, albeit one based upon the foundations derived from both the American and EU models of competition law. According to one Councillor, the Brazilian competition policy '...will be something unique; closer to the EU than it is now, but definitely unique'. Another Councillor made the following comment in respect to where the Brazilian policy is heading:

...the US [influence] is still very important, but it is not predominant anymore. There is an attempt to search for a Brazilian system of its own, taking into consideration the peculiarities of the Brazilian market and Brazilian law, but this is difficult. However I believe that in the next 15 years the CADE will consolidate its jurisprudence authority and coherence of its body of case-law.

In essence, there is evidence of an intention to adapt the international definitions and standards to the particular socioeconomic needs of the Brazilian market. Promoting market fairness and allowing companies to act freely, but at the same time being mindful of not harming the development of competition in the market. Despite this policy goal, there remain obstacles to the creation of a level playing field for multinational companies. For instance, imports cannot compete with national products in many sectors because of high barriers to entry, such as transportation costs, the existence of brand-fidelity as well as complex and expensive distribution systems.²⁷⁰

Many efforts have been made to improve the enforcement of competition law in Brazil.²⁷¹ However, it seems that the Brazilian competition authority is falling behind in terms of regulation of abuse of dominance. In fact, many Councillors highlighted in the interviews their concern with unilateral behaviour because of the level of concentration of markets in Brazil.²⁷²

In addition, a Councillor pointed out that because of the level of concentration in the markets ‘...unilateral behaviour in Brazil causes much more harm to society than cartels’. Such comments were not intended to diminish the relevance of cartels, but to make it clear that unilateral behaviour should receive greater consideration in Brazil. Indeed, one Councillor stated that ‘...there are cartels in important sectors of the Brazilian economy, but when you focus too much on cartels, you may neglect unilateral behaviour that can be even more harmful’. Therefore, many members of the CADE seem to be worried about the lack of

²⁷⁰ Bello, *Autonomia Frustrada: o Cade e o poder econômico*, 127.

²⁷¹ For instance, the development of a competition bill which will replace Law 8,884/94 and will address many institutional and procedural issues faced by the competition authority. See Cadoca, *Competition Bill n. 3,937/04*.

²⁷² See p. 58.

strong control over unilateral behaviour. Although the institutional reforms²⁷³ that will place the SDE within the CADE's institutional body will not give the CADE the power to define the policy agenda, these may increase the talks between the two institutions. This, together with the increase in the resources available, may enhance the control of abuses by dominant firms.

²⁷³ See section 2.4.

4.2.1 Consumer welfare

Although it could be said that competition law is intended to protect consumers from the harm caused to competition, the sort of consumer welfare envisaged may change from jurisdiction to jurisdiction. For instance, in the United States competition policy pursues consumer welfare through an increase of overall economic efficiency.²⁷⁴ In fact, it could be argued that the prevailing influence that has shaped modern antitrust law in the US is still Chicagoan.²⁷⁵ Under the economic analysis of the Chicago school of thought, ‘...the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth’.²⁷⁶ Therefore, consumer welfare is understood in the US within the context of overall economic efficiency, with neutrality in relation to how the welfare is distributed. It appears to follow Kaldor-Hicks’ view that total welfare is increased assuming that the benefits generated by a conduct are greater than the harm caused by it.²⁷⁷ Thus, there is no immediate concern with how many of the benefits of the conduct are passed on to consumers.

Consumer welfare is pursued by EU competition law as well, but it appears from the courts’ decisions²⁷⁸ and the speeches²⁷⁹ of Neelie Kroes, the Ex-Competition Commissioner, that the

²⁷⁴ See Posner, *Antitrust law*, IX.

²⁷⁵ Rosch, “I Say ‘Monopoly’, You Say ‘Dominance’: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?,” 1.

²⁷⁶ Bork, *The antitrust paradox a policy at war with itself*, 111.

²⁷⁷ Mercurio and Medema, *Economics and the law from Posner to post-modernism*, 26. On concepts of efficiency and consumer welfare, see Rojer J. Van den Bergh *European Competition Law and Economics*, p. 29-30-38

²⁷⁸ See *Van den Bergh Foods Ltd v Commission. Manufacture française des pneumatiques Michelin v Commission*, vol. 2003. *Hoechst AG v Commission - Joined cases 46/87 and 227/88*.

²⁷⁹ For instance, Neelie Kroes mentioned the ‘...benefits of competition policy in general terms - better goods and services, more choice, and lower prices – [but] also (...) the benefits of competition enforcement in far more

adverse effects of anti-competitiveness in the market upon consumer welfare should be understood as the wealth transfer from consumers to anti-competitive undertakings. A consumer welfare approach to competition policy in the EU would therefore refer to a concern with a decrease in consumer surplus.²⁸⁰ Examining the EU courts' decisions²⁸¹ and the DG Competition Ex-Commissioner's speeches, it can be argued that EU competition policy pursues consumer welfare in 'Pareto' terms.²⁸² Thus, the conduct of dominant firms can benefit producers as long as they do not harm consumers directly or indirectly by eliminating effective competition in the market.²⁸³ This view does not assume that benefits resulting from efficiencies will automatically be passed on to consumers. Moreover, '[t]he economic goal of EC competition law appears to be concerned with improving allocative efficiency in ways that do not impair productive efficiency so greatly as to produce no increase (or even a net reduction) in total consumer welfare'.²⁸⁴ This therefore differs from the US view discussed above,²⁸⁵ which does not have such concern with allocative efficiency and consumer surplus.

specific terms. In terms of what the competition rules do every day for consumers both as buyers of goods and services, and as taxpayers. For example, in the last years, the Commission has acted against more than a dozen cartels on markets worth billions of euros. (...) 6 billion euros of direct benefits for consumers and businesses through cartel enforcement in the last four years, and the 20 billion euros of indirect savings through deterrence'. Kroes, "EU competition rules – part of the solution for Europe's economy."

²⁸⁰ Motta, *Competition policy theory and practice*, 19.

²⁸¹ See *Van den Bergh Foods Ltd v Commission. Manufacture française des pneumatiques Michelin v Commission*, vol. 2003. *Hoechst AG v Commission - Joined cases 46/87 and 227/88*.

²⁸² See Bergh and Camesasca, *European competition law and economics a comparative perspective*, 41-43.

²⁸³ This view seems to be supported by the COJ decisions in cases like *Continental Can*, *British Airways*, as well as by the General Court's *Wanadoo* decision, which reaffirmed the COJ's view expressed in *Continental Can*. In these cases the Courts stated that consumers can be harmed directly, but also indirectly when the effective competition structure is harmed.

²⁸⁴ Bishop, *The Economics of EC Competition Law*, 32.

²⁸⁵ See p. 118.

In Brazil, Law 8,884/94 states that competition law should protect consumers.²⁸⁶ This statement implies that consumers should not be harmed by anti-competitive conduct. However, in the view of one Councillor of the CADE, the welfare created by competition should be understood ‘...according to Kaldor-Hicks’. Another Councillor stated that he did ‘...not believe that a policy that impedes the increase of total welfare because of a discussion about who is going to get which slice of the pizza is fair’.

Nevertheless, the predominant view expressed in the interviews was that consumer welfare was pursued in the sense that for the conduct in question to be considered permissible its resulting efficiencies had to benefit, at least in part, consumers. According to one Councillor, ‘...in a case where there is efficiency, in the sense that costs would be reduced, but there is an increase in prices for consumers, the conduct would be allowed in other countries, but would be illegal in Brazil. There cannot be harm for consumers’. In addition, another Councillor stated that the Council looked ‘...only at harm to consumers in terms of price, choice and quality’. It can be said that consumer surplus is pursued in Brazil in a similar manner as that of the EU, given that efficiencies cannot justify harm to consumers and the competition authority tries to ensure better products, more choice and better prices.²⁸⁷ Conduct resulting in the maximisation of productive efficiency would not be automatically considered as benefiting consumers, since there is no guarantee that the benefits of these efficiencies will be passed on to consumers in the form of lower prices. Moreover, it is possible for such efficiencies to occur without benefiting consumers, as they might be retained by the undertakings in question.

²⁸⁶ Brazil, *Law n. 8,884 of 11 June of 1994* Article 1.

²⁸⁷ See Rosch, “I Say ‘Monopoly’, You Say ‘Dominance’: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?,” 4-5.

At present, considerable attention is paid by the BCPS to ways of enhancing efficiencies that increase consumer welfare.²⁸⁸ However, there was no consensus amongst those interviewed regarding the need for a conduct to directly benefit consumers. Some Councillors were of the view that as long as there was no harm to consumers, conduct should be considered lawful under competition law²⁸⁹ whilst others thought that there had to be benefits for consumers.²⁹⁰ There also appeared to be a minority view which was sceptical about the benefits of productive efficiencies to consumers.²⁹¹

These opinions may be explained by the composition of the Council. In ideological terms, some Councillors regard themselves as left-wing or socialists whilst others declared themselves as liberals. However, this divergence has to be placed in perspective, as Councillors are aware that their decisions are expressed within the context of a plenary session,²⁹² so they have to compromise or at least appear moderate to convince others to follow their decisions. Thus, it is very unlikely that decisions would be politicised by views at either end of the ideological spectrum.

²⁸⁸ Such as investments in research and development (R&D) and new technologies.

²⁸⁹ In the words of one Councillor, 'there cannot be harm for consumers'.

²⁹⁰ For instance, according to one Councillor, the competition authority looks for 'a total welfare with the condition that there are benefits for consumers as well'.

²⁹¹ As stated by one Councillor: 'it will be very unlikely for you to see me approving for instance a merger based only on the argument of efficiency and the whole thing of productive efficiency is pretty much Chicago'.

²⁹² CADE's decisions are formulated by one of the seven Councillors and then voted in a plenary session (i.e., a session composed of all Councillors), as well as the General Attorney and the representative of the Public prosecution. Only the Councillors vote in the session and a decision is made by majority.

4.3 Defining the relevant market

The CADE's Resolution 20²⁹³ of 1999 contains brief guidelines as to how to analyse a conduct under Law 8,884/94. The resolution's recommended first step is to identify the nature of the practice, its legal classification and the existence of evidence of the conduct. Arguably, this stage would be unnecessary if it is found that the defendant does not have dominance, so this could be part of the final analysis of the conduct. In the second step, the Brazilian competition authority defines the relevant product and geographic markets, the market shares of the defendant and its actual and potential competitors, as well as the existence of barriers to entry. As a third step, it analyses the specific practice, including its harm and benefits, and, according to the Resolution, the competition authority 'balances' them to determine whether the harm caused by the conduct could be offset by its benefits. There are no explanations as to how this final step should be undertaken.²⁹⁴

Resolution 20 does not offer a proper structure for the analysis and arguably should be replaced by more suitable guidance. Detailed guidelines offering a structure of analysis following the definition of the relevant market, the establishment of dominance and the finding of abuse (reflecting Article 20 of Law 8,884/94 which prohibits the abuse of dominance) could offer more certainty not only for undertakings and practitioners, but also for members of the BCPS. Indeed, the lack of a clear structure for the analysis has resulted in the development of a policy which is at times incoherent, especially considering the use of international literature and authorities in the analysis of conduct.

²⁹³ Conselho Administrativo de Defesa Econômica, "Resolution n. 20."

²⁹⁴ See Conselho Administrativo de Defesa Econômica, "Resolution n. 20," 6-7.

In contrast to the approach of Resolution 20 described above, the first step in the assessment of a conduct in the US and the EU is to define the relevant market. According to the CADE, the concept of the relevant market can be understood as the space where competition takes place.²⁹⁵ It encompasses the various competing products in a particular geographic area, taking into account their substitutability. When determining the relevant market, it is necessary to take into account a product's characteristics, purpose, geographic and temporal dimension, as well as the real and potential competition.²⁹⁶

One of the earliest definitions of the relevant geographic market after the enactment of Law 8,884/94 was made in *Siderúrgica Laisa*,²⁹⁷ which was decided in 1995. The CADE established that the relevant geographic market could be understood as the territory where companies that offer certain products compete under relatively homogeneous conditions that are substantially different from neighbouring markets.²⁹⁸ The relevant product market, instead, encompasses products that can reasonably substitute each other with respect to their purpose, quality and price.²⁹⁹

As established in 1997 in *Panex*,³⁰⁰ the standard procedure for determining the relevant market is to identify the substitute products whose demand is sufficiently elastic in response to a small, but significant and non transitory increase in price by a hypothetical monopolist, i.e., the SSNIP test. The SSNIP test supposes a small but significant and non-transitory

²⁹⁵ *Kimikoil Transportes Especializados de Produtos Líquidos v Transdepe S.A., Esso Brasileira de Petróleo Ltda - 0045/1992.*

²⁹⁶ *Jovita Indústria e Comércio Ltda - 56/95, vote of Councillor Marcelo Soares.*

²⁹⁷ *Siderúrgica Laisa SA - 16/94.*

²⁹⁸ *Ibid.*, 12.

²⁹⁹ Forgoni, *Os Fundamentos do Antitruste*, 241.

³⁰⁰ *Panex SA Indústria e Comércio, Alumínio Penedo Ltda and Alcan Alumínio do Brasil SA - 0079/1996, 1123.*

increase in price, considering that all other market conditions remain the same.³⁰¹ If the price increase causes a reduction in the number of consumers that would make it unprofitable for the undertaking to increase prices, then the next best substitute product will be added to the product group.³⁰² A similar approach is undertaken to determine the relevant geographical market,³⁰³ where the analysis begins with the area of the undertaking and applies the SSNIP test. If the reduction in the number of purchasers is sufficient to make it unprofitable to the undertaking to increase prices, then the location which best substitutes the geographic area of the undertaking will be added and the SSNIP test will be applied on the expanded area. This process is repeated as many times as necessary until it is determined that, within a certain geographical area, the undertaking would be able to apply a small but significant and non-transitory increase in price.

The SSNIP test is also used for defining the relevant market in the EU, even though the test has American origins. However, the SSNIP test is applied with caution in both jurisdictions in order to avoid the ‘cellophane fallacy’.³⁰⁴ The cellophane fallacy originated from the American Du Pont case, where Du Pont, a cellophane producer, argued that cellophane did not constitute a separate relevant market because it competed with other packaging materials (e.g. aluminium foil, wax paper and polyethylene). The issue was that Du Pont was a monopolist in regards to the production of cellophane and it had set monopoly prices for its product. These were the prices that consumers had in mind when considering substitutes for cellophane. Had the prices been at a competitive level, consumers would have perceived cellophane as a separate market. The US Supreme Court failed to find that the high prices

³⁰¹ See U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines,” 1.0.

³⁰² Ten Kate and Niels, “The Relevant Market: A Concept Still in Search of a Definition,” 304-305.

³⁰³ See Macher and Mayo, “Making a Market Out of a Mole Hill?”

³⁰⁴ See *United States v E. I. Du Pont & Co*, vol. 377.

could be a sign that Du Pont was already exercising its monopoly power. Although the SSNIP test has its limitations for the analysis of cases on Section 2 of the Sherman Act, given that it often deals with firms that have market power, and other factual elements help the analysis of market power, there is no definite alternative in the US to the SSNIP test.

The SSNIP test was followed by the EU for the first time in 1992 in *Nestlé/Perrier*³⁰⁵ and was officially adopted by the Commission in 1997 in its Notice for the Definition of the Relevant Market.³⁰⁶ In the EU, concerns involving the use of the SSNIP test for abuse of dominance cases seem to have reinforced the use of a qualitative analysis for the definition of the relevant market.³⁰⁷ The reliance on qualitative analysis to define the relevant market can, however, result in a narrow definition of the relevant market. In any case, the SSNIP test in the EU seems to be confined to a first-step in the analysis of the relevant market, especially considering the limitations posed by the cellophane fallacy.³⁰⁸

Moreover, there are cases where it is not possible to apply the SSNIP test. For instance, in the *British Interactive Broadcasting*³⁰⁹ decision, the Commission declared that it was not possible to define the relevant market using the SSNIP test because there was no data available since the product in question had yet to be launched.³¹⁰

³⁰⁵ See European Commission, *Decision de la Commission du 22 juillet 1992 relative à une procédure au titre du règlement (CEE) n. 4064/89 du Conseil - Nestlé/Perrier.*

³⁰⁶ See European Commission, "Commission notice on the definition of the relevant market for the purposes of Community competition law," 15-17.

³⁰⁷ See e.g. *France Télécom SA v Commission of the European Communities - Case C-202/07* and *Microsoft Corp. v Commission of the European Communities - Case T-201/04.*

³⁰⁸ Jones and Sufrin, *EC Competition Law*, 76.

³⁰⁹ European Commission, "Commission Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.539 - British Interactive Broadcasting/Open)."

³¹⁰ *Ibid.*, 13.

In Brazil, the CADE published Resolution 15³¹¹ in 1998, which stated amongst other things that the relevant product market referred to all the goods and services considered substitutable in respect of consumer demand because of their characteristics, price and purported use.³¹² The Resolution did not mention the adoption of the SSNIP test, as it was only in 2001, with the publication of the Horizontal Merger Guidelines of SDE and SEAE, that the SSNIP test was formally adopted in Brazil; as stated therein:

The definition of a relevant market is the process of identifying a set of economic agents, consumers and producers which impact prices and quantities for the firm that results from the operation [e.g. a merger]. Within the limits of the market, the reaction of consumers and producers to changes in relative prices – the degree of substitution between products or the producers’ sources – is greater than outside these limits. The ‘hypothetical monopolist’ test (...) is the analytical tool to define the relevant market used to check the degree in which goods and services can be substituted.³¹³

When applying the SSNIP test, the CADE establishes the smallest group of products and geographic area where a hypothetical monopolist would be able to impose a small, but significant and non-transitory increase in prices.³¹⁴ For the increase in price to be material, it would generally need to be in the region of 5% and 15% depending on the particular case. The relevant time period to be considered under the test is of at least a year. In the US and the

³¹¹ Conselho Administrativo de Defesa Econômica, “Resolution n. 15.”

³¹² See *Ibid.*, 5.

³¹³ SDE/SEAE, “Horizontal Merger Guidelines,” 28. The Horizontal Merger Guidelines are not legally binding, but are usually followed by the SDE, SEAE and CADE.

³¹⁴ SDE “*Ex Offício*” v *Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49*, para. 5.1, 10.

EU the price increase considered under the SSNIP test is only between 5% and 10%,³¹⁵ whilst in Brazil an increase up to 15% may be considered as well. This different approach was adopted by the SEAE/SDE Horizontal Merger Guidelines³¹⁶ and seems to reflect a view that, in certain cases, an increase in prices of 15% could represent a more realistic approach to the reaction of consumer behaviour with respect to price increases. This is especially the case considering that Brazilian consumers are generally ill-informed about price formation and tend to pay purchases in instalments. As a result, an increase in price would have to be greater to impact demand.

The CADE does not appear to have developed a consistent position in regards to avoiding the cellophane fallacy when using the SSNIP test. This may be due to the fact that guidance for the definition of the relevant market via the use of the SSNIP test is offered under the SDE/SEAE Horizontal Merger Guidelines whilst Resolution 15 of the CADE suggested the use of product substitutability. This appears to have resulted in an inconsistent use of the SSNIP test for the definition of the relevant market. The case-law illustrates this issue. For instance, in *Microsoft/TBA*,³¹⁷ an abuse of dominance case decided in 2004, both the SDE and the CADE showed concerns to avoid the cellophane fallacy and it was stated that, in accordance with the European Commission's notice on the definition of the relevant market for the purposes of Community competition law,³¹⁸ the criteria for the definition of the

³¹⁵ See European Commission, "Commission notice on the definition of the relevant market for the purposes of Community competition law," 17. U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," 1.11. The US guidelines refer to a 5% increase in prices, but the agencies have used greater and smaller percentages, depending on the characteristics of the market.

³¹⁶ SDE/SEAE, "Horizontal Merger Guidelines," 8.

³¹⁷ SDE "*Ex Officio*" v *Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49*.

³¹⁸ European Commission, "Commission notice on the definition of the relevant market for the purposes of Community competition law."

relevant market should be differentiated if the case involved a merger or a conduct.³¹⁹ However, as demonstrated by *AmBev*,³²⁰ an abuse of dominance case decided later on in 2009, this approach does not appear to be always taken into consideration. In fact, when defining the relevant market in the *AmBev* case, the presiding Councillor simply used the same definitions of two previous merger cases in which *AmBev* was involved.³²¹

The definition of the relevant market is subject to a certain degree of discretionary interpretation. On some occasions the relevant market can be defined narrowly³²² but it can also be defined widely,³²³ encompassing even the whole international market. However, the competition authority stated that for a geographic market to be considered as global, the mere presence of imports is not enough. The international trade flux has to be at least equivalent to the domestic consumption and the product has to be homogeneous, so it would be impossible to distinguish between the product commercialised internationally and the one commercialised nationally.³²⁴

In *Merck/M.B. Bioquímica*,³²⁵ the relevant product market was defined as the market of vacuum glass and plastic tubes for collecting blood samples. The various types of these tubes were used for different medical exams, so in theory each type of tube could constitute a

³¹⁹ See Vote of Councillor Ronaldo Porto Macedo Júnior *SDE "Ex Offício" v Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49*, 16-17. See also the SDE's report on *Ibid.*, para. 205.

³²⁰ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*.

³²¹ *Ibid.*, para. 13.

³²² As in *Microsoft/TBA*, where the relevant product market was defined as the sale of software and IT services authorised by Microsoft to sell to the government. See *SDE "Ex Offício" v Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49*, sec. 5.1.1, 15.

³²³ As in *TV Globo*, where the winning vote of Councillor Romano considered the TV subscription as the relevant product market, which is a wider definition in respect of the Presiding Councillor, who considered the DTH distribution of audio and TV signals as the relevant product market. See *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*, 8, 28.

³²⁴ *Oberdorfer S.A., Kaspar e Agres Oberdofer, ELETROLUX Ltda - 0062/1995*, 669.

³²⁵ *Labnew Indústria e Comércio Ltda v M.B. Bioquímica Ltda - 08000.013002/1995-97*.

distinct product market. However, the CADE affirmed that, if this approach were to be adopted, too much emphasis would have been placed on the demand side, resulting in a market that would be defined too narrowly.³²⁶ The integration of the production lines was such that the manufacturers produced a whole range of tubes and there would be no significant costs if they decided to switch production. The CADE decided not to distinguish between the types of tubes when defining the relevant product market.³²⁷ The low sunk costs resulting from manufacturing new ranges of tubes is an element that would be taken into consideration both in the US and in the EU when analysing potential competition. In regards to the geographic product market, although imports were significant (64.9% in 1994 and 70.9% of the market in 1995), the relevant geographic market was defined as national. This was due to the fact that it was difficult for medical clinics to purchase the tubes directly from foreign manufacturers because of distribution obstacles, as well as costs and difficulties involved in the storage of excess stock. Therefore, a variety of aspects in the light of the particular circumstances of the case were taken into consideration when defining the relevant market.

Some Brazilian authors have argued that the CADE tends to define the relevant market too narrowly when formulating a decision.³²⁸ However, the majority of the interviewed members of the BCPS rejected claims that there is a tendency to define the relevant market either too narrowly or too widely. According to one Councillor:

³²⁶ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3170.

³²⁷ See *Ibid.*

³²⁸ See, for instance, Forgioni, *Os Fundamentos do Antitruste*, 261.

In merger cases, when we believe that it might be too expensive to go in depth into the relevant market analysis, we tend to adopt a narrow definition, but then we are ‘more lenient’ when analysing barriers to entry, etc. In abuse of dominance cases things are different because the relevant market is very important to find dominance, so we tend to be more precise.

Interviewed members of the competition authority appeared to be willing to define the relevant market for abuse of dominance cases in a wider sense than when analysing mergers. This may result from the relevance that the finding of dominance may have to the outcome of an abuse of dominance case. The concern of some Councillors with defining the relevant market in a way that is not considered as ‘too narrow’ results in a definition of the relevant market that appears to be wider than the EU definition. In fact, interviewed UK lawyers that notified mergers to the BCPS stated that they were surprised by the way that the competition authority defined the relevant market. According to one of them:

We are used to the EU definition of the relevant market,³²⁹ so we defined it in the same way and we thought that we would be in trouble with the Brazilian competition authority. However, to our surprise, they defined it very widely and we ended up with a very low market share. We are still wondering how they came to that conclusion.

³²⁹ The Commission has often been criticised for defining the relevant market too narrowly. See Jones and Sufrin, *EC Competition Law*, 352.

In *AmBev*,³³⁰ the relevant downstream product market was defined as the market relating to the sales of beers in bars and other traditional distribution channels, including snack bars, restaurants, discotheques and other types of entertainment venues.³³¹ This definition resulted from the fact that in these distribution channels there is not generally a wide variety of beer brands and the consumer demand is not substantially affected by higher beer prices; the demand is relatively inelastic. The loyalty programme of AmBev consisted in giving discounts in the form of loyalty points to the purchaser of beers bottled in reusable glass bottles³³² for the purposes of selling cold beer to be consumed within the premises of the points of sale.³³³ AmBev did not give loyalty points for sales of their canned beers, or beer sold outside points of sale. The relevant downstream geographic market was defined as ‘the local area’, which could be understood as the geographical surroundings of points of sale. This definition took into consideration the fact that consumers of beer sold in points of sale often venture to surrounding areas of where they reside.

It was stated by a Councillor that ‘...if the results indicate that there is no dominance even in a narrowly defined market, (...) then we can define it narrowly and there would be no need to endeavour into an in-depth analysis of the conduct’. This is an interesting comment, as it suggests an adjustment of the definition of the relevant market in accordance with the market share that would result from it, which is not a method that ensures certainty to companies operating in the market.

³³⁰ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

³³¹ *Ibid.*, para. 14-16.

³³² As opposed to aluminium cans that could be taken away from the point of sale.

³³³ Points of sale include places where beers are consumed in the premises, such as bars, entertainment venues, discotheques. In this respect, supermarkets are not points of sale.

It was also mentioned in the interviews that there is an inclination to define the relevant market narrowly in simpler cases, where the conduct is unlikely to be anti-competitive or dominance was unlikely. Conversely, considerable caution was used when defining the relevant market in abuse of dominance cases where there was great media interest.³³⁴ This is likely to be the result of the need to ensure that every step is undertaken in a clear manner to minimise the risk of a decision being reversed by the courts on appeal. It was also highlighted by one interviewee that ‘...for the most controversial cases there is no systematic way of defining the relevant market, but there may be a propensity in being slightly more conservative in these cases’. In widely publicised cases some members of the competition authority are of the view that the market should be defined in a wide sense. It appears that the considerable scrutiny that a widely publicised case involves results in some members of the competition authority being more cautious in their analysis to mitigate any negative repercussions of the definition of market power.

From the discussion above, it seems that, although not constantly, Brazil tends to apply a wider definition of the relevant market rather than the narrow definition generally applied in the EU. This would place the Brazilian approach to the definition of the relevant market closer to that adopted in the US.³³⁵ According to the interviews, the reasons for this approach are linked to concerns of potential criticism from the courts and the business community that might arise if the CADE generally opted for a narrow definition of the relevant market. In the words of a member of the competition authority: ‘We are always careful with the analysis of the relevant market. Finding dominance is especially important for abuse of dominance cases and we do not want to send the wrong message to the business community’. Another member

³³⁴ This has been noticed by other academics as well. See Forgioni, *Os Fundamentos do Antitruste*, 261.

³³⁵ Ibid.

of the competition authority stated that the competition authority ‘...tries not to define the relevant market too widely or too narrowly in abuse of dominance cases as we always bear in mind that our cases are likely to be reviewed by the Courts.’

Brazilian competition law does not deal in great detail with the definition of the relevant market, so this is a concept open to interpretation. According to one member of the BCPS: ‘...the professional support staff is in need of more guidance in relation to how to define the relevant market’. Some interviewees even indicated that, although they look at the EU and the US for guidance when defining the relevant market, they were unaware of the existence of any differences concerning the definition of the relevant market in these jurisdictions. It appears, therefore, that there is a considerable variance of knowledge among members of the BCPS with regards to the interpretation of concepts used to define the relevant market. The variation of how the relevant market is defined may have therefore roots on the training issue discussed previously,³³⁶ as a better training could result in more accurate relevant market definitions. This would ensure that the relevant market definition is not so influenced by the publicity that is given to a certain case; instead, the same standards would be applied to all abuse of dominance cases, resulting in more legal certainty.

³³⁶ See section 2.4.3.3.

4.4 The concept of dominance

Under Brazilian competition law, the determination of a dominant position requires the undertaking or group of undertakings to have either the exclusivity of the offer or demand of a given product or service, or substantial competition must be nonexistent in regards to such offer or demand.³³⁷

In the US a monopolist is a firm ‘...with significant and durable market power - that is, the long term ability to raise prices or exclude competitors. (...) [A] "monopolist" is a firm with significant and durable market power’.³³⁸ The undertaking should have the capacity to increase prices substantially above competitive levels for a durable period of time.³³⁹ Therefore, the central criterion for qualifying an undertaking as a monopolist rests on its capacity to maintain elevated monopolistic prices in the long term.

A similar concept of dominance is adopted by the EC Guidance.³⁴⁰ In order to establish dominance, it is necessary to determine if a firm has sufficient market power to behave independently from competitors and consumer demand. However, this independence is not absolute, given that the EC Guidance and the COJ expressly mention that the firm has to behave independently ‘to an appreciable extent’. Even if a firm has its consumers,

³³⁷ *Abraciclo v Promoparty Comercial Distribuidora de Partes Automotivas de Bicicletas Ltda - 08000.016498/1996-31*, 6.

³³⁸ Federal Trade Commission Bureau of Competition, “Resource Guide to Business Competition.”

³³⁹ U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines,” 0.1.

³⁴⁰ According to the Guidance, dominance is ‘...a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers’. European Commission, “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 5-6.

competitors or potential competitors in mind, it can still be considered dominant if it has a high degree of independence from them.

In Brazil, according to Law 8,884/94, dominance will be presumed when a company has a 20% market share.³⁴¹ In the US and the EU, the thresholds are set higher at usually 50%³⁴² and 40%³⁴³ respectively. The lower thresholds in Brazil probably result from the fact that its markets tend to be concentrated. This suggests that Brazilian policy-makers endorse the view that market pluralism is beneficial for economic development.

It should be noted that the 20% threshold is only a presumption of dominance which can be challenged by the defendant company. Moreover, the competition authority will need to prove the existence of other factors that allow or would allow the defendant to behave independently in the market irrespective of competitors and consumers. Thus, in practice, the determination of a 20% market share would just form part of the evidence supporting the likelihood of dominance, so further evidence and arguments need to be presented to establish whether the defendant enjoys market power. In this respect, the Brazilian mechanics of defining market power are consistent with the US and EU approaches.

It emerged from the interviews that there is some misunderstanding among members of the BCPS in respect to the 20% threshold for presuming market power. Some Councillors stated that if a firm has more than 20% market share it will automatically be presumed dominant. In the view of one Councillor, in accordance with the law the definition of dominance in Brazil

³⁴¹ See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20(IV)(3).

³⁴² See Federal Trade Commission Bureau of Competition, "Resource Guide to Business Competition."

³⁴³ See European Commission, "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings," 14.

is structural and ‘...the legal presumption of 20% market share is respected’. Other Councillors and members of the BCPS stated that the defendant firm would be considered dominant if it had a market share equal to or greater than 20%, but only if other elements supported this view, such as the state of actual competition, market shares and quality of actual competitors, as well as the contestability of the market by potential competitors. In the words of a Councillor: ‘...the 20% presumption represents market power and the concept of dominance is more than that, because the defendant company needs market power in conjunction with the power to behave independently in the market’.

The lack of clarity in respect of the definition of dominance evidenced by these contrasting views of members of the BCPS is worrying, as it clearly shows that some of them are unaware of the proper role of the market share in defining market power. The view requiring the defendant company to have market power plus an ‘extra’ power in order to be dominant may in reality refer to the need to verify, after defining the market share of the defendant, who are the actual competitors of the defendant and their market shares, as well as the definition of potential competitors and barriers to entry. If this analysis indicates that a defendant could behave independently in the market, it would be deemed to have market power and, therefore, to be dominant.

The contrasting views and the lack of clarity among members of the BCPS may be the result of a lack of proper guidelines, as well as a training issue, which was discussed previously.³⁴⁴ The drafting of the competition law³⁴⁵ does little to resolve this confusion, since it states that dominance is presumed when a company has a 20% market share. The straightforward

³⁴⁴ See section 2.4.3.3.

³⁴⁵ See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20(IV)(3).

understanding of the presumption is that it could be rebutted by a defendant. However, in practice the reasoning that takes place in order to determine the existence of dominance consists of the competition authority anticipating the rebuttal of the presumption by arguing that not only the defendant firm must have 20% of the market share, but also that other market conditions allow it to behave with a high degree of independence from its competitors and consumers.

The 20% market share is only a minimum threshold; if it is not met it is unlikely that dominance will be determined. The market power of the firm has to be calculated by taking into account additional factors such as the existence of competitors and barriers to entry. It seems that in practice many members of the BCPS already adopt this reasoning when analysing abuse of dominance cases. However, it is important for a standard analysis to be adopted by the majority of Councillors to facilitate the emergence of a coherent case-law.

In regards to the analysis of market contestability and barriers to entry, potential competitors are considered as such if they have the potential to produce the relevant product or service promptly and with ease. Moreover, the competition authority analyses whether there are sufficient incentives for a company to enter the market; e.g. whether the price of a product encourages market entry.³⁴⁶ The CADE acknowledges the need to analyse competition in a dynamic manner,³⁴⁷ considering not only the present structure of the market, but also the way that it adapts and develops. In *Center Norte*,³⁴⁸ the CADE stated that it is important to look at

³⁴⁶ See e.g. *Iochpe-Maxion SA and Cobrasma SA - 0003/1994*, 724.

³⁴⁷ *Laboratórios Frumtost S.A and Ind. Farmacêuticas and Allergan Lok Produtos farmacêuticos - 0034/1995*, 1141.

³⁴⁸ *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13*.

barriers to entry as to consider competition in a dynamic manner.³⁴⁹ The elasticity of supply and demand is analysed and actual or potential competition is established. If all these elements point to the capacity of exercising economic power, the competition authority will find that the firm is dominant.

One important aspect of the antitrust analysis regards barriers to entry, i.e. obstacles for competitors to enter the relevant market as they have the potential to strengthen an undertaking's market power. There are two main definitions of barriers to entry, namely the Bain and the Stigler definitions. According to Joe Bain, a barrier to entry is an obstacle that allows companies to charge monopoly prices without attracting entrants into the market, for instance this would be the case of economies of scale.³⁵⁰ George Stigler's definition, instead, views barriers to entry as production costs that firms currently operating in the market do not need to bear, whilst new do.³⁵¹

Stigler's definition has been widely adopted by exponents of the Chicago school.³⁵² However, according to Hovenkamp,³⁵³ most antitrust enforcement agencies and scholars prefer the Bainian definition of barriers to entry. Indeed, it has been adopted by the US Horizontal Merger Guidelines of 1992³⁵⁴ even if many of the guidelines' provisions have been influenced by the approach of the Chicago school. In practice, the interpretation of the courts also tends to conform to the Bainian definition, although the FTC has been more receptive of

³⁴⁹ Ibid., 915-18.

³⁵⁰ See Bain, *Barriers to new competition their character and consequences in manufacturing industries*.

³⁵¹ See Stigler, *The organization of industry*.

³⁵² Hovenkamp, *Federal Antitrust Policy: the law of competition and its practice*, 659.

³⁵³ Sullivan, *Antitrust Law, Policy, and Procedure*, 660.

³⁵⁴ U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," 1.32.

the Stigler approach.³⁵⁵ Barriers to entry have to ‘...meet three requirements. First, there must be some relatively high cost that the prospective entrant must bear. Second, there must be a significant risk of failure. Third, a significant percentage of these costs must be "sunk," or unrecoverable, in the event of failure’.³⁵⁶

As with the US, the EU appears to have adopted a Bainian definition towards barriers to entry. The EU may consider barriers to entry any of the following: legal barriers; capacity constraints; economies of scale and scope; privileged access to supply; a highly developed distribution and sales network; the established position of the incumbent firms in the market and other strategic barriers to entry, such as the high costs to switch to a new supplier.³⁵⁷ One important difference between the EU and the US approaches to barriers to entry is that in the EU an element such as advertising would be a barrier to entry *per se*, whilst in the US it would have to be proven that the new competitor would not be able to recover the sunk costs of advertising through entry, or that failure would be so likely that it would dissuade potential competitors.³⁵⁸

In common with the US and the EU, the Brazilian Horizontal Merger Guidelines adopt a Bainian definition of barriers to entry, which are regarded as any element in a market that places a potential competitor at a disadvantage in relation to the incumbent firms. The SEAE/SDE Horizontal Merger Guidelines state that the following are considered barriers to entry: sunk costs, legal or regulatory barriers, resources belonging exclusively to established firms, economies of scale or scope, the level of integration of the productive chain, the

³⁵⁵ Sullivan, *Antitrust Law, Policy, and Procedure*, 660.

³⁵⁶ *Ibid.*, 661.

³⁵⁷ European Commission, “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 17.

³⁵⁸ Monti, *EC competition law*, 147.

loyalty of consumers to established brands, as well as the threat of reaction or retaliation by established competitors.³⁵⁹

In *Condomínio Shopping Center Iguatemi*,³⁶⁰ it was stated that the scarcity of suitable places for building regional shopping centres could be considered a barrier to entry.³⁶¹ In addition to the geographic factor, the high construction costs of new shopping centres were considered to be barriers to entry, suggesting a Bainian approach.

In *AmBev*,³⁶² barriers to entry were considered high because of the significant marketing and distribution costs involved in the beer sector.³⁶³ The relevant market was characterised by high investments in marketing to change the preferences of consumers in the short and long terms. There were also barriers resulting from the distribution structure, which was extensive and complex, requiring high levels of logistical know-how and investments to allow a competitor to enter the market. In the decision, it was found that competitors also enjoyed similar distribution structures, but they differed from AmBev in terms of efficiency and capacity.

In *AmBev* it was stated that substantial investments in advertising by a competitor could be neutralised by the foreclosure of distribution channels, which would increase the unitary cost of advertisements and distribution for competitors. This suggests that in Brazil high

³⁵⁹ SDE/SEAE, “Horizontal Merger Guidelines,” 52.

³⁶⁰ *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

³⁶¹ *Ibid.*, 2750.

³⁶² *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

³⁶³ *Ibid.*, para. 19-23. For a discussion on barriers to entry in Brazil, see Schymura, “Barreiras à Entrada: o caso do setor de creme dental brasileiro.”

advertising costs are not considered a barrier to entry *per se* as they are in the EU. The CADE appears to have taken an approach that is similar to the US view of barriers to entry. It stated that potential competitors were unlikely to be capable of incurring such high costs to enter the market as AmBev could neutralise the effects of advertisement through the foreclosure of its complex distribution system. This placed AmBev in an advantageous position that allowed it to behave with relative independence from other market players and consumers.

4.4.1 Collective dominance

In the EU, the COJ affirmed for the first time in 1988, in *Bodson*,³⁶⁴ that collective dominance was possible under Article 86 of the European Economic Community (EEC) Treaty, now Article 102 TFEU. In accordance with that decision, for collective dominance to be established, undertakings had to be part of the same economic entity. In *Kali & Saltz*,³⁶⁵ the COJ stated that collective dominance was found when the undertakings were linked by economic or other elements. In *Gencor*,³⁶⁶ the General Court extended the concept of collective dominance to include structural ties between the undertakings with a common policy or deduced from the market structure even where such ties did not exist. This aspect was referred by the COJ in *Compagnie Maritime Belge*:

The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.³⁶⁷

³⁶⁴ *Corinne Bodson v SA Pompes funèbres des régions libérées - Case 30/87.*

³⁶⁵ *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities - Joined cases 19 and 20-74.*

³⁶⁶ *Gencor Ltd v Commission of the European Communities - Case T-102/96.*

³⁶⁷ *Compagnie maritime belge SA and Dafra-Lines A/S v Commission of the European Communities - Joined cases C-395/96 P and C-396/96 P, 2.*

Collective dominance is applicable for horizontal and vertical relations and abuse can be perpetrated even by only one of the collective dominant firms.³⁶⁸ In case where there is no collusion or agreements among the firms, the concept of collective dominance in the EU allows firms to have their practices prohibited as an abuse of collective dominance.³⁶⁹

In the United States, the economic entities that form part of the same corporate group are considered to form a single economic unit. However, if economic entities do not belong to the same corporate group but nonetheless behave collectively, the conduct could still fall within Section 2 of the Sherman Act as a conspiracy to monopolise.³⁷⁰ In the view of Gerald F. Masoudi, an Ex-Deputy Assistant Attorney General at the US DOJ, there is little difference between conspiracy to monopolise and the prohibition of cartels. According to him, it may be easier to prove the existence of a cartel than a unilateral conduct and situations that would be considered as collective dominance in the EU, tend to be dealt with in the US under the cartel prohibition of Section 1 of the Sherman Act.³⁷¹

According to Brazilian competition law,³⁷² dominance can be attributed collectively to a group of undertakings. Indeed, during the interviews, when questioned about the existence of the concept of single economic entity in Brazil, one member of the BCPS stated that the concept:

³⁶⁸ *Irish Sugar plc v Commission of the European Communities - Case C-497/99 P.*

³⁶⁹ See Geradin et al., "The Concept of Dominance in EC Competition Law," 23.

³⁷⁰ Such as in as in *American Tobacco Co. v United States*, vol. 328. For a discussion on oligopolies and Section 2 of the Sherman Act, see Neale and Goyder, *The antitrust laws of the United States of America a study of competition enforced by law*, 157-180. *The Antitrust Laws of the USA* p. 157-180.

³⁷¹ Masoudi, "Some comments on the abuse-of-dominance provisions of China's draft antimonopoly law." See also Lopatka, "Solving the oligopoly problem: Turner's try," 847.

³⁷² See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20(IV)(1).

...is considered in the widest way possible. The Council considers even a relevant influence of one company over the other. Any control that exists over another undertaking places the company as part of the group. (...) For instance, [even outside the sphere of corporate control via share ownership] if a company is in great debt to another, this is already a reason for including the company in the economic group.

However, in contrast to the EU and in common with the US, the Brazilian competition authority analyses the abusive conduct of a collectivity of undertakings under the cartel provisions. It seems, though, that the choice of dealing with collective dominance under cartel provisions was not entirely a conscious decision. A member of the BCPS stated that ‘...we have not arrived to this area of the debate regarding single economic entities, the level of responsibility of holding companies and so on’. One Councillor also stated that ‘I have never seen a collective dominance and I am not aware of its existence in Brazil, the US or the EU’. This suggests that there is not an overall familiarity with the exact meaning of collective dominance within the Brazilian competition authority.³⁷³ Members of the BCPS seem to understand that the single economic entity concept is relevant only in respect of merger and cartel cases, so when abuse of dominance results from collective dominance it is immediately conceptualised as a cartel because in their view there would always be a certain degree of collusion among the parties. In fact, one Councillor of the CADE stated that ‘...it is impossible for firms that are collective dominant in a market to abuse their position without colluding in a certain way, so these cases are always considered as cartels’.

³⁷³ For a discussion on abuse of dominance in the EU and on how some concerted practices that may not be caught under Article 81 can be caught under Article 82 if the undertakings are collectively dominant, see Monti, “The scope of collective dominance under articles 82 EC.”

The current approach of the Brazilian competition authority seems to differ from what some academics predicted in the past. In one of the first books on Brazilian competition law, in 1966, it was advocated that a group of undertakings could abuse their power collectively and that this should be prohibited as an abuse of dominance.³⁷⁴ This modern approach of the BCPS seems to be a reminiscent of the predominant influence that the US model had over Brazilian competition law and policy, especially in the 1990s, since in the United States collective dominance is usually treated as a cartel.³⁷⁵

In addition, according to the interviews, in order for undertakings to be considered as part of the same group there has to be a legal link in terms of ownership or control and there has to be some sort of economic control exercised by one firm over the other. In the words of one Councillor:

There is no respect for the corporate veil. Here it has not been mentioned like that [as collective dominance] but the CADE has been considering that, although it is dealing with different undertakings, if they do behave as one unit, they are considered as such. However, they have to be under the control of the same legal unit.

Indeed, in the case of abuses practised by Unimed, an association of medical practitioners, the CADE did not decide against all private cooperatives associated to Unimed.³⁷⁶ The decision was issued only against the cooperatives that were accused of the behaviour. The

³⁷⁴ Shieber, *Abusos Do Poder Economico; Direito e Experiencia Antitruste No Brasil e Nos E. U. A*, 3.

³⁷⁵ Lopatka, "Solving the oligopoly problem: Turner's try," 847.

³⁷⁶ *Organização Médica Clinihauer Ltda v UNIMED - Toledo - Cooperativa de Trabalho Médico - 08000.019008/1995-96. Ministério Público da Paraíba v Unimed de João Pessoa Cooperativa de Trabalho Médico - 08000.018480/1997-28. Conselho Administrativo de Defesa Econômica - CADE, "Súmulas n. 7."* Many cases were filed against Unimed, private a health care insurer, for requiring exclusivity of its cooperated doctors.

reason for this approach is that Unimed consists of cooperatives of medical practitioners and its legal structure did not have a central holding company. Although there is a federation of the cooperatives, all Unimed practices were legally independent from each other and could not control each other. In addition, there was no proof that all the ‘branches’ were dominant in their regions and that exclusivity arrangements were always imposed. Therefore, a general decision could not be made against all the cooperatives.

It appears that there is a similar, although much narrower, concept of collective dominance in Brazil than the EU. In fact, in the EU collective dominance can be found in respect of legally independent undertakings which present themselves or act in the market collectively.³⁷⁷ When questioned about the possibility of a similar approach in Brazil, the vast majority of the members of the BCPS said that the concept of single economic entity was relevant only for the analysis of mergers and cartels as for the latter there would always be a certain degree of coordination. This may explain why there has never been a case of abuse of collective dominance in Brazil to date.

The Brazilian understanding of collective dominance appears to dismiss the possibility of abuse by firms that are dominant without any form of collusion. This view seems to result in an approach that is closer to the US, where even though such cases could be dealt with under the prohibition of conspiracy to monopolise, they are usually treated as cartel offences. Apart from the lack of knowledge of the existence of abuses practised by collectively dominant firms without collusion, another possible explanation for this approach may be that the enforcement of competition law against cartels is much stronger in Brazil than against

³⁷⁷ See Monti, “The scope of collective dominance under articles 82 EC,” 133.

unilateral behaviour. Most of the resources are focused on fighting cartels which are easier to investigate and punish than collective abuses, due to the regulatory structure currently in place and the possibility of coordinating efforts with other branches of the government.³⁷⁸

³⁷⁸ Cartels are considered a crime and, as such, the federal police and the public prosecutors can be mobilised for its investigations.

4.5 Rule of reason, *per se* rule, and the role of effects, efficiencies and other justifications

It is important to note that due to Brazil's hybrid system of competition law, although the CADE adopts the EU definition of abuse, a version of the American rule of reason is used to determine whether a conduct is abusive or not.³⁷⁹ The interviews with members of the BCPS suggested different levels of knowledge amongst some members in relation to the rule of reason in this context. While some had a fair idea of the meaning of rule of reason, others seemed to have a rather less thorough understanding of its meaning. In addition, some interviewees believed that it was always the case that the US applied the rule of reason and the EU the *per se* rule.

The Brazilian concept of the rule of reason falls somewhere between the US and EU approaches. Whilst in the United States the competition authority has to prove the power of the company, as well as the purpose of the conduct and the likely effects, in the EU it is necessary to prove only the power, purpose and risk of effects.³⁸⁰ In Brazil, when configuring dominance, the competition authority has to demonstrate that an undertaking has at least a 20% market share³⁸¹ and that the market conditions allow it to exercise its market power and potentially harm competition and consumers. According to Brazilian competition law, a conduct is deemed an abuse if the dominant firm is capable of squeezing competitors out of the market or creating difficulties for other firms, resulting in harm to competitors and consumers. There is no need to prove the likely effects but there has to be a genuine risk that

³⁷⁹ It is important to note that the Competition bill declares the adoption of the rule of reason.

³⁸⁰ Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence?," 8. For a discussion on the different view-points of the US and the EU on the meaning of harm to competition, see Fox, "What is Harm to Competition - Exclusionary Practices."

³⁸¹ This percentage can be changed, in accordance with Law 8,884/94, for certain sectors of the economy.

the effects will take place. The rule of reason approach is applied in the sense that the benefits of the conduct are considered against the possible harm to the market and the outcome of that balance should not harm consumers. In the words of a Councillor:

...in a conduct that is considered *per se* in Brazil there is no need to prove the economic power. There is no need to prove the effects of the conduct and eventual economic or legal justifications are not accepted. When a conduct is analysed under the rule of reason, instead, there has to be proof of economic power, proof of the effects of the conduct or at least of its potential of causing anti-competitive effects and the CADE has to reject eventual economic and legal justifications.

This statement demands clarification in three aspects. Firstly, it was stated that under the *per se* rule there would be no need to prove economic power. This would conflict with the views of other Councillors who stated that cartels are usually treated as *per se* only when there is proof of economic power. Secondly, according to other members of the BCPS, the difference between the *per se* rule and the rule of reason would be the fact that for *per se* conduct,³⁸² efficiency defences would not be acceptable ‘...because until today nobody has managed to demonstrate an efficiency resulting from them’. Finally, the Councillor stated that the analysis of the CADE would have to reject eventual economic and legal justifications. This is an important statement because it implies that the burden of proof of efficiencies lies on the defendant. Although there is no legal requirement for the undertaking to prove the existence of justifications, this appeared to be present in the approach of the CADE in some

³⁸² It is important to note that, according to the majority of the members of the BCPS, cartels are the only type of conduct being treated as *per se*.

occasions.³⁸³ Therefore, it would be extremely helpful if this was clarified by the competition authority in decisions or guidelines.

Under the Brazilian rule of reason there is no need to follow the US structured approach.³⁸⁴ Complainants and the competition authority do not have to face the extremely hard standard of proof of the rule of reason, especially in respect to the first stage of the analysis, where it would be necessary to prove the likely effects of the conduct. Article 20 of Law 8,884/94 states that ‘Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order’.³⁸⁵ The conduct of the dominant firm only needs to be aimed at or to be capable of producing anti-competitive effects and even if these effects do not materialise, the conduct shall be prohibited. Therefore, the competition authority and complainants only have to demonstrate that the conduct aspires to or is capable of producing anti-competitive effects.

Members of the competition authority stated in the interviews that the CADE is concerned only with the potential anti-competitive effects of a conduct. The competition authority does not necessarily examine the concrete effects of the conduct in order to establish abuse of dominance, as the possibility that the effects could result from the conduct of the dominant firm offers sufficient grounds to prohibit an anti-competitive practice. In the words of one Councillor ‘...a behaviour will be an offence only if (...) it has the potential of causing harm

³⁸³ See sections 8.6.4 and 8.6.5.

³⁸⁴ See section 3.1.2.

³⁸⁵ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20.

to the entry conditions, to the market or if they result in a transfer of wealth from consumers to producers at an anti-competitive level’.

It is important to highlight that market dominance *per se* is not prohibited in Brazil. The CADE clarified this by stating that Law n. 8,884/94 does not prohibit market dominance,³⁸⁶ as long as it is a result of a natural process based on superior efficiencies of the undertaking in relation to its competitors.³⁸⁷ Therefore, in common with the US and the EU, the attainment of a position of dominance through internal growth is not prohibited in Brazil.

Moreover, there was no evidence from the case-law that the Brazilian competition authority equally balances pro and anti competitive effects. For those accustomed to the American use of the rule of reason, the Brazilian rule of reason would make little sense. Despite the ‘rule of reason’ label that is given to the Brazilian antitrust analysis, the reality is that Law 8,884/94 does not allow for a balancing process as in the US model. The law protects ‘...free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power’.³⁸⁸ Although these concepts leave some room for interpretation by the competition authority, their meaning cannot be completely changed. No matter what kind of interpretation is used, it becomes difficult to justify accepting possible harm for consumers and competition that could be balanced with efficiencies.

In addition, no discussion on the use of efficiencies as defences or objective justifications were found in the case-law, although interviews and cases suggested that members of the

³⁸⁶ *Poliolefinas SA et al. - 0054/1995*, para. 371.

³⁸⁷ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20(I).

³⁸⁸ *Ibid.*, Article 1.

BCPS view efficiencies as objective justifications. It is necessary to demonstrate the existence of dominance and the conduct; it is up to the defendant to provide objective justifications, which can be objective reasons for practising the conduct and the goal of achieving certain efficiencies. In common with the EU, the Brazilian competition authority has to analyse the justifications but these will not be accepted if the conduct raises artificial barriers to entry and is capable of excluding competitors, given that competition would be harmed directly and consumers would be harmed indirectly. Therefore, efficiency defences are perceived in Brazil as objective justifications. As explained previously,³⁸⁹ objective justifications are exemptions, as they refer those justifications which can take potentially unlawful conduct out of the scope of the prohibitions of competition law. A different approach is undertaken for efficiency defences, as first a breach of competition law is found and then the application of a defence is considered.³⁹⁰ This approach can be observed in the case-law which will be studied in the following chapter.

³⁸⁹ See p. 103.

³⁹⁰ See Albers-Llorens, "The role of objective justification and efficiencies in the application of Article 82 EC," 1755.

4.6 The concept of Abuse in Brazil

The Brazilian concept of abuse has changed over the last two decades following the developments of competition law and policy and substantive changes in the market structure.³⁹¹

Although distortions resulting from governmental intervention have reduced drastically, it is still not easy to establish successfully what conduct can be deemed as abusive. One reason for this is the lack of a legal definition of the concept of abuse of dominance, in addition to the lack of published guidelines on this issue.

The fact that an undertaking has market power does not mean that its mere existence is prohibited. In fact, in the US the Supreme Court stated that it is necessary to establish ‘...the possession of monopoly power in the relevant market and (...) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident’.³⁹²

It can be said that competition which is not based on the merits ought to fall within the scope of competition law. However, the difficulty arises in determining what constitutes competition on the merits.³⁹³

³⁹¹ See Ramin, *As Instituições Brasileiras de Defesa da Concorrência*, 12-41.

³⁹² *United States v Griffith*, para. 570-571.

³⁹³ See West, “Competition on the Merits,” 1.

Conduct that is regarded as competition on the merits in one jurisdiction may not be regarded as such in another, given that the merits relate to what is socially accepted as a fair way to compete in the market. For instance, in the United States, the use of certain strategies, such as raising artificial barriers to entry, could be considered competition on the merits,³⁹⁴ whilst in the EU such behaviour is likely to constitute an offence, given that there still seems to be a strong view about the need to ensure the access and existence of multiple players in the market.³⁹⁵ Therefore ‘competition on the merits’ ought to be defined on a case by case basis as it relates to the ‘fairness’ of the conduct. The above argument has been the subject of much debate among academics and has also posed difficulties to courts.³⁹⁶ Nevertheless, it could be argued that a conduct is fair when it is not aimed at artificially maintaining or increasing the market power of a monopolist, and results in efficiencies. In the EU:

Companies with a dominant position in a particular market may not abuse (...) [their] power to squeeze out competitors. (...) In doing business with smaller firms, large firms may not use their bargaining power to impose conditions which would make it difficult for their supplier or customer to do business with the large firm’s competitors. The Commission can (and does) fine companies for all these practices. (...) The overriding considerations are whether consumers will benefit or other businesses be harmed.³⁹⁷

Similarly to the EU, causing difficulties to competitors or driving the latter out of the market seems to be considered in Brazil an abuse to the extent that it is done through the creation of

³⁹⁴ Fox, “We Protect Competition, You Protect Competitors,” 159.

³⁹⁵ This concern with market access may result from an ordoliberal influence. See on this matter Gerber, “Constitutionalizing the Economy - German Ordoliberalism, Competition Law and the New Europe,” 71-76.

³⁹⁶ See Plompen, Luard, and Hancher, *On the merits current issues in competition law and policy*, 66.

³⁹⁷ European Union, “Activities of the European Union - Competition.”

artificial barriers to entry. The creation of artificial barriers was regarded by many interviewees as undesirable. This is understandable as Brazil has many concentrated markets, thereby justifying the concern with dominant firms that could behave independently from competitors and consumers.

4.6.1 The analysis of abuse in *Menthor*

*Menthor*³⁹⁸ demonstrates the need for guidance in regards to what can be considered an abuse. In this case, the CADE decided unanimously³⁹⁹ that *Menthor*, an internet provider, abused its dominance by creating difficulties for a competitor, so its conduct was prohibited under Articles 20(I) to (IV) as well as 21(V), (VI) and (XV) of Law 8,884/94. *Douranet* accused *Menthor* of interfering with its telephonic communications and, consequently, with the internet services it offered. Both companies were the only internet providers in the city of Dourados, but also offered their services in other areas. *Douranet* began to have problems with its computer servers which blocked without any apparent reason, thereby causing problems for its customers. With special tracing software it became possible to detect that the problem was caused by a ‘nuke’ program that was attacking *Douranet*’s systems and the attacks came from a computer used by *Menthor*. During the investigations it was revealed that the program used for the attacks was found in a computer in *Menthor*’s premises.

The presiding Councillor, João Bosco Leopoldino da Fonseca, concluded that the goal of *Menthor* was to harm the image and the services of *Douranet* in order to capture its unsatisfied customers. Councillor Fonseca also stated that if the conduct had continued, it would have been harmful not only for *Douranet*, but also for the process of competition, given that any new provider in the market could have suffered the same kind of attacks from *Menthor* and this would alter the structure of the market. This type of conduct was considered by Councillors to be illegitimate because of the means used to harm a competitor. The

³⁹⁸ *Douranet Informática Ltda v Menthor Informática - 08012.000573/1998-93.*

³⁹⁹ Councillors João Bosco Leopoldino da Fonseca and Mercio Felsky dissented only in regards to the fine to be applied.

conduct prohibited was the creation of difficulties to competitors. This could be interpreted as the use of unfair practices⁴⁰⁰ to exclude competitors or impede their access to the market.

It could be argued that *Menthor* concerned a case of unfair competition, rather than competition law,⁴⁰¹ as the conduct of Menthor could not be considered an abuse of dominance. Although Menthor had a market share above the 20% threshold and could therefore be presumed as dominant by law, it only had a market share of 33% compared to the higher share of Douranet of 67%. The Councillors have not expressly declared Menthor dominant, but have nonetheless prohibited its abuse of dominance. The finding of dominance was therefore implicit, which is arguably a mistake in the analysis. In addition, from the reasoning of the case it is not clear whether Councillors used the legal threshold to presuppose dominance or if they believed that it was not an important element in reaching the decision, as this was not debated. It appears that the policy consideration behind the decision was to prohibit a conduct that was clearly unfair and had elements of illegality. Moreover, the presiding Councillor highlighted that Menthor did not deny committing the offence and its defence was limited to the procedural inadmissibility of the evidence. Menthor had a weak defence and, as stated by Councillor Fonseca, they relied on procedural defences rather than giving objective justifications to avoid liability.

Menthor raises questions about the methodology used to define dominance as well as abuse. Dominance seems to have been found implicitly, although arguably this constituted a flaw in the analysis. While it did fulfil the 20% market share threshold, this alone should not have

⁴⁰⁰ Understood as means other than the undertaking's own efficiency.

⁴⁰¹ See fn 95 on the difference between unfair competition and competition law. Whilst the first is a private issue, the latter is a public matter. See OECD and Interamerican Development Bank, "Brazil - Peer Review of Competition Law and Policy," 42.

been sufficient to lead to a determination of dominance since not every firm that has 20% market share is dominant. For a firm to be dominant it has to be able to behave independently from competitors and consumers. This was certainly not the case in this instance as the defendant not only had a much lower market share than the claimant, but it was not demonstrated that it could behave independently from the claimant either. This is the factor which would be required in order to consider Menthor dominant and, therefore, to be able to assess its abuse.

With respect to the structure of the competition law, although the list of anti-competitive offences under Article 21 is not exhaustive⁴⁰² and the competition authority could argue that the conduct of Menthor was anti-competitive, in reality it should have not been considered anti-competitive as far as competition law is concerned. It could be argued that there was no dominance in the first place and without dominance there would be no unilateral anti-competitive conduct that could be penalised pursuant to competition law. It is unlikely, though, that the conduct of Menthor was fair. However, the dispute between Menthor and Douranet was a matter to be decided under unfair competition law.

There is no specific unfair competition law in Brazil but the Industrial Property Law 9,279⁴⁰³ contains in its chapter six provisions that regulate unfair competition. It was enacted in 1996 and since the conduct of Menthor started in 1997, the CADE should have declared that the matter should be judged by the courts under this law. Although the law does not exclude the application of competition law, if a proper analysis of the behaviour had been conducted, Menthor would not have been declared dominant and therefore Law 8,884/94 should not have

⁴⁰² Miron, "O Direito da Concorrência como Instrumento de Defesa do Consumidor," 216.

⁴⁰³ Brazil, *Law n. 9,279 of 14 May 1996*.

been applied. Unfair competition offences are considered crimes under Law 9,279/96 and Article 195 of the law typifies in fourteen sub-sections unfair competition conduct. The statutory offence is imprisonment from three to twelve months or the payment of a fine. With respect to the case above, Article 195(III) prohibits the fraudulent diversion of trade and this would have given legal grounds for Douranet to ask for relief in the form of an interim injunction and for the prosecution of Menthor.

The approach of the CADE resulted in the misuse of competition law. The argument based on the assertion that Menthor would have acquired dominance if it had continued to use the 'nuke' program to sabotage the internet service of Douranet did not sit well with the factual and legal requirements. Firstly, there was no proof that Douranet's customers were switching to Menthor. Secondly, even if they were, this would not guarantee that Menthor would become dominant. Thirdly, even if there was the possibility of Menthor becoming dominant, this could not be prohibited by evoking the American 'attempt to monopolise' doctrine, because pursuant to the latter the proof of a dangerous probability would have to be established and this was not present in the case.⁴⁰⁴

In *Menthor* it was wrongly alleged⁴⁰⁵ that there was no legal provision to punish Menthor's behaviour other than general principles under Brazilian tort law. As a result, it appears that Councillors had a strong inclination to intervene in order to attain justice, even if it resulted in the misuse of competition law. Consumers were surely harmed by Menthor's practice, but the case could have been referred to the Consumer Protection Department of the SDE, instead of

⁴⁰⁴ See *Spectrum Sports v McQuillan*, 506:447.

⁴⁰⁵ There was a recently enacted unfair competition law at the time. See Brazil, *Law n. 9,279 of 14 May 1996*.

dealing with the practice under competition law. As will be discussed later on,⁴⁰⁶ an imprecise delimitation of the jurisdiction of the CADE and other authorities responsible for enforcing consumer protection and unfair competition may blur the distinction between these areas of law. Thus, more effort should be put in improving the coordination between these organisations and clarifying their areas of competence. This would improve legal certainty and increase the enforcement efficiency of these matters.

⁴⁰⁶ See p. 207.

4.7 Special responsibilities of dominant firms

In the EU, once a firm is considered dominant due to its market power it will have ‘special responsibilities’.⁴⁰⁷ This concept was expressed for the first time by the COJ in *Michelin I*:⁴⁰⁸

It is not possible to uphold the objections made against those arguments by Michelin NV, supported on this point by the French government, that Michelin NV is thus penalised for the quality of its products and services. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.⁴⁰⁹

The special responsibilities of dominant firms refer to the requirement not to behave in a way that can distort competition in the common market. Conversely, in the United States companies do not have extra responsibilities as a result of their monopolist position in the market.⁴¹⁰

The CADE seems to have adopted the EU doctrine of special responsibilities of dominant firms, although it emerged from the interviews that most Councillors are not fully aware of the incorporation of this doctrine in the Brazilian system. When asked about the existence of

⁴⁰⁷ See Anderman and Kallauger, *Technology transfer and the new EU competition rules intellectual property licensing after modernisation*, 268.

⁴⁰⁸ *Compagnie maritime belge SA and Dafa-Lines A/S v Commission of the European Communities - Joined cases C-395/96 P and C-396/96 P*.

⁴⁰⁹ *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities - Case 322/81*, para. 57.

⁴¹⁰ See Marsden, *Handbook of research in trans-Atlantic antitrust*, 213.

special responsibilities, most interviewees' first reaction was to say that no such doctrine existed in Brazil. For instance, a Councillor stated '...that it is a bit too strong to say that a company has a special responsibility because it has dominance'.

Nevertheless, when discussing the doctrine, the interviewees were almost unanimous in saying that dominant firms could not always behave in the same manner as non-dominant firms, in the sense that certain types of conduct that could be practised by non-dominant firms were likely to be considered anti-competitive if practised by dominant firms. As stated by one Councillor: 'I would not say that the dominant firm has a special responsibility, but that certain types of behaviour carried out by a dominant firm could constitute an offence, whilst they may not if practised by a non-dominant firm'. Other members of the BCPS were even clearer in this respect, stating for instance that '...there is a strong presumption that a dominant firm cannot do what non-dominant firms do'.

Therefore, it appears that dominant firms do, in fact, have special responsibilities in Brazil. In the 2004 *Microsoft/TBA*⁴¹¹ case, Microsoft was held responsible for establishing and operating its distribution network of independent resellers and, as a result, it was held to be under a special duty to adopt measures to counter the harmful effects that could result from the monopolistic practices of its distributors.⁴¹²

⁴¹¹ SDE "Ex Offício" v *Microsoft Infomática Ltda, TBA Informática Ltda* - 08012.008024/1998-49.

⁴¹² Ibid., 24. Although there is no legal provision under Brazilian competition law which specifically states the special responsibility of dominant undertakings, there are decisions which show the gradual adoption of such doctrine in Brazil. See e.g. *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev* - 08012.003805/2004-10, para. 290-91.

Most of the members of the BCPS mentioned that elements of the doctrine could be identified in the 2009 *AmBev* decision,⁴¹³ where the presiding Councillor, Fernando de Magalhães Furlan, stated that ‘...dominance results in additional responsibilities’. According to the reasoning of the decision, a company with circa 70% of the market share should be responsible and careful enough to seek to prevent any negative repercussions of its commercial practices. In the words of the presiding Councillor: ‘...the steps of elephants have a greater impact, in a limited space, than those of felines’. Although the special responsibilities doctrine was not expressed as such, the statements in the decision implied that AmBev was deemed to be under a special duty to avoid or mitigate any potential negative repercussions of its commercial practices. It can be said that AmBev represents a move towards a greater convergence between the EU and Brazilian competition policy. Many of the interviewees agreed with the views expressed in *AmBev*, suggesting that the substance of the EU doctrine of special responsibilities has been adopted by the Brazilian competition authority and is likely to be applied in future abuse of dominance cases.

An instructive point in *AmBev* is that Councillor Furlan reflected on Montesquieu’s thoughts that all those who have power tend to abuse it. Within the context of competition law, he stated that these thoughts of Montesquieu⁴¹⁴ were applicable not only in the context of political power, but also for economic power, given that power could be understood as the capacity, faculty and means of achieving anything in any sort of human activity.

It should be noted that Montesquieu is also credited with the solution to the problem of abuse of power by stating that power should be a check to power. In the context of the

⁴¹³ See *Ibid.*

⁴¹⁴ These thoughts can be found at Montesquieu, *The spirit of laws with D'Alembert's analysis of the work.*

enlightenment, Montesquieu's thoughts were against the unchallenged power of the French Monarch and consequently in favour of a more balanced model, as was the case in England where Parliament and the courts were at times able to challenge the decrees and authority of the Monarch. Montesquieu's thoughts inspired the separation of the Executive, Legislative and Judiciary in modern Constitutions, as each branch of government could function as a check if other branches abused their powers. The Brazilian Constitution of 1988 also contained such checks and balances as it was enacted after decades of dictatorship and was based on the respect of the principles of the rule of law, democracy and human rights. In this context, the separation of powers seeks to reduce its concentration in a single branch of government and consequently the possibility of abuse.⁴¹⁵ According to Montesquieu, if one person or body held many or all these powers he would be able to behave tyrannically and people would not have confidence in their security.

If Montesquieu's thoughts can be applied to economic power, as suggested by Councillor Furlan, then it could be said that in order for competitors and for society as a whole to feel confident in their economic well-being and on the proper functioning of the market economy, concentrations of economic power must be shared or challenged. However, dominance is not prohibited *per se*; economic power does not need to be shared. Therefore, it appears that the competition authority has to fulfil the role that other economic players would be able to play in the market to avoid abuses from dominant firms. The role of the competition authority could be conceptualised as a check at an institutional level to counter the abuse of economic power by dominant firms.⁴¹⁶

⁴¹⁵ Vieira, "Inequality and the Subversion of the Rule of Law in Brazil," 14.

⁴¹⁶ This is in harmony with ordoliberal thoughts. See Gerber, "Constitutionalizing the Economy - German Ordoliberalism, Competition Law and the New Europe," 37.

The enunciation of a relationship between dominance and special responsibilities in the *AmBev* decision may also be justified by other principles in the Brazilian Constitution, which proclaims the protection of free competition, the right to private property and the social function of property.⁴¹⁷ Although many aspects of the Brazilian Constitution were inspired by the Constitution of the United States of America, the former also reflects many of the characteristics of Constitutional texts found in Continental Europe, especially in regards to social rights.⁴¹⁸

One Constitutional principle enshrined by the Brazilian competition law⁴¹⁹ that seems to influence the enforcement of abuse of dominance is the social function of property. This principle does not mean that private enterprise is only a means to an end, but that companies do indeed have social commitments and responsibilities.⁴²⁰ In the United States the enjoyment of private property is a fundamental right *per se* and there is no additional social function of property required by the Constitution. As in the United States, companies in Brazil can enjoy their property as they please to the limits established by the Constitution. The fundamental difference lies on the limits imposed by both Constitutions. The American Constitution does not have any principles evoking a social responsibility of property owners, whilst the Brazilian Constitution does. The enjoyment of economic power in Brazil is guaranteed by the same Constitution that also places limitations on it in order to safeguard society as a whole.

⁴¹⁷ See section 2.3.

⁴¹⁸ See in particular the German Constitution on the regulation of the economy. Germany, *Weimar Constitution*, pt. II, chap. 5.

⁴¹⁹ See Brazil, *Law n. 8,884 of 11 June of 1994* Article 1.

⁴²⁰ See Lopes, *Empresa e Propriedade: função social e abuso de poder econômico*, 281.

In common with the US and the EU, private property is respected and protected in Brazil⁴²¹ and unlike other BRIC countries, such as China, Brazil is a western democratic country, so the government will not interfere in the enjoyment of private property unless it is strictly necessary. However, in Brazil, the ownership of private property, or market power in the context of competition law, does bring about special responsibilities. The presiding Councillor of the *AmBev* case could not have been more unequivocal when stating that a dominant undertaking has to be careful with the consequences of its conduct in the market.

The social function of property and the special responsibilities of dominant firms do have an influence on the development of competition law and policy. This has been demonstrated in the recent *AmBev* decision. Undertakings holding market power must be aware of the special social responsibilities that are attached to their power, namely that their conduct should not be detrimental to society. In essence, they should act not only in their self interest but in the interest of society as a whole.

⁴²¹ See Brazil, *Federal Constitution of 1988*, Article 5.

4.8 Conclusion

Although Brazilian competition law states that competition should benefit society as a whole, there is no general agreement in relation to which specific type of welfare should be pursued. Most of the interviewed members of the BCPS seemed to believe that consumers should not be harmed. Even those who thought that consumers could be harmed by a legitimate conduct without offending competition law also stated that this would be acceptable only in limited cases; for instance, if an increase in prices were to be offset by another benefit to consumers, such as an increase in choice or quality, so the overall outcome would therefore benefit consumers. The majority of the members of the BCPS believe that competition law should bring benefits to consumers in terms of consumer surplus. This differs from US competition policy, which pursues consumer welfare in terms of overall economic efficiency and is closer to the EU, which also views consumer welfare in terms of consumer surplus.⁴²²

In relation to the definition of the relevant market, it emerged that this is defined by way of the SSNIP⁴²³ test. One particular characteristic of the SSNIP test in Brazil is that the percentage used to simulate an increase in prices ranges from 5% to 15%, whilst in the US and the EU it ranges from 5% to 10%. The use of a 15% increase proxy seems to reflect an approach of the Brazilian competition authority that is more realistic, i.e. reflecting an increase that would be likely to be felt by consumers.

There is a frequent concern among members of the BCPS not to define the relevant market too narrowly in abuse of dominance cases, particularly in cases that generate considerable

⁴²² See section 4.2.1.

⁴²³ Small but significant and non-transitory increase in prices.

public opinion. As stated by members of the competition authority, the reason for this is the impact that a narrow definition of the relevant market can have on the outcome of a case, as well as concerns with possible judicial reviews of the CADE's decisions as the courts may disagree and overrule a decision where the market was defined too narrowly.⁴²⁴ Proceeding in this way, the CADE generally defines the relevant market in a similar manner to the US and in a wider manner when compared with the EU.

There is a considerable discrepancy of knowledge among members of the BCPS with regards to the interpretation of concepts used to define the relevant market. Whilst some interviewees had a good understanding of how the relevant market is defined in Brazil and what the differences between the US and EU approaches are in this area, others did not. It appears fundamentally important for members of the competition authority to receive more thorough guidance of how the relevant market ought to be defined.⁴²⁵ This would not only benefit competitors, but also allow the emergence of a coherent approach to competition policy within the BCPS.

It is common to encounter the citation of foreign cases in the CADE's decisions⁴²⁶ and, as confirmed by some interviewed members of the BCPS, the cases cited are at times selected randomly to support the view of the member of the competition authority on the matter being analysed. While the citation of American and EU cases in Brazilian decisions is to be welcomed in most respects, this practice may generate uncertainty in certain cases because of the different treatment given to some types of conduct in the US and the EU. In addition,

⁴²⁴ See section 4.3.

⁴²⁵ See section 2.4.3.3.

⁴²⁶ See e.g. *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*, vote of Councillor João Bosco Leopoldino da Fonseca, where parts of the decision *United States v Colgate & Co* were quoted to state the situations in which a refusal to supply would be prohibited.

many members of the competition authority stated that they tend to lean more towards either the US or EU doctrines. This, according to interviewees, results from the education and professional training that some Brazilian officials received in the US and in the EU. Therefore, once again the issue of training becomes important.

The unequal knowledge among members of the BCPS, as well as the random use of US and EU doctrine in Brazilian cases could be addressed by providing more uniform training to its members with the specific aim of clarifying these issues. This problem becomes even more relevant when considering the competition bill that is currently being deliberated in Congress. When enacted, it will increase considerably the number of administrative staff and institutional funding. This could prove to be a historic opportunity to make improvements in this area.⁴²⁷

Dominance is found when there is no substantial competition in the relevant market or when there is exclusivity of offer or demand. There is a rebuttable legal presumption that if an undertaking has a 20% market share or more, competition is not deemed substantial enough and therefore the firm is considered dominant. It emerged from the interviews that this legal threshold caused confusion among many members of the competition authority as some believed that if a firm has a 20% market share, it would be dominant. In fact, this seems to have been the case in *Menthor*,⁴²⁸ where a firm with 33% market share was punished for its abusive practice even though its competitor had a 67% market share. However, currently the presumption seems to be usually interpreted in a similar manner as the US and EU market share thresholds. The 20% market share is a threshold for examining abuse of dominance

⁴²⁷ See section 2.4.3.3.

⁴²⁸ See section 4.6.1.

offences and does not necessarily correlate to dominance. After establishing that the defendant has 20% market share or more, the CADE examines other elements to verify whether the firm would be able to behave independently in the market by disregarding competitors and consumers; if this proves to be the case, the undertaking will be considered dominant. It is essential that the definition of dominance is clarified in future decisions or guidelines, given that this is a fundamental concept and members of the BCPS should have a shared understanding of it.

It has emerged from this study that although the Brazilian competition authority states that it applies the 'rule of reason',⁴²⁹ in reality this is implemented differently from its American counterpart. According to Law 8,884/94, the competition authority does not need to prove the actual or likely effects of the conduct; only that it is capable of causing the anti-competitive effects.⁴³⁰ In this respect, the standard of proof under the Brazilian rule of reason is similar to that of the EU model and different from that of the US, due to the fact that it is not necessary to prove the actual or likely effects of the conduct.

The BCPS does not differentiate between efficiency defences or objective justifications. These are both categorised as justifications. Case-law suggests that, in practice, efficiencies and other justifications are treated in the same way as objective justifications under the EU *per se* rule. If a conduct has the potential to result in market foreclosure and harm to consumers, the defendant would be unlikely to justify successfully the alleged conduct.

⁴²⁹ See e.g. Cadoca, *Competition Bill n. 3,937/04*, 30.

⁴³⁰ Brazil, *Law n. 8,884 of 11 June of 1994*. See sections 2.3.3.1 and 2.3.3.2.

The acceptance of the EU doctrine of special responsibilities of dominant firms appears to be gradually gaining momentum in Brazil. Although Brazilian policy-makers are wary of using the term ‘special responsibilities’, in substantive terms this doctrine already forms part of Brazilian case-law. In the recent *AmBev* decision it was made clear that dominant firms have greater responsibilities than non-dominant firms. The adoption of the special responsibilities doctrine in Brazil is likely to result from the influence of the continental European tradition on the values underpinning the Brazilian constitutional and competition law.⁴³¹

In Brazil, the doctrine of special responsibilities is ideologically linked to the social function of property. The latter concept is enshrined in the Brazilian constitution, in Article 1 of Law 8,884/94 and embedded in the legal system, as well as widely accepted and understood by policy-makers as the need to balance private property rights with the socioeconomic interest. The gradual acceptance of the doctrine of special responsibilities in Brazil may result from the acknowledgement that the ownership property is inherently linked to a special responsibility, in the same way that private property rights are inherently linked to a social function. The more property or economic power one gains, the greater the responsibilities one attains. Constitutional principles and values are incorporated into Brazilian competition law, so the social function of property could manifest itself in the interpretation of the special responsibilities doctrine. Consequently, undertakings that have considerable economic power ought to be subject to special responsibilities.

The elements discussed in this and the previous chapters also give a framework for the analysis of how specific abuse of dominance offences are dealt with by the Brazilian

⁴³¹ Particularly the legal traditions of Portugal, Spain, France, Germany and Italy.

competition authority. This will allow the identification of peculiar aspects of the enforcement of competition law in Brazil and will shed some light on which types of offences tend to follow a US or EU orientation.

5. Chapter Four - Non-Pricing Abuse of Dominance in Brazil

5.1 Introduction

Having examined the assessment of market power in Brazil and undertaken a comparative analysis of the two major models that have inspired the Brazilian competition law and policy, namely the US and the EU, the following chapters will examine specific exclusionary conduct deemed to constitute abuse of dominance.

The study of the US and EU dominance models illustrated a contrasting approach to abuse of dominance. In the United States the rule of reason is the predominant approach requiring proof of actual or likely effects, efficiency defences and proof that the aim of the dominant firm could have been achieved by less restrictive means. After these elements are demonstrated, the pro and anti competitive effects of the conduct are balanced. This high standard of proof and complex analysis results in a more *laissez-faire* policy in the US than the EU, where the value of economic freedom is still strong, resulting in concerns with restrictions to market access. Thus, in the EU it is required to prove only the risk of anti-competitive effects which cannot be justified objectively if the conduct eliminates competition in regards to a substantial part of the market, and the *per se* rule is still prevalent.

This chapter explores how non-pricing cases of abuse are examined and adjudicated by the BCPS. The purpose is to reveal the approach that the Brazilian competition authority has undertaken in respect of some of the main abuses. The underlying argument is that the development of a predictable and relatively uniform interpretation of competition law is of fundamental importance in ensuring the emergence of a system of competition law in Brazil which, amongst other resulting benefits, would ensure an adequate degree of legal certainty

for companies. Indeed, the fact that Brazilian competition law incorporates broad principles that can be interpreted in a variety of ways⁴³² may create legal uncertainty and contrasting *dicta* often aggravate this problem. Moreover, the analysis of the case-law and the input given by interviewees will allow for a better understanding of the influence that the EU and the US competition law and policy had over the Brazilian interpretation and enforcement of competition law.

Specific non-pricing types of conduct are examined. The study of each abuse includes a brief overview of the conduct, followed by the relevance of effects and the role of justifications, as well as a discussion of the analysis performed by the BCPS, which is referred to as the 'Brazilian rule of reason'. Final observations conclude this chapter.

⁴³² See section 2.

5.2 Refusal to deal

5.2.1 Overview

Refusing to deal is a competition law offence under Article 21 of Law 8,884/94, which prohibits the following conduct:

XIII - to deny the sale of a certain product or service within the payment conditions usually applied to regular business practices and policies;

XIV - to hamper the development of or terminate business relations for an indeterminate period, in view of the terminated party's refusal to comply with unreasonable or non-competitive clauses or business conditions; (...)

XX - to discontinue or greatly reduce production, without proven good cause;

XXII - to retain production or consumer goods, except for ensuring recovery of production costs.⁴³³

In common with other offences under Article 21, the above are prohibited to the extent that they are capable of breaching Article 20 of Law 8,884/94.⁴³⁴

In principle, the BCPS considers that a dominant undertaking does not have an obligation to cooperate with its rivals. Undertakings are free to choose who they do business with. For instance, refusing to deal with a middleman or reseller is generally accepted. In fact, in

⁴³³ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(XIII), (XIV), (XX), (XXI) and (XXII).

⁴³⁴ See p. 101.

*Goodyear*⁴³⁵ it was decided that the exclusion by a manufacturer of a reseller from its list of distributors, as well as its refusal to accept a qualified distributor,⁴³⁶ did not constitute an offence as long as the market remained competitive.⁴³⁷ This approach is similar to both the US⁴³⁸ and the EU⁴³⁹ models, where undertakings are generally allowed to choose their business partners.

An exception to the rule that allows firms to have a free choice of whom they want to do business with is the ‘essential facilities’ doctrine. This doctrine was first pronounced in the US *Terminal Railroad Association*⁴⁴⁰ case where it was decided that a joint venture composed of many railroad companies was obliged to give access to the use of its terminals to other railroad companies. The terminals were considered essential facilities, since companies would not be able to operate efficiently without access to them.

Although the essential facilities doctrine originated in the US, the American courts appear to have adopted a cautious approach towards accepting this doctrine and finding a refusal as an offence.⁴⁴¹ Indeed, American courts have narrowed the application of the essential facilities

⁴³⁵ *Comércio de Pneus Adriano, Recapadora Eldorado Ltda, Eskina dos Pneus, Paddock - Comércio de Pneus Ltda and Mário Pneus Ltda v Goodyear do Brasil Produtos de Borracha Ltda - 42/92.*

⁴³⁶ A qualified distributor is understood as a distributor that fulfils specific predetermined requirements.

⁴³⁷ *Comércio de Pneus Adriano, Recapadora Eldorado Ltda, Eskina dos Pneus, Paddock - Comércio de Pneus Ltda and Mário Pneus Ltda v Goodyear do Brasil Produtos de Borracha Ltda - 42/92*, opinion 28/95.

⁴³⁸ See *United States v Colgate & Co*, 250:307. See also Alese, *Federal antitrust and EC competition law analysis*, 277.

⁴³⁹ See Incardona, “Modernisation of Article 82 EC and Refusal to Supply: Any Real Change in Sight?,” 344.

⁴⁴⁰ See *United States v Terminal Railroad Association*, 224:383.

⁴⁴¹ As stated by the US Supreme Court in *Trinko*: “[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.” *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one'. *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP*, vol. 540, para. 4.

doctrine to exceptional circumstances,⁴⁴² i.e. where an undertaking holds the monopoly of a product or service which is essential and the product cannot be substituted.⁴⁴³

Unlike the US Supreme Court, which has stated that it would not adopt nor reject the doctrine,⁴⁴⁴ the European courts appear to have adopted the substance of the essential facilities doctrine without expressing it,⁴⁴⁵ although the current approach of the EU courts narrowed the scope of the essential facilities doctrine as well. In *Bronner*⁴⁴⁶ it was decided that for a refusal to be abusive, it should not merely create difficulties for competitors, but it should also be likely to – and not merely be able to – eliminate competition.⁴⁴⁷ In addition, the refusal should not be objectively justifiable and should concern a product that is indispensable, i.e. not economically viable for the competitor to maintain the business in question resulting in the elimination of competition, without mentioning the need to assess whether the competitor was as efficient as the dominant firm, which is similar to the US approach to refusal to deal.⁴⁴⁸ The need to prove that the product is indispensable made it extremely difficult for the court to find an abusive refusal. Nevertheless, it seems that the doctrine of essential facilities has received less approval in the US than in the EU.⁴⁴⁹

⁴⁴² See Léveque and Shelanski, *Antitrust and regulation in the EU and US legal and economic perspectives*, 78-79.

⁴⁴³ See e.g. *United States v Colgate & Co*, 250:307. *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP*, vol. 540, pt. III.

⁴⁴⁴ The essential facilities doctrine has not been adopted nor rejected by the US Supreme Court. See *Ibid.*

⁴⁴⁵ In *European Night Service* the General Court of the European Union expressly mentioned the essential facilities doctrine and highlighted that the facility could be essential only if there were no substitutes. See *European Night Services Ltd (ENS) et al. v Commission of the European Communities - Joined cases T-374/94, T-375/94, T-384/94 and T-388/94*, 208. However, the COJ has avoided using the term essential facility in the *Bronner* case. See *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs et al. - Case C-7/97*.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*, 4.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ See Pitofsky, “The essential facilities doctrine under US antitrust law,” 443.

Bearing in mind this comparative framework, the sections below are aimed at identifying the approach adopted by the BCPS in regards to refusals to deal.

5.2.2 Proof of effects

Under Brazilian competition law it is not necessary to prove that an offence produces anti-competitive effects.⁴⁵⁰ Article 20 of Law 8,884/94 clearly states that a practice is prohibited even if its effects fail to materialise. However, this is not always made clear in the case-law, as demonstrated by *TV Globo*.⁴⁵¹ The 2001 CADE decision involved TV Globo, Brazil's largest aerial TV broadcaster. The Brazilian National Telecommunication Agency (ANATEL) brought a claim on behalf of TVA Sistema de Televisão and Directv (Directv), against TV Globo Ltda and TV Globo São Paulo Ltda (TV Globo). The claim was based on TV Globo's refusal to supply to Directv. The facts leading up to the case consisted of Directv's proposal to purchase the licence rights of TV Globo's programmes, with the aim of allowing the former to include them in its satellite TV services in the cities of São Paulo, Rio de Janeiro, Belo Horizonte and Porto Alegre.

The refusal allegedly resulted in anti-competitive effects in the market of distribution of TV and audio programmes via satellite. This claim was supported by four main assertions: (1) TV Globo had authorised the satellite distribution of its aerial TV programmes to Sky TV, which was Directv's main competitor; (2) Sky TV formed part of the same corporate group as TV Globo, so the latter had a vested interest in refusing Directv's proposal; (3) TV Globo was the undisputed leader in the Brazilian aerial TV sector, which is the most common method of TV signals distribution in Brazil and therefore (4) TV Globo's refusal to license its programmes allegedly resulted in the creation of a considerable barrier to entry in the satellite TV market.

⁴⁵⁰ See p. 101.

⁴⁵¹ *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*.

Directv argued that although TV Globo's programmes were broadcasted freely via aerial TV, most consumers of satellite services preferred to subscribe to comprehensive satellite channel packages that included TV Globo's programmes, so as to avoid the inconvenience of switching between aerial TV and satellite services. It was also argued that TV Globo's refusal served the purpose of harming competition by allowing Sky TV to dominate the market. However, studies of ANATEL indicated that the market share of Directv was not smaller than that of Sky TV in areas where the latter distributed TV Globo's programmes. This data suggested that anti-competitive effects were unlikely to occur, as Directv's market share was largely unaffected.

Although proof of effects is not required under Law 8,884/94, Councillor Campilongo was of the opinion that Directv needed to have demonstrated that it sought to provide alternative TV programmes but that this had not been enough to mitigate its losses.⁴⁵² This reasoning appears to be flawed for two reasons: (1) it presupposes that the effects would have had to materialise before a claim against TV Globo was brought; (2) it makes mitigation a necessary condition before a claim can be brought; this would be contrary to Law 8,884/94, which does not make these requirements. TV Globo was acquitted because the refusal was not considered to be part of an exclusionary strategy.

*MATEC*⁴⁵³ is another refusal to deal decision which took place in 2003 and was highlighted by interviewees as relevant to the development of the analysis of this conduct. The claimant company, Power-Tech Teleinformática Ltda (Power-Tech), brought a claim against Matel Tecnologia de Informática SA (MATEC), submitting that the latter abused its dominance by

⁴⁵² Ibid., para. 36, 1404.

⁴⁵³ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42.*

refusing to supply spare parts for telephone switchboards MD 110 from Ericsson. MATEC was the only company in Brazil which had entered into licence agreements with Ericsson to manufacture and sell Ericsson branded products in the national market. In its submissions, Power-Tech argued that as a result of MATEC's refusal to supply, it was not able to procure new clients or to fulfil existing technical assistance agreements with its clients.

MATEC was found liable and Councillor Pfeiffer argued that MATEC was intentionally and deliberately⁴⁵⁴ abusing its dominance to maintain its position, control prices and exclude competitors in the downstream market.⁴⁵⁵

Power-Tech proved that it would not have been able to compete in the maintenance market as a result of MATEC's refusal to supply, as it would not have been commercially viable for Power-Tech to import spare parts directly. Power-Tech's arguments appear to have been reasonable, given that it often needed spare parts urgently and there were many delays and logistical complications involved when importing products.

It emerges from *TV Globo* and *MATEC* that although by law there is no need to prove the actual or potential effects of the conduct, if the alleged effects materialised before the proceedings, these are taken into consideration by the CADE. Moreover, there does not yet appear to be a consensus among members of the BCPS as to whether it is necessary to prove the likely effects in refusal to deal cases. Indeed, Councillor Campilongo's opinion⁴⁵⁶

⁴⁵⁴ Nevertheless, it should be noted that the intention is not a required element of competition law offences in Brazil.

⁴⁵⁵ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42, 3885.*

⁴⁵⁶ See p. 180.

according to which Directv would have had to demonstrate that it sought to provide alternative TV programmes would result in the need to prove effects.

The disparities between *dicta* were noted by Councillor Macedo Júnior in *MATEC* by stating that there is no universal consensus in regards to the economic reasoning in competition cases and that this was especially evident in Brazil. He also noted that the proof of a dangerous probability of the effects is considered relevant to some Councillors but not to others.⁴⁵⁷

In common with the EU and in contrast with the US, where proof of likely effects is required, Brazilian competition law does not require proof of actual or potential effects of the conduct.⁴⁵⁸ This seems to be the majority view in the competition authority. The Brazilian competition policy seems to be much closer to the EU in this respect, as it adopts a preventative approach in relation to anti-competitive effects. However, this approach is not always consistent and, as the two cases discussed above suggest, there may be situations involving refusals to deal where the likely effects must be demonstrated.

⁴⁵⁷ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, 107.

⁴⁵⁸ See p. 101.

5.2.3 Efficiencies and other justifications

If the competition authority is satisfied with the evidence that anti-competitive effects could be created by a refusal, the defendant is given the opportunity to demonstrate the existence of justifications to escape liability. Article 21(XIII)⁴⁵⁹ does not express the possibility of justifying the conduct. However, as the Constitution gives every party the right to be heard, to defend itself and to have the due process of law respected,⁴⁶⁰ the defendant can provide justifications and such justifications can be accepted.

The competition authority often adopts a more impartial approach and tries to identify, by its own initiative, any objective reasons that may justify the conduct. Even if the defendant fails to justify its refusal, the CADE may be convinced that findings of the SDE and the SEAE demonstrate that the practice could be justified.⁴⁶¹

In *TV Globo*, the defendant attempted to justify its refusal on the grounds that it had legitimate reasons for the control of the distribution of its TV channels. This was supported by the allegation that 70% of TV Globo's profits on advertisements originated from local advertisers. According to TV Globo, the control of the distribution of its TV channels would ensure that local programmes were transmitted effectively. This justification, however, does not seem to have been the reason for acquitting TV Globo as the reason for this was the disagreement among Councillors in respect of the existence of dominance and abuse.⁴⁶² In fact, Councillors of the CADE are allowed to have dissenting opinions and in *TV Globo* most

⁴⁵⁹ See p. 175.

⁴⁶⁰ Brazil, *Federal Constitution of 1988*, Article 5(LV).

⁴⁶¹ This was the case e.g. in *Ciro Comércio de Pneus Ltda v Bridgestone Firestone do Brasil Indústria e Comércio Ltda - 08012.005197/98-51*, vote of Councillor Mércio Felsky.

⁴⁶² See *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*. For more details, see section 8.8.1.

of the Councillors made use of such right, disagreeing to a certain extent with the decision of the presiding Councillor, João Bosco Leopoldino da Fonseca, resulting in the vote of Councillor Romano being the one finally adopted.

In *MATEC*, Councillor Pfeiffer stated that in order to avoid liability under competition law, the refusal to supply by a dominant undertaking must be justified in economic terms.⁴⁶³ The defendant submitted many justifications. The first one was based on cross product elasticity, stating that consumers would be able to switch brands if prices were abusive in the downstream market. This argument was not accepted because the replacement of the original products that needed maintenance would not have been convenient for consumers. There were high replacement costs involved so consumers would be locked into MATEC's maintenance services after purchasing the products. MATEC counter argued by submitting that many of its clients were large corporations and public institutions that were aware of the maintenance costs involved before purchasing products. However, MATEC had earlier submitted that the existence of competing maintenance companies in the downstream market would have been harmful to its commercial reputation and goodwill if they failed to perform their services properly. Therefore, this argument appears to have backfired, as Councillor Pfeiffer stated that if MATEC's customers were sufficiently knowledgeable of the complexities of the product and services involved, they ought to have been sufficiently knowledgeable to avoid competing companies tarnishing MATEC's reputation.⁴⁶⁴

⁴⁶³ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, para. IV, 4.

⁴⁶⁴ *Ibid.*, para. IV. 1.4, 6.

MATEC brought a final submission based on the fact that the complainant had the option to purchase spare parts directly from Ericsson. However, this justification was rejected, as maintenance services required the occasional acquisition of spare parts without incurring long delays of logistical complications. The CADE found that no justifications applied. Therefore, it could be argued that the justification of a refusal to deal must demonstrate a legitimate commercial reason,⁴⁶⁵ which would be an objective justification, rather than offering an efficiency defence, i.e. demonstrating benefits that outweigh the exclusion of competitors from the market.⁴⁶⁶

In contrast with the US and in common with the EU, there is no clear shift of the burden of proof from the competition authority to the defendant when submitting justifications. The defendant is given the opportunity to submit justifications and the competition authority is free to consider whether these or other justifications apply. However, in contrast with both the US and the EU, there is no clear distinction between efficiency defences and objective justifications.⁴⁶⁷ These are all mentioned simply as justifications. What the Council will assess is whether the justification proves that the conduct was put in practice for reasons other than to raise barriers to entry artificially and eliminate competition from the market.

⁴⁶⁵ *Ciro Comércio de Pneus Ltda v Bridgestone Firestone do Brasil Indústria e Comércio Ltda* - 08012.005197/98-51, vote of Councillor Mércio Felsky.

⁴⁶⁶ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC* - 08012.000172/1998-42, para. v. 2, 13.

⁴⁶⁷ See section 3.3.

5.2.4 Brazilian rule of reason

Under the US rule of reason, if the defendant provides valid efficiency defences, the burden of proof shifts to the claimant, who in turn will need to prove that the alleged offence is not reasonably necessary or that its objectives could be achieved by less restrictive means. If the claimant is able to satisfy this burden, the pro and anti competitive effects are balanced.⁴⁶⁸

In Brazil, the concept of the rule of reason is conceived in a different fashion. The competition authority considers the reasonableness of the conduct, the commercial strategy implemented by the undertaking and its possible justifications.⁴⁶⁹ The rule of reason in Brazil refers to whether the conduct is reasonable or objectively justifiable.

In accordance with CADE's reasoning, refusing to deal is not an offence under competition law *per se* because it is subject to an assessment based on the reasonableness of the conduct.⁴⁷⁰ Reasonableness is determined from legal and economic perspectives as well as in relation to the possible effects of the conduct. The CADE has declared that it would be legal for a producer to refuse to sell to a non-qualified⁴⁷¹ wholesaler in distribution markets regulated by exclusivity arrangements, even if such refusal restricts competition to a certain extent. It would be declared legal as long as it also generates net efficiency gains which ultimately benefit consumers.⁴⁷² The specific reference to the restriction of competition 'to a certain extent' implies that competition must not be totally eliminated. For instance, in *TV*

⁴⁶⁸ See section 3.1.2.

⁴⁶⁹ *Murilo Regis Dantas v Cervejaria Reunidas Skol Caracu SA - 0036/1992*, para. 14-17.

⁴⁷⁰ See e.g. *Poliolefinas SA et al. - 0054/1995*, para. 371.

⁴⁷¹ See fn 436.

⁴⁷² *F. G. Macedo Comércio Atacadista de Cereais - Comércio Atacadista de Bebidas v Companhia Cervejaria Brahma - 0139/1993*, vote of Councillor Mércio Felsky.

Globo, Councillor Romano stated that there was no elimination of competition as Directv was not being excluded from the market and had a similar market share to Sky TV and the TV Globo group.

However, a refusal could be deemed unreasonable if it forms part of an exclusionary strategy,⁴⁷³ so the commercial strategy of an undertaking must be analysed.⁴⁷⁴ The exclusionary effects have to appear reasonable in relation to possible harm to consumers and competition. As shown in the case-law, refusing to deal appears to be unlawful when it is used by a dominant firm to unreasonably raise entry barriers to harm competition and consumers.⁴⁷⁵

There is no need to prove the stringent requirements of the US rule of reason, i.e. that the alleged conduct is not necessary, or that the goals of the defendant could be achieved by less restrictive means, as well as the pro and anti-competitive effects of the alleged offence. These are requirements that can be found in Article 54 of Law 8,884/94 which are applicable to concentrations.⁴⁷⁶ However, Councillors tend to refer to Article 54 for guidance rather than strictly applying it. Therefore, although these elements do not need to be proven, members of the competition authority do often check if they are present. If they are, the conduct is likely to constitute an offence under competition law.

⁴⁷³ See, e.g. *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, v. 2, 13.

⁴⁷⁴ *Murilo Regis Dantas v Cervejaria Reunidas Skol Caracu SA - 0036/1992*, para. 14-17.

⁴⁷⁵ See, e.g. *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, v. 2, 13.

⁴⁷⁶ See p. 45.

In the EU, the degree of market power of the undertaking is particularly important in determining whether a refusal to deal constitutes an abuse under Article 102 TFEU. According to Monti, market power has to be much greater in a refusal to deal case than in those of predatory pricing and rebates, especially when dealing with a *de novo* refusal, when the undertaking must generally enjoy a quasi-monopolist position to be held liable.⁴⁷⁷ In *TV Globo*, Councillor Romano appears to have adopted a similar reasoning, stating that the Directv group already enjoyed a considerable market share in the Americas and for this reason TV Globo was not deemed to have acted unreasonably when refusing to grant the licence rights of its television programmes to Directv. This argument highlights the importance placed by the BCPS on market power when assessing the reasonableness of the conduct. According to Councillor Romano, it would have been preferable for Directv to invest in new programmes rather than merely duplicating the transmission of TV Globo. This would have advanced the goal of competition policy in terms of consumer welfare and the dynamic efficiencies that would have resulted from the creation of new television programmes.

Councillor Fonseca stated in *TV Globo* that Article 20 of Law 8,884/94 followed the parameters of the EU model in determining which types of conduct are abusive. He stated that there were two fundamental criteria for the prohibition of an abusive conduct: (1) the undertaking whose conduct is being examined must have dominance in the relevant market; (2) the undertaking must abuse its dominance. Councillor Fonseca decided that TV Globo's dominant position had been established and, by limiting or impeding the access of Directv

⁴⁷⁷ Indeed, in refusals to supply the level of dominance must often approach that of an essential facility. See e.g. *Microsoft Corp. v Commission of the European Communities - Case T-201/04*, 1288. See also Monti, "The Concept of Dominance in Article 82," 34.

into the relevant market, TV Globo was harming the economic development of a competitor, as well as impeding its access to a source of materials, equipment or technology. Further, it was refusing to sell goods or services within the standard payment conditions in accordance with uses and customs. In essence, Councillor Fonseca was of the opinion that TV Globo's unreasonableness was manifested as it was seeking to maintain its dominant position by creating artificial barriers to entry and not competing on the merits. In his opinion, TV Globo was dominant and the concession of the broadcasting licences to a company that was part of its own group, and the refusal of the same signals to a competitor, was enough to constitute an abuse.

The *per se* approach of Councillor Fonseca in TV Globo seems to have been followed by Councillor Pfeiffer in *MATEC*. According to Councillor Pfeiffer the dominant position of MATEC in the upstream market, i.e. the distribution and manufacture of Ericsson branded products, allowed it to leverage its economic power in the downstream market, i.e. the maintenance and repair of Ericsson branded products. In his view there was no evidence that competition in the upstream market would in itself be sufficient to impede an increase in prices in the downstream market. All the justifications brought forward by the defendant were rejected and the main reason for this seemed to be the fact that, if acquitted, MATEC would have a monopoly of the relevant market, given that Power-Tech would not have access to the necessary spare parts, allowing MATEC to continue charging high prices.

Although the competition authority has declared many times that there are no *per se* offences in Brazil, and this is included in the competition bill, in practice the reasoning of some Councillors in *TV Globo* and *MATEC* has opposed this view. The reason for the objection to accept the existence of a *per se* analysis in Brazil results from a misunderstanding of the *per*

se concept. In fact, it emerged from the interviews that most interviewees believed that a *per se* rule signified that the competition authority would not be able to accept any justifications from the defendant. As seen previously,⁴⁷⁸ this is not the case and therefore, the approach of many Councillors to the refusal cases above resembled a *per se* analysis.

⁴⁷⁸ See section 3.1.1.

5.2.5 Essential facility

In *TV Globo*, submissions in relation to the uniqueness of the product took an interesting turn, as it resulted in the qualification of the product as an essential facility by Councillor Fonseca, but not by other Councillors. Councillor Fonseca affirmed that TV Globo was refusing an essential facility.⁴⁷⁹ In his view, when a dominant undertaking controls an essential facility, it should not refuse its access; if it did, there would be a legal presumption of abuse. This reasoning implies the use of a *per se* approach when the product or service refused is deemed to constitute an essential facility. This follows a similar reasoning formulated in the US decisions *Terminal Railway*⁴⁸⁰ and *Aspen*.⁴⁸¹ However, Councillor Fonseca's reasoning appears deficient, as he failed to mention the existence of criticism to the essential facilities doctrine in the US. With respect to the EU authorities, Councillor Fonseca mentioned the *Commercial Solvents*⁴⁸² and *Sea Containers v Stena Sealink*⁴⁸³ decisions to reinforce the idea that the essential facilities doctrine was accepted on both sides of the Atlantic. Due to the popularity of TV Globo's programmes and the fact that consumers preferred integrated Satellite TV services that included TV Globo's programmes that were normally available via aerial TV, the licensing over TV Globo's programmes equated, in his view, to an essential facility.⁴⁸⁴ However, the Councillor did not mention that although the essential facilities doctrine was adopted in the EU, the COJ restricted the ambit of the doctrine in *Bronner*⁴⁸⁵ by

⁴⁷⁹ See section 5.2.5.

⁴⁸⁰ *United States v Terminal Railroad Association*, 224:392.

⁴⁸¹ *Aspen Skiing Company v Aspen Highlands Skiing Corporation*, 469:599.

⁴⁸² *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities - Joined cases 6 and 7-73*.

⁴⁸³ European Commission, *Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v Stena Sealink - Interim measures)*, vol. 015.

⁴⁸⁴ See European Commission, "Commission notice on the application of the Competition Rules to access agreements in the telecommunications sector," 68.

⁴⁸⁵ *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs et al. - Case C-7/97*.

establishing that the refusal should not simply create difficulties for competitors;⁴⁸⁶ it should also be indispensable and result in the risk of eliminating effective competition. It is questionable whether the refusal of TV Globo met these criteria.

According to Councillor Campilongo the product refused was not an essential facility. He highlighted that the doctrine was developed in the United States for extreme cases where the exclusive ownership of a product, structure or infrastructure made it impossible for competition to exist, given that the product or service refused could not be replicated.⁴⁸⁷ In his opinion, TV Globo's programmes did not fulfil the requirements of an essential facility.⁴⁸⁸

Although it is understandable that the Councillors followed the US and the EU approaches to essential facilities, it is important to note that the Brazilian competition law does not require the refused product to be an essential facility. It appears that this doctrine has been given disproportionate significance in *TV Globo*, where the key deciding arguments of Councillors Fonseca and Romano regarded the essentiality of TV Globo's television programmes. Instead, the focus of the decision should have been on the stimulus to innovation that the refusal could create and the benefits that this would bring to consumers.

In *MATEC*, Councillor Pfeiffer affirmed that the essential facilities doctrine was not only applicable to infrastructure such as ports and railways, but also to products that were

⁴⁸⁶ See *Ibid.*, 41-44.

⁴⁸⁷ In the sense that it was a natural monopoly.

⁴⁸⁸ The requirements are: i) [...] without the access to that structure there was no chance to competition, i.e., it was indispensable for competition; ii) that it was not economically efficient or possible, for new entrants, to duplicate the structure; iii) that the control of the structure gave to its owner the potential to eliminate competition; iv) that the facility was effectively essential, literally, and not only a mere convenience or a less costly opportunity to a competitor; v) that the refusal of access to the essential facility did not have an economic or legal reasonable reason.

unquestionably indispensable for the entry or survival of competitors in the market and therefore this doctrine could be applicable to the case in question.⁴⁸⁹

It was not questioned, in *MATEC* or *TV Globo*, whether Brazilian competition law allowed for the adoption of the essential facilities doctrine. Neither the existence of criticism of the essential facilities doctrine in the US and in the EU was mentioned. Before adopting international doctrines to assist the interpretation of Brazilian law, it is important to question their suitability to avoid the adoption of a hybrid approach to the Brazilian competition law that results in an application of the law without due regard to the interpretation of the national legal text. Clarifications on this matter would be welcomed if guidelines on abuse of dominance are issued in Brazil.

⁴⁸⁹ Therefore, Councillor Pfeiffer adopted the essential facilities doctrine, notwithstanding the fact that it is not expressly mentioned in the Brazilian competition law. In this sense, he adopted a similar reasoning to Councillor Fonseca in *TV Globo*. See *TVA Sistema de Televisão v TV Globo Ltda* - 53500.000359/1999, para. 114, 852.

5.2.6 Observations

It is possible to refuse to deal as long as there is no attempt to eliminate competition.⁴⁹⁰ If a refusal to deal is practised by a dominant firm that is not attempting to eliminate competition, the conduct can only constitute an offence under Brazilian consumer protection law.⁴⁹¹

As noted by Councillor Macedo Júnior in *MATEC*, there is no general consensus in regards to many aspects of competition law among Councillors, including in respect of the need to prove the probability of the effects.⁴⁹² The case-law seems to reflect the provisions of competition law in this respect, i.e., that there is no need to prove the effects of the refusal. However, the competition authority took into consideration the fact that no actual effects resulting from the refusal were present in *TV Globo*, whilst the effects had already materialised in *MATEC*. In any case, the competition authority does not need to prove the likely effects of a conduct as in the US.

In Brazil there is no distinction between efficiency defences and objective justifications as in the US and the EU and there is no discussion among Councillors about which conduct can be accepted as competition on the merits. However, Councillors gave opinions suggesting what they perceived as competition on the merits. For instance, in *MATEC*, Councillor Pfeiffer made reference to the US *Kodak*⁴⁹³ decision and stated that *MATEC* was harming Power-Tech by refusing to supply it with spare parts because Power-Tech offered much lower maintenance prices. The refusal was understood as a means to harm competition, rather than

⁴⁹⁰ *Murilo Regis Dantas v Cervejaria Reunidas Skol Caracu SA - 0036/1992*, para. 14-17.

⁴⁹¹ See section 2.3.2.

⁴⁹² This suggests that Brazil is at the cross-roads between the EU and US approaches to competition law.

⁴⁹³ *Eastman Kodak Co v Image Technical Services Inc*, vol. 498.

a legitimate business practice. In regards to acceptable justifications, in *TV Globo* and *MATEC*, efficiencies raised were considered in the same way as objective justifications, although Councillors did not expressly make any distinctions between objective justifications and efficiency defences.

In *TV Globo* the majority of the Councillors agreed with the decision of Councillor Romano, which ‘balanced’ the pro and anti-competitive effects of the conduct. It was stated that there would be more harm to consumers if TV Globo was forced to licence its programmes. This was because if such a licence was not granted to Directv, the latter would have to invest in innovation, creating new and better programmes to compete with TV Globo instead of replicating what was already available in the market. This analysis reflects the Brazilian rule of reason. All the factors are taken into consideration and the competition authority assesses which alternative would be the best for consumers and would, at the same time, enhance competition.

Moreover, a refusal cannot result in competition being eliminated in the market. In *TV Globo* it was stated by Councillor Romano that there was no abuse because there was no elimination or risk of elimination of competition. In *MATEC*, it was established that Power-Tech, the only competitor of MATEC in the downstream market, would be excluded from the market as a result of the refusal to supply. This finding was fundamental for the outcome of the decision.

There was no debate as to whether Power-Tech was as efficient as MATEC. The key element was that it offered better prices and it would be excluded from the market. In *TV Globo*, Councillor Romano highlighted that Directv should be able to find a way to compete with TV

Globo given that they were both competitors of a similar calibre. The issue, however, did not rest on whether Directv was as efficient as TV Globo or not. Councillor Campilongo highlighted that the refusal of TV Globo to licence its programmes to Directv would have been assessed under another light if Directv had shown that it tried to offer different TV programmes but this had not been enough to mitigate its need to have access to TV Globo's programmes. If that was the case, it is likely that TV Globo would have had to licence its programmes to Directv, no matter how efficient it was.

There is not yet a clear competition policy in regards to refusal to deal. Brazil is finding its own way which appears to reveal a development of the policy towards an EU standpoint. The main concern of the BCPS when analysing this conduct is ensuring that no artificial barriers to entry are created and that competition in the market is maintained in order to provide better and cheaper products to consumers.

It is worth noting that Brazil is a civil law jurisdiction; therefore, there is no judicial doctrine of *stare decisis* or binding precedent. This may partly explain a greater disharmony in the Brazilian body of case-law in comparison with its common law counterparts, as Brazilian decisions are persuasive rather binding law. In any case, coherence and consistency in decisions is important in ensuring legal certainty. In this respect, the publication of guidelines to aid in the enforcement of competition law could prove beneficial in aspiring to legal certainty and aiding the development of Brazilian competition policy.

5.3 Tying arrangements

5.3.1 Overview

Tying arrangements are prohibited pursuant to Article 21(XXIII) which describes the practice as ‘...to condition the sale of a product to the acquisition of another good or service, or to condition the performance of a service to contracting another service or purchasing another good’.⁴⁹⁴ In common with other types of abusive offences, tying arrangements are prohibited to the extent that they are able to breach Article 20.⁴⁹⁵

The products that are tied must be distinct from each other, i.e., there must be consumer demand for each product independently. This seems to be a simple test; for instance, it would not be reasonable for a single shoe to be sold separately. However, it can be difficult to define the extent to which there is enough consumer demand to justify the sale of some products separately, especially if they are technological products that are integrated.⁴⁹⁶

The products must not be available separately or, if they are, there has to be an element of coercion. The CADE has determined in *Basf*⁴⁹⁷ that in addition to the objective characteristics of the offence, tie-in sales are deemed to contain an element of coercion or duress, as the purchaser is forced, at least at a commercial level, to purchase the subordinate good or service. This appears to be appropriate, as tying arrangements are often imposed on final consumers, i.e. consumers at the final stage of the commercial chain, as well as on weaker or dependant commercial parties within the commercial chain such as suppliers or distributors.

⁴⁹⁴ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(XXIII).

⁴⁹⁵ *Ibid.*, Article 20. See section 2.3.3.1.

⁴⁹⁶ See e.g. Fox, “We Protect Competition, You Protect Competitors,” 158.

⁴⁹⁷ *Mansão Materiais para Construção Ltda v Basf SA - 08000.014925/1994-58*, 2.

Tie-in sales can also be implemented by alternative means of conditioning the purchase of another product in the actual contractual arrangement. The characteristics of the primary product could be modified, so it would inherently require the purchase of the subordinate product to serve its function. This method has the added advantage of impeding the purchase of competing primary and subordinate products by consumers.⁴⁹⁸ However, a firm has never been found guilty in Brazil for adapting a product in order for it to require the purchase of a subordinate good or service.

Tying arrangements used to be considered *per se* prohibitions in the United States.⁴⁹⁹ However, the situation seems to be changing. In *Microsoft*,⁵⁰⁰ the decision of the D.C. Circuit Court stated that the *per se* prohibition should not be applicable for technical bundling resulting from the integration of software. Further, the Appellate Court held that even an intentional creation of incompatibilities by changes in the product would not be an offence under Section 2 of the Sherman Act since it would fall within the category of innovation.⁵⁰¹

This approach appears to be in line with the statements made by the Assistant Attorney General and the Chief of Staff of the Antitrust Division of the US DOJ at the end of 2008. According to them ‘...[t]he historical hostility of the law to tying is unjustified, and the qualified rule of *per se* illegality applicable to tying is inconsistent with the Supreme Court’s modern antitrust decisions and should be abandoned’.⁵⁰² Bearing in mind that a few months

⁴⁹⁸ See Forgioni, *Direito Concorrencial e Restrições Verticais*, 246, 251.

⁴⁹⁹ See e.g. the approach of the US Supreme Court in *Eastman Kodak Co v Image Technical Services Inc*, vol. 498. See Hovenkamp, *Federal Antitrust Policy: the law of competition and its practice*, 404. See also Raybould and Firth, *Law of monopolies competition law and practice in the USA, EEC, Germany, and the UK*, 72.

⁵⁰⁰ *United States v Microsoft Corp*, vol. 87.

⁵⁰¹ See *United States v Microsoft Corp*, vol. 253, para. 75.

⁵⁰² Barnett and Wellford, “The DOJ’s Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act,” II.

afterwards the DOJ stated that it will be tougher with the conduct of monopolies,⁵⁰³ it is still to be seen how the contrasting decisions and statements will play out and which view will prevail.

Conversely, in the EU tying arrangements are prohibited *per se*. *Microsoft*⁵⁰⁴ is arguably the most notorious tying case in the EU. In 2004, the European Commission decided that Microsoft was liable for abusing its dominance by including Windows Media Player in the Windows operating system. The reasoning for the decision was that the practice weakened competition on the merits, discouraged innovation and reduced consumer choice.⁵⁰⁵ The decision of the Commission was upheld by the General Court. A similar concern was brought to the attention of the competition authority in the United States, i.e., the bundling of Internet Explorer to Windows operating system. In the EU, Microsoft was found liable for breaching Article 102 TFEU, fined and ordered to provide PC manufacturers the versions of Windows without its Media Player. In contrast, the US DOJ withdrew its tying claim against Microsoft. While the analysis of tying arrangements has been shifting in the US from a *per se* rule to what could be called a *quasi per se* rule, the EU still seems to take a more formalistic approach.⁵⁰⁶ The different outcomes to similar circumstances suggest a more tolerant approach of the American competition authorities to the use of market power in a primary market to obtain advantages in a secondary market as long as it would not likely result in a monopoly in the secondary market as well.

⁵⁰³ Department of Justice, “Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard with Focus on the Impact of Exclusionary Conduct on Consumers.”

⁵⁰⁴ *Microsoft Corp. v Commission of the European Communities - Case T-201/04*.

⁵⁰⁵ See *Ibid.*, 1088, 1095.

⁵⁰⁶ Ahlborn and Evans, “The Microsoft Judgment and Its Implications for Competition Policy Towards Dominant Firms in Europe,” 13.

In Brazil the CADE has stated that tying is not prohibited *per se*.⁵⁰⁷ However, as will be seen below, the analysis of the conduct is closer to the EU approach to tying arrangements.

⁵⁰⁷ *DPDE v Petrobrás Distribuidora SA - 0047/1992*, para. 3, 4.

5.3.2 Proof of effects

According to CADE's Resolution 20, the principal anti-competitive effects resulting from tying arrangements are: (1) Abusive increase of profits; (2) harm to purchasers and consumers, and (3) the creation of barriers to entry in the downstream market with respect to actual and potential competitors.⁵⁰⁸ This is consistent with the concern suggested by the case-law with ensuring market access and the maintenance of competition in the market.

In 2004 the CADE judged *Microsoft*,⁵⁰⁹ which concerned the inclusion of the program 'Money 97' in the Brazilian version of the software package of 'Microsoft for Small Business 97'. According to the claimant, Paiva Piovesan Engenharia & Informática Ltda, Microsoft's inclusion of Money 97 constituted a tying arrangement that blocked the entry of competitors into the market. The case also concerned the practice of discounts and rebates to distributors which resulted in the latter giving preference to Microsoft's products.⁵¹⁰ Both practices were considered legitimate. The presiding Councillor, Thompson Almeida Andrade, affirmed that the anti-competitive effects of tie-in sales would be analysed in relation to the leverage, i.e. the use of market power in the main product market that could increase its market power in the tied product market. If the tie-in sales allowed the defendant to leverage its market power, thereby foreclosing downstream markets, the anti-competitive effects would be market foreclosure and harm to consumers, given that the creation of artificial market barriers in the secondary market could result in price increases.⁵¹¹

⁵⁰⁸ See Conselho Administrativo de Defesa Econômica, "Resolution n. 20," 5.

⁵⁰⁹ *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*.

⁵¹⁰ On the reasons for considering legitimate the practice of discounts and rebates, see p. 269.

⁵¹¹ *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*, 4-5.

This decision suggests that proof of likely effects is not required by the BCPS and that it is concerned with market access, as well as the maintenance of competition in a market free from artificial barriers to entry, reflecting the constitutional principles enshrined in the competition law.⁵¹²

⁵¹² See section 2.3.3.

5.3.3 Efficiencies and other justifications

In Brazil, the defendant has the right to present justifications in its defence arguments. In cases where the defendant is silent or submits a defence with a restricted scope, the competition authority can also unilaterally decide that justifications apply to the case under analysis.⁵¹³

In *Microsoft*, the defendant successfully justified its conduct. It was decided that including ‘Money 97’ into the Brazilian version of the software package of ‘Microsoft for Small Business’ did not constitute a tie-in offence, as each version of the software could be purchased individually, so there would not be in fact tying.⁵¹⁴ In addition, selling the software together allowed users to access various programs that were completely integrated with each other for substantially lower prices than purchasing them separately.⁵¹⁵

Moreover, efficiency considerations based on the technological advantages resulting from Microsoft’s integrated software package were relevant in justifying the alleged offence. However, Councillor Andrade highlighted that even if the tie-in sales allowed for lower prices, it had to be assessed whether it increased the network effects of Windows Operating System. In this case, the network effects were not considered sufficient to constitute an offence.

⁵¹³ See Brazil, *Federal Constitution of 1988*, Article 5(LV).

⁵¹⁴ *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*, 4.

⁵¹⁵ *Ibid.*, 5.

The innovation justification relates to dynamic efficiency and is frequently raised by defendants that operate in technological sectors, such as the IT sector, or that acquired IP rights through innovation. Thus far, there have not been any offences found in cases where the innovation justification has been reasonably argued, suggesting that, similarly to the US, the BCPS is cautious due to the adverse consequences that the enforcement of competition law against IP rights could have on economic and technological development. Thus, the technological integration defence is likely to be justified by the fact that innovation promotes economic growth.

5.3.4 Brazilian rule of reason

The reasoning in *Microsoft* suggests that the Brazilian competition policy adopts an approach to tying similar to that of the EU as a more formalistic approach is undertaken by the Brazilian competition authority. In fact, in *Microsoft* the pro and anti competitive effects of tying were not balanced as they would be in the US and there was no mentioning of the need to prove that the goals could have been achieved by less restrictive means. This demonstrates the existence of differences between the Brazilian rule of reason and its American counterpart.⁵¹⁶ However, it must be noted that the Brazilian competition authority seems to be less reluctant than the EU when it comes to the analysis of justifications based on innovation and the existence of IP rights, so the application of the law in these situations appears to be closer to the US approach.

In addition, Councillor Andrade examined some situations where in his view it would be likely that an offence would exist due to network effects in the technological sector, i.e. when dominant undertakings: (1) refuse the compatibility of their competitor's programs with their software systems, thus prohibiting the entry of new competitors that could further improve the existing technological standards; (2) advertise before the launch of a new product version without allowing the consumer to choose a particular program to suit their needs, thereby discouraging purchases of other brands; (3) upgrade programs with the introduction of new technology that is not accessible to other competitors; (4) impose the incompatibility of products developed by competitors in the aftermarket with the systems of the dominant firm's competitors in the main market; (5) attempt to purchase a successful software of a competitor

⁵¹⁶ See section 3.1.2.

that, combined with the market share of the dominant firm would result in an increase in barriers to entry.⁵¹⁷ These statements help to increase certainty, by clarifying the practices of dominant undertakings that are unlikely to allow for justifications.

⁵¹⁷ *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*, 6.

5.3.5 Observations

It emerges from the analysis above that tying arrangements are prohibited from the moment that they allow the dominant firm to leverage its market power in the secondary market, as they could result in artificial barriers to entry and elimination of competition. If it is proved that the dominant firm is able to leverage its market power, the CADE will consider the justifications submitted by the defendant and the ones that appear applicable to the particular case.

It is not clear whether it is necessary for the competition authority to prove that the effects could have been achieved by less restrictive means, given that in *Microsoft* this was not stated. Furthermore, there has been no discussion in the case-law about what could be regarded as competition on the merits, although the main concern appears to have been the creation of artificial barriers to entry.

The analysis of the case-law reveals that the BCPS does not appear to have given much attention to tie-in sales. There are less than ten administrative cases dealing with this conduct in CADE's database,⁵¹⁸ and only in one of them was the defendant held liable. This was *Unimed of Santo Ângelo*,⁵¹⁹ where a private health care provider was held liable for tying its medical services to laboratorial and pharmaceutical services. The reason for the apparent neglect of tying arrangements may result from the fact that this conduct is generally

⁵¹⁸ As per August 2009. This figure can be said to be low in comparison e.g. with the EU, where only at a EU Court level the number of cases have been more than double the number of tie-in cases than in the Brazilian competition authority.

⁵¹⁹ *Sindicato dos Laboratórios de Análises Clínicas do Rio Grande do Sul v Unimed de Santo Ângelo et al - 08000.025966/1996-69*. This decision differs from the cases involving the same cooperative discussed above. See p. 145.

associated with consumer protection and it is expressly prohibited under the Brazilian Consumer Code.⁵²⁰ Moreover, consumer protection bodies can intervene even in situations where there are tie-ins which are exploitative and exclusionary at the same time. Therefore, complaints are likely to be referred to the Consumer Protection Department rather than to the Competition Protection Department of the SDE.⁵²¹ Thus, at an institutional level, there appear to be organisational problems that hamper the coordination of competition and consumer protection policies. In the words of one interviewed member of the BCPS:

...the consumer protection policy is enforced by the consumer protection department of the SDE. There may be a bridge between the consumer and competition departments within the SDE, but I do believe that they do not exchange any kind of information. They behave almost as completely different organisations.

Another reason that might explain the neglect of tie-in sales is that the BCPS may not have the resources to monitor the markets and identify potential competition law offences.⁵²² In addition, competitors themselves may not be aware of the possibility of complaining to the BCPS over this offence. According to one interviewed Councillor ‘...the Brazilian population is not usually aware of what competition law is or of its benefits for society; even when they complain to the competition authority, they are not capable of identifying properly the kind of conduct that is taking place’.

⁵²⁰ See Brazil, *Law n. 8,078 of 11 September 1990*, Article 39. See also section 2.3.2.

⁵²¹ See section 2.4.

⁵²² See section 2.4.3.1.

Competition advocacy could play an essential role in clarifying the harmful consequences of tying arrangements, not only to consumers, but also to the process of competition. This is relevant, as there is a danger that the scope of application of the Brazilian Consumer Code could extend to the point of blurring the distinction between competition and consumer protection policies. Proposed administrative reform pursuant to the competition bill should address this issue by incentivising and allowing the BCPS to play a more proactive role in competition law advocacy.⁵²³

⁵²³ See section 2.4.

5.4 Exclusive dealing

5.4.1 Overview

Exclusive dealings are prohibited pursuant to provisions of Article 21 of Law 8,884/94. Although the following subsections usually refer to some of the consequences of exclusive dealings, together with Article 20⁵²⁴ of Law 8,884/94 they form the legal basis for prohibiting anti-competitive exclusive dealings in Brazil:⁵²⁵

IV - to limit or restrain access to the market by new companies; V - to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service; VI - to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels.⁵²⁶

In addition, exclusive dealing is specifically prohibited in relation to the mass media sector if an agreement or conduct ‘requires or grants exclusivity in mass media advertisements’.⁵²⁷

Exclusive dealing consists of the imposition by dominant undertakings of exclusivity covenants on other economic players, such as producers, suppliers and distributions. The imposition of covenants to deal exclusively with a dominant firm could be done by means which are either (1) formal or legal, or (2) informal or commercial. An example of a ‘formal/legal’ means of practising exclusive dealing is via the inclusion of exclusivity

⁵²⁴ See section 2.3.3.1.

⁵²⁵ See e.g. *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13*.

⁵²⁶ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(IV), (V), (VI).

⁵²⁷ *Ibid.*, Article 21(VII).

covenants or trade restrictions in commercial agreements. An example of an ‘informal/commercial’ means is the adoption of a commercial strategy where there is a common understanding or perception that the dominant firm would retaliate against commercial parties that deal with its competitors. A Brazilian decision exemplifying the use of informal commercial means to impose exclusivity is *AmBev*.⁵²⁸

Together with refusal to deal,⁵²⁹ exclusive dealings represent the most common complaints and decisions registered against dominant undertakings in Brazil. Due to a greater *corpus* of case-law, in comparison with other offences discussed in this research, this section will examine a greater number of decisions, which allows for a better understanding of the policy.

*Frigelar*⁵³⁰ exemplifies the CADE’s initial view of exclusive dealing before Law 8,884/94 was enacted. In this 1992 decision, which has since been overruled, it was established that exclusivity clauses, whereby dominant undertakings imposed exclusivity covenants on distributors, were not abusive *per se*, as they could be rescinded unilaterally by the contractual parties. This understanding was in favour of dominant undertakings and was based on the principle of freedom of contract, which is how contracts between commercial parties are commonly interpreted. The CADE has moved away from this approach, as the commercial strength of the parties involved has shifted in favour of dominant firms.

As exclusive dealings became increasingly relevant under Brazilian competition law, the competition authority began to deal with the practice outside a traditional law of contract

⁵²⁸ See section 8.5.2.

⁵²⁹ See section 5.2.

⁵³⁰ *Frigelar Moto Refrigeração Ltda et al. v ABRAPAR – Associação Brasileira das Indústrias de Produtos para Refrigeração et al. - 0033/1992*, vote of Councillor Ruy Santacruz.

context. As a result, many challenges to exclusivity agreements or contractual clauses have been heard by the CADE over the past two decades. Examples include the various cases against Unimed,⁵³¹ a well-known and dominant Brazilian medical cooperative of associated private clinics and medical professionals, which provides medical cover to members of the Unimed health care plan. Unimed regulates its activities by a common charter and separate membership contracts with affiliated medical practitioners. These often contained restrictions against providing medical services to patients from competing health care providers. In situations where affiliated members breached their exclusivity obligations, they were expelled from Unimed. This practice resulted in severe commercial consequences for medical practitioners, patients and competitors, as Unimed was and remains, Brazil's leading private health care provider. With the Unimed cases, the Brazilian approach towards exclusive dealing began to be more concerned with the creation of artificial barriers to entry and this was the reason why Unimed was found guilty.

This differs from the US, where exclusive dealing is prohibited only if, under the rule of reason, it would result in a significant and unjustified exclusion of competitors and harm to consumers. In fact, in the US exclusive dealings are usually perceived as pro-competitive⁵³² and are only prohibited in cases where they substantially lessen competition.⁵³³

The Brazilian analysis is similar to the EU *per se* approach which prohibits the imposition of exclusivity by dominant firms unless there is an objective justification. Indeed, the freedom

⁵³¹ See Administrative case n° 08012.001204/98-72, administrative case n° 08000.011866/94-84, administrative case n° 08000.014608/95-86, administrative case n° 08000.019008/95-96, administrative case n° 08000.021182/96-15, administrative case n° 08000.023281/97-41, administrative case, n° 08000.026711/95-32, administrative case n° 08000.018480/97-28, administrative case n° 08012.007631/97-65, administrative case n° 08012.006248/98-25 and administrative case n° 0147/94.

⁵³² Alese, *Federal antitrust and EC competition law analysis*, 328.

⁵³³ *Brown Shoe Co Inc v United States*, vol. 370, para. 3, 4.

of firms to operate in the market without artificial obstacles created by dominant firms appears to play a central role in the assessment of exclusive dealings in Brazil.⁵³⁴

⁵³⁴ Fox, “We Protect Competition, You Protect Competitors,” 158.

5.4.2 Proof of effects

One of the first cases where an exclusivity agreement was prohibited concerned a claim against Unimed Santa Maria,⁵³⁵ a health care provider. It was based on the premise that exclusivity covenants imposed upon affiliated medical practitioners increased barriers to entry into the health care market for Unimed's competitors. There was no need to demonstrate the likely effects, but simply that the exclusivity could create difficulties for the entry of new competitors.⁵³⁶

*White Martins*⁵³⁷ is a more recent exclusive agreement decision from 2002, which regarded the industrial gas sector. The parties were the claimant, Messer Grisheim, and the defendant, White Martins. The claim was based on the allegation that White Martins had anti-competitive exclusivity agreements with producers of raw materials for the production of CO₂. White Martins entered into a ten-year exclusivity agreement with Ultrafértil, one of the key suppliers in the market. Messer Grisheim argued that the exclusivity agreements resulted in: (1) the creation of barriers to entry; (2) the monopolisation of all the sources of raw material, and (3) the exclusion of competitors. Messer Grisheim also alleged that White Martins lacked the capacity of processing and commercialising all the raw material that it purchased and was dispersing the production surplus of CO₂ into the air. This practice was inefficient and was allegedly undertaken because White Martins sought to exclude competitors. In this case, there was no need to show the existence of likely effects as in the US. It was sufficient to demonstrate that there were no suppliers of raw material that were

⁵³⁵ *Ministério Público do Estado do Rio Grande do Sul v Unimed Santa Maria - Cooperativa de Trabalho Médico - 08012.010271/1998-51.*

⁵³⁶ See p. 212.

⁵³⁷ *Messer Grisheim do Brasil Ltda v White Martins e White Martins Gases Industriais SA - 08000.022579/1997-05.*

equivalent in terms of quality and distance as those of Ultrafértil.⁵³⁸ As a result, White Martins was found in breach of competition law.

Two years later, the CADE decided *Microsoft/TBA*,⁵³⁹ which concerned exclusive agreements in the software sector. Microsoft had entered into an exclusivity agreement with TBA Informatics (TBA) which conferred the latter exclusivity over the sale and distribution of Microsoft software products in the federal district of Brasilia. Although in formal terms the exclusivity agreement had a limited geographic scope, it substantially conferred TBA exclusivity in respect of public procurements involving the federal government. When analysing the anti-competitive effects of Microsoft's distribution network in term of its territorial division, the CADE acknowledged that the main issue was the monopolisation of the software market. There was no effective competition amongst distributors, which would have resulted in higher prices. In this case, the effects had already taken place, i.e., the exclusivity agreement harmed competition in the relevant market and deprived the federal government of a pool of competing distributors to participate in its public procurements. Therefore, the actual effects of the conduct were demonstrated, suggesting the existence of a competition law offence. As will be seen in the cases discussed below, this does not appear to be the approach of the CADE to those situations where the effects have not yet materialised.

In 2005, the CADE heard *Center Norte*,⁵⁴⁰ a case that concerned a dispute between shopping centres. The claimant, Condomínio Shopping D, accused Center Norte SA of breaching competition law by imposing a non-competition covenant in its commercial tenancy

⁵³⁸ Ibid., 767.

⁵³⁹ SDE "Ex Offício" v *Microsoft Infomática Ltda, TBA Informática Ltda* - 08012.008024/1998-49.

⁵⁴⁰ *Condomínio Shopping D v Center Norte SA* - 08012.002841/2001-13.

agreements. Consequently, Center Norte's commercial tenants were restricted from undertaking the same or similar commercial activities within the vicinity of 1,000 metres from Center Norte. The only exception concerned tenants that were already established within the restricted area when the agreement came into force or who obtained the express authorisation of Center Norte. Condomínio Shopping D argued that the covenants in the tenancy agreements acted as barriers to entry, reduced consumer choice and allowed the defendant to charge higher rents. In this case, the claimant only had to prove that the restrictive covenants impeded shop owners from opening shops within 1,000 metres from Center Norte and this would impede the entry and limit the development of competitors.⁵⁴¹

Three years later, *Iguatemi*⁵⁴² was decided by the CADE. The facts of this decision largely mirrored those of *Center Norte* as it also concerned territorial exclusivity covenants imposed on commercial tenants. The defendant, Condomínio Shopping Center Iguatemi, is one of Brazil's largest shopping centre groups. In the same way as in *Center Norte*, the claimant only needed to demonstrate that the tenancy agreements restricted the freedom of tenants to open new shops in competing shopping centres.⁵⁴³

In the same year as *Iguatemi*, *Celular CRT*⁵⁴⁴ was decided by the CADE. This decision concerned exclusive agreements in the mobile phone sector. The claimant, Telet SA, was a mobile phone operator that brought a complaint in respect of the exclusivity agreements between the defendant, Celular CRT SA (CRT) and distributors from the State of Rio Grande do Sul. The claimant argued that the exclusivity agreements of CRT had the effect of

⁵⁴¹ Ibid., 399.

⁵⁴² *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

⁵⁴³ Ibid., 2732.

⁵⁴⁴ *Telet SA v Celular CRT SA - 53500.000502/2001.*

increasing barriers to entry, given that CRT's competitors had to incur into considerable risks and expenses in order to implement their own distribution channels. This was due to the fact that the largest retailers of mobile phones and services were operated by parties to the exclusivity agreements with CRT.

In *Celular CRT* it was not necessary for Telet SA to prove that effects were likely, but rather that such effects could take place. Indeed, Telet SA stated that the exclusivity agreements caused unjustified difficulties for competitors and had the scope to raise the costs of rivals.⁵⁴⁵ This understanding is in harmony with Law 8,884/94, which prohibits conduct to the extent that it is capable of producing the anti-competitive effects listed by Article 20, even if they have failed to materialise.⁵⁴⁶ The plenary of the CADE⁵⁴⁷ had to decide whether CRT's exclusivity agreements had the potential to foreclose the market at the time in which they were agreed, rather than at the time of the decision. A main issue resulted from the delay in the investigations as the harm to competition failed to materialise by the time that the decision was heard by the CADE. Councillors faced the difficult decision of whether to find an undertaking liable for a past conduct that could have potentially harmed competition, although no harm had actually occurred.⁵⁴⁸ Notwithstanding the fact that the standard of proof in Law 8,884/94 was satisfied, the delays during the investigations appear to have resulted in the acquittal of the defendant. This suggests that when a decision is made *ex post facto* and, with the benefit of hindsight, there is proof that the effects have not materialised, it is unlikely that a defendant will be held liable, even if the conduct had the potential to harm competition.

⁵⁴⁵ Ibid., 1646.

⁵⁴⁶ See sections 2.3.3.1 and 2.3.3.2.

⁵⁴⁷ CADE's decisions are made by all seven Councillors.

⁵⁴⁸ See also *Kellogg's* at p. 238.

5.4.3 Efficiencies and other justifications

In *White Martins*,⁵⁴⁹ the defendant submitted the argument that there was no intention of increasing the prices of raw materials. However, the presiding Councillor, Celso Fernandes Campilongo, highlighted that the exclusion of competitors by the artificial creation of barriers to entry would still be unjustified if prices of raw materials remained unaffected and the anti-competitive strategy would still be effective if prices remained the same and competition was restricted or eliminated.⁵⁵⁰

In *AmBev*⁵⁵¹ it was stated by the CADE that a dominant undertaking should not condition discounts to an obligation on its retailers to maintain high levels of stock, since this would constitute a barrier to entry by impeding retailers to purchase competing products.⁵⁵² These observations were made in relation to AmBev's strategy regarding its distribution agreements and commercial practices which resulted in exclusivity. AmBev's conduct was considered to result in prohibited and unjustified harm to competition. According to Councillor Furlan, in the alternative scenario where the loyalty programme would have been limited to the accumulation of discounts by points-of-sale,⁵⁵³ calculated in relation to the volume of purchases of bottled beer, *a priori* there would be no violation of competition law.⁵⁵⁴ In his view, without the exclusivity and minimum stock requirement imposed on points of sale, the loyalty programme would not have been capable of generating a significant increase in the

⁵⁴⁹ *Messer Griseim do Brasil Ltda v White Martins e White Martins Gases Industriais SA - 0800.022579/1997-05.*

⁵⁵⁰ *Ibid.*, 782.

⁵⁵¹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁵⁵² *Ibid.*, para. 98.

⁵⁵³ See fn 333.

⁵⁵⁴ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 114.

purchase of AmBev beers. Therefore, the exclusivity imposed on points of sale and the artificial creation of barriers to entry were perceived as the main reasons for finding an offence.

According to Councillor Furlan, imposing exclusivity by legal or commercial means in the beer market could not be justified by arguing that it resulted in a reduction of transaction costs.⁵⁵⁵ However, this justification could be valid in dynamic markets in technical and innovative sectors, where exclusivity arrangements could be necessary to market effectively new technological products to consumers. Exclusivity in the downstream market could be justified if the dominant undertaking invested a considerable amount in aspects such as training, sales and technical assistance teams.⁵⁵⁶

In the view of Councillor Furlan, the justification raised by AmBev based on the need to protect its commercial reputation could not be accepted.⁵⁵⁷ The product differentiation in the beer sector resulted from marketing and branding, rather than differences in quality or taste of the product. Therefore, the presence of competing brands sold at the points of sale, contrary to AmBev's loyalty programme, was not deemed capable of causing damage to the reputation and commercial goodwill of AmBev's beer brands.

The justification based on the allegation that AmBev had made specific investments was not accepted either, because it was not necessary for AmBev to invest in catering equipment and

⁵⁵⁵ Ibid., para. 261.

⁵⁵⁶ Ibid., 262.

⁵⁵⁷ Ibid., para. 264.

shop-fitting of points of sale.⁵⁵⁸ These practices were deemed to constitute incentives or ‘perks’ to induce them into the exclusivity scheme. In addition, given the cash flow generated by sales and the fact that AmBev’s beer brands were advertised in shops and catering equipment, there were no significant sunk costs in the event that the exclusivity arrangements ceased.

With regards to the justification based on achieving efficiencies via economies of scale, the presence of AmBev in 97 percent of points of sale and a market share of circa 70 percent in the national market signified that AmBev had already consolidated an unchallenged dominant position. Thus, it was not deemed reasonable for AmBev to justify exclusivity arrangements on the need to achieve economies of scale.⁵⁵⁹

The defence submission based on the argument that AmBev’s market share did not increase was rejected because AmBev was pursuing a commercial strategy primarily aimed at excluding competitors and raising barriers to entry. Therefore, its loyalty programme was deemed to be anti-competitive even if AmBev maintained its market share. This understanding is stricter than the one in *Kellogg’s*, where the lack of an increase in the defendant’s market share was considered to demonstrate that no anti-competitive offence had taken place. The CADE stated in *AmBev* that for anti-competitive effects to occur it was not necessary for the market to be foreclosed and AmBev’s market share to increase as the aim

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid., para. 265.

and scope of the exclusivity programme had to be taken into consideration.⁵⁶⁰ This is similar to the *per se* rule in the EU.

In *Microsoft/TBA*,⁵⁶¹ the defendant submitted efficiency justifications for its conduct. As explained below,⁵⁶² the CADE felt that there was no need for an in-depth analysis of such justifications, given that the conduct would result in a monopoly and consequently in higher prices and less product choice.⁵⁶³

Justifications were also raised in *Center Norte*⁵⁶⁴ and *Iguatemi*.⁵⁶⁵ In both decisions the defendants argued that the exclusivity covenants reflected common market practice, which was openly encouraged by the Brazilian Association of Shopping Centres as a way of ensuring a greater diversity and quality of tenants. However, the justification was not accepted by the CADE. It appears that the justifications failed as a result of the anti-competitive scope of the exclusivity covenants.

From the cases above it remains clear that the competition authority will consider any possible justifications to the conduct. Although there is no legal burden of proof on the defendant to provide justifications, in practice these are usually raised by the defendant and the competition authority has the discretion to accept them. As will be discussed in the next section, in common with the EU and in contrast to the US, once it is found that the dominant

⁵⁶⁰ Ibid., para. 286 In this respect, an unjustified non-linearity of the programme between purchases and discounts was deemed to be anticompetitive.

⁵⁶¹ *SDE "Ex Offício" v Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49.*

⁵⁶² See section 5.4.4.

⁵⁶³ *SDE "Ex Offício" v Microsoft Informática Ltda, TBA Informática Ltda - 08012.008024/1998-49, para. 6.3.*

⁵⁶⁴ *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13.*

⁵⁶⁵ *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

firm's conduct could result in the foreclosure of the market and harm to consumers, it is unlikely that the CADE will accept any justification for the conduct.

5.4.4 Brazilian rule of reason

The case analysis suggests an approach to exclusive agreements that differs from the American rule of reason. After the exclusivity dealing cases involving Unimed, the CADE published, in December 2009, in the Official Journal a statement which established that ‘...it is an offence to the economic order, a conduct, in any form manifested, that impedes or creates difficulties for cooperated medical practitioners to work outside the ambit of the cooperative when such cooperative is dominant’.⁵⁶⁶ Although Unimed was not expressly mentioned in the statement, it is implied that it was the intended recipient due to its previous and continuing breaches of competition law. Statements of the CADE are non-binding, as Brazil is a jurisdiction where administrative bodies do not have the constitutional mandate to issue legal decrees. However, the publication of the statement in the Official Journal will legitimise the grounds for any future prosecution against Unimed, as the latter was warned that continuing to impose exclusivity covenants on medical practitioners is interpreted as a conduct that could be deemed illegal pursuant to Law 8,884/94. The wording of the statement of the CADE against health care providers appears to contain a *per se* prohibition. This is likely to be due to the social importance of the health care sector as competition ensures greater choice, lower costs and higher quality of services.

In *White Martins*, Councillor Macedo Júnior commented that it was plausible for some efficiency to result from exclusivity agreements, such as the reduction of transaction costs. However, he highlighted that the benefit of such efficiencies was offset by the inefficient

⁵⁶⁶ Conselho Administrativo de Defesa Econômica - CADE, “Súmulas n. 7.”

purchase of surplus raw materials from Ultrafertil SA.⁵⁶⁷ Initially, this suggests a balancing of pro and anti competitive effects, but this is, in fact, not the case. The practice of imposing exclusivity covenants over the whole of Ultrafertil SA's production was considered contrary to competition law, because the surplus of raw material purchased did not serve a legitimate commercial purpose. It was deemed that the exclusivity over the whole production of raw materials created an artificial barrier to entry.⁵⁶⁸ As the conduct created artificial barriers to entry and harmed competition, it was deemed contrary to competition law, irrespective of the efficiency justifications raised. The Counsel for the defendant complained that the economic rationale of the exclusivity agreements was not considered when applying the 'rule of reason'.⁵⁶⁹ This complaint would have been valid under the US rule of reason. However, although the same term is used in Brazil, the substance of the Brazilian rule of reason does not correspond to its American counterpart. Instead, the Brazilian rule of reason is closer to the EU *per se* approach, whereby it is possible, although unlikely, for the competition authority to accept efficiency justifications that balance the harm caused to competition. Indeed, Councillor Macedo Júnior considered that the efficiency justifications could not be accepted because the conduct could eliminate effective competition in the market. The Councillor stated that efficiencies were taken into consideration in the reasoning, but were not deemed applicable as they failed to exclude liability.

In *Microsoft/TBA*,⁵⁷⁰ the CADE considered the approaches to vertical restraints in the US and the EU. With regards to the US, Councillor Cueva stated that vertical restraints were considered as *quasi per se* offences until *GTE Sylvannia v Continental TV*, whereby a more

⁵⁶⁷ *Messer Griseim do Brasil Ltda v White Martins e White Martins Gases Industriais SA - 08000.022579/1997-05*, 781.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*, 15.

⁵⁷⁰ *SDE "Ex Officio" v Microsoft Infomática Ltda, TBA Infomática Ltda - 08012.008024/1998-49.*

liberal approach was adopted.⁵⁷¹ Councillor Cueva stated that Microsoft opted for a vertical restraint rather than a vertical integration and that this showed that the first option was likely to be less costly for the producer.⁵⁷² In relation to the EU approach, Councillor Cueva stated that there is a great degree of convergence between the EU and the Brazilian models of competition law and policy as in the EU vertical restraints are not analysed in an absolute manner and efficiencies and inefficiencies created by a conduct are examined carefully.⁵⁷³ This is in harmony with the findings of the interviews conducted with the Councillors of the CADE. When asked about how the rule of reason is applied in Brazil, the vast majority stated that it meant that they took efficiencies and inefficiencies into account in the analysis. This finding reveals that the Brazilian rule of reason is substantially similar to the reasoning under the EU model.

If a conduct results in market foreclosure or harm to competition and consumers, it is unlikely that efficiencies would justify the conduct. In the words of one Councillor: ‘You will not see me approving an anti-competitive conduct just because there are efficiencies resulting from it’. This statement mirrors the reasoning applied by another Councillor in *Microsoft/TBA*, where Councillor Cueva stated he would only consider efficiency justifications if the regional allocation of Microsoft’s distribution network had been planned via objective criteria. An in-depth analysis of the efficiency justifications was not deemed necessary as Microsoft had intentionally planned to give TBA the monopoly over the federal district of Brasilia, and consequently over public procurement competitions at a federal level.

⁵⁷¹ Ibid., 6.1.1. See *Continental T. V., Inc. v GTE Sylvania*, vol. 433.

⁵⁷² SDE "Ex Offício" v *Microsoft Infomática Ltda, TBA Informática Ltda - 08012.008024/1998-49*, 6.1.1.

⁵⁷³ Ibid., 6.1.2.

Although Councillor Cueva stated that he would apply the ‘rule of reason’,⁵⁷⁴ in substantial terms the reasoning demonstrates the adoption of an EU approach, as the efficiency justifications raised by Microsoft were analysed as objective justifications. The creation of a monopoly in relation to distributions to the federal government strongly suggested the existence of an offence because competition and ultimately consumers were harmed. The reasoning adopted by the CADE appears to be closer to the EU than to the US, given that in the former the existence of dominance together with a conduct that has the risk of eliminating competition is enough in itself to constitute an abuse of dominance.

Although under the Brazilian rule of reason the competition authority does not need to prove that a conduct is not reasonably necessary or that the goals could be achieved by less restrictive means, in *Center Norte*⁵⁷⁵ the CADE stated that it would be reasonable in some cases for shopping centres to include non-competition covenants on tenants.⁵⁷⁶ For instance, this could occur when substantial investments are made in relation to new shopping centres and a return on investment can only be guaranteed via proportionate commitments from key anchor tenants. Therefore, the inclusion of non-competition covenants for an indeterminate period of time was deemed to be excessive and in breach of competition law.

In *Center Norte* the CADE looked at the competition policy of another South American jurisdiction rather than solely the US and the EU as in most cases. Councillor Pfeiffer stated that the Chilean competition authority had declared void a radius exclusivity covenant imposed by a shopping centre which had similar effects to the non-competition covenants of

⁵⁷⁴ Ibid., 6.1.1.

⁵⁷⁵ *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13*.

⁵⁷⁶ Ibid., para. IV. 3.

Center Norte's tenancy agreements.⁵⁷⁷ The Chilean precedent seemed to play an important role in the decision, as the CADE stated that the defendant was not competing on the merits because it was imposing non-competition covenants on tenants, rather than using legitimate ways to maintain its market dominance, such as investing on structural improvements. Although it is not common for the Brazilian competition authority to look at decisions of other competition authorities apart from the US and the EU, the fact that the CADE took the Chilean decisions into account suggests that the enforcement policy of abuse of dominance in Brazil may have, to a certain extent, some influence from jurisdictions other than the US, EU and the Brazilian legal system.

In *Iguatemi*,⁵⁷⁸ although the facts were largely similar to *Center Norte*, the SDE concluded its investigations by declaring that Iguatemi's non-competition covenants were reasonable, as there was only one competitor within the territorial exclusivity radius, so its impact was negligible.⁵⁷⁹ Therefore, it would not be deemed to constitute an offence under competition law. However, the CADE disagreed with the SDE's conclusions. Councillor Vasconcellos highlighted that the SDE's investigations omitted the fact that the territorial exclusivity covenants were reinforced with nominal restrictions on tenants to open shops in other shopping centres.⁵⁸⁰ However, during proceedings, Iguatemi offered to settle with the CADE by proposing to waive its rights under the nominal restrictions in respect of shopping centres within its radius exclusivity. This offer was rejected by the CADE, as it considered that the

⁵⁷⁷ *Ibid.*, 926.

⁵⁷⁸ *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

⁵⁷⁹ *Ibid.*, 1061.

⁵⁸⁰ *Ibid.*, 2752.

existence of a restrictive covenant, which could be either nominal or territorial, foreclosed the market.⁵⁸¹ This suggests the adoption of a *per se* approach by the CADE in this decision.

According to Councillor Vasconcellos, the vertical restraints imposed by the exclusivity covenants harmed competition. In his opinion, admitting that the exclusivity covenants could be deemed to favour competition via efficiency defences would be the same as stating that resulting social costs, consisting of the harm of competition in relation shop owners, were less important than Iguatemi's economic interest.⁵⁸² The reasoning in *Iguatemi* suggests that the Brazilian 'rule of reason' is closer to the EU approach than to the US rule of reason.

Three years after *Center Norte* and *Iguatemi*, the CADE decided *Celular CRT*,⁵⁸³ where it declared that the imposition of exclusivity covenants on resellers or distributors could be contrary to competition law if competitors did not have a reasonable alternative channel to distribute or resell their products.⁵⁸⁴ In *Celular CRT*, the conduct was found legitimate because competitors managed to grow in the market by finding alternative distribution channels.⁵⁸⁵ However, it is questionable whether the outcome would have been the same if the decision had not been delivered seven years after the conduct took place. The CADE had the benefit of hindsight, notwithstanding the fact that the use of the alternative channels by CRT's competitors may not have been foreseeable when the exclusivity agreements were put into place.

⁵⁸¹ *Ibid.*, 2764-65.

⁵⁸² *Ibid.*, 2760.

⁵⁸³ *Telet SA v Celular CRT SA - 53500.000502/2001*.

⁵⁸⁴ *Ibid.*, 1721.

⁵⁸⁵ *Ibid.*, 1675-76.

In *AmBev*,⁵⁸⁶ the reasoning of the CADE considered arguments from the Chicago school against the hypothesis of viably excluding competitors by way of discounts and rebates that require exclusivity.⁵⁸⁷ According to this view, it would not be rational for an inefficient firm to engage in exclusivity agreements with retailers in the downstream market. Councillor Furlan rejected the applicability of the Chicago school thoughts by stating that exponents of the Post-Chicago school maintain that in some cases there could be harmful exclusionary effects.⁵⁸⁸ A dominant undertaking might have sufficient market power to put commercial pressure on distributors or resellers to enter into exclusivity agreements. Under this scenario, when distributors first enter into the agreement or arrangement, this would create a negative externality and other distributors would enter into the agreement as well. As a result, the dominant producer would be able to act as a monopolist.

The decisions discussed above suggest an analysis of exclusive dealings in Brazil that is *quasi per se*. If it is deemed that the conduct forecloses the market and harms consumers, the competition authority will analyse the justifications in a similar fashion as in the EU. Thence, it would be unlikely for the dominant firm to be acquitted.

⁵⁸⁶ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁵⁸⁷ *Ibid.*, para. 225.

⁵⁸⁸ *Ibid.*, para. 226.

5.4.5 Observations

It appears that the formulation of legal principles has not yet matured to the point of allowing a precise definition of how each and every element of exclusive dealing is dealt with by the BCPS. However, in all the decisions examined the CADE has shown considerable concern with the creation of artificial barriers to entry. Such behaviour was not deemed to promote competition on the merits. In addition, there was a concern with indirectly protecting consumer choice and prices.

In regards to proof of effects and the standard of proof, in none of the decisions discussed above was it necessary for the competition authority to prove the likely effects of the conduct; only that it would have been possible for the alleged effects to take place. This places the Brazilian competition law and policy closer to the EU and further from the US model, as in the latter actual or likely effects need to be proven under the first step of the rule of reason.⁵⁸⁹

In *White Martins*, efficiencies were taken into consideration as they formed part of the defendant's submissions, but they were considered immaterial in the reaching of the decision. In the view of Councillor Macedo Júnior, efficiencies were rejected because they failed to exempt the conduct. Efficiencies could not be admitted given that there was market foreclosure caused by the purchase of all raw materials produced by Ultrafétil, including raw material in excess of White Martins' commercial purchasing capacity, thereby creating

⁵⁸⁹ See section 3.1.2.

barriers to entry. Therefore, efficiencies were assessed in a similar way to objective justifications in the EU.

Although in formal terms exclusive dealing is not considered to be a *per se* offence under Brazilian competition law,⁵⁹⁰ efficiencies appear to be treated, in common with the EU, as objective justifications. It could be argued that, on this issue, the Brazilian competition law is different from its US counterpart. The provisions of Law 8,884/94 expressly protect consumers and the maintenance of a competitive market, free from artificial entry barriers created by dominant firms.⁵⁹¹ This is mirrored in the Brazilian case-law, as in the aforementioned cases the creation of barriers to entry formed the basis of the decisions. Article 20 of Law 8,884/94 expressly prohibits any conduct that is capable of limiting, impeding or in any way injuring open competition or free enterprise.⁵⁹² Such prohibition is reinforced by Article 1 of Law 8,884/94, whereby constitutional principles represent the goals of competition law, such as ‘...free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power’.⁵⁹³ Consequently, many elements play a role in the Brazilian competition policy, which is concerned with society as a whole.

⁵⁹⁰ See e.g. Cadoca, *Competition Bill n. 3,937/04*, 30.

⁵⁹¹ See Forgioni, *Direito Concorrencial e Restrições Verticais*, 181.

⁵⁹² See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20.

⁵⁹³ *Ibid.*, Article 1.

5.5 Conclusion

Some elements of the reasoning of the CADE appear to differ in relation to the type of abuse of dominance, notwithstanding the fact that Law 8,884/94 provides a general regulatory framework and standards irrespective of the conduct involved. Nevertheless, there seems to be a general concern on the part of the BCPS with the artificial creation of barriers to entry.

With regards to refusals to deal, the CADE considers that it could be deemed contrary to competition law if it forms part of an exclusionary strategy.⁵⁹⁴ The possible exclusionary effects have to be analysed in terms of potential harm to consumers and competition. In accordance with *MATEC*, refusing to deal would be deemed unlawful when it is utilised as a means of artificially creating barriers to entry. This approach is closer to the EU, given that in the latter the creation of artificial barriers to entry through refusing to deal is a reason for concern whilst it is not prohibited in the US. Moreover, the Brazilian competition authority does not need to prove the likely effects on competition as pursuant to the stringent standards under the US rule or reason.

Law 8,884/94 and the case-law are silent in respect of the conditions that make an essential facility necessary for determining whether a refusal to deal or any other conduct constitutes an offence. However, it appears that the essential nature of a product has played an important

⁵⁹⁴ See e.g. *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, v. 2, 13.

role in decisions such as *TV Globo*, suggesting that there has been an implied adoption of the essential facilities doctrine in Brazil.⁵⁹⁵

In respect of tie-in sales, these are prohibited from the moment that they allow the dominant firm to leverage its market power in the secondary market. The tying arrangement is relevant as it could serve the purpose of creating artificial barriers to entry and eliminating competition. If it is proved that the dominant firm is able to leverage its market power, the CADE will consider the justifications submitted by the defendant or that appear applicable to the particular case. However, from the moment that it is shown that the conduct could result in market foreclosure and harm to consumers, it is possible yet unlikely, that the dominant firm will be able to justify its conduct.

The Brazilian case-law is in a relatively early stage of development and has not yet matured in regards to tying arrangements. There are only ten relevant decisions on CADE's database⁵⁹⁶ and only one where an undertaking has been fined for this offence thus far.⁵⁹⁷ The reason for this could be that tying is already prohibited under the Brazilian Consumer Code,⁵⁹⁸ hence it is an offence that generally falls within the scope of consumer protection. However, tying arrangements could result in serious harm to competition and this explains why they are considered a *per se* offence in the EU and a *quasi per se* offence in the US. The Brazilian approach does not seem to take into consideration the seriousness of the conduct within the ambit of competition policy and there seems to be an over reliance on the Brazilian

⁵⁹⁵ See *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*, votes of Councillors Afonso Arinos de Mello Franco Neto, Celso Fernando Campilongo, Hebe Teixeira Romano, João Bosco Leopoldino da Fonseca and Thompson Andrade.

⁵⁹⁶ This figure can be said to be low in comparison e.g. with the EU, where only at a EU Court level the number of cases have been more than double the number of tie-in cases than in the Brazilian competition authority.

⁵⁹⁷ Namely *Unimed Santo Ângelo*. See section 5.3.

⁵⁹⁸ See Brazil, *Law n. 8,078 of 11 September 1990*, Article 39.

Consumer Code. Competition law advocacy, as well as improved training at the BCPS could play an essential role in resolving this issue.

With regards to exclusive dealing, the case-law suggests a particular concern with the artificial creation of barriers to entry.⁵⁹⁹ In common with the US and the EU, economic efficiencies in Brazil can form part of the defendant's submissions in order to justify the conduct. However, the Brazilian position appears to be closer to that of the EU, as the main concern of the competition authority seems to be the protection of the freedom of competitors to operate in a market without artificial barriers created by dominant firms. This contrasts with the US position where the primary concern regards overall economic efficiency.⁶⁰⁰

The above findings in relation to non-pricing offences suggest that the Brazilian model is converging with the EU model. However, in some respects the development of the Brazilian system of competition law and policy is at a crossroads. For instance, there appears to be disagreement among members of the BCPS as to whether it is necessary to prove the dangerous probability of effects in refusal to deal cases.⁶⁰¹ This suggests that the influence of the US on the development of Brazilian competition law and policy still persists.

⁵⁹⁹ See e.g. *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13*, 909-10. *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43*, 2750-51.

⁶⁰⁰ See p. 118.

⁶⁰¹ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, 107.

6. Chapter Five - Pricing Abuse of Dominance in Brazil

6.1 Introduction

This chapter explores how pricing offences are examined by the BCPS in relation to abuse of dominance. Particular attention is given to exclusionary offences, such as predatory pricing, price discrimination, as well as discounts and rebates. In order to provide a full account, this chapter also includes excessive pricing which can be exclusionary but is mainly an exploitative conduct.

The purpose of analysing various types of offences is to determine whether there is coherence and consistency in the development of the Brazilian competition law and policy, particularly in relation to its legal standards. Moreover, it assists this study in determining where the hybrid model of competition law in Brazil is positioned in the spectrum of the EU and US models.

This chapter first examines predatory pricing, followed by pricing discrimination, discounts and rebates and abusive pricing. The study of each offence includes a brief overview of the conduct, an analysis of the treatment given to effects and justifications, as well as a discussion of the reasoning adopted by the BCPS, i.e. the Brazilian 'rule of reason'.

6.2 Predatory pricing

6.2.1 Overview

Pursuant to Article 21(XVIII) of Law 8,884/94, it is an offence to the economic order 'to unreasonably sell products below cost to the extent that it may breach Article 20.⁶⁰² Therefore, predatory pricing in Brazil is essentially conceived as the unjustified sale of products below cost.⁶⁰³ Although similar definitions of predatory pricing are found in the US and the EU, many differences emerge in the assessment of the conduct and standards of proof in these jurisdictions.

An element of divergence between the US and the EU concerns the cost criterion to qualify a price as predatory.⁶⁰⁴ In *Brooke Group*,⁶⁰⁵ the US Supreme Court failed to express whether prices set above total costs ought to be qualified as a safe harbour, although its reasoning suggested that this would unlikely constitute an offence.⁶⁰⁶ EU competition law, instead, adopts a *per se* rule whereby the conduct is deemed abusive if prices are set below average variable costs.⁶⁰⁷ Moreover, in *Tetra Pak II*⁶⁰⁸ the COJ considered that predatory pricing

⁶⁰² See section 2.3.3.1.

⁶⁰³ See section 2.3.3.2.

⁶⁰⁴ Fixed costs do not change regardless of the output. Variable costs are those that change in accordance with the quantity of products produced. Total costs are the sum of fixed and variable costs. The average costs mean the total costs divided by the amount of products produced. Finally, marginal costs regard a change in the total cost resulting from an increase of output of a certain product; for this reason, marginal costs are also called incremental costs. Avoidable costs regard all costs that could be avoided if the firm had decided not to sell the product in question during the period of the alleged conduct. For more details on the concept of costs, see Posner, *Economic analysis of law*, 684.

⁶⁰⁵ *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*

⁶⁰⁶ *Ibid.*, pt. II, A.

⁶⁰⁷ See *Tetra Pak International SA v Commission of the European Communities - Case C-333/94*, 4.

⁶⁰⁸ *Ibid.*

could occur when an exclusionary aim is present and prices are set above average variable costs but below average total costs.⁶⁰⁹

In contrast to the COJ, the US courts tend to be sceptical about claims of predatory pricing.⁶¹⁰ In *Brooke Group*,⁶¹¹ the US Supreme Court stated that predatory pricing would require a dangerous probability of recoupment of losses.⁶¹² This makes it difficult to establish liability in the US and differs from the EU, where proof of dangerous probability of recoupment is not required. Indeed, the COJ expressly rejected the need for such requirement in *Tetra Pak II*.⁶¹³ As will be discussed below, the Brazilian treatment of predatory pricing appears to show a greater resemblance to the US approach than to the EU.

⁶⁰⁹ See *Ibid.*

⁶¹⁰ Federal Trade Commission Bureau of Competition, “Exclusionary or predatory acts: predatory pricing.”

⁶¹¹ *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*

⁶¹² *Ibid.*, pt. II, A.

⁶¹³ *Tetra Pak International SA v Commission of the European Communities - Case C-333/94*, 4. See also *France Télécom SA v Commission of the European Communities - Case C-202/07*, 110.

6.2.2 Proof of effects

Under the general standard set forth under Articles 20 and 21 of Law 8,884/94, it is only necessary to prove that anti-competitive effects could potentially result from the conduct.⁶¹⁴ It is not necessary to prove actual or likely effects in order to constitute the offence of predatory pricing. However, the enforcement on some occasions has departed from the general standards under Law 8,884/94. In the decisions discussed below, the reasoning of the CADE implied the need to prove the likely effects of the conduct, thereby adopting an approach similar to the US.⁶¹⁵

In *Kellogg's*,⁶¹⁶ Nutrifoods claimed that a previous merger which had been authorised by the CADE, between the multinational Kellogg's and Superbom, a Brazilian company in the cereal sector, increased Kellogg's market power and its ability to set predatory prices. When formulating its decision in favour of the defendant, the CADE departed from the general standards set forth in Law 8,884/94 by stating that even in the hypothetical scenario that the defendant committed predatory pricing, further evidence demonstrating a genuine possibility of direct harm to competitors would be needed to support the claim.⁶¹⁷ Among other reasons, the CADE was not in favour of finding Kellogg's liable as Nutrifoods did not lose substantial market share as a result of the conduct.⁶¹⁸ However, it could be argued that the conduct of Kellogg's might have hampered the growth of Nutrifoods' market share.⁶¹⁹

⁶¹⁴ See sections 2.3.3.1 and 2.3.3.2.

⁶¹⁵ See section 3.2.

⁶¹⁶ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10.*

⁶¹⁷ *Ibid.*, 3.

⁶¹⁸ Nutrifoods' market share remained stable at circa 10%. See *Ibid.*

⁶¹⁹ It has to be borne in mind that '...a focus on actual effects can produce misleading results where the claim is that the defendant's exclusionary conduct helped to maintain its monopoly power without necessarily resulting

Kellogg's was heard two years after the alleged conduct took place and the CADE had the benefit of hindsight when determining that no harm occurred to competitors.⁶²⁰ As the exclusionary effects failed to materialise, there was reluctance in finding *Kellogg's* liable. This is a similar situation to *Celular CRT*.⁶²¹ It emerged from the interviews that, in many cases, alleged breaches of competition law are permitted because of excessive delays in the investigatory phase. In such cases, some Councillors felt compelled to take into consideration what happened in practice, rather than adjudicating the alleged offence in the light of the facts and circumstances at the time that it occurred, i.e. by considering the potential harm to competition at the time of the alleged conduct in accordance with the standards set forth under Law 8,884/94.⁶²² According to a member of the BCPS:

Sometimes the investigation takes a long time and you can see that the anti-competitive effects did not take place in practice. Although the law states that a conduct could be punished even if the effects do not materialise,^[623] if there was no exclusionary effect or a substantial harm to competition you feel compelled to absolve the company.

In the light of the above, although in formal legal terms only the potential harm needs to be proven, in substantive terms, the actual recoupment and a serious possibility of direct harm to competitors need to be proven.⁶²⁴

in immediate incremental price-output effects'. Balto, "Proof of competitive effects in monopolization cases: a response to Professor Muris," 312.

⁶²⁰ This was also the case in *Celular CRT*. See section 8.6.6.

⁶²¹ See p. 56.

⁶²² See p. 101.

⁶²³ This was clearly stated in the case *Telet SA v Celular CRT SA - 53500.000502/2001*, 1669-79.

⁶²⁴ See *Kellogg's* at p. 238.

In *Merck/M.B. Bioquímica*,⁶²⁵ Labnew brought a claim against Merck and its subsidiary M.B. Bioquímica for allegedly selling vacuum tubes for the collection of blood samples at prices below costs. In this decision it was suggested that even when a conduct results in exclusionary effects it would be permitted, unless the dominant firm is able to increase prices abusively at a later stage. Therefore, the CADE appears to have adopted a similar reasoning to that of US courts by requiring proof of a dangerous probability of recoupment. This approach ignores the fact that consumers would have less product choice, and competitors would be harmed as a result of the exclusionary practice. In effect, products would be subject to monopolistic prices, at least until a competitor managed to enter the market.

⁶²⁵ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3162.

6.2.3 Efficiencies and other justifications

Law 8,884/94 does not provide a list of acceptable justifications for the sale of products at below cost by a dominant undertaking. However, there are various justifications applicable to selling below costs⁶²⁶ as demonstrated by the reasoning in the decisions of the CADE. For instance, in *Kellogg's* the justification accepted was based on the submission that the conduct was temporary and aimed at mitigating the operational loss from holding excess stock.⁶²⁷

Moreover, in *Merck/M.B. Bioquímica* the presiding Councillor, Mércio Felsky, stated that one-off occurrences, such as an exceptional discounted sale that resulted in negligible harm to competitors would not constitute predatory pricing.⁶²⁸ Furthermore, sales below cost could be justified in a number of ways, as long as the conduct does not materially harm the process of competition, and consumers benefit from resulting efficiencies.

⁶²⁶ See Oliveira and Rodas, *Direito e Economia da Concorrência*, 58.

⁶²⁷ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10*, 4.

⁶²⁸ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3165.

6.2.4 Brazilian rule of reason

Law 8,884/94 prohibits the ‘unreasonable’ sale of products or services below cost.⁶²⁹ Therefore, there is an objective standard, based on reasonableness, to evaluate the conduct. In 1999, the CADE published Resolution 20 which sets forth additional standards for establishing predatory pricing. Pursuant to Resolution 20, predatory pricing is defined as the deliberate practice of setting prices below average variable costs with the aim of excluding competitors and with the ultimate purpose of setting monopolistic prices at a later stage.⁶³⁰ Resolution 20 also states that the competition authority ought to conduct a detailed analysis of the costs and pricing conditions in the years surrounding the alleged offence, as well as the alleged strategic conduct of the undertaking, in order to determine effective or potential gains capable of compensating previous losses.⁶³¹ Hence, the latter requirement provides a standard of proof based on purpose, effects and recoupment, which is higher than the standard set forth in Law 8,884/94. In this way it is similar to the US approach to predatory pricing. The drafting of Resolution 20 raises a serious issue, as it is a form of secondary legislation of an administrative nature whose purpose is to provide guidance in relation to the provisions of Law 8,884/94. The additional requirements contained in Resolution 20, which are not provided in Law 8,884/94, create law rather than provide guidance as it elevates the standard of proof. This creates incoherence within the system of Brazilian competition law, as the assessment of predatory pricing diverges from other offences regulated by the general standards pursuant to Law 8,884/94.

⁶²⁹ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(XVIII).

⁶³⁰ Conselho Administrativo de Defesa Econômica, “Resolution n. 20,” 3.

⁶³¹ *Ibid.*

In *Merck/M.B. Bioquímica*⁶³² proof of recoupment was required on the basis that if a predator fails to eliminate its rivals, it would not be able to recover its losses. Therefore, selling below cost would not in itself constitute an offence. Moreover, it was stated that the alleged conduct could be justified as efficiencies would be increased and consumers would benefit from lower prices. Councillor Felsky cited the recoupment requirement test based on market contestability set by the US Supreme Court in *Brooke Group*,⁶³³ whereby it was determined that the recoupment of losses would be unlikely when a market was highly diffused and competitive, barriers to entry were low and the supposed predator did not have excess capacity to absorb the market share of its rivals.

In *Merck/M.B. Bioquímica*, Councillor Felsky adopted the *Brooke Group* test by stating that there are five indicative conditions, although not sufficient in themselves, for configuring predatory pricing: (1) the relevant market must be concentrated; (2) the predator must have dominance;⁶³⁴ (3) the barriers to entry must be high;⁶³⁵ (4) the predator must have excess installed capacity of production; and (5) the commercial goodwill of rivals expelled from the market must be taken over by the predator.⁶³⁶ The main purpose of analysing these conditions is to verify whether recoupment was likely. Nonetheless, the conditions were regarded as

⁶³² *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda* - 08000.013002/1995-97, 5165.

⁶³³ *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 226.

⁶³⁴ It must be noted that the defendant did not have dominance, so the Councillor appears to be contradicting himself. See also section 8.4.2.

⁶³⁵ High barriers to entry would be necessary to allow the predatory firm to charge high prices after excluding competitors from the market without the risk of having to compete with new entrants.

⁶³⁶ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda* - 08000.013002/1995-97, 3167-68.

indicative rather than necessary for proving the likely recoupment.⁶³⁷ In this sense, the only requirement that seems to constitute predatory pricing is recoupment itself.⁶³⁸

The reasoning in *Merck/M.B. Bioquímica* represents a departure from the general standards set forth in Law 8,884/94. This appears to result from the ideological orientation or professional training received by policy-makers. In his opinion, Councillor Felsky stated that the predominant theoretical understanding on predatory pricing comes from the Chicago school.⁶³⁹ According to this school of economic thought, the theoretical definition of predatory pricing would result in an irrational conduct that is rarely observed in the real world. However, Councillor Felsky indicated that the Chicago school suffered criticism at times and in his view recoupment of losses would not always be the main goal of the strategy.⁶⁴⁰ In any case, it must be noted that this proof of recoupment is not required when assessing other forms of abuse and is not needed in accordance with Brazilian competition law.

Law 8,884/94 defines predatory pricing as the sale of products below costs.⁶⁴¹ Hence, it is necessary to establish which definition of costs ought to be adopted, i.e. fixed, variable, total, average or marginal costs.⁶⁴² According to Resolution 20⁶⁴³ and *Merck/M. B. Bioquímica*,⁶⁴⁴

⁶³⁷ For instance, excess capacity of production was disregarded in *Merck/M. B. Bioquímica* given that a considerable proportion of the products were imported.

⁶³⁸ This is in accordance with Regulation 20 but not with Law 8,884/94. See p. 242.

⁶³⁹ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3162.

⁶⁴⁰ *Ibid.*, 3168.

⁶⁴¹ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(XVIII).

⁶⁴² See fn 604. See also Posner, *Economic analysis of law*, 684.

⁶⁴³ Conselho Administrativo de Defesa Econômica, "Resolution n. 20," 3.

⁶⁴⁴ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3166.

the Areeda-Turner test⁶⁴⁵ should be adopted to establish whether products were sold below cost. This test is primarily focused on average variable costs. However, in *Merck/M. B. Bioquímica*, the CADE also conceded that in some cases it may be difficult to distinguish between variable and fixed costs and that the Areeda-Turner test does not always reflect the real costs incurred.⁶⁴⁶

When assessing the probability of predation, emphasis is given on the inability of other competitors to meet efficiently the prices set by the dominant firm. In common with the EU and the US, the Brazilian competition authority examines many considerations rather than the alleged predation in isolation. Moreover, an analysis of prices practised by the actual competitors avoids the complexities of speculating on the costs of hypothetical competitors that are deemed to be reasonably efficient.⁶⁴⁷

Notwithstanding the above, there are aspects of divergence between the US and the EU that should be borne in mind by Brazilian policy-makers. The European Commission has admitted that in certain cases it may be necessary to protect competitors that are not yet as efficient as a dominant undertaking by ‘...taking account of economies of scale and scope, learning curve effects or first mover advantages that later entrants cannot be expected to match even if they were able to achieve the same production volumes as the dominant company’.⁶⁴⁸ Although there has not been a similar statement from the BCPS with regards to predatory pricing, the CADE has followed the reasoning of the European Commission in

⁶⁴⁵ This test identifies the variable costs and divides them by the number of units produced.

⁶⁴⁶ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3167.

⁶⁴⁷ Petit, “From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC,” 6.

⁶⁴⁸ European Commission, “DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses,” 67.

decisions concerning exclusivity arrangements where it has taken into consideration elements such as the first mover advantage.⁶⁴⁹ Therefore, notwithstanding the drafting of Resolution 20, which gravitates towards the US approach, it is possible for the Brazilian competition authority to apply the statements of the European Commission to predatory pricing as well. This unfortunately does not improve legal certainty in relation to the application of competition law to predatory pricing offences in Brazil.

⁶⁴⁹ *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13, 910. Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

6.2.5 Observations

Although Law 8,884/94 prohibits the ‘unreasonable’ sale of products below cost, Regulation 20 has raised the standard of proof by giving a greater emphasis on the recoupment requirement. In *Merck/M.B. Bioquímica*, the CADE appears to have applied an American inspired approach to predatory pricing by requiring proof of a dangerous probability of recoupment.⁶⁵⁰ Hence, in order to constitute predatory pricing, it would be necessary to prove that the alleged predator is likely to recover its losses at a later stage by charging monopolistic prices.

The interviews revealed that some Councillors have questioned the need to always prove recoupment. This is in harmony with the statement of Councillor Felsky in *Merck/M.B. Bioquímica*. He highlighted that recoupment of losses would not always be the main goal of the dominant firm’s strategy and recoupment would be difficult to determine if practised by multi-product firms, such as conglomerates, as cross subsidises may be used strategically to exclude competitors.⁶⁵¹ The CADE has not yet faced a scenario consisting of cross subsidies in this context, so it remains unknown how proof of recoupment would be assessed.

The majority view among Councillors is that it is necessary to prove that recoupment is likely.⁶⁵² Predatory pricing is perceived as an offence that is unlikely to materialise and whose attempt would result in lower prices benefiting consumers. According to a member of the BCPS:

⁶⁵⁰ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97*, 3165.

⁶⁵¹ *Ibid.*, 3169.

⁶⁵² Such as Councillor Felsky in *Ibid.*, 3165.

...the initial phase of predatory pricing is good for consumers. The conduct would begin to cause harm to them only when the predatory firm that excluded other competitors from the market started to abuse its dominance. If the predator does not have the ability to recover the losses, then it will make no economic sense to keep its prices low for a long period of time. For the conduct to be considered predatory, the company would have to be able to increase prices at a later stage.⁶⁵³

Law 8,884/94 is silent in respect to recoupment. However, one of its main goals is to protect consumers,⁶⁵⁴ which would in fact benefit from lower prices. The Chicagoan orientation of many members of the BCPS in respect to predatory pricing, the higher standards of proof set out in Regulation 20 and the pursuit of a policy that promotes low prices explain why no undertaking has yet been found liable for predatory pricing in Brazil.⁶⁵⁵

In the light of the above, setting prices below cost is permitted, even if it results in exclusionary effects, unless it is proven that a dominant firm is likely to recoup losses and increase prices abusively at a later stage. This contrasts with the EU, where there is a greater concern with the exclusion of competitors from the market. The treatment of predatory pricing in Brazil also departs from the general standards set forth under Law 8,884/94 and sets it apart from other offences.

⁶⁵³ This is in harmony with the views of the Chicago School and with the interpretation of Councillor Fonseca in *Labnew Indústria e Comércio Ltda v M.B. Bioquímica Ltda* - 08000.013002/1995-97.

⁶⁵⁴ Brazil, Law n. 8,884 of 11 June of 1994, Article 1.

⁶⁵⁵ *Empresa Folha da Manhã v Diário do Grande ABC* is the only case where CADE was of the opinion of finding liability for predatory prices. However, the defendant was not found liable because the case prescribed due to the expiration of the limitation periods. *Empresa Folha da Manhã* accused *Diário do Grande ABC* of practising predatory prices by giving significant discounts in an attempt to gain the exclusivity of advertisers in its newspaper. In this case, it was declared that a company that concedes high discounts in order to obtain the exclusivity of its clients abuses its dominant position.

Notwithstanding the above findings, it is not clear whether the BCPS embracement of a US-inspired approach to predatory pricing resulted from a conscious policy decision. When interviewed members of the BCPS were questioned about the fact that predatory pricing decisions in Brazil cited European and American cases, and how the divergences between these two models were resolved, some answered that there were no significant differences. One Councillor stated that ‘...the differences between the two systems are said to be bigger than they really are’. According to another interviewee, ‘...predatory pricing is a concept that is basically uniform around the world’. These statements appear to be a cause for concern, as there are different legal standards in the EU and the US in respect to predatory pricing.

On the one hand, the citation of foreign decisions could harmonise Brazilian competition policy with international standards, or facilitate the application of Law 8,884/94. On the other hand, according to one member of the BCPS, ‘...the quotations are chosen randomly among these jurisdictions. [The Councillors] look for statements that justify their reasoning, but there is no concern with possible contradictions’. The unsystematic citation of foreign decisions, particularly if it results in a differential treatment given to a particular offence, has the potential of harming the coherent development of the Brazilian competition law and policy. Moreover, the contrast between the provisions of Law 8,884/94 and the manner in which competition law is applied results in legal uncertainty. A possible solution to this issue is to improve the quality of training of members of the BCPS, particularly in regards to the differences between the US and the EU models and the general standards under Brazilian competition law.⁶⁵⁶

⁶⁵⁶ See section 2.4.3.3.

Many interviewees of the BCPS expressed the concern with committing type I errors⁶⁵⁷ rather than type II errors⁶⁵⁸ as the reason for requiring proof of recoupment. According to one Councillor ‘...in uncertain cases, it is best to have a less interventionist stance to avoid harming innocent parties’. It appears that the non-interventionist position of most members of the BCPS in respect to predatory pricing is inspired from the prevalent US position, even if it is not supported by the general standards of Brazilian competition law. The only legal basis for the CADE’s non-interventionist position is Regulation 20,⁶⁵⁹ which mentions the requirement of recoupment as a standard of proof.⁶⁶⁰ However, Law 8,884/94 takes priority over any guidance or subordinate legislation. The fact that Law 8,884/94 is silent in relation to proof of recoupment⁶⁶¹ does not legitimise the distortion of the general principles set therein by subordinate legislation.

The adoption of a higher standard of proof for predatory pricing compared to other offences means that Brazil adopts a *laissez-faire* approach in terms of this offence, similarly to the US and in contrast with the EU. Due to the treatment given to predatory pricing, the CADE has never held a firm liable for this offence. It appears that the application of the law does not correspond with reality, as it is very unlikely that predatory pricing has never taken place in Brazil, especially considering that Brazil has many concentrated markets and powerful undertakings which have the resources for behaving in a predatory manner towards their smaller rivals.

⁶⁵⁷ False positive, i.e. condemnation of a legitimate conduct.

⁶⁵⁸ False negative, i.e. acquittal or non-prosecution of an illegitimate conduct.

⁶⁵⁹ It has to be noted that Resolution 20 is a not legally binding to third parties and adding extra requirements to the competition law through this instrument does not appear to be in harmony with the legal system, which does not admit this type of administrative document to add requirements to any law.

⁶⁶⁰ Conselho Administrativo de Defesa Econômica, “Resolution n. 20,” 3.

⁶⁶¹ This requirement is mentioned only in Resolution 20, which does not have the same legal ranking in hierarchical terms as Law 8,884. For further details, see Conselho Administrativo de Defesa Econômica, “Resolution n. 15,” A(4).

The interviews revealed that the CADE is likely to find an undertaking liable for predatory pricing for the first time. This is supported by the statements of interviewees in relation to a complaint which is currently under investigation.⁶⁶² The preliminary findings and opinions of members of the BCPS provide arguments in favour of the prohibition of the conduct. However, it still needs to be seen how the submissions raised by the defendant will affect the decision. In this respect, any eventual decision from the CADE should seek to clarify what the standard of proof is in relation to predatory pricing and, if necessary, restate the law to harmonise the treatment given to predatory pricing with the general standards set under Law 8,884/94 and the case-law.

⁶⁶² The name of the company under investigation remains confidential.

6.3 Price discrimination, discounts and rebates

6.3.1 Overview

Article 21(XII) of Law 8,884/94 prohibits dominant undertakings from setting discriminatory prices and conditions. According to Resolution 20, price discrimination is conceived as the use of market power to charge different prices to the same product, discriminating among purchasers.⁶⁶³

Price discrimination does not always constitute an offence. Under the general principles of Brazilian private law, parties are free to set prices and conditions as they please. However, the setting of discriminatory prices by dominant undertakings has the potential to harm the process of competition and consequently falls within the scope of Brazilian competition law. For instance, this would be the case if a conduct forms part of a strategy to increase barriers of entry.

A research on CADE's database revealed that less than ten administrative cases concerning price discrimination have been decided thus far; this appears to be a low number in comparison, for instance, with the more than 60 cases on exclusive dealing that have been decided by the CADE to date.⁶⁶⁴ This finding suggests that either Brazilian dominant undertakings rarely commit the offence, which is unlikely, or that few cases have come to the attention of the CADE by way of claims from affected parties or investigations from the SDE. Another relevant finding is that in none of these cases was the defendant found liable.

⁶⁶³ Conselho Administrativo de Defesa Econômica, "Resolution n. 20," 5.

⁶⁶⁴ A wide range of keywords was used in the research, such as 'discrimination'.

Discounts and rebates can also fall within the scope of price discrimination if they are offered in a discriminatory fashion. Such practice was far more common on the database, though it was not formally classified as price discrimination. Indeed, the most notorious abuse of dominance decision in recent years, namely *AmBev*,⁶⁶⁵ concerned the practice of offering discounts and rebates, combined with the informal requirement of exclusivity of a large share of the distributors' sales. Such practices were prohibited given that they increased barriers to entry and as efficient competitors would not be able to match the substantial discounts offered by AmBev. There was no need to prove the dangerous probability of recoupment.

In the US, it is unlikely that discounts and rebates would be considered an antitrust offence, unless they are offered below cost and there is a dangerous probability of recoupment. In fact, in *Brooke Group*⁶⁶⁶ volume rebates were granted in a discriminatory fashion and the Supreme Court ruled that there were two conditions to find an offence under Section 2 of the Sherman Act: prices should be below an appropriate measure of its rival's cost and there would have to be a dangerous probability of recoupment.⁶⁶⁷ Consequently, a high standard of proof is required, namely, the dangerous probability of recoupment. Therefore, in the US the offence is conceptualised in a similar fashion to predatory pricing.

The US approach is different from the EU, where the relationship between the costs and prices charged might not be fundamental.⁶⁶⁸ The key aspect concerns the effects that such

⁶⁶⁵ See section 8.5.2.

⁶⁶⁶ *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*

⁶⁶⁷ *Ibid.*, pt. II, A.

⁶⁶⁸ See 88/138/EEC: *Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - Eurofix-Bauco v Hilti)*, vol. 065. For comments on this case, see Jones and Sufrin, *EC Competition Law*, 466-467.

discrimination may have in the market. For instance, in *Irish Sugar*⁶⁶⁹ the Commission considered that the selective price cuts practised by a sugar beet monopolist in Northern Ireland were abusive. The reasoning was mainly based on the fact that Irish Sugar was a dominant firm which was seeking to exclude competition by practising selective and targeted price cuts as a response to the increase of imports from other Member States.⁶⁷⁰

Moreover, the European Commission stated that it would analyse whether the conduct is ‘...capable of hindering the expansion or entry of efficient competitors by making it more difficult for them to supply part of the requirements of individual customers’.⁶⁷¹ However, EU courts do not appear to have embraced the efficient competitor test, as one of their main concerns is ensuring that unnecessary exclusionary conduct does not take place. Therefore, unlike US courts, EU courts appear to show a greater concern with type II errors rather than type I errors. For instance, in *British Airways*,⁶⁷² the COJ stated that when balancing the pro and anti competitive effects of the conduct, ‘[i]f the exclusionary effect (...) bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse’.⁶⁷³

The EU understanding of discounts and rebates differs from the US particularly in regards to the relevance of the harm to consumers for a conduct to be deemed abusive. Such a

⁶⁶⁹ European Commission, *Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 - Irish Sugar plc)*, vol. 258.

⁶⁷⁰ See *Ibid.*, vol. 258, para. 129.

⁶⁷¹ European Commission, “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 40.

⁶⁷² *British Airways plc v Commission of the European Communities - Case C-95/04*.

⁶⁷³ *Ibid.*, 86.

divergence became clear in *British Airways*.⁶⁷⁴ Virgin Airways brought claims against British Airways in the US and the EU simultaneously. The case involved retrospective bonuses to travel agents linked to the growth of sales of British Airways' tickets. In the US, the Federal Court of the Second Circuit found that the agreements could affect output or quality, but there were pro-competitive justifications in terms of rewarding loyal consumers and the claimant did not suggest an alternative programme that would be able to achieve the same pro-competitive effects. In the EU, however, the conduct was considered abusive because of the exclusionary effects resulting from the loyalty created by the scheme.

The US courts seemed to be interested in allowing the pro-competitive effects to consumers while the COJ seemed to be concerned with the exclusion of firms from the market that could result in consumer harm. Therefore, the different approaches to discounts and rebates undertaken by these two jurisdictions are important and may have particular consequences for companies operating in these markets.⁶⁷⁵

With respect to the Brazilian position, as a general principle, discounts and rebates that result in lower prices are regarded as beneficial for consumers, the process of competition and the greater economy.⁶⁷⁶ This demonstrates a traditional convergence with US competition policy. However, it appears that the Brazilian interpretation is currently shifting towards that of the EU. The recent *AmBev*⁶⁷⁷ decision demonstrates a concern with the potential anti-competitive

⁶⁷⁴ *British Airways plc v Commission of the European Communities - Case C-95/04. Virgin Atlantic Airways Limited v British Airways PLC.*

⁶⁷⁵ For a discussion on the role of the abuse doctrine in respect of the British Airways case, see Monti, *EC competition law*, 162-72.

⁶⁷⁶ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10, 2.*

⁶⁷⁷ See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

effects of discounts and rebates, especially if they form part of an anti-competitive strategy aimed at inducing consumer loyalty.⁶⁷⁸

⁶⁷⁸ Ibid., para. 245.

6.3.2 Proof of effects

In order to prove price discrimination in the US it needs to be shown that prices are below an appropriate measure of its rival's cost and there is a dangerous probability of recoupment.⁶⁷⁹ Conversely, in the EU, there is no need to prove the above and the co-relation between costs and prices is not essential.⁶⁸⁰ In the EU, the potential exclusionary effects resulting from the conduct are given a central importance.⁶⁸¹ Even in cases where prices are above average total costs, offering discounts and rebates could be deemed a competition law offence, although only in exceptional circumstances.⁶⁸²

The European Commission must prove that a conduct is '...likely in due course to undermine the competitive structure of the market and ultimately to permit the undertaking concerned to abuse the consumer'.⁶⁸³ However, the word 'likely' in the preceding sentence could be interpreted as the 'risk' or 'potentiality' of resulting in anti-competitive effects, as the standard of proof in the EU is lower than in the US.⁶⁸⁴

In Brazil, according to the general standard of proof set forth pursuant to Law 8,884/94, it is not necessary to prove actual or likely effects of price discrimination. It only has to be demonstrated that the conduct is capable of producing anti-competitive effects.

⁶⁷⁹ *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, pt. II, A.

⁶⁸⁰ See 88/138/EEC: *Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - Eurofix-Bauco v Hilti)*, vol. 065. For comments on this case, see Jones and Sufrin, *EC Competition Law*, 466-467.

⁶⁸¹ See European Commission, *Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 - Irish Sugar plc)*, vol. 258, para. 158.

⁶⁸² European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses," 127-133.

⁶⁸³ *Manufacture française des pneumatiques Michelin v Commission of the European Communities - Case T-203/01*, 53.

⁶⁸⁴ See p. 253.

*Telemar*⁶⁸⁵ exemplifies the treatment given to price discrimination in Brazil. The facts of the decision concerned a claim brought by Terra Networks against Telemar Internet Ltda (Telemar) and Telemar Norte Leste SA (Oi Internet). Telemar and Oi Internet formed part of the same corporate group and were jointly accused of adopting an anti-competitive discriminatory strategy. In 2005, the Telemar Group launched its broadband service, Oi Broadband, resulting in a complaint by Terra Networks that prices were set below costs as a result of combined discounts of Velox Telemar⁶⁸⁶ and Oi Broadband. The essence of Terra Networks' claim was that the alleged price arrangements between the defendant companies resulted in discriminatory prices.⁶⁸⁷ The CADE did not follow a US interpretation by assessing whether the recoupment of losses would be required. Rather, the analysis focused on whether there were any cross-subsidises between the co-defendants and whether competitors were excluded from the downstream market.⁶⁸⁸ The co-defendants were not deemed to be liable as it was found that they had offered similar prices and conditions to their competitors.

*AmBev*⁶⁸⁹ is a landmark and recent abuse of dominance decision concerning discriminatory pricing. The defendant company, AmBev,⁶⁹⁰ forms part of the multinational Anheuser-Busch InBev group. AmBev is the largest beer brewery in South America. It produces and sells many international and national brands of beers and soft drinks, such as Antartica, Brahma,

⁶⁸⁵ *Associação Brasileira dos Provedores de Acesso, Serviços e Informações da Rede Internet-ABRANET, et al. v Telemar Internet Ltda and Telemar Norte Leste SA - 53500.013140/2005.*

⁶⁸⁶ An ADSL connection service provided by Telemar.

⁶⁸⁷ *Associação Brasileira dos Provedores de Acesso, Serviços e Informações da Rede Internet-ABRANET, et al. v Telemar Internet Ltda and Telemar Norte Leste SA - 53500.013140/2005, 985.*

⁶⁸⁸ *Ibid.*, 986, 988.

⁶⁸⁹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁶⁹⁰ The defendant is named 'Companhia de Bebidas das Américas', i.e. 'the American Beverage Company', hence the acronym 'AmBev'.

Guaraná, Pepsi and Stella Artois. AmBev was no stranger to competition law, as it came into existence in 1999 as a result of a controversial merger between Brahma and Antartica which was approved by the CADE.

In *AmBev*, the defendant was held liable by a unanimous decision of the CADE for breaching Article 20(I) and (IV) and Article 21(IV), (V) and (VI) of Law 8,884/94. One of the key deciding factors concerned the anti-competitive scope of AmBev's loyalty programme, which consisted of offering discounts and rebates in exchange for exclusivity commitments from points of sale. *AmBev* is widely regarded as the most significant abuse of dominance decision in Brazil to date, not only in respect to its contribution to the development of competition law, but also due to the considerable amount of publicity that it received. AmBev received the highest fine ever imposed in relation to an abuse of dominance offence, approximately 133 million pounds sterling.⁶⁹¹

The leading opinion⁶⁹² in *AmBev* was given by Councillor Furlan, who highlighted that in the EU discounts and rebates could be subject to competition law for their exclusionary effects, as consumers could be incentivised to purchase greater amounts of a particular product, thereby resulting in the creation of barriers of entry.⁶⁹³ This understanding was applied by the CADE, as the discounts and rebates offered by AmBev formed part of a loyalty programme involving distributors and retailers with the scope of strategically excluding competitors and increasing barriers to entry.

⁶⁹¹ As of September 2010 exchange rate for Brazilian Reais (R\$) 352,693,696.58.

⁶⁹² In Brazil every Councillor has a vote and dissenting opinions are allowed, although in *AmBev* the decision was unanimous.

⁶⁹³ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 81-104.

In *AmBev* the general standards of proof pursuant to Law 8,884/94 were applied, hence it was only necessary to prove that the conduct could potentially result in anti-competitive effects, rather than that the effects were actual or likely to occur.⁶⁹⁴ During the investigatory phase, the potential harm was alleged to result from the distortion of the process of competition due to the loyalty created by discounts and rebates. Therefore, the focus of the SDE's investigation was centred on providing evidence of whether the conduct could potentially harm competition and consumers.⁶⁹⁵

The SDE inspected AmBev's premises by way of dawn raid similarly to what takes place in other jurisdictions. However, one particular characteristic of Brazilian dawn raids is that there is no element of surprise. The undertaking must be notified 24 hours in advance;⁶⁹⁶ thus, the Brazilian dawn raids may not be as effective, given that company officers have sufficient time to destroy or conceal incriminatory documents. Nevertheless, hardcopy and softcopy documents such as PowerPoint slides, emails and handwritten notes outlining the structure and anti-competitive scope of the loyalty programme were discovered. The documents were very important for the prosecution of Ambev's conduct as they provided evidence not only of the loyalty programme, which formed the basis for the SDE's investigations, but also of the specific aim to exclude competitors and to create barriers to entry.

⁶⁹⁴ See *Ibid.*, para. 222.

⁶⁹⁵ See *Ibid.*, para. 238.

⁶⁹⁶ *Ibid.*, para. 52.

6.3.3 Efficiencies and other justifications

Not all discriminatory pricing, discounts and rebates, are prohibited pursuant to competition law. For instance, this would not be the case when an undertaking is competing with discounts offered by its competitors, e.g. ‘meeting competition’ or when the pricing differentiation is objectively justified and results in greater efficiencies and benefits for consumers.⁶⁹⁷ A typical example of this is when an airline charges different prices depending on the manner or the time that tickets were purchased. Although this type of conduct could appear to be abusive, it can be justified on the basis of keeping overall costs low and the ability to compete with other airlines.

With regards to the burden of proof, the BCPS has the discretion to assess whether any justifications apply. However, in practice the defendant’s submissions are largely based on justifications. As a result, the burden lies with the defendant. Moreover, as cases of abuse of dominance generally involve highly specialised Counsel instructed by the parties, the competition authority appears to rely on the initiative of the defendant to provide evidence to prove whether any justifications apply.

In *Telemar*,⁶⁹⁸ the CADE agreed with the findings of ANATEL which established that Telemar had offered similar prices and conditions to the co-defendant and other

⁶⁹⁷ See Conselho Administrativo de Defesa Econômica, “Resolution n. 20,” 7.

⁶⁹⁸ *Associação Brasileira dos Provedores de Acesso, Serviços e Informações da Rede Internet-ABRANET, et al. v Telemar Internet Ltda and Telemar Norte Leste SA - 53500.013140/2005.*

competitors.⁶⁹⁹ Therefore, pricing discrimination was deemed not to have taken place and there was no need to determine whether any justifications applied.

*AmBev*⁷⁰⁰ illustrates the Brazilian view of possible defences better than *Telemar*, as the defendant's submissions were largely based on efficiencies and justifications. In addition to challenging the dawn raid on procedural grounds, the defendant submitted that it had the right to protect its business interests and that its loyalty programme was pro-competitive, given that similar loyalty programmes were created by its competitors.

The CADE cited various EU cases⁷⁰¹ to support its reasoning when rejecting the defendant's submissions; it also highlighted the following three points: (1) although dominant undertakings have the right to protect their commercial interests, discounts and rebates should be justified in terms of economic efficiencies which are consistent with the interests of consumers;⁷⁰² (2) loyalty discount schemes should result in efficiencies justified by economies of scale,⁷⁰³ and (3) the discount strategy should not create uncertainties in relation to the final price of the product or service, nor result in the dependence of the retailer or purchaser.⁷⁰⁴

⁶⁹⁹ *Ibid.*, 988.

⁷⁰⁰ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁷⁰¹ *Ibid.*, para. 52, *Hilti AG v Commission of the European Communities - Case T-30/89, Irish Sugar plc v Commission of the European Communities - Case C-497/99 P, AKZO Chemie BV v Commission of the European Communities - Case C-62/86, Manufacture française des pneumatiques Michelin v Commission*, vol. 2003 and *Van den Bergh Foods Ltd v Commission of the European Communities - Case T-65/98.*

⁷⁰² According to European Commission, *Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 - Irish Sugar plc)*, vol. 258 in *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 95.

⁷⁰³ According to *Manufacture française des pneumatiques Michelin v Commission*, vol. 2003 in *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 95-96.

⁷⁰⁴ *Ibid.*

In the light of the above, discriminatory pricing could be justified if it benefits consumers, results in economic efficiencies and is not discretionary. The discounted prices should be certain, transparent and based on objective criteria. Moreover, distributors or retailers should not be legally bound or commercially coerced to give commercial information to the dominant undertaking, as this would increase the dependency of the former and the market power of the latter.⁷⁰⁵

Councillor Furlan stated that the justifications contained in CADE's Resolution 20, i.e. the reduction of transaction costs, the protection of the reputation of the firm and the promotion of economies of scale and technological development were not applicable to the particular facts of the case.⁷⁰⁶ No economic efficiency raised by the defendants was deemed capable of justifying the scope of AmBev's loyalty programme.⁷⁰⁷ The primary purpose of the programme was anti-competitive as AmBev sought to create barriers to entry in the downstream market by penalising distributors that failed to comply with the programme. On the one hand, distributors that abided by the commercial terms of the programme received discounts. On the other hand, distributors that sold competing beer brands were excluded from the scheme or subjected to unfair commercial treatment, thereby harming distributors, competitors and ultimately consumers.

Points of sale in metropolitan areas were deliberately targeted by AmBev. Their strategic selection corresponded with the purpose of creating barriers to entry in specific geographic

⁷⁰⁵ See *Ibid.*

⁷⁰⁶ See Conselho Administrativo de Defesa Econômica, "Resolution n. 20," 13-14.

⁷⁰⁷ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 261.

markets. Therefore, the submission of AmBev alleging that the scope of the programme was not significant as it affected only 20 percent of the national beer market was rejected.⁷⁰⁸

⁷⁰⁸ Ibid., para. 281.

6.3.4 Brazilian rule of reason

In contrast with the US, the Brazilian rule of reason does not require proof that the conduct is not necessary and that its goals could be achieved by less restrictive means. In addition, there is no evidence that a balancing of pro and anti competitive efficiencies takes place in practice. The BCPS only needs to demonstrate that the conduct is not reasonable as it has the aim or capacity to harm competition.

In *Ambev*, when investigating the potential anti-competitive effects of the loyalty programme, the SDE managed to prove the imposition of exclusivity obligations on points of sale on a commercial basis. Moreover, the SDE provided the CADE with documents found in the dawn raid that offered evidence of the incentives used in the scheme, e.g. supplying points of sale with branded catering equipment such as refrigerators, tables and chairs.⁷⁰⁹ Councillor Furlan highlighted that the provision of incentives would have been pro-competitive if it was not for the exclusivity obligations.⁷¹⁰ This reasoning appears to be correct for the following three reasons: Firstly, incentives transferred wealth from AmBev to smaller points of sale. Secondly, AmBev's competitors would have been faced with competitive pressure to offer similar incentives, thereby resulting in greater efficiencies. Thirdly, the provision of catering equipment lowered the capital expenditure faced by entrepreneurs wishing to open points of sale. It is only when incentives are conditional upon the exclusivity that the loyalty scheme breaches competition law by raising artificial barriers to entry. The non renewal of the loyalty programme and the discontinuation of supply were used to coerce points of sale suspected of selling a share greater than 10 percent of competing beer brands. Imposing such level of

⁷⁰⁹ *Ibid.*, para. 32.

⁷¹⁰ *Ibid.*, para. 222.

commitment to AmBev's brands under the loyalty programme was considered anti-competitive.

An important element of *AmBev* is the non-linear correlation between total sales and discounts given to determine the anti-competitiveness of the loyalty programme.⁷¹¹ Points of sale that sold higher shares of AmBev's beer brands received greater discounts, even if they sold smaller volumes of beer than others. This finding revealed that the main purpose of AmBev's loyalty programme was to exclude competitors from distribution channels, rather than offering discounts based on the quantity of units.⁷¹²

Councillor Furlan acknowledged that his leading judgment had been inspired by EU academic literature and case-law,⁷¹³ according to which discounts above cost can be illegal if they produce market foreclosure via product loyalty.⁷¹⁴ With respect to US antitrust law and its relevance to *AmBev*, Councillor Furlan stated that American antitrust policy was gradually demonstrating a greater concern with discounts and rebates.⁷¹⁵ He stated that in contrast with *AmBev*, in the US *LePage's* case⁷¹⁶ no exclusivity requirements were imposed on retailers by the dominant firm. Nonetheless, the concession of discounts resulted in retailers giving

⁷¹¹ Ibid., pt. C.

⁷¹² In support of this view, AmBev's internal documents discovered during SDE's dawn raid stated that the main purpose of the loyalty programme was to increase barriers to entry by creating difficulties for competitors to have access to distribution channels.

⁷¹³ *AmBev* made reference to the *Intel* decision. See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 95-96, whereby Intel was held liable as a result of discounts given to manufacturers of computers and to Media Market, one of the largest European computer retailers. Although the lower prices generated by the discounts indirectly benefited consumers, the practice harmed Intel's main competitor, Advanced Micro Devices, as well as consumers.

⁷¹⁴ See Faull and Nikpay, *The EC law of competition*, 383.

⁷¹⁵ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 105.

⁷¹⁶ *LePage's Inc et al. v Minnesota Mining & Manufacturing Co et al.*, vol. 324.

preference to 3M products which resulted in 3M breaching US antitrust law for attempting to monopolise.⁷¹⁷

The statements above suggest that, in *AmBev*, the EU position on discounts and rebates was deemed to be more suitable for the Brazilian context than the US view. In addition, it was acknowledged that the US approach is changing and is becoming less permissive. Indeed, Councillor Furlan noted that in May 2009 the DOJ declared that it will no longer refer to the Report on the Application of Section 2 of the Sherman Act,⁷¹⁸ as it was considered to be too lenient towards the exclusionary practices of dominant undertakings.⁷¹⁹

⁷¹⁷ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 105.

⁷¹⁸ See Department of Justice, “Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard with Focus on the Impact of Exclusionary Conduct on Consumers.”

⁷¹⁹ According to the DOJ, the withdraw of the report resulted from a shift in philosophy and demonstrated that ‘...the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers’. Ibid. Christine Varney, the US Attorney in charge of the Antitrust Division of the DOJ, stated that this was a response to the recent economic developments in the light of the global economic crisis. This suggests an approach based on the belief that the monopolistic markets cannot correct themselves and ensure the protection of competition and consumers. See Ibid.

6.3.5 Observations

The *corpus* of the Brazilian case-law on price discrimination is relatively modest and no defendant companies have been held liable thus far.⁷²⁰ The exception is *AmBev* as the defendant's loyalty programme consisted of offering exclusionary discounts and rebates in a discriminatory fashion.

Discounts and rebates are generally seen by the BCPS as benign, unless they form part of an exclusionary strategy.⁷²¹ It appears that as long as consumers benefit from the practice and the process of competition is not harmed, discounts and rebates will not only be deemed legal, but also pro-competitive. The determination of prices charged to final consumers is fundamental to the outcome of the analysis of cases involving discounts and rebates.⁷²² As a general rule, in the interest of consumers, the CADE regards the imposition of discounts as beneficial⁷²³ and their prohibition as detrimental.⁷²⁴ This is similar to the EU and US

⁷²⁰ According to the research undertaken in CADE's database using wide meaning keywords such as 'discrimination'.

⁷²¹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁷²² See *Sindicato das Empresas de Turismo do Estado do Pará-SINDETUR, Associação Brasileira de Agências de Viagens do Pará - ABAV v Sindicato Nacional das Empresas Aeroviárias - 08000.027994/1996-75.*

⁷²³ In *Texaco Brasil et al.*, CADE dealt with an accusation of abuse of dominance of an oil distributor which incentivised its dealers to grant discounts to consumers. It was argued that the oil distributor was using its market power to actually force the practice of discounted prices. CADE considered that there was no offence to the economic order if a distributor incentivised distributors to offer discounted prices to final consumers. Such practice was considered to be consistent with the rules of a modern and competitive economy. According to CADE, instead of harming competition, the conduct enhanced it. *Sindicato Nacional do Comércio Transportador - Revendedor-Retalhista de Óleo Diesel, Óleo Combustível e Querosene v Texaco do Brasil SA, SINDICON - Sindicato Nacional das Empresas Distribuidoras de Combustíveis e Lubrificantes, et al - 08000.004451/1993-28.*

⁷²⁴ The 2004 Sindetur decision concerned a dominant firm that was accused of coordinating a practice of not granting discounts to flight tickets purchased by the federal government. Its charter contained a clause that disaffiliated associated travel agencies which conceded discounts. CADE considered that Sindetur's behaviour was anti-competitive and infringed Article 20(I) and Article 21(II) of Law 8.884/94. See *Augusto Carvalho v SINDETUR - Sindicatos das Empresas de Turismo/DF and ABAV - Associação Brasileira de Agências de Viagens - 08000.007754/1995-28.*

approaches, whereby price reductions by monopolists are assumed to be positive as long as prices are not set below cost.

AmBev represents a change in Brazilian competition law and policy, as well as a different approach in relation to discounts and rebates offered by dominant firms. The latter may be considered harmful to the process of competition when it results in market foreclosure via the creation of artificial barriers to entry such as the inducement of consumer loyalty. *AmBev* follows the EU approach, whereby discounts and rebates could be deemed anti-competitive if they result in consumer loyalty and cannot be matched by smaller, though efficient, competitors. The European Commission will generally analyse whether a conduct is ‘...capable of hindering the expansion or entry of efficient competitors by making it more difficult for them to supply part of the requirements of individual customers’.⁷²⁵ The adoption of the EU approach in relation to discounts and rebates appears to be appropriate, as Brazil is a country with concentrated markets. Consequently, competition policy should seek to promote market entry and contestability, particularly considering the fact that the Brazilian Constitution, as well as Law 8,884/94, protect free enterprise and open competition.⁷²⁶

With respect to exclusionary effects resulting from discounts and rebates, in *Microsoft*⁷²⁷ the discounts given to distributors were based on the volume of sales of Microsoft for Small Business 97 and were deemed legitimate even if the practice resulted in the distributors giving preference to Microsoft’s products.⁷²⁸ One key difference between *Microsoft* and

⁷²⁵ European Commission, “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 40.

⁷²⁶ See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20 (I).

⁷²⁷ *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*.

⁷²⁸ *Ibid.*, para. IV. 3.

AmBev is that in the former, discounts and rebates were calculated in relation to the volume of sales rather than a set market share.

Moreover, although *AmBev*'s discounts amounted to a mere three percent of the final price, its competitors were forced to offer discounts which were disproportionately higher at 7.9 percent because of the dominant position of *AmBev* and the additional benefits offered in the loyalty scheme. Moreover, *AmBev* had consolidated 72 percent of the relevant geographic market by way of the loyalty programme.⁷²⁹

According to Councillor Furlan, it would have been possible, in an extreme case scenario, for *AmBev*'s loyalty programme to result in the exit from the upstream market of an equally efficient competitor.⁷³⁰ However, this seemed to be an *obiter* statement as it was not deemed necessary to prove that such effect was likely to occur. In conformity with the general standard of proof under Law 8,884/94, it was only necessary to prove that the conduct had the potential to harm competition by causing competitors to offer higher discounts than the defendant.⁷³¹

Pursuant to *AmBev*, if the effective price of discounts is set below average total cost, it would be deemed difficult, if not impossible, for efficient undertakings to compete with the dominant undertaking. Moreover, Councillor Furlan stated that *AmBev* could still have excluded or limited competition if the effective price charged was set above the average total cost. Competitors would not only have had to offer superior discounts, but also compensate

⁷²⁹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, 253-54.

⁷³⁰ *Ibid.*, para. 257.

⁷³¹ *Ibid.*, para. 293.

the points of sale for the losses suffered as a result of leaving the loyalty scheme. Therefore, in common with the EU, discounts and rebates can be prohibited in Brazil even if prices are set above average total costs. In this respect, the Brazilian approach diverges from the US, which requires higher standards of proof, e.g. in respect to recoupment. The fact that as efficient competitors would have had to offer their products below a viable measure of AmBev's costs was one of the main factors for prohibiting the conduct. This is similar to the approach undertaken by the Commission in the *Intel* case, where the Commission found that '...if in order to compensate an OEM [Original Equipment Manufacturers] for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of foreclosing the as efficient competitor'.⁷³²

CADE's appraisal of price discrimination contrasts with its assessment of predatory pricing,⁷³³ where prices are deemed predatory only when they are set below average variable cost and proof of recoupment is possible. This suggests a discrepancy in the treatment given to abusive offences as a result of the EU and US influences on the development of Brazilian competition law and policy. A restatement of the law in the form of published guidelines or authoritative decisions is needed to ensure greater coherence and consistency as to how abusive pricing offences ought to be analysed. As demonstrated by *AmBev*, the approach under the BCPS appears to be diverging from the more liberal US antitrust policy and converging with EU competition policy. *AmBev* demonstrates that the CADE is capable and willing to decide on controversial issues and adopt foreign models to develop further Brazilian competition policy. The implementation of EU inspired reasoning appears adequate

⁷³² European Commission, *Case COMP/C-3/37.990 - Intel*, vol. 227, para. 30.

⁷³³ See section 6.2.

for Brazil, as the scope of EU competition law is shaped by the various goals under the EU treaties and its enforcement priority is the maintenance of competition in the market which ultimately benefits consumers.⁷³⁴

⁷³⁴ See European Commission, “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 42, 43, 59.

6.4 Abusive pricing

6.4.1 Overview

Article 21(XXIV) of Law 8,884/94 prohibits undertakings ‘to impose abusive prices, or unreasonably increase the price of a product or service’.⁷³⁵ In common with other offences under Article 21, this conduct is prohibited to the extent that it may potentially result in anti-competitive effects.⁷³⁶

The overriding goal of the Real Plan reform of 1993 was to combat accelerated and endemic inflation,⁷³⁷ which in turn explains the drafting of the abusive pricing offence under Article 21(XXIV) of Law 8,884/94. During the 1970s and 1980s, the government adopted interventionist policies whereby it would step in if prices were deemed to be excessive. As a result, society in general expected the government to intervene to control high prices. Therefore, in the early years of Brazilian competition law, consumer organisations, agencies and private undertakings brought proceedings before the CADE based on alleged breaches of Article 21(XXIV) of Law 8,884/94. This finding was confirmed by interviewed members of the BCPS.⁷³⁸ Some interviewees went as far as to claim that President Itamar Franco only ratified Law 8,884/94 because he was convinced that it could serve the purpose of controlling inflation in the private sector, particularly in the field of pharmaceutical products because their price formed part of his political agenda.

⁷³⁵ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 21(XXIV).

⁷³⁶ See section 2.3.3.1.

⁷³⁷ See p. 23.

⁷³⁸ According to one Councillor, ‘...there were far too many cases covering abusive prices in the early days of the competition law as a result of the end of price regulation’.

Abusive pricing is perceived differently in the US and the EU. In the US the conduct of charging excessive or disproportionate prices is not an antitrust offence under Section 2 of the Sherman Act⁷³⁹ and the possibility of charging high prices is considered to attract ‘business acumen’.⁷⁴⁰ Abusive pricing may signal that an undertaking has market power, but this in itself is not a breach of competition law. If an undertaking sets excessive prices, the high profits may even lure competitors into the market.⁷⁴¹ This argument is linked to the ‘invisible hand’ premise supported by liberal economists. In essence, antitrust law should not intervene where the free market can correct itself.⁷⁴²

High prices might indicate the existence of an antitrust offence, rather than an offence in itself. Indeed, it was stated by an Ex-Deputy Assistant Attorney General at the DOJ that:

...we should be pleased when firms that legitimately obtain monopoly positions are able to obtain monopoly profits, since it is the prospect of obtaining higher-than-normal profits that drives firms to become more efficient and to develop innovative products. Second-guessing the unilateral, non-exclusionary pricing decisions of dominant firms will lead to price regulation by the government, which is not consistent with the market-oriented goals of competition laws.⁷⁴³

⁷³⁹ Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?,” 8.

⁷⁴⁰ Elhauge and Geradin, *Global competition law and economics*, 360.

⁷⁴¹ Gal, “Monopoly pricing as an antitrust offense in the U.S. and the EC: two systems of belief about monopoly,” 344.

⁷⁴² For in-depth information on the ‘invisible hand’ and how the market corrects itself, see Smith, *The wealth of nations*.

⁷⁴³ Masoudi, “Some comments on the abuse-of-dominance provisions of China’s draft antimonopoly law.”

This statement suggests that the DOJ wants to reassure undertakings that they can rightfully achieve monopoly status and attain higher profits by competing on the merits. Moreover, the case-law has precluded the deployment of Section 2 of the Sherman Act to address excessive pricing.⁷⁴⁴ Therefore, excessive pricing is not considered an offence under the US Sherman Act.

The EU has a different approach to the US when it comes to abusive prices. In the EU excessive pricing can be an offence pursuant to Article 102 TFEU, although there are few cases where dominant firms were held liable.⁷⁴⁵ In fact, since *United Brands*,⁷⁴⁶ the Commission has rarely determined prices to be abusive⁷⁴⁷ and commentators such as David Howarth⁷⁴⁸ consider that this is likely to continue, except for exceptional cases where there are insuperable barriers to entry and there is evidence that the conduct has a purpose contrary to the EU Treaty.

Although a proportionate interference to fix market imperfections is not conveyed as necessarily evil in the EU, the European Commission does not intend to become a price regulator either.⁷⁴⁹ However, it seems to be keener than the US to regulate the functioning of the market and perform a more preventive role if required.

Notwithstanding the considerable concern with pricing demonstrated by the drafting of Article 21(XXIV) of Law 8,884/94, the CADE has adopted a similar posture to that of the

⁷⁴⁴ See e.g. *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP*, vol. 540.

⁷⁴⁵ See Ezrachi and Gilo, "Are excessive prices really self-correcting?," 252.

⁷⁴⁶ *United Brands Company and United Brands Continental BV v Commission of the European Communities - Case 27/76*.

⁷⁴⁷ See Korah, *An introductory guide to EC competition law and practice*, 168.

⁷⁴⁸ David Howard Amato, Ehlermann, and Komninos, *EC Competition Law*, 272-273.

⁷⁴⁹ See Ezrachi and Gilo, "Are excessive prices really self-correcting?," 253.

US. The CADE made it clear since the early years of the Law 8,884/94 that its competence was to protect the proper functioning of the market rather than establishing the reasonableness of commercial prices.⁷⁵⁰ As abusive pricing is also prohibited pursuant to Article 39 of the Brazilian Consumer Code,⁷⁵¹ whenever claims of abusive pricing are not supported by circumstances that would make them relevant under competition law, they are deemed to fall within the scope of consumer law rather than competition law.⁷⁵²

In 1997, the CADE heard *Sindicato das Escolas Particulares do Distrito Federal*,⁷⁵³ where the DPDE brought a claim against the Union of Private Schools of the Federal District. Private schools were accused of abusively increasing tuition fees. This resulted in more than a hundred separate cases of abusive pricing involving private schools decided by the CADE in the same year. In every instance, the CADE decided that abusively increasing prices was a consumer law matter rather than a competition law one. Consequently, all the claims were referred to the DPDC.⁷⁵⁴

⁷⁵⁰ *Associação Brasileira de Citricultores - ASSOCITRUS and Associação dos Citricultores do estado de São Paulo - ACIESP v Bascitrus Agroindustrial et al.* - 0800.012720/94-74.

⁷⁵¹ Brazil, Law n. 8,078 of 11 September 1990.

⁷⁵² See section 2.3.2.

⁷⁵³ *DPDE v Sindicato das Escolas Particulares do Distrito Federal* - 08000.014677/1994-18.

⁷⁵⁴ See *Ibid.*, 139. See section 2.4.1.

6.4.2 Proof of effects

Pursuant to the general standard of proof under Law 8,884/94, there is no need to prove that the alleged anti-competitive effects under Article 20 are actual or likely to occur. It is only necessary to demonstrate that the effects could potentially result from the conduct.⁷⁵⁵ However, in respect to abusive pricing the BCPS has not yet reaffirmed the general standard under Law 8,884/94.

In *Xerox do Brasil Ltda*⁷⁵⁶ the Brazilian subsidiary of the Xerox group was accused of abusing its dominant position. The claim was based on the terms of standard form agreements, whereby Xerox had the unilateral right to increase prices. Although deciding in favour of Xerox, the CADE formulated some legal requirements for determining whether a conduct amounts to abusive pricing. According to the CADE, the determination of an arbitrary increase in prices requires an evaluation of the normal standards of profit margin in the relevant market. The evaluation encompasses a comparison of the past and present levels of profitability in the relevant market, as well as of the particular undertaking in question. A factual link between the alleged conduct and the eventual abusive realisation of profits needs to be established.⁷⁵⁷ Given the reluctance of the CADE to recognise abusive pricing as a competition law offence, the latter requirement implies a higher standard of proof, whereby another competition law offence would need to take place, resulting in the undertaking arbitrarily charging excessive prices.

⁷⁵⁵ See sections 2.3.3.1 and 2.3.3.2.

⁷⁵⁶ *Farina e Fraga Associados v Xerox do Brasil Ltda 2 - 0046/1992*.

⁷⁵⁷ *Ibid.*, 16.

In *Enila*,⁷⁵⁸ the defendant was accused of increasing the prices of some of its medicines in an abusive manner. The plenary in the CADE decided unanimously that there was no offence to the economic order.⁷⁵⁹ It was established that abusive prices would exist when prices were fixed higher than the market price and if there was a pricing strategy aimed to distort artificially the process of competition. The offence would be triggered when an undertaking adopted strategic means to impose higher prices that would not sustainably exist in a competitive market. Therefore, the power to impose higher prices must result from the exclusion or obstruction of actual or potential competitors.⁷⁶⁰ The claimant would first have to prove the exclusion of actual or potential competitors in order to substantiate a claim for abusive pricing. Although this may suggest that proof of effects is required, it appears that *Enila* follows the reasoning in *Xerox* by requiring proof in respect of the existence of another anti-competitive offence that resulted in abusive prices.

⁷⁵⁸ *CPI - Medicamentos da Câmara dos Deputados v Laboratório Enila Indústria e Comércio de Produtos Químicos e Farmacêuticos SA - 08012.000903/2000-82.*

⁷⁵⁹ *Ibid.*, 370.

⁷⁶⁰ *Ibid.*, 362.

6.4.3 Efficiencies and other justifications

The CADE has not yet clarified whether the defendant needs to justify abusive pricing by way of an efficiency defence. In *Xerox* the defendant simply declared that the price increases were related to its costs and the CADE declared that the matter should be judged by the courts, which are competent to apply the provisions of the Consumer Code.⁷⁶¹ This reasoning was justified by the fact that there was no evidence to suggest that the price increases resulted or formed part of an anti-competitive strategy.

In *Enila*, the defendant raised a justification submitting that its price increase resulted from the monetary devaluation of the Brazilian currency.⁷⁶² This mirrors a statement made by the CADE in *Xerox*, whereby in times when the economy is enduring unpredictable levels of inflation, it would be deemed practically impossible to determine what the normal market prices ought to be.⁷⁶³ The CADE did not decide on this justification and declared that the investigation of the SDE did not confirm whether Enila had dominance. However, rather than ordering a stay of proceedings and instructing the SDE to amend the scope of the investigations, the CADE decided to acquit the defendant.

⁷⁶¹ *Farina e Fraga Associados v Xerox do Brasil Ltda 2 - 0046/1992*, 14-15.

⁷⁶² *CPI - Medicamentos da Câmara dos Deputados v Laboratório Enila Indústria e Comércio de Produtos Químicos e Farmacêuticos SA - 08012.000903/2000-82*, 360.

⁷⁶³ *Farina e Fraga Associados v Xerox do Brasil Ltda 2 - 0046/1992*, 15-16.

6.4.4 Brazilian rule of reason

It has not yet been elucidated by the CADE whether it is necessary to prove that the increase in prices is not reasonably necessary or that the goals of the dominant firm could have been achieved by less restrictive means. Neither is it possible to assess from the case-law whether pro and anti competitive effects ought to be balanced, as it appears that the CADE does not regard the conduct as an independent offence within the scope of competition law, notwithstanding the drafting of Law 8,884/94.

In *Enila*, Councillor Prado declared that high prices, in most cases, offer a warning that an offence to the economic order is probably taking place, thereby implying that abusive pricing ought to be regarded primarily as a consequence of an anti-competitive conduct rather than an autonomous offence.⁷⁶⁴ This was also the view of most of the interviewed members of the competition authority. Given that the CADE considers abusive pricing as a consequence of an anti-competitive conduct rather than as an autonomous offence, claims based solely on breaches of Article 21(XXIV) of Law 8,884/94 are likely to be dismissed, rather than proceeding to an in-depth analysis.

⁷⁶⁴ *CPI - Medicamentos da Câmara dos Deputados v Laboratório Enila Indústria e Comércio de Produtos Químicos e Farmacêuticos SA - 08012.000903/2000-82*, 366.

6.4.5 Observations

The CADE has not yet clarified the standard of proof in respect of abusive pricing, given that it does not consider the latter as an independent competition law offence, notwithstanding the drafting of Article 21(XXIV) of Law 8,884/94. To date, the CADE has never found a firm liable for abusive pricing, which confirms the CADE's unwillingness to become a price regulator; a trend also featured in the US and the EU.⁷⁶⁵

As a result of the stabilisation of the economy and the non-interventionist policy adopted by the CADE, the number of complaints in regards to abusive pricing has reduced considerably over the past decades. As suggested by interviewees, this may result from a shift in the Brazilian understanding of the concept of abusive prices. According to one Councillor '...currently there are very few cases [of abusive pricing] and many wanted to remove this offence from the competition bill'. Abusive pricing has been excluded from the competition bill as an autonomous offence, although setting high prices will still fall under the proposed general prohibition pursuant to Article 36(III) of the competition bill.⁷⁶⁶ Abusive pricing will remain part of competition law in a purely formalistic sense. It is very unlikely that a claim based solely on breaches of Article 36(III) of the competition bill will be substantiated. Rather, it is likely that this provision will be interpreted to qualify a price increase as a symptom or as a tool of an anti-competitive offence.

⁷⁶⁵ See Ezrachi and Gilo, "Are excessive prices really self-correcting?," 252.

⁷⁶⁶ Cadoca, *Competition Bill n. 3,937/04*. Article 36(III) is the equivalent of Article 20(III) of Law 8,884/94, which prohibits increasing profits on a discretionary basis.

According to one Councillor, there are currently two situations where abusive prices are examined by the competition authority:

The first one regards when a consequence is considered to be an offence to the economic order; for instance, in a situation where a firm has an exclusivity that results in market foreclosure. The second regards when it is an instrument of an exclusionary conduct. This is especially important in vertically integrated markets such as the petrochemical sector, where a firm that is dominant in the mainstream market can increase prices considerably in the downstream market where it operates as well in order to exclude competitors.

Other members of the BCPS also confirmed that abusive prices are not an independent offence. It was stated by one Councillor that there are some members of the BCPS that go as far as considering abusive prices to be outside the scope of competition law.⁷⁶⁷ Indeed, when questioned about this issue, one Councillor stated ‘I do not even consider the merits of claims for abusive pricing’.

The fact that abusive pricing remained indirectly as a possible offence in the competition bill suggests that the Brazilian legislator wanted to ensure that the BCPS will still be empowered to curb excesses if necessary. In this respect, the Brazilian understanding of abusive pricing demonstrates some influence from the EU, where abusive pricing is regarded as a form of abuse of dominance, although prohibitions of this practice are rare.⁷⁶⁸

⁷⁶⁷ Although setting abusive prices that affect the final consumer could fall within the scope of consumer protection law. See p. 276.

⁷⁶⁸ See Jones and Sufrin, *EC Competition Law*, 586.

The hybrid influence over the Brazilian competition law and policy appears evident in the light of the above. This has resulted in a Brazilian approach that is non-interventionist in substantial terms, although the legitimacy of the BCPS to intervene exists in formal terms pursuant to Law 8,884/94. The competition bill will not materially change this position, although it will remove abusive pricing as an independent offence.

6.5 Conclusion

The findings from this chapter suggest that the approach of the CADE has departed from the formal provisions of Law 8,884/94 in respect of pricing conduct. This differs from some of the non-pricing conduct examined previously, especially in relation to predatory and abusive pricing.⁷⁶⁹

With regards to predatory pricing, the CADE has adopted the US approach, as proof of recoupment is required and it is necessary to prove that the effects of the conduct are likely, thereby resulting in a higher standard of proof. This approach departs from the general standards pursuant to Law 8,884/94.⁷⁷⁰ The difficulties in proving the recoupment of losses and likely effects have resulted in a Brazilian *laissez-faire* approach towards predatory pricing. This is confirmed by the fact that the CADE has never held an undertaking liable for predatory pricing.⁷⁷¹ Nevertheless, there seems to be a growing concern among members of the BCPS about this policy. According to some interviewees, it is likely that in the near future the CADE will find an undertaking liable for predatory pricing in a case which is currently under investigation.⁷⁷²

It is not clear from the case-law if the adoption of the US approach to predatory pricing resulted from a conscious policy decision. Interviews with members of the competition

⁷⁶⁹ See section 5.

⁷⁷⁰ This requirement was added by CADE's Resolution 20. This is an issue, since Brazil is a Civil Law country where secondary legislation should not depart from the parameters set forth under primary legislation, i.e. Law 8,884/94.

⁷⁷¹ In *Empresa Folha da Manhã v Diário do Grande ABC*⁷⁷¹, CADE found the undertaking liable for practising predatory prices. However, the defendant escaped liability due to the lapsing of statutory limitation periods.

⁷⁷² The name of the undertaking remains confidential as it was under investigation when the interviews took place.

authority revealed that, at times, there is a lack of knowledge regarding the differences between the US and the EU competition laws and policies, particularly in relation to the standards of proof, which make it more difficult to prohibit predatory pricing offences in the US.

The Brazilian position towards predatory pricing is different from that of price discrimination. There are very few cases concerning price discrimination and the most important one, *AmBev*, concerns price discrimination in the form of discounts and rebates. The reasoning in *AmBev* has been largely inspired by the EU approach, whereby the relationship between costs and prices may not be fundamental⁷⁷³ as exclusionary effects are deemed more important.⁷⁷⁴ Documents found in the dawn raid provided evidence not only of the existence of the conduct, but also that it was aimed at excluding competitors and raising barriers to entry. In fact, it was found that as efficient competitors would not be able to compete with the substantial discounts offered by AmBev. These findings largely explain the adoption of the EU approach in *AmBev*.

In terms of justifications for predatory pricing and price discrimination, there is no specific burden on the defendant to prove their existence. However, in practice, the defendant's submissions are generally substantiated with justifications in order to avoid liability. In

⁷⁷³ See 88/138/EEC: Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - *Eurofix-Bauco v Hilti*), vol. 065. For comments on this case, see Jones and Sufrin, *EC Competition Law*, 466-467.

⁷⁷⁴ See European Commission, Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 - *Irish Sugar plc*), vol. 258.

addition to examining the justifications of the defendant, the CADE seeks to verify whether any applicable objective criteria⁷⁷⁵ would make the alleged conduct reasonable.

The Brazilian 'rule of reason' is applied to both predatory pricing and price discrimination. It differs from the American rule of reason, as there is no need to prove that the goal of the dominant firm could be achieved by less restrictive means, and there is no evidence of a balance of pro and anti competitive effects in practice. The Brazilian rule of reason primarily focuses on the specific elements of the alleged conduct, the wider circumstances of the market and whether the conduct could be justified via the application of objective criteria.

With regards to abusive pricing, the CADE does not appear to consider it as an autonomous offence, notwithstanding the provisions of Law 8,884/94. Abusive pricing appears to be regarded as a consequence or as a means of achieving an anti-competitive goal. The CADE has not clarified what the standards of proof are in respect to abusive pricing, nor has it provided an in-depth analysis of the conduct. This could be explained by the adoption of the US view of abusive pricing. In fact, the CADE has never held an undertaking liable for abusive pricing. The competition bill will abolish abusive pricing as an offence, though some general provisions will still make reference to setting unreasonable prices on a discretionary basis. Therefore, it is likely that the CADE will continue to view abusive prices under the same light as the US, but some influence of the EU seems to be present as in the latter abusive pricing is prohibited, although such prohibitions are rare.

⁷⁷⁵ The drafting of Article 21(XVIII) of Law 8,884/94 states that it is an offence to unreasonably sell products below cost; therefore, it contains an objective criterion based on reasonableness.

7. Final Conclusions

This research has examined how Brazil has developed its hybrid model of competition law in regards to abuse of dominance. Brazilian competition law and policy incorporates aspects of EU competition law and policy, such as the concept of abuse of dominance and the doctrine special responsibilities of dominant firms. At the same time, it adopts a version of the American concept of the rule of reason. The adaptation of foreign models raises the issue of how they are accommodated in the system of Brazilian competition law, as well as in the wider constitutional, political and socioeconomic context.

The research analysed how abusive conduct is conceived and dealt with by the BCPS. The wide and hybrid nature of the drafting of Law 8,884/94 was intended to ensure that it conformed to international standards whilst offering flexibility and discretion to the competition authority and courts. However, although Law 8,884/94 has been largely successful as Brazil's first comprehensive competition law, its particular drafting has resulted in some inconsistencies in terms of enforcement. Law 8,884/94 lacks a definition of the elements of abuse and contains a non-exhaustive list of practices that can constitute offences. In addition, the CADE's Resolution 20,⁷⁷⁶ which contains brief guidelines about the analysis of conduct, is confusing and does not prescribe the common steps which have to be taken in order to define the relevant market, dominance and abuse to reflect the prohibition of abuse by Law 8,884/94. New guidelines, reflecting competition law provisions and the current analysis of conduct, as demonstrated by the case-law studied in this research, would be welcomed.

⁷⁷⁶ Conselho Administrativo de Defesa Econômica, "Resolution n. 20."

The lack of definition of the elements of abuse in Law 8,884/94, in conjunction with a lack of authoritative guidelines on abusive behaviour and institutional issues, result in a lack of clarity and coherence in terms of the required standard of proof and the general application of the law.

7.1 Institutional Issues

Institutional issues were raised in this research with the aim of identifying why there have been at times inconsistent approaches to abuse of dominance in Brazil, as well as why the interpretation of the law has followed sometimes the views of the EU, the US or of none of them. Interviews were crucial to unveil some of the findings and to have an insight into the views of those who are part of the competition authority. It must be noted that the competition bill seeks to remedy many of the institutional problems discussed in this research,⁷⁷⁷ such as the shortage and the high rotation of administrative staff. This is of particular importance, as these problems are responsible for hampering the development of an ‘institutional memory’ and a consistent development of competition policy in Brazil.

With regards to the term of office of Councillors, the competition bill will extend the current term of two to four years and abolish the possibility of re-appointing the Councillor to a second term. The proposed single term of four years seeks to reduce the ‘indirect’ influence of the government on decisions.

A significant problem that the draft of the competition bill does not remedy concerns the ineffectiveness of the CADE’s decisions as a result of the current system of judicial review. The causes of this problem are twofold: firstly, appeals to the courts result in considerable procedural delays which, in extreme cases, result in the preclusion of enforcement; secondly, judges lack the expertise to interpret competition law and review the CADE’s decisions. These problems could be addressed by allowing appeals from the CADE to go directly to the

⁷⁷⁷ See section 2.4.

appellate courts, rather than the first instance, or by creating specialised courts.⁷⁷⁸ However, this would be difficult to achieve, as it would require constitutional reform, given that the Constitution specifies the jurisdiction and the structure of the Judiciary, as well as clear political consensus at the institutional level. One proposed solution is a change in the drafting of Article 97 of the competition bill, which currently reflects the provisions of Article 64 of Law 8,884/94. By removing the possibility of appealing in the judicial district where the defendant is domiciled, all appeals would instead be adjudicated at the federal courts of Brasilia, resulting in faster and better quality decisions as these judges would be familiarised with competition law issues. This proposal could be criticised on the grounds that it unfairly impedes the adjudication of appeals at the judicial district where the defendant is domiciled. However, it is unlikely that the defendant would be significantly disadvantaged by this change, given that all such cases originate at the competition authority in Brasilia so the hearing of the appeal there would simply continue the proceedings in the same location.

There are two main issues in relation to the training received by Specialists in Public Policy and Management and other administrative personnel at the BCPS. The first issue concerns the international training of members of the competition authority. One of the findings of this research is that the jurisdiction at which training was received, generally the US or the EU, had an impact in the manner that members of the competition authority interpreted and applied competition law in Brazil. This issue should not be neglected due to differences between these jurisdictions. Diverging approaches could adversely affect the coherent

⁷⁷⁸ According to the current procedural regime under Article 64 Law 8,884/94, decisions of the CADE can be appealed to the first instance. The competent *forum* is either the federal court of Brasilia or the court in the place of residence of the defendant, at the discretion of the CADE.

development of Brazilian competition law and policy.⁷⁷⁹ This is linked to the second issue, i.e. the inadequate training received by Specialists and other members of the BCPS. Both these problems could be addressed if, as soon as Specialists are appointed, they received training tailored to the Brazilian case-law and in relation to economic sectors that the competition authority considers to be of central importance. It is fundamental that members of the BCPS share an understanding of key legal and economic concepts in order to avoid some of the inconsistencies in the interpretation of competition law that have been discussed in this research.

On the one hand, the competition bill resolves some of the issues in regards to training, as administrative resources of the BCPS will increase. On the other hand, under the current draft of the bill one hundred new Specialists will be employed. Therefore, it is crucial that the quality, quantity and consistency of training are improved to ensure the development of a coherent competition policy.

⁷⁷⁹ For instance, interviews revealed that many members of the SDE and the SEAE have trained in the United States and as a result, in respect of abuse of dominance, these bodies tend to be more permissive than the CADE, where there are many members who have received training in the EU as well.

7.2 The Relevant Market

When determining the relevant market, in common with the approach of the EU and the US, the BCPS adopts the SSNIP test. However, one particular characteristic of the Brazilian version of the test is the criterion adopted to simulate an increase in prices. In Brazil, this ranges from 5% to 15%, whilst in the US and the EU it is from 5% to 10%. The adoption of a higher criterion in Brazil appears to reflect a more realistic approach by the competition authority suited to the current socioeconomic context of Brazil. Consumers generally lack information on prices, or cannot easily identify price increases. Due to the low levels of purchasing power of the poor and the emerging middle class, most purchases, even those of trivial items, are paid for in instalments. Therefore, consumers generally show a greater concern with payment plans proposed by retailers rather than the final price of the product.

The research findings also revealed that most members of the BCPS are concerned not to define the relevant market too narrowly in abuse of dominance cases, particularly when there is considerable public interest.⁷⁸⁰ The reason for this is that a narrow definition of the relevant market would have an impact on the determination of dominance and there are concerns that when the decisions of the CADE are appealed to the courts, they may reverse the original decision because the market was defined too narrowly. The CADE therefore seems to be more careful in its analysis of the relevant market in these situations. This appears to result in a definition of the relevant market that is usually similar to the US and wider than the EU.

⁷⁸⁰ See section 4.3.

7.3 The Concept of Dominance

The SDE/SEAE Horizontal Merger Guidelines and the CADE's Resolution 20 both require the definition of the market share of the defendant and of its competitors. This serves the purpose of determining whether the undertaking is sufficiently large to exercise market power. In addition to determining the market share, the competition authority will assess whether other market conditions permit the exercise of market power to qualify the undertaking as dominant.

However, Law 8,884/94 states that dominance will be presumed when an undertaking's market share exceeds 20%.⁷⁸¹ The US and the EU have higher market share thresholds for finding dominance at 50% and 40% respectively.⁷⁸² In the light of the high concentration of the Brazilian market, the lower threshold for presuming dominance in Brazil probably results from the fact that policy-makers endorse the view that market pluralism is beneficial for economic development. The market share threshold for presuming dominance has caused many misunderstandings among members of the BCPS.⁷⁸³ The correct approach would be to treat the market share as a threshold for the analysis of dominance. In this way, after determining that the undertaking has a market share greater than 20%, the CADE should examine other factors to verify whether the undertaking would be able to behave independently from competitors and consumers; if this does not prove to be the case, the presumption should be rebutted.

⁷⁸¹ See Brazil, *Law n. 8,884 of 11 June of 1994*, Article 20(IV)(3).

⁷⁸² Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence?," 8. European Commission, "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings," 6.

⁷⁸³ See section 4.4.

When examining other factors for determining dominance, such as the existence of competitors and barriers to entry, the Brazilian competition authority seems to seek guidance from the SDE/SEAE Horizontal Merger Guidelines. In common with the US and the EU models, the Brazilian guidelines adopt a Bainian definition of barriers to entry, i.e. any element in the market that places a potential competitor at a disadvantage in relation to the incumbent firms. According to the SDE/SEAE Guidelines, the following are considered barriers to entry: sunk costs, legal or regulatory obstacles, resources belonging exclusively to the established firm, economies of scale or scope, the level of integration of the productive chain, the loyalty of consumers to established brands and the potential retaliation by the established firm.⁷⁸⁴

In practice, the interpretation of barriers to entry in Brazil appears to be closer to the US than the EU. In *AmBev* it was decided that potential competitors were unlikely to be capable of incurring high advertising costs to enter the market because AmBev could neutralise the effects of advertising through the foreclosure of its distribution system. Therefore, instead of considering high advertising costs as barriers to entry *per se* as in the EU, the CADE questioned whether the entrant would be able to recover the sunk costs of advertising through a successful entry, or whether failure to enter the market would be so likely that it would dissuade any potential entrant.⁷⁸⁵

Dominance can also be held collectively in Brazil. However, in order for undertakings to be considered as part of the same group, there has to be a legal link in terms of corporate ownership or control. This Brazilian concept is narrower than its EU counterpart, whereby

⁷⁸⁴ SDE/SEAE, “Horizontal Merger Guidelines,” 52.

⁷⁸⁵ Monti, *EC competition law*, 147.

links between companies could be established in cases where legally independent firms act collectively and their conduct can be deemed to be abusive.⁷⁸⁶

In contrast with the EU⁷⁸⁷ and in common with the US,⁷⁸⁸ the BCPS analyses collective conduct under the cartel provisions, notwithstanding the adoption of the concept of single economic entity under Brazilian competition law.⁷⁸⁹ However, it seems that the choice of dealing with collective dominance under cartel provisions was not entirely a conscious policy choice. The interviews revealed that most members of the BCPS were not aware of the possibility of finding collectively dominant undertakings liable for abusive conduct. Instead, most interviewees accept the concept of single economic entity as relevant only in relation to mergers. Therefore, collective dominance is immediately conceived as a cartel in conduct cases.

⁷⁸⁶ Jones and Sufrin, *EC Competition Law*, 302.

⁷⁸⁷ See p. 142.

⁷⁸⁸ See p.143.

⁷⁸⁹ See section 4.4.1.

7.4 Abuse Prohibitions under Law 8,884/94 and the Competition Bill

The research has highlighted the fact that in order to understand the challenges facing competition law in Brazil it is important to appreciate that throughout its history the Brazilian market has been characterised by State intervention, monopolies and oligopolies. In addition, Brazil has undergone major socioeconomic and political changes over the past decades, such as the return to democratic rule in 1985, the enactment of the current Federal Constitution in 1988 and the liberalisation of the economy in the 1990s, via the privatisation of state-owned enterprises and the opening of internal markets to international trade and foreign direct investment.

This context, in addition to the need to fight high levels of inflation, had an influence on Law 8,884/94. Its general provisions and goals seek to implement constitutional rights and principles, such as free enterprise, open competition, the social role of property, consumer protection, and the restraint of abuses of economic power. Law 8,884/94 is applicable not only to the private sector, but to the State as well, as the latter had abused its power and caused considerable economic inefficiencies prior to the return of democratic rule.

Pursuant to the Real Plan of 1994, the current Brazilian currency, the Real, was adopted as part of a series of economic policies to combat endemic hyperinflation. Thus, it is understandable that Law 8,884/94 has provisions in relation to excessive pricing offences, such as Article 21(XXIV) which prohibits abusive prices or unreasonable increases in prices. Similar provisions are also present in the Consumer Code of 1990.⁷⁹⁰

⁷⁹⁰ See p. 276.

Despite the express provision of excessive pricing offences in Law 8,884/94, the competition authority, in common with its US counterpart, has distanced itself from the role of a price regulator, so that to date none of these provisions have been enforced. The position of the BCPS is reflected in the competition bill, as the unreasonable price increase offence is no longer present in its current draft.

The competition bill maintains the present structure under Law 8,884/94 of a non-exhaustive list of practices that become offences to the extent that they are capable of producing anti-competitive effects. The main difference between the current law and the proposed competition bill is that the latter merged the provisions of Articles 20 and 21 of Law 8,884/94 into a single provision, namely, Article 36 of the most recent draft of the competition bill. Therefore, all types of conduct, irrespective of being unilateral, joint, horizontal or vertical, will be prohibited under Article 36.

In common with Law 8,884/94, the competition bill is structured and drafted in a manner that allows the discretion of the BCPS in interpreting and applying competition law. The legislative style of Law 8,884/94 was adopted as it allowed the competition authority to exercise flexibility and control over the development of competition law in Brazil. The early 1990s was a period of rapid socioeconomic change, so the legislator at the time was not in a position to anticipate how competition law would develop.

The continuation of a similar legislative style in the most recent draft of the competition bill is, in some ways, to be welcomed as it could allow the emergence of a coherent system of competition law and policy in Brazil. However, it also has the potential for making matters worse if there is no general consensus within the BCPS in respect to how competition law

ought to be interpreted and enforced. The need to ensure legal certainty and coherence seems to be a central issue in relation to the present state and future development of Brazilian competition law. In this respect, improvements are needed in professional training at the competition authority. The publication of guidelines and the pronouncement of decisions that restate the law would bring greater clarity.

According to Article 21, the conduct of a dominant undertaking is prohibited as long as it is *capable* of causing anti-competitive effects. There is no need to assess the probability of the exercise of market power and efficiencies are considered as justifications which, in practice, are not balanced according to the American rule of reason. As observed during the analysis of abusive conduct,⁷⁹¹ the reasoning undertaken by the CADE in relation to abuse of dominance offences appears to differ in respect to the type of conduct, notwithstanding the fact that the framework pursuant to Articles 20 and 21 of Law 8,884/94 provides a general standard. Therefore, it is imperative that the Brazilian competition policy develops into a coherent system, whereby the standards of proof and elements are applied in a similar fashion, irrespective of the conduct.

⁷⁹¹ See chapters four and five.

7.5 Proof of Effects

In contrast with the US approach, Brazilian competition law does not require proof of actual or likely effects of the conduct.⁷⁹² In this respect, the standard of proof is closer to the EU model, as it adopts a preventive approach in relation to anti-competitive effects. This is the majority view among members of the BCPS and is reflected in the case-law as well. It emerged from the case analysis that there is no need to prove actual or likely anti-competitive effects to constitute the offences of refusal to supply, tying arrangements or exclusive dealing; it merely has to be proven that anti-competitive effects could potentially result from the conduct.⁷⁹³

However, on some occasions the Brazilian competition authority has departed from the general standards set forth in Articles 20 and 21 of Law 8,884/94. In predatory pricing cases,⁷⁹⁴ the reasoning of the CADE implied that there was a requirement to prove the likely effects of the conduct, thereby adopting an approach modelled on US antitrust policy,⁷⁹⁵ which departs from the general standards set by Law 8,884/94. There is no requirement of recoupment under Law 8,884/94 and this additional factor is contained in Resolution 20 published by the CADE. This discrepancy is an important issue that should be resolved, as Brazil is a democratic state with a consolidated legal tradition, where the provisions set out in secondary legislation should not diverge from the parameters of the primary legislation.

⁷⁹² See p. 101.

⁷⁹³ See sections 2.3.3.1 and 2.3.3.2.

⁷⁹⁴ See section 6.2.

⁷⁹⁵ See section 3.2.

The findings of the case analysis suggested that when a conduct results in exclusionary effects it will not constitute a competition law offence, unless it is deemed that the dominant firm would be able to increase prices abusively at a later stage.⁷⁹⁶ The Brazilian position appears to mirror the US approach to predatory pricing, which requires proof of a dangerous probability of recoupment. This standard of proof is very difficult to satisfy. As a result, the CADE has never held an undertaking liable for predatory pricing.

However, it is not clear from the analysis of the opinions in the decisions whether the adoption of the US approach to predatory pricing resulted from a conscious policy decision. The interviews suggested that many policy-makers are not fully aware of the differences between the US and EU approaches to predatory pricing or of the impact of the recoupment criterion on the standard of proof. This finding highlights the importance of ensuring that members of the BCPS receive adequate training.

With respect to the determination of costs in price discrimination cases, it appears that the CADE follows the position of the EU, as it does not require proof of dangerous probability of recoupment of losses. In *AmBev* it was not necessary to prove actual or likely effects as the potential harm was implied from the loyalty created by the discounts.⁷⁹⁷

Irrespective of the drafting of Law 8,884/94, abusive pricing is not generally regarded as a standalone offence by members of the BCPS; rather, it is considered to be a symptom of an anti-competitive conduct. The CADE has never held a firm liable for abusive pricing.

⁷⁹⁶ See e.g. *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda* - 08000.013002/1995-97, 5165.

⁷⁹⁷ Only proof of potential effects was required. See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev* - 08012.003805/2004-10, para. 293.

According to the case-law, the power to impose monopolistic prices would result from the exclusion of effective or potential competitors.⁷⁹⁸ Therefore, evidence of exclusion would be needed to substantiate a claim where abusive pricing is alleged. This does not suggest a higher standard where effects need to be proven, but proof of the existence of another anti-competitive conduct as abusive pricing is not considered to be a standalone offence.

⁷⁹⁸ See e.g. *CPI - Medicamentos da Câmara dos Deputados v Laboratório Enila Indústria e Comércio de Produtos Químicos e Farmacêuticos SA - 08012.000903/2000-82*, 366.

7.6 Efficiencies and Justifications

In Brazil there is no burden of proof in relation to efficiencies or other justifications. However, according to the Constitution, every party must be heard in accordance with the due process of law.⁷⁹⁹ Therefore, the defendant has the right to submit the existence of justifications and, in accordance with the Brazilian rule of reason and the impartiality of the CADE, such justifications could be accepted.

The Brazilian competition authority does not distinguish between objective justifications and efficiency defences.⁸⁰⁰ Efficiencies are taken into consideration in the analysis of the conduct as they could offset the alleged harm to competition; a similar approach to that adopted in the United States. However, if the conduct is deemed to harm consumers and forecloses the market it is unlikely that the evidence of efficiencies submitted will substantiate a defence. In this sense, economic efficiencies play a similar role to objective justifications under EU competition law.

In some cases the competition authority suggested the existence of a burden of proof on the defendant in relation to efficiencies. In accordance with *AmBev*, for a dominant undertaking to justify discounts and rebates, it would have to prove that one of the following efficiencies would result: (1) reduction of transaction costs; (2) protection of commercial reputation; (3)

⁷⁹⁹ Brazil, *Federal Constitution of 1988*, Article 5(LV).

⁸⁰⁰ See section 3.3 on efficiency defences and objective justifications.

protection of specific investments; (4) economies of scale or scope in the downstream market; or (5) technological development in the upstream market.⁸⁰¹

Moreover, the CADE would seek to verify whether any objective criteria would apply to make it reasonable for the dominant firm to practice the conduct. However, a defendant would generally submit justifications in its defence where there is evidence of an alleged breach of competition law. In terms of proposed reforms, the eventual publication of guidelines on abuse of dominance should clarify whether or not the defendant bears the burden of proving the existence of justifications.

⁸⁰¹ See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 260.

7.7 Rule of Reason and *Per Se* Rule

A significant finding which emerged from the study is that members of the BCPS are not fully aware of the meaning of the *per se* rule. Most interviewees incorrectly believed that the *per se* rule was only applicable in the EU and that it was a form of strict liability applicable only to dominant firms.⁸⁰² According to this mistaken assumption, justifications would not be taken into account under any circumstance after the alleged conduct was proven. In turn, this demonstrated a lack of knowledge of the use of objective justifications under EU law, which are valid even in cases where the *per se* rule applies.

In addition, most members of the BCPS were not aware of the scope of the rule of reason. Most interviewees did not know that under the rule of reason it is necessary to prove the actual or likely effects of the conduct and that the burden rests on the defendant to demonstrate efficiencies that justify the conduct. Similarly, some interviewees were not aware that the competition authority has to prove that a conduct was necessary and that the goal of the undertaking could not have been achieved by less restrictive means. The most common definition of the meaning of the rule of reason put forward by interviewees was that it meant taking into account wider circumstances of the market and considering efficiencies as justifications.

Such a lack of information explains why, although the Brazilian competition authority officially rejects the use of the *per se* rule and adopts the ‘rule of reason’, it does not reflect what happens in practice. For instance, the Brazilian rule of reason is substantially different

⁸⁰² The *per se* rule is applied in the US as well, although with a narrower scope. See section 3.1.1.

from the US rule of reason and, according to the interviews, the *per se* rule is applicable at least in respect of cartels.⁸⁰³

The Brazilian rule of reason lacks the high standard of proof required pursuant to its US counterpart, particularly in regards to the first stage, where it is necessary to prove the likely effects of a conduct. Under the general terms of the Brazilian rule of reason, the conduct of the dominant firm only needs to be capable of producing anti-competitive effects, even in cases where the latter fail to materialise. This standard of proof is in accordance with Law 8,884/94. The only exception concerns predatory pricing, as the CADE has required proof of the effects for this type of conduct.⁸⁰⁴

Unlike the US, under the Brazilian rule reason there is no legal burden on the defendant to demonstrate the existence of efficiencies. Moreover, there was no evidence in the case-law that the competition authority needs to prove that a conduct is necessary and that the aim of the conduct could be achieved by less restrictive means. However, it was found that the defendants generally, in fact, tend to present justifications. The competition authority takes into consideration evidence put forward by the complainant demonstrating that the goal could have been achieved by less restrictive means.

In addition, there was no indication from the findings of the case analysis that the Brazilian competition authority balances pro and anti competitive effects. This is in accordance with Law 8,884/94 which does not provide a balancing process based on the US model. As the law

⁸⁰³ It emerged from the interviews that the competition authority uses the *per se* rule in the analysis of cartels. The study of cartels falls outside the scope of this research, so this information was not confirmed by an analysis of the case-law and should be subject of further research.

⁸⁰⁴ See section 7.5.

protects ‘...free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power,’⁸⁰⁵ it would be difficult to justify harm to these interests by way of overriding efficiencies via a balancing process. Therefore, despite the fact that the Brazilian rule of reason is markedly different from its US counterpart, the label of the ‘rule of reason’ is given to the Brazilian assessment of abuse.

The analysis of the case-law revealed that, in common with the EU model, the CADE considers a conduct abusive when it creates artificial barriers that exclude or impede the entry of competitors in the relevant market.⁸⁰⁶ The Brazilian rule of reason is understood as the requirement to take into consideration the benefits resulting from a conduct, as efficiency justifications form part of the analysis. Although the case-law failed to recognise a difference between efficiency defences and objective justifications, the findings suggest that the Brazilian justifications operate in the same way as the EU objective justifications. In Brazil, a range of justifications can be accepted, as long as they objectively demonstrate that the conduct is not capable of foreclosing the market, excluding competitors and, most importantly, harming consumers. With the exception of the assessment of predatory pricing and abusive pricing, which are dealt with by the CADE in the same way as in the US, the competition authority generally adopts an approach that is similar to the EU, especially for non-pricing conduct.

⁸⁰⁵ Brazil, *Law n. 8,884 of 11 June of 1994*, Article 1.

⁸⁰⁶ See, e.g. *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42*, 3880.

The Brazilian version of the rule of reason, as well as the adoption of the special responsibilities doctrine,⁸⁰⁷ suggests the pursuit of a competition policy which aims to protect market freedom, whilst allowing the BCPS to assess on a case by case basis whether the actions of dominant firms harm the interests of society at large. The CADE has adopted an approach which, although concerned with type I errors, demonstrates a willingness to take measures when dominant firms distort competition by artificially creating barriers to entry, excluding competitors and harming consumers. This suggests that the CADE is conscious of the interest protected by Law 8,884/94 and by the Brazilian Constitution and understands that the proper functioning of the market requires regulation and adequate enforcement.

The decisions of the CADE are administrative in nature and can be reviewed by the courts. Therefore, the role of the courts is also important for the effectiveness of competition law enforcement. At the present time, it is not possible to identify a general approach by the courts, as the *fora* for appeals are generally scattered throughout the Brazilian territory. This issue could be resolved under the proposed reform made in this study to eliminate the possibility of appeals to the *forum* where the defendant resides, so all appeals would be heard by the federal courts of the federal district of Brasilia.⁸⁰⁸ This would facilitate the emergence of a consistent body of judicial decisions and judicial expertise on competition law. Notwithstanding the above, according to information given by Advocates at the CADE, the vast majority of the courts' judgments confirm the CADE's decisions. Therefore, it could be argued that courts in Brazil are also aware that the proper functioning of the market requires adequate regulation.

⁸⁰⁷ See section 4.7.

⁸⁰⁸ See section 2.4.3.5.

7.8 The Special Responsibility of Dominant Firms and the Social Function of Property

The EU doctrine of special responsibilities of dominant firms appears to be gradually gaining momentum in Brazil. Although the CADE and other Brazilian policy-makers are wary of expressly adopting the term, this doctrine is substantially accepted under the Brazilian case-law.

The recent *AmBev* decision made clear that dominant firms do have more responsibilities than non-dominant firms. Therein, Councillor Furlan reflected on Montesquieu's thoughts that everyone who holds power tends to abuse it.⁸⁰⁹ He stated that Montesquieu's thoughts were valid not solely in relation to political power, but also for economic power, given that power could be understood as the capacity, faculty and means of achieving anything in any sort of human activity. This does not mean that dominance is prohibited. Rather, the competition authority must fulfil the role that other economic players would be able to play in preventing the abuse of dominant firms. Therefore, the competition authority provides a check at an institutional level to counter the abuse of economic power by dominant firms.

Montesquieu's thoughts have also inspired the Brazilian Constitution.⁸¹⁰ Therefore, the declaration of a relationship between dominance and special responsibilities in *AmBev* by citing Montesquieu's thoughts goes beyond a simple academic exercise. The doctrine of special responsibilities could be justified in the need to safeguard interests protected by the

⁸⁰⁹ These thoughts can be found at Montesquieu, *The spirit of laws with D'Alembert's analysis of the work*.

⁸¹⁰ See section 4.7.

Brazilian Constitution, such as free competition, the right to private property and the social function of property.⁸¹¹

Brazil's constitutional principles and the gradual acceptance of the doctrine of special responsibilities imply that the right to private property and market power are inherently linked to obligations, in the same way that the exercise of private property rights is conditioned to the social function of property. Therefore, the more property or economic power one acquires, the greater the responsibilities imposed by the legal system. This is how the Constitutional principle of the social function of property manifests itself in the application of the special responsibilities doctrine in Brazil.

⁸¹¹ See section 2.3.

7.9 The Long-Term Policy Prospects in Respect of Abuse of Dominance in Brazil

The professional training of members of the BCPS will prove to be fundamental in determining the direction that the Brazilian competition policy will take, especially when considering the significant increase in the number of professional staff members which is due to take place when the competition bill is enacted.

Members of the BCPS need to be fully aware of the different approaches taken by the competition authorities and courts in the US and the EU in respect of some types of abuse when citing decisions from both sides of the Atlantic. As foreign decisions are frequently cited, this could improve the consistency of the Brazilian decisions. More importantly, this would allow a conscious citation of foreign decisions to implement a desired policy, rather than the current random use of citations to illustrate a specific view on a particular concept. The bigger picture should always be borne in mind by members of the BCPS.

Members of the competition authority would also need to become more familiar with the meanings of other concepts, such as the Brazilian 'rule of reason', since a clear understanding would ensure their proper application. The development of a predictable and relatively consistent interpretation of competition law would be of fundamental importance in ensuring the emergence of a coherent system of competition law in Brazil which, among other benefits, would ensure an adequate degree of legal certainty for competitors. Not only would guidelines on the enforcement of competition law on abuse of dominance be needed, but also authoritative decisions could serve an educational purpose to clarify some of the uncertainties revealed in this research. The rise of Brazil as one of the emerging economic powers of the 21st century, with its growing economy and foreign direct investment, only emphasises the

importance of a clear and coherent understanding of competition law among members of the BCPS.

It emerged from the interviews that members of the BCPS were aware of the benefits of effective competition law enforcement for the development of the economy and society. However, there was no intention to intervene in the market to address social problems. It was a common understanding among interviewees that such social improvements would result from a competitive market that benefits not only producers but also consumers. On the one hand, the majority of the interviewees were of the opinion that Brazilian competition law would continue to distance itself gradually from the US model and move towards the EU approach, particularly in relation to the abuse of economic power. On the other hand, they also pointed out that the Brazilian competition policy will not slavishly follow the EU; rather, they believed that the Brazilian competition authority would find its own way. They believed it would incorporate elements from the EU and US competition policies, but also take into account the particular characteristics pertaining to Brazil and tailor the policy to the needs and structure of the Brazilian markets.

Brazil has not fully resolved the issues of reconciling the differences between the US and EU models of competition law and policy. Further reform is needed to bring greater coherence to its competition policy. Nevertheless, Brazil perhaps represents the only major developing country with the suitable conditions, in terms of its established competition law as well as its legal, political and socioeconomic environment, to allow it to develop a successful competition policy that is suited to the particularities of its legal system, economy, culture and institutional framework. One notable finding of this research is that Brazilian policy-makers appear to have the determination and capacity to develop a unique model of

competition law and policy. The CADE has come a long way in the past fifteen years, and there appears to be enthusiasm and a desire by its members to develop a coherent and successful system of competition law and policy in the years to come.

The mixture of elements from the US and the EU models is shaping the development of Brazilian competition law and policy. This, in conjunction with the need to adapt these elements to the Brazilian legal and socioeconomic context, could eventually result in a distinct Brazilian model of competition law and policy, particularly in respect to the regulation of market power. As was discussed in this research, the Brazilian competition authority has interpreted its competition law at times following the US, such as for abusive pricing, sometimes following the EU, for instance for discounts and rebates, and in its own way, for instance when determining a greater price increase for the Brazilian SSNIP test. The adoption of the view in accordance with one or another jurisdiction (or none of them) appears to correspond to the views of those who work in the competition authority. Interviews suggested that at times the adoption of one view may be linked to the fact that members of the staff have undertaken training in the US or the EU, but may also result from a random choice which may be related to the way in which one believes that competition should be in the market. The latter may be linked to social and historic factors, but also to the member's legal and economic studies and views. It appears therefore that the transplantation of legal concepts from other jurisdictions has resulted in adaptations to conform with the views of those who enforce the law and legal and institutional framework where they operate. Thus, a 'third way' in the sphere of competition law appears to be emerging in a developing economic power with a consolidated democratic system which does not endorse a *laissez-faire* approach, nor does it seek to promote interventionism and where the reasonableness of the conduct could be balanced with its fairness.

7.10 Further lines of inquiry

Much research has been undertaken in respect of the similarities and differences in the approach of the competition authorities in the US and the EU.⁸¹² This research has identified a number of elements that are relevant for the understanding of such differences and similarities and applies this theoretical framework to examine Brazilian competition law and policy. Very little has been said to date in Brazil in relation to abuse of dominance. Most authors have focused their researches on mergers⁸¹³ and cartels⁸¹⁴ and the very few who have proposed a comprehensive study of competition law and policy in Brazil have not dealt with abuse of dominance in any depth.⁸¹⁵ Only one author has published case-law books on competition law in Brazil,⁸¹⁶ but these do not offer an analysis of the cases. Moreover, they contain only some of the decisions that were considered by interviewees as leading cases and none of them contain cases decided after 2003.

This is therefore the first research that combines the use of in-depth interviews, case-law analysis and literature review to examine how the Brazilian competition authority has dealt with the divergences between the EU and the US models when applying Brazilian

⁸¹² See e.g. Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?.” Varney, “Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness.” De Smet, “The Diametrically Opposed Principles of US and EU Antitrust Policy.”

⁸¹³ See e.g. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. I. Oliveira and Rodas, *Direito e Economia da Concorrência*, chap. V. Forgioni, *Os Fundamentos do Antitruste*. Botta, “Fostering Competition Culture in the Emerging Economies: The Brazilian Experience.”

⁸¹⁴ See e.g. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. III. Oliveira and Rodas, *Direito e Economia da Concorrência*, chap. II. De Araujo, Pugliese, and Castillo, “European Union and Brazil: Leniency in Cartel Cases - Achievements and Shortcomings.” Forgioni, *Os Fundamentos do Antitruste*, chap. VII.

⁸¹⁵ See e.g. Oliveira and Fujiwara, “Competition Policy in Developing Economies: The Case of Brazil.” Forgioni, *Os Fundamentos do Antitruste*. Forgioni, *Direito Concorrencial e Restrições Verticais*. Mattos, *A Revolução Antitruste no Brasil: a teoria econômica aplicada a casos concretos*, pt. II. Rocha et al., *A Lei Antitruste - 10 anos de combate ao abuso de poder*.

⁸¹⁶ See Franceschini, *Direito da concorrência: case law*. Franceschini, *Jurisprudência do CADE de 1962 a 2003*. Franceschini, *Lei da concorrência conforme interpretada pelo CADE*.

competition law in respect of abuse of dominance. The identification, selection and analysis of the leading cases carried out in this study are useful for any further studies of the subject. Moreover, it identifies the elements of abuse in Brazil, placing Brazil in the competition policy spectrum between the US and the EU, currently leaning closer to the latter. This will also be useful to academics wishing to analyse abuse of dominance, the Brazilian model or to compare the latter with models from other jurisdictions. The comparative methodology and the mix of interviews with case-law adopted in this research will also help other academics to study the adoption of hybrid competition law systems in other jurisdictions, given that it identifies the elements that are relevant for the resulting policy.

This research identified the relevance of professional training for the development of Brazilian competition policy. Further research should be undertaken on the issues identified herein, particularly in relation to matters outside the scope of this research, such as cartels and mergers. In collaboration with the BCPS, this could allow for the development of a suitable training programme for professional personnel. The training should ensure a coherent understanding of competition law and policy among members of the competition authority and should try to anticipate the future needs of the BCPS in terms of expertise.

It emerged from the study that, although the Brazilian competition authority rejects a *per se* approach to any competition offence, the interviews revealed that this approach is in fact used in respect of cartel cases. As the study of cartels falls outside the scope of this research, this finding was not confirmed by the case-law analysis. The study of the Brazilian case-law on cartels would be an instructive source of information in identifying not only the existence of a *per se* approach in these cases, but also in assessing the coherence of the policy.

Finally, but not less importantly, an issue that emerged in this research which should be the subject of further research concerns the approval of controversial mergers, particularly those which resulted in dominant firms or increased the market power of existing dominant firms. The numerous accusations of abusive conduct against AmBev and the imposition by the CADE of the highest fine ever imposed by the competition authority on that company raises the question of whether the terms on which the competition authority has approved such mergers have been sufficient to avoid abusive conduct. Therefore, further research should be undertaken to analyse whether the remedies imposed on such mergers have been sufficient to avoid the distortion of competition at a later stage.

8. Appendix

8.1 Interviews

This research was conducted using a qualitative methodology which offered the best opportunity to understand the underlying competition policy in the analysis of abuse of dominance in Brazil. The views of those directly involved in the investigations and decisions of abuse of dominance, as well as in the defence of dominant firms were fundamental for fully understanding the decisions examined. Most importantly, the use of interviews minimised the risk of imposing the researcher's own assumptions or expectations when analysing the case-law or when constructing explanations for the reasons of certain decisions or actions.

The methodology was used in an inductive manner: rather than creating a hypothesis and testing it through empirical research, the researcher built up a theory based on the gathered data. Thus far, most researchers of Brazilian competition law and policy have used a deductive approach. In addition, the interviews were fundamental for this study, given the lack of in-depth research in Brazil concerning abuse of dominance. They were also very helpful for the identification of the leading cases and to clarify the contradictions evidenced by the case-law, as well as what has been stated by Brazilian scholars, which frequently assume that the Brazilian competition law is applied in the same way as in the EU and the US.

8.1.1 Methodology

Within the BCPS, interviews were undertaken with seven Councillors of the CADE, two Assistants of Councillors, the Advocate General and three Advocates of the CADE, as well as one member of the SDE and two members of the SEAE. Moreover, one Ex-Councillor of the CADE was interviewed. In order to maintain the anonymity of the former Councillor interviewed, it was not possible to state throughout the thesis whether the statements belonged to a current or former member of the competition authority. The limitation of having only one former member interviewed was minimised by the fact that most of the current members interviewed gave valuable information in regards to the views of previous members of the competition authority. Moreover, the information given by the former Councillor was re-stated by many other current members of the competition authority. Three Brazilian competition lawyers and two UK competition lawyers were also interviewed. In total, twenty-two persons were interviewed.

In order to have a full picture of the views of those making the decisions involving abuses, all Councillors of the CADE were interviewed. It was also helpful to have at least two Assistants interviewed, who could offer a different perspective as they were Specialists. Given that the SEAE and the SDE are not located in the same building as the CADE, this created a few difficulties to organise interviews with many members of these bodies. However, it was possible to interview one senior member of the SDE and two of the SEAE. In addition, one Ex-Councillor accepted to be interviewed over the phone, offering a perspective of how the CADE has developed its policy previously to the appointment of the current Council. Moreover, Brazilian competition lawyers were interviewed in order to bring the view of practitioners in respect to those responsible for enforcing competition law, namely the BCPS

and the courts. The researcher also had the chance of meeting and questioning UK lawyers that had experience in notifying mergers in Brazil in respect of the differences in approach of the Brazilian competition authorities and the UK and EU competition authorities, especially in terms of the definition of the relevant market.

Except for the Ex-Councillor of the CADE, whose interview was conducted over the phone, all other interviews were conducted in person. They took place between July 2009 and December 2009. Generally, the interviews regarded: institutional issues, such as the difficulties faced by the competition authority as a policy-maker, training of staff and appointments, as well as policy matters, such as the Brazilian rule of reason, the *per se* rule, the proof of effects, the role of efficiencies and other justifications and the reconciliation of the Brazilian competition policy with the US and EU views on competition law.

8.1.2 Confidentiality and anonymity

All the interviews were anonymous. Interviewees were given the possibility of being mentioned if they wished, but none manifested the intention to do so. Therefore, under no circumstances data which can lead to the person of the interviewee was or will be revealed.

Precisely for this reason, the full notes of the interviews are not available in the appendix. The number of interviewees is relatively small and all members of the competition authority know each other relatively well. The kind and subject of comments made in the interviews would allow the identification of most interviewees so the full notes will not be published.

Moreover, the researcher was advised by one Councillor of the CADE that interviews should not be recorded if honest answers (rather than the 'official version') were expected. Following this advice, interviews were not recorded; instead, notes were taken. Except for two, all the interviews were conducted in Portuguese. Every effort was made to offer a truthful translation.

8.1.3 Interviews guidelines sent to interviewees

Laíse Da Correggio Luciano
Law PhD Candidate
Queen Mary, University of London
School of Law
67-69 Lincoln's Inn Fields
London WC2A 3JB

Re: authorisation to conduct interviews.

I am a PhD student at Queen Mary, University of London, under the supervision of Professors Steven D. Anderman and Kate Malleson. My thesis concerns the Brazilian competition law and policy in regards to abuse of dominance cases in comparison with the US and the EU.

In March this year I was authorised by the President of the CADE to undertake an observation internship in the CADE and conduct interviews, which will be fundamental to better understand the Brazilian competition policy in respect of abuse of dominance. In order to conduct these interviews, I have elaborated a topic guide, which can be found below.

I would like to bring to your attention the fact that the data gathered will be treated with confidentiality and will respect the *United Kingdom Data Protection Act* of 1998. All the interviews will be confidential and no data that can lead to the person of the interviewee will be revealed, unless expressly authorised by the interviewee before publication. To ensure this, all data that can identify the interviewees will be omitted in the transcription of the

interviews and will be substituted randomly by numbers and letters. I will be the only person to have access to the transcriptions, which will be destroyed at the end of the research that is expected to be completed by September 2010.

Interviews topic guide:

- a) The main challenges faced by the competition authority in regards to its role (as policy-maker) and administrative structure.

- b) The reduction in the number of cases dealing with abuse of dominance in the past decade.

- c) The BCPS approach to the reconciliation of the Brazilian system of competition with the international thoughts and standards (considering the different, and at times contradictory views in respect of abuse of dominance, e.g. in the US and the EU)

- d) The possible effects of the international crisis in the application of the competition law in Brazil.

- e) The interaction between consumer protection and competition policy.

Thank you very much for your collaboration.

Sincerely,

Laíse Da Correggio Luciano

8.1.4 Detailed topic guide

Which are the challenges faced by the CADE in regards to its role (as policy-maker) and administrative structure?

How is the effectiveness of decisions ensured?

How is the training of the staff done? What is emphasised in regards to abuse of dominance?

Do members of the SDE and the SEAE participate as well?

Usually, do Councillors and the Advocate General remain for two mandates? Who decides if they stay in their positions?

There was a reduction in the number of cases dealing with abuse of dominance. Why this is?

Has the international crisis had an impact in the application of the competition law in Brazil?

Is there an economic theory that is more aligned to the competition policy implemented by the CADE? Is this choice a conscious one? The definition of the dominant position in Brazil is close to a structural, Chicagoan or other concept?

How does the CADE approach the reconciliation of the Brazilian system of competition law with the international thoughts and standards? What about the use of US and EU decisions to support decisions on predatory pricing?

Is it necessary to prove the effects of the conduct?

How much is social harm taken into account by the economic analysis?

How is the interaction between consumer protection and competition policy done?

How legitimate and illegitimate competition are differentiated?

Is there the concept of single economic unit or is the corporate veil respected?

How is the rule of reason applied?

Is there a tendency in defining the relevant market in a narrow or wide manner?

Is there a special responsibility of dominant firms in Brazil?

Are there *per se* prohibitions?

Which were the most important unilateral cases?

Where is the CADE's policy heading towards?

Is there an understanding of a competition policy of MERCOSUR, or is it still at a national level?

8.2 Cases analysis

The research analysed the most significant cases involving abuse of dominance. The existence of a research of this nature, using an inductive approach to reveal in detail the analysis of the Brazilian case-law, is unknown to the researcher. Therefore, its findings will contribute to the academic literature and provide much needed information to the competition authority, practitioners and the academic community in respect of the suitability and consistency of the policy on abuse of dominance in Brazil.

It is important to note that, in common with most civil law jurisdictions, Brazil does not have a system of case-law reporting as in England and Wales. Brazilian decisions can be found online in CADE's database, but it does not contain a complete body of case-law. Moreover, in most case searches it is not possible to separate abuse of dominance from other types of conduct such as cartels, given that keyword searches will lead to results based on the words contained in the often imprecise short description of the case.

In order to ensure a good sample of abuse of dominance cases, in addition to keyword searches, the following search criteria was used: minutes of judgments, cases contained in Brazilian competition law publications and cases which, in the opinion of Councillors and other members of the BCPS, were the most relevant. The body of abuse of dominance cases was narrowed down in order to identify different types of abuses in the Brazilian jurisprudence and to single out the most significant cases. In total, fifteen cases were examined in detail. Their analysis can be found below.

8.3 Abusive Pricing

8.3.1 Xerox

In 1998, the CADE decided *Xerox do Brasil Ltda.*⁸¹⁷ Farina and Fraga accused Xerox of abusing its dominant position by imposing standard form agreements whereby Xerox had the unilateral right to increase prices. Although deciding in favour of Xerox, the CADE formulated some legal requirements for determining whether a conduct amounts to an arbitrary increase in prices. It was established that the determination of the offence of increasing arbitrarily profits requires an evaluation of the normal standards of profit margin in the relevant market. The evaluation encompasses a comparison of the past and present profitability in the sector and relevant market, as well as of the undertaking in question. Moreover, with respect to establishing causation, a factual link between the alleged conduct and the eventual abusive realisation of profits needs to be established.⁸¹⁸

Increases in price are considered a symptom of an anti-competitive practice.⁸¹⁹ Therefore, it is not CADE's competence to punish an increase in price *per se*.⁸²⁰ However, the CADE will interfere if there is an anti-competitive conduct causing the increase in price. For instance, this would occur in cases where the undertaking responsible for increasing prices has a dominant position or there is an element of collusion in the conduct.

⁸¹⁷ *Farina e Fraga Associados v Xerox do Brasil Ltda 2 - 0046/1992.*

⁸¹⁸ *Ibid.*

⁸¹⁹ Andrade and Alves, "Distribuidoras de Veículos vs. Montadoras: Conduas Anticompetitivas e Relações Verticais," 352.

⁸²⁰ *Revalino Vieira da Cunha v Golden Cross Assistência Internacional de Saúde S/C - 08000.000178/90.*

8.3.2 Laboratório Enila

*Enila*⁸²¹ is a decision of 2008 regarding the pharmaceutical sector. The defendant (Enila) was accused by the SDE of increasing the prices of some of its medicines in an abusive manner. The plenary of the CADE decided unanimously that there was no offence to the economic order. The CADE considered that there was not enough evidence to prohibit the conduct. Moreover, according to the presiding Councillor, Luiz Carlos Thadeu Delorme Prado, the complaint and the investigations of the SDE did not focus on determining dominance, which would be a fundamental element to be established before finding prices to be abusive under Brazilian competition law.

The above suggests that preliminary investigations were completed in a flawed manner, as the factual findings did not correspond with the elements which needed to be proven at law, making it difficult for Councillors to decide the case properly. The fact that the SDE failed to focus on first establishing dominance may have resulted from the lack of clear procedural guidance within the BCPS. When questioned about the deficiency in the reasoning of some decisions, one member of the competition authority stated that:

...the legal basis is randomly chosen. Many times paragraph IV [of Article 20, which prohibits conduct of firms that may result in abuse of dominance] is used to justify the prohibition of the abusive conduct, but many times it does not appear in the decision at all. The reality is that it should always be included when dealing with unilateral behaviour. This probably occurs because of a lack of technical skills of assistants.

⁸²¹ *CPI - Medicamentos da Câmara dos Deputados v Laboratório Enila Indústria e Comércio de Produtos Químicos e Farmacêuticos SA - 08012.000903/2000-82.*

Therefore, the lack of proper understanding of the structure that the investigations and the decisions should follow may result in flawed decisions and investigations. In this case, such problems with the investigation had an impact on the outcome of the case, given that without the proper establishment of dominance during investigations it became difficult for the CADE to analyse the conduct.

In *Enila* it was established that abusive prices would be found when prices were fixed at a high rate or if there was a pricing strategy aimed at artificially distorting the competitive process. The abuse of dominance would refer to the strategic means of the undertaking to impose higher prices that would not sustainably exist in a competitive market. In essence, the power to impose higher prices would result from an exclusion or obstruction of effective or potential competitors.

Councillor Prado declared that high prices in most case cases offer a warning that it is likely that an offence to the economic order is taking place. Indeed, they would suggest the existence of an anti-competitive conduct, such as abuse of dominance or cartel.⁸²² In fact, the *Enila* decision stresses the idea that abusive pricing ought to be regarded as a consequence of an anti-competitive conduct, rather than an offence in its own right.

⁸²² Forgioni, *Os Fundamentos do Antitruste*, 353.

8.4 Predatory Pricing

8.4.1 Kellogg's

In *Kellogg's*,⁸²³ the claimant (Nutrifoods) argued that a previous merger between Kellogg's and Superbom, the later being a Brazilian company in the cereal sector, increased Kellogg's market power and facilitated its ability to set predatory prices. However, the practice of selling products at below cost after the acquisition of Superbom by Kellogg's was considered reasonable, as the latter was eliminating excess stock purchased from the former. In addition, arguments in Nutrifoods' claim against the merger were deemed unjustified as the CADE had previously cleared the merger.

When formulating its decision in favour of the defendant, the CADE stated that even in the hypothetical scenario that the defendant committed predatory pricing, further evidence demonstrating a serious possibility of direct harm to competitors would be needed to support the claim. However, it is worth noting that the case was decided two years after the alleged conduct took place, so it was easy to determine that no harm occurred to competitors, given that Nutrifoods did not lose market share as a result of Kellogg's practice.⁸²⁴ The exclusionary effects had not taken place, although it could be argued that Kellogg's conduct might have impeded the growth of Nutrifoods' market share.⁸²⁵

⁸²³ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10.*

⁸²⁴ Nutrifoods' market share remained stable at circa 10%.

⁸²⁵ It has to be borne in mind that '...a focus on actual effects can produce misleading results where the claim is that the defendant's exclusionary conduct helped to maintain its monopoly power without necessarily resulting in immediate incremental price-output effects'. Balto, "Proof of competitive effects in monopolization cases: a response to Professor Muris," 312.

It emerged from the interviews that in many decisions a supposedly anti-competitive conduct is allowed because it took a considerable amount of time to investigate and decide the case. In such cases some Councillors felt compelled to take into consideration what happened in practice with the advantage of hindsight, rather than adjudicating the alleged conduct by considering the potential harm to competition at the time of the conduct.

This is particularly important when analysing predatory pricing, given that proof of recoupment is necessary, so if the facts show that recoupment was not possible, there would be no offence to competition law. Therefore, although under a formal understanding of the law the competition authority would not need the proof of effects in predatory pricing cases,⁸²⁶ it seems that this is required by the CADE when the investigation takes place after the effects materialised.

Although Kellogg's was acquitted, the final remarks in this decision of the presiding Councillor, Lucia Helena Salgado e Silva, demonstrated a concern with its market power. The Councillor stated that '...although Kellogg's has a worrying position in the market of ready-to-eat cereals, it was not proven in this case that an anti-competitive practice took place'.⁸²⁷ This statement could be interpreted as a warning to Kellogg's with respect to the manner that it was behaving after the merger with Superbom was approved. These

⁸²⁶ Not only the Competition Law 8,884/94 does not require the proof of the effects of the conduct, but also guidelines on predatory pricing clearly state that the conduct prohibited must either produce the anticompetitive effects or have the capacity of producing them. See SEAE, "Guidelines on the economic analysis of predatory pricing," 4.

⁸²⁷ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10*, 5.

concluding remarks suggest the acknowledgement of Kellogg's special responsibility⁸²⁸ resulting from its dominant position.

⁸²⁸ See section 5.4 on exclusive dealing for more details on the competition authority's view on special responsibility of dominant firms.

8.4.2 Merck/M.B. Bioquímica

In *Merck/M.B. Bioquímica*,⁸²⁹ the claimant, Labnew Indústria e Comércio Ltda (Labnew), accused Merck SA and its subsidiary M. B. Bioquímica Ltda of selling tubes for the collection of blood samples under vacuum at prices below costs in public procurements in 1994. Labnew also brought separate complaint proceedings to another federal institution, the Department for Commercial Defence of the Ministry of Industry, Commerce and Tourism (DECOM/MICT),⁸³⁰ accusing the defendants of breaching anti-dumping laws as the tubes originated from the United States. The dumping was confirmed by DECOM/MICT and the defendants had to pay additional import tariffs. In contrast with previous cases, where breaches of anti-dumping laws were confused with elements of predatory pricing,⁸³¹ in this decision there were elements of predatory pricing and dumping. Therefore, the dumping offence was taken care by the appropriate federal body (DECOM/MICT) and the predatory pricing offence was examined by the BCPS.

The relevant market of vacuum tubes for collecting blood was concentrated as there were only five competitors: (1) Becton Dickinson, (2) Terumo (whose importer was the defendant Merck/M.B. Bioquímica), (3) Labnew, (4) Sherwood and (5) Greiner. On average, between 1993 and 1999, the approximate market shares of the above companies were as follows: (1) Becton Dickinson at 65%, (2) Labnew at 15% and (3) Merck/M.B. Bioquímica at circa 15% and the remaining companies at 5%. After the defendants entered into the national market in

⁸²⁹ *Labnew Indústria e Comércio Ltda v Merck SA Indústrias Químicas and M.B. Bioquímica Ltda - 08000.013002/1995-97.*

⁸³⁰ Departamento de Defesa Comercial, Ministério da Indústria, do Comércio e do Turismo.

⁸³¹ For a discussion on the lack of clarity on the differences among predatory pricing, dumping and unfair competition in the early days of Law 8,884/94, see Oliveira and Rodas, *Direito e Economia da Concorrência*, 72.

1993, importing Terumo's products, their market share rose from 2.88% in 1994 to a maximum of 24.55% in 1996. However, their market share reduced significantly to 16.84% in 1997 and 5.58% in 1998; in 1999 it was only 1.01% as a result of the fines imposed for the dumping offences.

There were high entry barriers as a result of the considerable sunk costs for setting up operations for distributing and manufacturing the vacuum tubes. As a result, most competitors relied on foreign imports. Due to such entry barriers, there was no entry of competitors other than the defendants in the 1990s, notwithstanding the fact that it was a period when the Brazilian economy became more open for multinationals to setup operations.

Although there were high sunk costs in setting local operations in Brazil, the prominence of imports suggests that barriers to import were low as a result of low transportation costs (the vacuum tubes could be shipped by sea without additional costs such as refrigeration) as well as efficiencies resulting from the instauration of a proper import channel, such as setting up a local representative or distributor. Low import costs help to explain two important findings: (1) the claimant was the only competitor that was 100% Brazilian in terms of manufacturing operations, and (2) defendant companies successfully managed to increase their market share between 1993 and 1996, which in turn coincided with a decrease of the claimant's market share. These findings help to explain the commercial rationale for the proceedings in question. It must be noted that the CADE did not find in favour of the claimant, albeit it had succeeded in its anti-dumping claim, demonstrating that since the early years of Law 8,884/94 competition law was not used to carry out protectionist policies by discriminating against importers or multinationals.

In *Merck/M.B. Bioquímica*, the decision of the presiding Councillor Mércio Felsky stated that the offence of predatory pricing should be understood as the conduct of setting prices below average variable costs with the aim of eliminating competitors. One-off occurrences, such as an exceptional discounted sale that had a low impact on competitors could not be considered predatory pricing. It is worth highlighting that Councillor Felsky's definition connotes the principle that the conduct must result in actual or potential harm to competition to become a competition law offence. Therefore, simply selling products at below costs would not be an offence.

According to Councillor Felsky, the predominant theoretical understanding on predatory pricing comes from the Chicago school. According to this school of economic thought, predatory pricing is an irrational conduct and is rarely observed in the real world. Moreover, one of the important goals of Brazilian competition law is to promote low prices, which explains the unwillingness of the CADE in finding an undertaking liable for predatory pricing.

Councillor Felsky highlighted that in common with Section 2 of the Sherman Act 1890, Articles 20 and 21 of Law 8,884/94 consider predation as a strategy adopted by a firm in an attempt to monopolise the market of a product. In his view, only undertakings that have market power or dominance would be able to sustain a reduction of their earnings for a sufficient period of time until their rivals are eliminated⁸³² and only after competitors are excluded from the market is that the predator would impose higher prices.⁸³³ However,

⁸³² The initial reduction of prices could be conceived as benefiting consumers in the short term.

⁸³³ The subsequent increase in prices could be conceived as harmful to consumers and the process of competition in the long term.

Councillor Felsky also stated that the lack of dominance was not enough to acquit the defendant. It was necessary to examine the complexities and dynamics of the market to identify the aims of the strategy. As stated above, Becton Dickinson was dominant as it had a market share of 65%; however, it was in danger of losing its dominance as it had been fined for dumping in 1993 and was losing a commercial battle with Labnew. Therefore, Councillor Felsky stated that the defendants might have engaged in predatory pricing against Labnew in the hope that Becton Dickinson would not be able to recover.

This reasoning demonstrates an improper application of competition law. Merck/M.B. Bioquímica were not considered dominant, but nonetheless risked having their conduct prohibited. If the Councillor was considering the fact that Merck/M.B. Bioquímica imported their products from Terumo, which was the second largest company in the sector in the US, as an element that could allow Merck/M.B. Bioquímica to practice predatory prices and exclude competitors, then the Councillor should have assessed the existence of collective dominance. If that was not the case, then there was no reason for the Councillor to examine the conduct of Merck/M.B. Bioquímica. It is important to follow a certain structure in the decisions in order to avoid making flawed statements as the ones above.

When analysing the conduct, Councillor Felsky stated that the correct application of the Brazilian competition law would require a detailed analysis of the effective variation of costs and the behaviour of prices over the long term. The strategic rationale of the conduct would have to be examined in the light of the objective conditions of the market; that is, if there was a probability of posterior extraordinary profits that would be capable of compensating the losses incurred by selling at below costs.

According to Councillor Felsky, recoupment was a requirement which meant the capacity of an undertaking to recover its losses⁸³⁴ from selling below costs with subsequent monopolist profits. The rationale for the recoupment requirement would be that if the predator failed to eliminate its rivals, it would not be able to recover its losses. Therefore, there would be no harm to competition and consumers. In fact, the latter would benefit from prices below cost. Councillor Felsky stated that the US Supreme Court used the recoupment requirement test in *Brooke Group*,⁸³⁵ where it determined that the recoupment of losses would be unlikely when a market was highly diffused and competitive, barriers to entry were low and the supposed predator did not have excess capacity to absorb the market share of its rivals.

With the aim of moulding the aforementioned US reasoning to the case in question, Councillor Felsky stated that there would be five structural conditions, albeit not sufficient, for predatory pricing to occur: (1) the relevant market must be extremely concentrated; (2) the predator must have dominance;⁸³⁶ (3) the barriers to entry must be high;⁸³⁷ (4) the predator must have excess installed capacity of production; and (5) the goodwill or customers from rivals expelled from the market must be taken over by the predator.

The main purpose of analysing these structural conditions would be to verify whether recoupment was possible. However, the conditions were regarded as indicative, rather than necessary for recoupment to exist, so the only requirement is recoupment itself. For instance, the condition of excess installed capacity of production was disregarded in *Merck/M. B.*

⁸³⁴ Losses could be understood as an investment, given that the predator is seeking a monopolist return in the long term.

⁸³⁵ *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*

⁸³⁶ It must be noted, however, that the defendant did not have dominance, so the Councillor appears to be contradicting himself.

⁸³⁷ High barriers to entry would be necessary to allow the predatory firm to charge high prices after excluding competitors from the market without the risk of having to compete with new entrants.

Bioquímica, given that a considerable proportion of the glass vacuum tubes were imported. According to Councillor Felsky, the important question to be answered was whether Merck had a supply agreement with Terumo, since this could suggest a long term strategy to gain dominance.

Although the aforementioned conditions were regarded as not necessary, the reasoning of Councillor Felsky does not appear to express coherence. For instance, earlier in the decision it was stated that dominance by the defendant companies was not necessary for establishing the offence, whilst it was later mentioned that dominance would be needed to achieve recoupment.

Although the decision appears to have been largely inspired by a Chicagoan approach to predatory pricing, Councillor Felsky highlighted that the Chicago school was not immune from criticism as recoupment of losses would not always be the main goal of the strategy. In this respect, recoupment would be difficult to determine if practised by multi-product firms, such as conglomerates, as the practice of cross-subsidises may be used as a strategy to exclude a competitor.

The test used in *Merck/M. B. Bioquímica* to determine whether the products were sold at below costs was the Areeda-Turner test which considers the average variable costs. Councillor Felsky stated that the practice of setting prices below average variable costs was essential for the configuration of predatory pricing, but it had to be combined with the aim of

eliminating competitors to achieve monopolistic prices and profits.⁸³⁸ The results of the Areeda-Turner test showed that *M. B. Bioquímica* did set prices below average variable costs. With respect to Merck, there were a few of its products sold below average variable costs, but they represented only 2% of all the tubes sold between 1994 and 1995. In order to demonstrate the existence of predatory prices it was deemed necessary for prices to be clearly below production costs,⁸³⁹ relatively consistent for a long period of time, as well as capable of affecting a significant part of the relevant market.

Finding in favour of the defendants, Councillor Felsky concluded that the commercial hardships of Labnew began well before the alleged conduct took place. Furthermore, even if this was not the case, it would not have been an offence to the economic order if prices were above average variable costs. Given that the prices of Merck and *M. B. Bioquímica* were generally capable to cover all other costs incurred in their commercialisation, the conduct was deemed to be legitimate.

⁸³⁸ This was the understanding of CADE also in the 2009 AmBev decision. In this case there was an accusation of the use of predatory prices with respect to the Antartica beer brand. The evidence showed that AmBev placed Antartica in various markets at an inferior price than it was practising previously, apparently as a response to the increase in sales of competing brands. However, the data did not show sales consistently below the average marginal cost or the existence of an exclusionary strategy resulting from this behaviour in order to increase prices and recover the losses at a later stage. Therefore, Ambev's conduct was not deemed to be anti-competitive.

⁸³⁹ It must be noted that the products were imported, not produced by the defendants.

8.5 Price Discrimination

8.5.1 Telemar

*Telemar*⁸⁴⁰ is a case decided in 2008 resulting from a complaint from Terra Networks in respect of the pricing practices of Telemar Internet Ltda (Telemar) and Telemar Norte Leste SA (Oi Internet), the latter being companies of the Telemar Group. Telemar and Oi Internet were jointly accused of practising an anti-competitive promotional discriminatory strategy.

In 2005, the Telemar Group launched its broadband service (Oi Broadband). The claimant stated that prices were below costs as a result of combined discounts of Velox Telemar⁸⁴¹ and Oi Broadband. It was alleged that the price arrangements between the defendants would result in discriminatory prices. This was supported by the fact that the Telemar Group was capable of practising cross-subsidises.

The relevant market and the existence of dominance were not assessed in the decision. This is an important aspect, because if the defendants lacked dominance, there would have been no need to analyse the conduct, as the conduct would not have been relevant under competition law. The formulation of the decision was deficient, as it should have commenced with the definition of the relevant market and followed with the verification of dominance before dealing with the conduct.

⁸⁴⁰ *Associação Brasileira dos Provedores de Acesso, Serviços e Informações da Rede Internet-ABRANET, et al. v Telemar Internet Ltda and Telemar Norte Leste SA - 53500.013140/2005.*

⁸⁴¹ An ADSL connection service.

The presiding Councillor, Paulo Furquim de Azevedo, agreed with the findings of ANATEL⁸⁴² in favour of the defendant companies, as it established that Telemar had offered similar conditions to Oi Internet and to other competitors. The plenary of Councillors decided unanimously for the legitimacy of the practice. It appears that the main reason for this outcome was that the same conditions were offered to competitors. This in part explains why the reasoning in the decision did not go through the steps of defining the relevant market and establishing dominance.

The decision did not clarify whether proof of recoupment of losses is needed in cases where prices charged to certain undertakings are much lower than those charged to competitors. Furthermore, it was not made clear who had the burden of proof of justifications. Clarity in this respect is fundamental for ensuring legal certainty, so legal reform in the shape of amendments to the existing procedural rules, as well as guidelines in the form of official publications, or a consolidated judicial position would be welcome in the years to come.

⁸⁴² ANATEL is the Brazilian national telecommunications regulator.

8.5.2 AmBev

In July 2009, one of the biggest beer breweries in the world, AmBev, was held liable under competition law in a unanimous decision by the CADE for its loyalty programme, which consisted of giving discounts as part of a strategy to increase barriers to entry. *AmBev*⁸⁴³ is widely regarded as the most significant abuse of dominance decision judged thus far. In addition to the legal impact of the decision, its importance originates from the fact that the defendant came into existence as a result of a highly publicised merger approved by the CADE a decade earlier. Moreover, AmBev was penalised with the highest fine ever imposed for an abuse of dominance offence in Brazil, circa 133 million sterling pounds.⁸⁴⁴

The presiding Councillor, Fernando de Magalhães Furlan, stated in this decision that the previous merger that resulted in AmBev was polemic, notwithstanding its approval, as it resulted in one of the largest companies in the beverage sector in the world. He also mentioned that there were many complaints presented in the past few years to the BCPS involving possible abuses by AmBev where the defendant was cleared of the charges. Such statements suggest an intention to make it clear that AmBev was not being wrongly accused by the competition authority solely because it was dominant. According to Councillor Furlan, the enforcement of competition law in Brazil had improved considerably in forensic terms as a result of properly conducted dawn raids, the procurement of specialised institutes to conduct field researches, as well as the use of in-depth economic analysis. Councillor Furlan stated that there has also been an increased concern in the BCPS in respect of the due process

⁸⁴³ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

⁸⁴⁴ As of September 2010 exchange rate for Brazilian Reais 352,693,696.58.

of law, by way of ensuring that the arguments of the defendant are always heard and that constitutional principles are observed in cases before the CADE, as well as during its interface with the courts. These statements summarise the thoughts of many members of the BCPS. Although there is a general awareness that there are many aspects that need improvement, the interviews and field research revealed a common feeling amongst interviewees that much has been achieved towards building a functioning competition law regime in Brazil. This in part is demonstrated by the fact that recent decisions by the CADE are superior in terms of the legal reasoning and content to decisions emanated in the last decades.

AmBev regarded a complaint concerning the use of the defendant's loyalty programmes known as 'Tô Contigo' and 'Festeja'⁸⁴⁵ as part of an exclusionary strategy, together with the offence of predatory pricing involving its Antartica brand. AmBev was deemed to have breached Article 20(I), (II), (IV) and Article 21(IV), (V), (VI), (XI) of Law 8,884/94.

⁸⁴⁵ Which translate as 'I am with you' and 'Celebrate' respectively.

8.5.2.1 The Definition of the Relevant Market

AmBev's exclusionary strategies were horizontal⁸⁴⁶ as well as vertical⁸⁴⁷ in nature. Therefore, Councillor Furlan defined both the upstream and downstream relevant markets. Given that there were pre-existing complaints against AmBev, as a matter of administrative efficiency, Councillor Furlan adopted the definitions of the relevant market formulated in previous cases. The relevant upstream product market for the horizontal practices was previously defined as the 'beer market', and the relevant upstream geographic market for the horizontal practices was defined as the 'regional markets all over the national territory'.

In *AmBev*, the relevant downstream product market was defined as the market relating to the '...sales of beers in bars and other traditional distribution channels, including snack bars, restaurants, discotheques and other types of entertainment venues.' This definition resulted from the fact that in these distribution channels there is not usually a great variety of beer brands. In addition, in these distribution channels consumer demand is not substantially affected by higher beer prices, i.e. the demand is relatively inelastic.

The loyalty programme of AmBev consisted in giving discounts in the form of loyalty points to purchasers of beers sold in reusable glass bottles,⁸⁴⁸ to be consumed cold within the premises of the points of sale. AmBev did not give loyalty points in respect of canned beer, or beer sold outside the points of sale.

⁸⁴⁶ Possible predatory pricing resulting from the tacit positioning of the brands of AmBev's portfolio and abuse of advertising.

⁸⁴⁷ Anti-competitive effects of the loyalty programme 'Tô Contigo'.

⁸⁴⁸ As opposed to aluminium cans which could be taken away from the point of sale.

The relevant downstream geographic market was defined as ‘the local area’, which could be understood as the geographical surroundings of points of sale. This definition took into consideration the fact that consumers of beer sold in points of sale often venture to surrounding areas of where they reside.

8.5.2.2 The Definition of Dominance

Following the definition of the relevant market, Councillor Furlan went on to consider whether AmBev was dominant. With respect to AmBev's market power and barriers to entry, he highlighted that imports did not have an impact in the market supply. In addition, it was found that there were high barriers to entry as a result of the considerable marketing and distribution costs, as well as consumer loyalty to AmBev's beer brands. Even substantial investments in advertising by a competitor could be neutralised by the foreclosure of distribution channels, which would increase the unitary cost of advertisement and distribution by competitors. The relevant market was also characterised by high investments by AmBev in marketing strategies aimed at changing the preferences of consumers in the short and long terms. The resulting brand loyalty allowed the charge of higher prices of those brands. Moreover, the marketing strategies undertaken consisted of the prominent presence of AmBev's brands in points of sale, which allowed the 'fixation' of the brands to points of sale and consumers.

The distribution channels were considered as another significant barrier to entry, especially with respect to the sale of beer in points of sale. AmBev's distribution channels were complex, requiring know-how and substantial investments in marketing and logistics. AmBev's competitors also had distribution channels, which varied in terms of efficiency and impact on demand. However, none of AmBev's competitors had distribution channels as effective as AmBev and it would have been necessary for them to spend considerable amounts of money to implement a similar distribution strategy. Therefore, the high costs

faced by competitors to mitigate the effects of AmBev's distribution channels by implementing similar channels were deemed to be high barriers to entry.⁸⁴⁹

AmBev was considered an unchallenged market leader in terms of sales and turnover. Its beer brands enjoyed the largest consumption share in all Brazilian geographic regions. In addition, AmBev's brands were heavily advertised and well perceived by consumers, so they were sold at higher prices as a result of consumer loyalty.

The above findings, in addition to the fact that AmBev's beer brands had the highest penetration in distribution channels and points of sale, resulted in the CADE finding AmBev as dominant and therefore capable of unilaterally exercising market power.

⁸⁴⁹ This is in harmony with the provisions of the Brazilian Horizontal Merger Guidelines, which adopt a Bainian definition of barriers to entry. See section 4.4.

8.5.2.3 The Analysis of the US and EU Approaches to Discounts and Rebates

Councillor Furlan highlighted that, according to the European Commission, the fact that an undertaking is dominant will generally in itself ensure that consumers purchase a greater amount of goods or services from the dominant firm. For instance, this often occurs in cases where loyalty to the dominant undertaking's brands results in its products or services becoming indispensable for many consumers. In addition, if the dominant undertaking begins to offer discounts for consumers purchasing higher quantities of the branded product, consumers will be induced to buy greater amounts than usual.

According to Councillor Furlan, the European Commission's analysis of discounts and rebates takes into consideration the difference between the price effectively paid and the normal purchase price.⁸⁵⁰ If the effective price is below the average total cost, then it would be difficult, if not impossible, for a competitor to enter the market or compete with the dominant undertaking.

Many EU cases dealing with discounts and rebates were cited in *AmBev* to highlight the following points:⁸⁵¹ (1) Although a dominant undertaking has the right to protect its commercial interests, its discounts should be justified in terms of economic efficiencies

⁸⁵⁰ According to European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses." in *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 84.

⁸⁵¹ *Hoffmann-La Roche & Co. AG v Commission of the European Communities - Case 85/76*, *Hilti AG v Commission of the European Communities - Case T-30/89*, *Irish Sugar plc v Commission of the European Communities - Case C-497/99 P*, *AKZO Chemie BV v Commission of the European Communities - Case C-62/86*, *Manufacture française des pneumatiques Michelin v Commission*, vol. 2003 and *Van den Bergh Foods Ltd v Commission of the European Communities - Case T-65/98*.

which are consistent with the interests of consumers.⁸⁵² Loyalty discount schemes should also result in efficiency gains justified by economies of scale.⁸⁵³ The discount strategy should not create uncertainties in relation to the final price of the product or dependence of the retailer. Therefore, prices should be certain, transparent and based on objective criteria.

With respect to the arrangements between the dominant undertaking and its distributors, the latter should not be forced to give financial information to the former, since such information would increase the dependency of the retailer and the market power of the dominant undertaking. In addition, the dominant firm should not link the discount to an obligation on the retailer to acquire and maintain excessive quantities of stock, since this would impede or make it difficult for retailers to purchase from competitors.

Councillor Furlan concluded that the academic literature and case-law in the EU consider that discounts above costs could be illegal if they produced market foreclosure by way of generating product loyalty. He also highlighted that in 2005, the European Commission made an agreement with Coca-Cola⁸⁵⁴ regarding the fizzy-drinks market in order to increase consumer choice in points of sale such as bars and shops. The agreement prohibited the conclusion of exclusivity agreements, except for public purchases, or quantity or performance discounts, together with the promotion of strong brands to sell less popular products. Also, in

⁸⁵² According to *Irish Sugar plc v Commission of the European Communities - Case C-497/99 P in Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 95.

⁸⁵³ According to *Manufacture française des pneumatiques Michelin v Commission*, vol. 2003 in *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*.

⁸⁵⁴ European Commission, “Competition: Commission makes commitments from Coca-Cola legally binding, increasing consumer choice” in *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*.

order to prevent market foreclosure, 20 percent of Coca-Cola refrigerators could be stocked with products from other brands if there were no other refrigerators available in the shop.

The 2009 *Intel*⁸⁵⁵ decision of the European Commission was also mentioned. In this decision the Commission imposed a fine on Intel as a result of discounts given to manufacturers of computers and to Media Market, one of the largest European computer retailers. Although the lower prices generated by the discounts indirectly benefited consumers, the practice harmed Intel's rival AMD as well as consumers as they had less choice because Intel's products had been given preference.

With respect to the US position and its relevance to the facts in *AmBev*, Councillor Furlan stated that American antitrust policy was slowly showing its concerns with discounts and rebates. Under *LePage's*,⁸⁵⁶ there were no exclusivity requirements imposed on retailers by the undertaking in question. However, a concession of small discounts resulted in 3M being held liable for attempting to monopolise.

In any case, the statements above suggest that the presiding Councillor believed that the EU view on discounts and rebates was the right approach and that the US was moving towards the right direction. In fact, after mentioning *LePage's*, Councillor Furlan stated that in May 2009 the DOJ declared that it will no longer apply the Report on the Application of Section 2

⁸⁵⁵ European Commission, *Case COMP/C-3/37.990 - Intel*, vol. 227.

⁸⁵⁶ *LePage's Inc et al. v Minnesota Mining & Manufacturing Co et al.*, vol. 324.

of the Sherman Act,⁸⁵⁷ as it was too lenient in respect of exclusionary practices of dominant undertakings.

⁸⁵⁷ See Department of Justice, “Justice Department Withdraws Report on Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard with Focus on the Impact of Exclusionary Conduct on Consumers.”

8.5.2.4 Abuse of dominance

Councillor Furlan analysed AmBev's loyalty scheme to determine if the conduct was abusive. The economic value of the prizes awarded by AmBev to resellers in exchange for loyalty points equated to approximately three percent of the average purchases of the points of sale. According to Councillor Furlan, in the alternative scenario where the loyalty scheme would have been limited to the accumulation of points by points of sale, calculated in relation to the volume of purchases of bottled beer, *a priori* there would be no violation of competition law. In his view, without the exclusivity and stock requirement imposed in the form of informal covenants on retailers, the loyalty programme would not have been capable of generating a significant increase of purchases of AmBev branded beers. In addition, considering the fact that AmBev enjoyed market dominance, these covenants harmed competition and increased barriers of entry.

During preliminary investigations, the SDE made enquiries to owners of points of sale in regards to the terms of the loyalty scheme. There was a common commercial understanding in the shape of a gentlemen's agreement implying that there was an exclusivity covenant imposed on owners of points of sale, although there was no formal agreement to this effect.⁸⁵⁸

The *onus* of the exclusivity covenants on owners of points of sale varied in relation to their commercial relationship with AmBev in the sense that, after negotiating with an AmBev's

⁸⁵⁸ The fact that no formal exclusivity agreements were in place strengthens the argument against AmBev, as the latter is one of the largest multinational breweries in the world and had been the subject to proceedings by CADE in the past. Moreover, AmBev had a large in-house legal team and access to expert competition law advisers. Therefore, one could reasonably argue that AmBev's directors and advisers contemplated that there was an element of illegality (at least in the civil sense) with the commercial terms of the loyalty scheme, so they tried to avoid prosecution or civil claims by not entering into any formal exclusivity agreements with owners of points of sale.

representative, the owners of points of sale could sometimes be allowed to stock small quantities of competing beer brands. There were routine checks by AmBev's agents to ensure compliance and to exercise commercial control over the operations of points of sales. Moreover, AmBev kept comprehensive and detailed databases of the historic volumes of beer purchased from individual points of sale, which allowed it to easily calculate if there was an unjustified drop in demand and strategically retaliate against those suspected of breaching the exclusivity arrangements.

During investigations undertaken by the Brazilian Institute of Research and Statistics (IBGE) it was verified that almost half of the surveyed owners of points of sale believed that the participation in the loyalty programme required the obligation of selling exclusively AmBev's beer brands. In addition, a third of the surveyed owners of points of sale stated that they believed that although there was no legal agreement in place, there would be commercial retaliations from AmBev if they breached their gentlemen's agreement and sold products from other companies, alongside the forfeiting of any accumulated loyalty points. The survey suggested that exclusivity covenants existed, albeit at an informal level.⁸⁵⁹

AmBev was dawn raided by SDE inspectors in a procedure similar to EU and US dawn raids. However, one main difference in Brazil is that the SDE is granted a judicial authorisation and the undertaking subject to the dawn raid is notified 24 hours in advance. Therefore, the Brazilian dawn raids may not be as effective as there is no element of surprise given that the

⁸⁵⁹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 136-139.

notice should allow undertakings to prepare in advance.⁸⁶⁰ Nevertheless, many incriminating documents, such as PowerPoint slides and handwritten notes outlining the structure and aims of the loyalty scheme were discovered in AmBev's premises. These documents provided the CADE with tangible evidence that exclusivity arrangements were in place, albeit not in a formal legal sense.

In addition to demonstrating the imposition of exclusivity covenants, the documents provided additional supporting evidence of benefits connected with the scheme, such as supplying points of sale with branded refrigerators, tables and chairs. Councillor Furlan highlighted that the offer of such benefits would be pro-competitive if they were not conditional on the exclusivity of the points of sale. This reasoning appears to be correct for the following reasons: (1) Benefiting points of sale by supplying catering equipment transferred wealth from AmBev to smaller points of sale; (2) The practice forced AmBev's competitors to offer similar benefits; (3) Providing catering equipment lowered costs for entrepreneurs wishing to open points of sale.

In respect of AmBev's wider strategy, figures revealed in its internal documents demonstrated a sharp increase in sales as a result of the loyalty programme. Internal documents sent to AmBev's sales representatives contained a step-by-step guide on how to proceed if they suspected that a point of sale was selling products from competitors. According to internal memos, there should be a commercial retaliation by disconnecting the point of sale from the scheme. In order to avoid civil claims or prosecutions, the

⁸⁶⁰ For instance, AmBev's officers could have destroyed incriminating documents, or obtained legal advice in order to challenge SDE's inspectors by arguing that incriminating documents were subject to legal privilege and consequently cannot be disclosed.

discontinuation would be justified by informing the point of sale that it resulted from an objective reason, such as a reduction in the geographical dimension of the scheme.

The non renewal of the loyalty scheme was used as a coercion tool against the points of sale suspected of selling a share greater than 10 percent of competing beer brands. According to Councillor Furlan, imposing an obligation on points of sale to sell a 90 percent share of AmBev's brands was considerably onerous and anti-competitive. Moreover, there was a non-linear correlation between total sales and prizes. The points of sale that sold higher shares of AmBev's brands received more prizes and benefits, even if they sold smaller volumes than other points of sale. This finding suggested that AmBev's loyalty scheme was used to carry out an exclusionary practice. In support of this view, AmBev's internal documents discovered during SDE's dawn raid stated that the main aim of the loyalty programme was to increase barriers to entry by creating difficulties for competitors to have access to distribution channels.

The reasoning in *AmBev* considered arguments from the Chicago school against the hypothesis of viably excluding competitors by way of discounts and rebates.⁸⁶¹ Under the theories of the Chicago school, it would not be rational for an inefficient firm to engage in exclusivity agreements with retailers in the downstream market. Councillor Furlan stated that according to Posner and Bork, in order to impose exclusivity agreements, the manufacturer would have to offer the distributor or reseller advantages or benefits.⁸⁶² Under this thesis, a rational reseller would not accept to enter into an agreement to exclusively purchase products

⁸⁶¹ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev* - 08012.003805/2004-10, para. 225.

⁸⁶² *Ibid.*, para. 227.

from an inefficient manufacturer. Therefore, *a priori* exclusivity agreements would not be regarded as anti-competitive. In fact, in some cases there would be even favourable effects, such as lower costs for retailers and incentives for competitors to become more efficient.

However, Councillor Furlan dismissed the Chicago school approach to exclusivity agreements, as well as discounts and rebates, by stating that exponents of the Post-Chicago school sustain that in some cases there could be harmful exclusionary effects resulting from these practises.⁸⁶³ A dominant undertaking might have sufficient market power to commercially add pressure on distributors or resellers to enter into exclusivity agreements, which could consist of formal legal agreements or *de facto* commercial arrangements. In this scenario, when a limited number of distributors first enter into the agreement or arrangement, this will create a negative externality and other distributors will enter into the agreement as well. As a result, the dominant producer is able to act as a monopolist because distributors outside of the exclusivity scheme are harmed.

It is possible that discounts and rebates offset the detrimental effects of the exclusivity covenants in some specific cases. However, the monopolist producer is the party that receives the greatest commercial benefit, as it could abusively foreclose the market by impeding the entry of equally efficient competitors into the market. This could be done by enforcing the exclusivity scheme in a commercial sense, as the monopolist could retaliate against distributors which fail to abide the exclusivity covenants.

⁸⁶³ Ibid., para. 226.

Although AmBev's discounts amounted to a mere three percent, its competitors were forced to offer discounts which were disproportionately higher at 7.9 percent.⁸⁶⁴ Be that as it may, these higher discounts were not capable to mitigate AmBev's monopolistic power, as it had acquired 72 percent of the relevant geographic market by way of the loyalty scheme which combined discounts and rebates with exclusivity covenants. AmBev could impose barriers to entry on its competitors even in cases where the effective price would still be over its average total cost. An entrant or existing competitor would not only have to offer higher discounts than AmBev's, but it would have to compensate the participating points of sale for the losses suffered for leaving the loyalty scheme.

Discount strategies with the magnitude of AmBev's loyalty scheme reduced the contestability in the downstream market, harming competition and consumers by reducing product choice and artificially giving AmBev the power to unilaterally increase prices. In essence, the incontestability of the beer market in respect of points of sale resulted from the fact that AmBev was not competing on the merits. According to Councillor Furlan, it would have been possible in an extreme case scenario that AmBev's loyalty scheme could have the long term effect of causing the exit of an equally efficient competitor from the upstream market. The adoption of this reasoning in *AmBev* demonstrates an influence of EU competition law over the current development of Brazilian market control, as the former's goal is not only to protect consumers, but to protect equally efficient firms as well.⁸⁶⁵

⁸⁶⁴ The real economic value of the discounts given by AmBev and its competitors could not be precisely calculated, other than discounts and prizes resulting from the exclusivity programme, as there were also other benefits given to induce loyalty, such giving branded catering equipment to participating distributors.

⁸⁶⁵ See European Commission, "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings," 42, 43, 59.

8.5.2.5 Efficiency justifications

In regards to possible efficiencies, Councillor Furlan stated that none of the justifications contained in CADE's Resolution n. 20⁸⁶⁶ applied. The relevant justifications that can be admitted in respect to discounts and rebates concern effects deemed as beneficial, such as the reduction of transaction costs, the protection of the reputation and specific investments of the dominant undertaking, the stimulation of the development of economies of scale in the downstream market and the protection of technological development in the upstream market.⁸⁶⁷ The burden of proof for proving these justifications appears to fall on the defendant, although the CADE can find their applicability to the case in question, even if they have not been mentioned in the claim or defence.

According to Councillor Furlan, imposing exclusivity by legal or commercial means in the beer market could not be justified by arguing that the practice resulted in a reduction of transaction costs. This defence argument could be valid in complex markets in technical and innovative sectors,⁸⁶⁸ where exclusivity arrangements could be necessary to advertise or effectively market new technological products to consumers. For instance, exclusivity arrangements could be justified if they were necessary for the dominant undertaking to train sales and technical assistance teams in the downstream market.

In the view of Councillor Furlan, the justification of protecting AmBev's reputation could not be accepted either. The product differentiation in the beer sector resulted from marketing and

⁸⁶⁶ Conselho Administrativo de Defesa Econômica, "Resolution n. 20."

⁸⁶⁷ See *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10*, para. 260.

⁸⁶⁸ Such as the IT sector, given that it is innovative and dynamic and certainly not the beer sector.

branding and not from differences in the quality or taste of the product. The presence of competing brands in points of sale, contrary to AmBev's exclusivity scheme, was not deemed capable of causing damage to the reputation and goodwill of AmBev's beer brands.

The justification of making specific investments was not accepted either, because it was not necessary for AmBev to invest in catering equipment and shop fitting of points of sale. These practices were deemed to constitute incentives or 'perks' to pressurise points of sale into the exclusivity scheme. In addition, given the cash flow generated by the exclusivity scheme and the fact that AmBev's beer brands were advertised in shops and catering equipment, there were no significant sunk costs in case the exclusivity arrangements ceased.

With respect to the justification of achieving efficiencies via economies of scale, the presence of AmBev in 97 percent of points of sale and its market share of circa 70 percent in the beer market meant that AmBev had a consolidated and unchallenged dominant position, so there was no reasonable justification for imposing exclusivity arrangements to achieve economies of scale.

As a result of the above findings, there were no economic efficiency arguments capable of justifying AmBev's loyalty programme. A substantial reason for this was that consumers and owners of points of sale were the most harmed parties by the loyalty programme. With respect to consumers, those living in the suburbs of large cities were harmed the most, as points of sale were strategically targeted in such regions. The strategy of selection of the points of sale by AmBev was also coherent with the exclusionary aim of the scheme. Therefore, the argument made by AmBev that the reach of the programme was not

significant, as it affected only 20 percent of the beer market share, was rejected because the points of sale had been strategically selected.

The defence argument stating that the conduct in question did not result in an increase of AmBev's market share was also rejected as AmBev was not competing on the merits, so the exclusivity programme could also have the effect of artificially maintaining AmBev's market share, or abusively exclude competitors from the market. This understanding is less permissive than the one in *Kellogg's*,⁸⁶⁹ where the CADE interpreted the lack of increase in market share as a signal that there was no anti-competitive offence. In addition, the CADE stated in *AmBev* that for anti-competitive effects to occur it was not necessary for the market to be foreclosed as the aims and scope of the exclusivity programme had to be taken into consideration.⁸⁷⁰

⁸⁶⁹ *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10.*

⁸⁷⁰ In this respect, an unjustified non-linearity of the programme between purchases and discounts was deemed to be anti-competitive.

8.6 Exclusive dealing

8.6.1 Unimed Santa Maria

In 1999, one of the first cases involving exclusivity agreements in the health sector was filed by the Public Prosecutor of the State of Rio Grande do Sul against Unimed Santa Maria.⁸⁷¹ The Prosecutor's arguments were based on the allegations that exclusivity covenants imposed upon affiliated medical practitioners increased barriers to entry into the health care market.

Unimed Santa Maria was considered dominant by the CADE because 719 out of the total of 967 registered medical practitioners in the relevant geographic market were affiliated to Unimed. In its defence, Unimed Santa Maria admitted that exclusivity covenants were included in membership agreements. However, it also made a submission based on the principle of freedom of contract by stating that affiliated medical practitioners were made aware of the exclusivity covenants before entering into membership agreements. Moreover, they were free to leave Unimed if they decided to work for a competing health care provider. According to Unimed, the exclusivity clauses were perfectly legitimate under principles of the law of contract, as well as the Brazilian Cooperatives Law of 1971.⁸⁷²

Notwithstanding the above submissions in favour of exclusive dealing, the presiding Councillor, Hebe Teixeira Romano Pereira da Silva, affirmed that when the Brazilian Cooperatives Law of 1971 was enacted, the legislator was content with the liberal doctrine of freedom of contract and was not aware of greater socioeconomic considerations, such as the

⁸⁷¹ *Ministério Público do Estado do Rio Grande do Sul v Unimed Santa Maria - Cooperativa de Trabalho Médico - 08012.010271/1998-51.*

⁸⁷² Brazil, *Law n. 5,764 of 16 December 1971.*

protection of consumers and competition. In her view, the Brazilian law of contract has evolved considerably since the enactment of the aforementioned cooperatives law. For instance, under the Brazilian Consumer Protection Code of 1990,⁸⁷³ standard form agreements made with consumers could have specific clauses declared void by the courts if they were deemed unreasonable or harmful to consumers. Although medical practitioners were not consumers, the membership agreements were standard form agreements as members did not have the power to negotiate the terms with Unimed. Therefore, in *Unimed Santa Maria* the CADE acknowledged that it could be possible to depart from a traditional understanding of the law of contract that favoured the validity of exclusivity agreements, albeit the provisions of the Brazilian Consumer Protection Code of 1990 did not apply to facts of the decision.

Following the above reasoning, Councillor Teixeira mentioned that the competition law 8,884/94 was created to protect competition and the interests of society, so it would not be fair to allow a company to harm such interests. In its defence, Unimed Santa Maria submitted that they had won a previous case in the courts based on similar facts, whereby the practice of imposing exclusivity covenants on affiliated medical practitioners was deemed to be legitimate. The CADE did not accept these submissions, as exclusivity agreements which are not void under the law of contract could nonetheless be contrary to competition law. As a result, Unimed Santa Maria was held liable unanimously for breaching Articles 20(I), (II) and (IV) and Article 21(IV), (V) and (VI) of Law 8,884/94. Unimed's imposition of exclusivity covenants was deemed to be abusive because they impeded the entry of competitors in the

⁸⁷³ Brazil, Law n. 8,078 of 11 September 1990.

relevant market. Moreover, the conduct was considered anti-competitive and detrimental to society as it resulted in higher prices and less choice of health care providers.

Notwithstanding the *Unimed Santa Maria* decision, Unimed remains the dominant private health care provider in Brazil and has continued to use commercial practices which run contrary to the provisions of Law 8,884/94. In December 2009, the CADE issued a statement which was published in the Official Journal where it clarified that ‘...it is an offence to the economic order, a conduct, in any form manifested, that impedes or creates difficulties for cooperated medical practitioners to work outside the ambit of the cooperative when such cooperative is dominant’.⁸⁷⁴ Although Unimed was not specifically mentioned in the statement, it is clear that it was the intended recipient of the message due to its past offences, as well as its continuous breaches of competition law and unchallenged dominance throughout the Brazilian territory.

Statements by the CADE are non-binding, as in Brazil administrative bodies do not have the constitutional mandate to issue legal decrees. However, the publication of such statement in the Official Journal will support the grounds for a future prosecution against Unimed, as it has been specifically warned that continuing to impose exclusivity covenants on medical practitioners would be illegal under Law 8,884/94. Therefore, as long as Unimed continues to have dominance and associated medical practitioners are restricted from practising outside of the cooperative system of Unimed, there is a substantial possibility that competition law will be breached. Given the particular social importance of health care services, it could even be argued that CADE’s statement against Unimed would develop into a *per se* prohibition in in

⁸⁷⁴ Conselho Administrativo de Defesa Econômica - CADE, “Súmulas n. 7.”

relation to exclusivity agreements by dominant firms in the health care sector. The CADE appears to be willing to ensure that the health care sector remains competitive, so consumers have access to greater choice, lower costs and higher quality services.

8.6.2 White Martins

*White Martins*⁸⁷⁵ is a 2002 decision concerning the industrial gas sector. The parties were Messer Griseim as the claimant and White Martins as the defendant. The claim was based on the complaint that White Martins had exclusivity agreements with producers of raw materials for the production of CO₂. The merits of these allegations were supported by the fact White Martins was dominant as it had a 73 percent market share. One of White Martin's key suppliers, Ultrafertil SA, had a ten-year exclusivity agreement with it. Messer Griseim argued that the exclusivity agreements resulted in the creation of barriers to entry. It stated that it could not enter the market because Ultrafertil refused to supply due to the exclusivity agreement. White Martins was accused of breaching competition law by monopolising all the sources of raw materials and creating barriers to entry which hindered the normal functioning of the market. Messer Griseim supported its claim by submitting that the intent of White Martins was to exclude competitors. The claimant alleged that the defendant was not capable of processing and commercialising all the raw material that it purchased and inefficiently dispersed the production surplus of CO₂ into the air.

The CADE was familiar with the sector and circumstances of the case as it had earlier cleared the acquisition of Unigases by White Martins in 1999. Given the similarity of many material facts between these two decisions, as a matter of administrative and procedural efficiency, the CADE adopted the same definition of the relevant market. The relevant product market was defined as the specific gas in question, namely CO₂. The relevant geographic market was defined in regional terms in relation to South-Eastern States of Brazil.

⁸⁷⁵ *Messer Griseim do Brasil Ltda v White Martins e White Martins Gases Industriais SA - 08000.022579/1997-05.*

In its defence, White Martins made the submissions that its market share in 1999 was 73 percent, whilst it had decreased to 59 percent in 2002. The presiding Councillor Macedo Júnior stated that these submissions were questionable and that, even if they were true, they were immaterial to White Martins' defence as a 59 percent market share established dominance as well and supported the argument that the market was excessively concentrated.

Councillor Macedo Júnior also highlighted that it was immaterial if the purpose of the conduct was to increase the price of raw materials. The conduct of excluding competitors by the artificial creation of barriers to entry would still be illegal if prices for raw materials remained unaffected. Such type of anti-competitive strategy would be effective even if prices remained high and competition was restricted or eliminated.

It was decided that it was plausible to believe that some efficiency resulted from the exclusivity agreements, such as the reduction of transaction costs. However, Councillor Macedo Júnior highlighted that the benefit of such efficiencies were counteracted by the inefficient purchase of surplus of raw materials from Ultrafertil SA. In his view, in the hypothetical scenario that there was exclusivity only of a certain quota, allowing Messer Grisheim and other competitors to purchase any surplus materials for the production of CO₂, there would be nothing to suggest an abusive exclusionary practice by White Martins. The practice of imposing exclusivity covenants over the whole of Ultrafertil SA's production was considered contrary to competition law because the surplus of raw material purchased did not have a commercial use for White Martins. Therefore, the only explanation for such inefficient practice was the creation of artificial barriers to entry for Messer Grisheim and other competitors.

In common with the EU, the efficiencies of the exclusivity, in terms of reduction of transaction costs, seem to have been analysed as objective justifications. Indeed, the defendant complained about the fact that the economic rationale of the exclusivity agreements did not form part of the analysis when applying the rule of reason. Efficiencies appear to have been rejected as justifications because the conduct could eliminate effective competition in the market. In fact, Councillor Macedo Júnior stated that the arguments of White Martins based on efficiencies were taken into consideration in the reasoning, but were rejected because they did not exempt the defendant's conduct. This statement reinforces the argument that CADE's 'rule of reason' can be in practice more similar to the EU analysis of objective justifications instead than the American rule of reason.

8.6.3 Microsoft/TBA

In 2004, the CADE heard *Microsoft/TBA*,⁸⁷⁶ which concerned exclusivity arrangements in the software sector. In this case, Microsoft entered into an exclusivity agreement with TBA Informatics (TBA), which gave the latter exclusivity over the sale and distribution of Microsoft software products to the Brazilian federal government.

Microsoft's distribution network in Brazil was very complex and effective. Resellers throughout were classified in accordance with a variety of criteria and allotted specific geographical areas that would allow them to sell Microsoft software to certain types of clients. In 1998, Microsoft modified the classification system of its distribution network when it was aware that, by using the new criteria, TBA would be the only distributor of Microsoft that would be allowed to sell Microsoft's products in the federal district of Brasilia. After changing the classification criteria, Microsoft informed the federal government that the exclusive distributor of Microsoft in the federal district of Brasilia was TBA. As a result of the strategic geographical partition of Microsoft's distribution network, TBA effectively became the sole distributor allocated to the federal government, given that administrative agencies of the latter are based in the federal district of Brasilia. Therefore, the government was disadvantaged because there was no need for public procurements given that TBA was the only reseller of Microsoft software products in the region.

With respect to the analysis of the relevant market and the establishment of dominance, Microsoft had a 90 percent market share of the software market and TBA effectively had the

⁸⁷⁶ SDE "Ex Offício" v *Microsoft Infomática Ltda, TBA Informática Ltda* - 08012.008024/1998-49.

exclusivity of distribution of software to the federal government from 1998 until 2002. Therefore, TBA was effectively a monopolist at a regional level and the market was highly concentrated at the national level.

As in the EU, the presiding Councillor, Ricardo Villas Bôas Cueva, stated that although a high level of concentration was necessary to establish market power, it was not a sufficient condition to make it an offence under Brazilian competition law. Thus, existence of market power, the creation of barriers to entry and the specific characteristics of the software market were taken into consideration to determine whether the defendants were acting contrary to competition law.

The US and the EU approaches to vertical restraints formed part of the decision. With regards to the US view, Councillor Cueva stated that vertical restraints were considered as almost illegal *per se* for a long period of time, but that the American view changed with *GTE Sylvania v Continental TV*,⁸⁷⁷ when a more liberal approach was adopted. In this respect, he stated that the fact that Microsoft opted for a vertical restraint instead of a vertical integration showed that the first option was likely to be less costly for the producer and therefore, more efficient. Due to the different efficiencies which could potentially legitimate Microsoft's conduct, it was acknowledged that exclusivity arrangements needed to be analysed on an individual basis utilising the rule of reason.

In relation to the EU approach, Councillor Cueva stated that there is a great degree of convergence between the EU and the Brazilian competition law regimes, as the former has

⁸⁷⁷ *Continental T. V., Inc. v GTE Sylvania*, vol. 433.

influenced considerably the development of Brazilian competition policy. Councillor Cueva stated that in the EU vertical restraints are not analysed in an absolute manner and that efficiencies and inefficiencies created by the conduct are examined carefully.

When discussing the anti-competitive effects of Microsoft's distribution network, it was acknowledged that the main issue was the monopolisation of the market, as there was no effective competition amongst distributors, resulting in higher prices for software products. From a legal perspective, there was no contractual relationship between Microsoft and the ultimate consumers of its software, which included the federal government. In addition, Microsoft did not exercise absolute control over the price charged by TBA and other resellers. Therefore, Microsoft could have argued that it was not liable under competition law. Nevertheless, Microsoft was responsible for establishing and operating its distribution network of independent resellers and it was held to be under the special duty to adopt measures to counter the harmful effects that could result from the monopolistic practices of its distributors. This finding supports the argument in favour of the emergence of the special responsibilities doctrine in Brazil.⁸⁷⁸

After determining that the conduct of the defendant companies was contrary to competition law and before dealing with the efficiencies argued by Microsoft, Councillor Cueva made it clear that in reality he would seriously consider the efficiency justifications only if the regional allocation of Microsoft's distribution network had been done by way of objective criteria. An in-depth analysis of the efficiencies was not deemed necessary, as Microsoft had intentionally planned to give TBA a monopoly over the federal district of Brasilia. It had

⁸⁷⁸ See section 4.7.

achieved this by restructuring its distribution network, adapting the regional classification criteria of resellers.

Although the Councillor stated that he would apply the rule of reason, in substantial terms the above reasoning demonstrates the adoption of a different approach. Microsoft had the burden of proof of efficiencies that could justify its behaviour, but these were not taken into consideration as efficiency defences; rather, they appear to have been analysed as objective justifications, in the same way as in the EU.

Given that TBA's monopoly resulted from the deliberate and planned strategy of Microsoft, there was no need to look at possible efficiency justifications. The existence of an artificial monopoly of sales to the federal government was already enough to constitute an offence to competition law since it eliminated effective competition and harmed consumers (in this case the federal government).

8.6.4 Center Norte

The *Center Norte*⁸⁷⁹ decision concerned a dispute between shopping centres and was judged by the CADE in 2005. The claimant was Condomínio Shopping D, who accused the defendant, Center Norte SA, of breaching competition law by imposing a non-competition covenant in its commercial tenancy agreements. Center Norte's commercial tenants were prohibited from undertaking the same or similar commercial activities within the vicinity of 1,000 metres from Center Norte, with the exception of tenants that were already established in the shopping centre when the agreement came into force or who obtained express authorisation of Center Norte. Condomínio Shopping D claimed that the commercial tenancy agreements breached Brazilian competition law as they had the effect of harming competition, impeding the entry and development of competing businesses, reducing the choices of consumers and allowing the defendant to charge higher rents.

Center Norte admitted that the non-competition covenants were included in most of its commercial tenancy agreements. However, it argued that these types of covenants were a common market practice and were openly encouraged by the Brazilian Association of Shopping Centres as a way of ensuring a greater diversity of tenants. As it will be revealed below, these arguments were not accepted by the CADE as a reasonable justification for Center Norte's conduct.

In the analysis of the relevant market, it was determined that Center Norte and Condomínio Shopping D had market shares of 69.57 and 30.43 percent respectively. As a result of these

⁸⁷⁹ *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13.*

findings, the defendant acknowledged that it had market dominance. However, it argued that it resulted from its previous investments in the area when there were considerable commercial risks. Therefore, Center Norte's defence was primarily based on submissions that it had acquired its dominance based on its own merits. The presiding Councillor, Roberto Augustos Castellanos Pfeiffer, stated that Center Norte was established in the area ten years before Condomínio Shopping D and this gave the former a 'first-mover' advantage. Although this advantage was not deemed to constitute an abuse, it was argued that it allowed the defendant to behave strategically by creating barriers of entry.

According to the decision, it could be reasonable in some cases for shopping centres to include non-competing covenants on tenants. For instance, this would be reasonable when new shopping centres are developed in a specific area and needed to ensure the return of investments from key anchor tenants. However, the inclusion of non-competition covenants in most tenancies, which were valid for an indeterminate period of time, was considered excessive and in breach of competition law.

This decision sought inspiration from another South American jurisdiction, not only from the US and the EU as it occurs in most cases. Councillor Pfeiffer stated that in Chile, the competition authority had declared void a radius exclusivity clause imposed by a shopping centre which had similar effects to the non-competition covenants in Center Norte's tenancy agreements.

When determining the existence of market foreclosure, Councillor Pfeiffer stated that, in the US, the courts and the FTC often require a market foreclosure of at least twenty percent in

respect of exclusive dealing. CADE's Resolution 20⁸⁸⁰ does not mention such a percentage and there were no judicial precedents that clarified this issue in Brazil. Although there was no total foreclosure in the case in question, the Councillor did not base his reasoning on how much of the market was being foreclosed. The decision was based on the argument that the process of competition was being harmed by the imposition of non-competition covenants on tenants. Center Norte was not competing on the merits against Condomínio Shopping D. Rather than using legitimate ways to maintain its market dominance, such as investing on structural improvements of its shopping centre, Center Norte's abusive practices were harmful to the process of competition in a wider sense, given that they adversely affected its tenants as well as Condomínio Shopping D.

⁸⁸⁰ Conselho Administrativo de Defesa Econômica, "Resolution n. 20."

8.6.5 Condomínio Shopping Center Iguatemi

The 2008 *Iguatemi* decision⁸⁸¹ concerned the territorial radius exclusivity covenants imposed on commercial tenants by Condomínio Shopping Center Iguatemi (Iguatemi), one of Brazil's biggest shopping centre groups. There are many common features between the *Center Norte*⁸⁸² and *Iguatemi* decisions. As in *Center Norte*, the defendant justified the adoption of territorial exclusivity covenants with the need to promote tenant diversity and with the fact that it was a common market practice. The presiding Councillor, Luis Fernando Rigato Vasconcellos, considered that Iguatemi had a 'first-mover' advantage because it represented the first group of upmarket shopping centres in Brazil. This resulted in Iguatemi's dominant position in relation to upmarket tenants selling high priced goods to the most affluent sections of the Brazilian population. In contrast with *Center Norte*, Iguatemi had a strong brand as a result of its upmarket status which attracted considerable goodwill and consumer loyalty. These factors allowed it to behave strategically towards potential competitors.

Although the material facts of *Iguatemi* were largely similar to *Center Norte*, in the former the SDE concluded that Iguatemi's imposition of non-competition covenants in tenancy agreements based on a territorial radius was reasonable and did not constitute an offence under competition law. The SDE based its reasoning on the fact that there was only one competitor within the territorial exclusivity radius, so its impact was negligible. The CADE disagreed with the SDE's findings. Councillor Vasconcellos highlighted that the SDE omitted the fact that the exclusivity covenants based on a territorial radius were often reinforced with

⁸⁸¹ *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43.*

⁸⁸² *Condomínio Shopping D v Center Norte SA - 08012.002841/2001-13.*

nominal exclusivity covenants which placed restrictions on tenants to open shops in other shopping centres. However, during proceedings, Iguatemi offered to settle with the CADE by proposing to waive its rights under the nominal exclusivity covenants in respect of shopping centres existing within its radius exclusivity area. This settlement offer was rejected by the CADE, as it deemed that the existence of a restrictive covenant, which could be either nominal or territorial, foreclosed the market.

In the light of the Brazilian rule of reason, Councillor Vasconcellos stated that the unreasonableness of Iguatemi's conduct was clear, as the defence did not submit any strong arguments in favour of efficiencies to render the conduct legitimate. Therefore, it appears that as a result of the anti-competitive scope of the non-competition covenants, the burden of proof in respect of the possible harm and efficiencies was placed on the defendant. According to Councillor Vasconcellos, the vertical restrains imposed by the exclusivity covenants clearly harmed competition. Therefore, admitting that the exclusivity clauses could favour competition would be the same as stating that resulting social costs, consisting of the lessening of competition among shop owners, were lesser than the social benefits alleged in Iguatemi's defence.⁸⁸³

The economic power of the Iguatemi group was also highlighted in the decision. It is plausible that a different outcome, in accordance with the SDE's initial findings, would have been reached had the Iguatemi group not enjoyed such a strong market power in the upmarket retail sector at the national level. The outcome of this case suggests that a private dispute between a landlord and its tenants based on covenants drafted in standard commercial terms

⁸⁸³ Understood as the protection of the investment of the shopping centre.

can become a competition law matter as a result of market dominance. Therefore, this decision in some ways supports the argument in favour of the emergence of the special responsibilities doctrine in Brazil.

8.6.6 Celular CRT

In 2008, the CADE heard *Celular CRT*,⁸⁸⁴ which dealt with exclusivity agreements in the mobile phone sector. The claimant, Telet SA, is a mobile phone operator that brought a complaint against the exclusivity agreements between the defendant, Celular CRT SA (CRT) and distributors situated in the State of Rio Grande do Sul. It was alleged that the exclusivity agreements were implemented by CRT to create unjustified difficulties for its competitors, as well as to create barriers to entry in respect of distribution channels in the mobile phone sector.

It was argued by Telet SA that the exclusivity agreements of CRT had the aim of increasing entry costs for its competitors, given that they would have had to incur into considerable risks and expenses to implement their own distribution channels, as the largest retailers of mobile phones and services were operated by companies that had entered into exclusivity agreements with CRT.

The presiding Councillor, Luis Fernando Rigato Vasconcellos, declared that the exclusivity agreements resulted in indirect negative effects on consumers and direct negative effects on retailers. The indirect negative effects on consumers could be understood as the possibility of an increase in prices and a reduction in product choice. The direct negative effects on retailers could be understood as their inability to sell other mobile phone brands. In regards to the latter effect, it was demonstrated by Telet SA that many retailers would have sold other mobile brands if this was not contrary to the exclusivity agreements with CRT.

⁸⁸⁴ *Telet SA v Celular CRT SA - 53500.000502/2001.*

The plenary of the CADE⁸⁸⁵ had to decide whether the CRT's exclusivity agreements had the potential to foreclose the market at the time in which they were made. A main issue with this decision is that it was heard *ex post facto*; therefore the CADE had the advantage of hindsight. The delay in the investigations resulted in an awkward situation, as the findings revealed that the harm to competition did not materialise. Consequently, Councillors had to decide whether to hold an undertaking liable for a past conduct that had the potential to harm competition, although the anti-competitive effects did not actually occur.⁸⁸⁶ According to some interviewees it is essential to prove at least that the possibility of causing the effects was significant, even if the effects did not materialise. It seems that whilst the normal standard of proof is the risk of causing any of the effects listed in Article 20 of Law 8,884/94, if the conduct is analysed *ex post facto* and it is proven that the effects did not materialise, the standard of proof increases, requiring the proof that the conduct was likely to result in anti-competitive effects. The majority of the Councillors in *Celular CRT* were of the opinion that the evidence suggested that the creation of exclusivity agreements with large retailers was not an effective way of foreclosing the market, since there were alternative distribution channels in the mobile phone sector available to competitors which in some cases were not being used. The CADE's understanding was that the imposition of brand loyalty on resellers or distributors by way of exclusivity agreements could be considered illegal only if competitors did not have a reasonable alternative channel to distribute or resell their products.

The conduct was found legitimate because other companies managed to grow in the market by finding alternative distribution channels. However it is questionable if the outcome would

⁸⁸⁵ CADE's decisions are made by all seven Councillors.

⁸⁸⁶ According to Article 20 of Law 8,884/94, a conduct that harms competition is prohibited independently of the willfulness of the firm, even if the effects have not been achieved. See also section 6.2.1.1 on *Nutrifoods Indústria e Comércio de Alimentos Ltda v Kellogg Brasil & Cia - 08012.000349/1998-10*.

have been the same if the decision had not been delivered seven years after the complaint took place. The CADE had the advantage of hindsight when deciding that other distribution channels were available and there was no harm to competition, notwithstanding the fact that the use of the alternative channels by CRT's competitors may not have been foreseeable when the exclusivity agreements were put into place.

According to a member of the BCPS:

...there are two main negative consequences of the delays in completing preliminary investigations. Firstly, there is a danger that offences dealing with potential harm will be incorrectly decided with hindsight in cases where the harm did not materialise. Secondly, in cases where the harm materialised, there is a danger that the evidence will be challenged or dismissed given that it is against the due process of law to unreasonably delay the course of preliminary investigations.

The delay in completing preliminary investigations is a notorious problem which hinders the correct formulation of decisions and when asked about the difficulty in deciding cases where the conduct was practised a long time ago, many members of the BCPS stated that although there have been considerable improvements in the duration of investigations, it was important for preliminary investigations to be completed more promptly.

8.7 Tying arrangements

8.7.1 Microsoft

This case regarded the inclusion of the program ‘Money 97’ in the software package of the Brazilian version of ‘Microsoft for Small Business 97’. The decision also concerned other offences, as Microsoft had sold without public procurement 250,000 licences of ‘Money 97’ to the Bank of Brazil and 110,000 licences to another public financial institution, Caixa Econômica Federal. According to the claimant, Paiva Piovesan, a company in the IT sector, Microsoft’s tie-in arrangements blocked the entry of competitors into the market. In addition to this complaint, Microsoft was also accused of exclusionary practices by restricting the access of its competitors to its distributors.

The presiding Councillor, Thompson Almeida Andrade, established that Microsoft was dominant given that between 1995 and 1997 it had a market share greater than 80 percent in relation to the national software market. With respect to the conduct, he affirmed that the anti-competitive effects of tie-in sales would be analysed in relation to the leverage of market power of one product over the other. This was due to the fact that, according to him, the tie-in sale could result in an increase in prices in the primary market, harming competitors, distributors and ultimately consumers. Moreover, it could result in the creation of artificial barriers to entry in the secondary market.

Microsoft justified the conduct by stating that its software package, which included Money 97, allowed users to access various programs that were completely integrated with each other for substantially lower prices than purchasing them separately. In the view of Councillor Andrade, there was no imposition of tie-in sales because Money 97 could be purchased

separately from Microsoft Office as well. However, the Councillor highlighted that there was a risk of abuse of dominance because the software package widened the scope of Microsoft operational software, namely Microsoft Windows.

Councillor Andrade also examined some situations where it would be likely that an offence would occur in the technological sector due to network effects, i.e. when dominant undertakings (1) refuse the compatibility of their competitor's programs with their software systems, thus prohibiting the entry of new competitors that could further improve the existing technological standards; (2) advertise before the launch of a new product version without allowing the consumer to choose a particular program to suit their needs, discouraging users to change brands; (3) upgrade programs with the introduction of a new technology that is not accessible to other competitors; (4) require the incompatibility of products developed by competitors in the aftermarket with the systems of the dominant firm's competitors in the main market; (5) attempt to purchase a successful software of a competitor that, combined with the market share of the dominant firm, would result in an increase in the barriers to entry.⁸⁸⁷

The facts of the decision were in favour of the defendant, as the addition of 'Money 97 to the package of Microsoft for Small Business 97 did not fall within any of the situations described above. Therefore, Microsoft was not held liable, as the conduct was not perceived to form part of an abusive strategy. The decision was unanimous in favour of Microsoft. A main factor that contributed to the outcome was that purchasers were given the option of buying the products separately as well.

⁸⁸⁷ See *Paiva Piovesan Engenharia & Informática Ltda v Microsoft Informática Ltda - 08012.001182/1998-31*.

In respect of the alleged breaches of public procurement laws as a result of the sale of software licences to the Bank of Brazil and Caixa Econômica Federal, Councillor Andrade concluded that, although the sales had an impact on the relevant market, there was no illegal conduct from a competition law perspective and recommended the notification to federal authorities to verify the legality of the transactions.

In regards to the restriction of access of Microsoft's distributors to the products of competitors, only one exclusivity arrangement was found during the investigations; even so, this arrangement was not anti-competitive as it involved the financial assistance of Microsoft to the distributor in order to cover start-up costs. There was no evidence that Microsoft imposed any sort of exclusivity obligations on its distributors in respect of Microsoft for Small Business 97.

In relation to exclusionary effects resulting from discounts and rebates, according to Councillor Andrade, Microsoft's discounts were based on the volume of sales of Microsoft for Small Business 97 and legitimate even if the practice resulted in the distributors giving preference to Microsoft products. This reasoning differs from *AmBev*,⁸⁸⁸ where the defendant was found in breach of competition law rules as a result of the exclusionary effects of its discounts and rebates. One key difference between these cases is that Microsoft did not condition discounts or rebates to the achievement of a set market share in relation to the distributor's products, whilst AmBev imposed such condition. Therefore, in *AmBev* the discounts were not given proportionally to the quantity of products sold as in *Microsoft*, but to the share of products sold.

⁸⁸⁸ *Primo Schincariol Indústria de Cervejas e Refrigerantes SA v Companhia de Bebidas das Américas - Ambev - 08012.003805/2004-10.*

8.8 Refusal to deal

8.8.1 TV Globo

*TV Globo*⁸⁸⁹ is a 2001 decision involving TV Globo, Brazil's largest aerial TV broadcaster. The Brazilian National Telecommunication Agency (ANATEL) brought a claim on behalf of TVA Sistema de Televisão/Directv (Directv), against two companies of the TV Globo Group, TV Globo Ltda and TV Globo São Paulo Ltda (TV Globo). The facts leading up to the case consisted of TV Globo's refusal to license its channels to Directv's satellite TV services in the cities of São Paulo, Rio de Janeiro, Belo Horizonte and Porto Alegre. According to Directv, the refusal created anti-competitive effects in the market of distribution of TV and audio programmes via satellite, as TV Globo authorised the satellite distribution of its aerial TV channel to Sky TV. Directv's claim was supported by the fact that Sky TV, Directv's main competitor in the market of distribution of TV and audio programmes via satellite, was part of the same corporate group as TV Globo.

TV Globo is the leader in the Brazilian aerial TV sector, which is the most common TV signal distribution method in Brazil. Consequently, its programmes attract the largest audiences. It was argued by Directv that TV Globo's refusal to license resulted in the creation of a considerable barrier to entry in the satellite TV market. Directv stated that most consumers of satellite services preferred to subscribe to satellite channel packages that included TV Globo's programmes, even if they were freely available via aerial TV, to avoid the hassle of switching between TV and satellite services. As a result, TV Globo's refusal to

⁸⁸⁹ *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999.*

deal was allegedly intended to harm competition and to allow Sky TV to dominate the satellite TV market, as these companies belonged to the same corporate group.

The *dicta* in *TV Globo* were conflicting. Although the presiding Councillor, João Bosco Leopoldino da Fonseca was of the opinion of holding TV Globo liable, the majority of the other Councillors disagreed by following the opinion of Councillor Hebe Teixeira Romano. As a result, TV Globo was not found liable. The conflicting opinions of Councillors resulted in rich argumentation in relation to the definition of the relevant market, dominance and abuse.

8.8.1.1 The relevant market

In the view of Councillor Fonseca, there were three different types of TV services available by subscription: wired TV via cable, MMDS via microwaves and DTH via satellite. During his analysis of the relevant product market, Councillor Fonseca mentioned the EU decisions *Continental Can*⁸⁹⁰ and *United Brands*⁸⁹¹ and stated that the criterion used to determine the relevant product market was product interchangeability. This criterion had to take into consideration the superior quality of DTH signals, the need for customers to purchase a specific decoder in relation to each provider, as well as the higher price of DTH decoders in respect to other TV distribution systems. After taking these factors into account, Councillor Fonseca decided that the relevant product market was the DTH distribution of audio and TV signals via satellite.

With regards to the determination of the relevant geographic market, Councillor Fonseca mentioned that, although Directv's request of authorisation to transmit TV Globo programmes via satellite concerned a limited number of Brazilian federal states, the reach of TV Globo's aerial distribution signals in conjunction with Sky TV satellite signals were much wider. Therefore, the presiding Councillor determined that the relevant geographic market was national rather than regional.

Councillor Romano defined the relevant product market differently from Councillor Fonseca. In her decision, she agreed with an argument given by Directv from a former Councillor,

⁸⁹⁰ *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities - Case 6-72.*

⁸⁹¹ *United Brands Company and United Brands Continental BV v Commission of the European Communities - Case 27/76.*

Professor Arthur Barrionuevo Filho, who did not define the relevant product market as narrowly as the presiding Councillor. According to Professor Barrinuevo Filho, the relevant product market should be defined as the subscription of TV services because subscribers would migrate to cheaper types of subscription TV services if there was a small but significant and non-transitory increase in prices of DTH TV via satellite. The opinion of Councillor Romano seems to disregard the costs involved in switching providers that were highlighted by Councillor Fonseca.

Councillor Celso Fernandes Campilongo stated that the relevant product market should be defined on the basis of origin and destination. The market of origin would be the competing channels whilst the market of destination would be the service of distribution of DTH TV via satellite, given that the transmission technology was very different from other types of non-aerial TV services.

Councillor Afonso Arinos de Mello Franco Neto stated that the subscription TV market had different characteristics from the aerial TV market. In common with Councillor Fonseca's view, in his opinion the market could be subdivided in wired TV, MMDS and DTH services. However, Councillor Neto did not clearly express which one he regarded as the relevant product market, albeit one could imply that he agreed with the presiding Councillor.

In relation to the relevant geographic market, Councillor Neto agreed with all the above Councillors in the sense that the relevant geographic market was national. The reason for this understanding was different from Councillor Fonseca, as it was based on the fact that DTH signals are distributed nationwide, rather than by examining the combined positions of TV Globo and Sky Satellite TV.

Councillor Thompson Andrade defined the relevant product market as the distribution of DTH signals. He omitted reference to the relevant geographic market. However, it could be implied that it was defined at a national level, as he stated that that only two firms, namely Sky TV and Directv, offered the product in the national market. Nevertheless, he also stated that in some regions in Brazil there were other products, such as cable TV that competed with satellite TV; therefore part of his reasoning is unclear.

8.8.1.2 Dominance

Following the determination of the relevant market, the Councillors continued to disagree when determining dominance. Councillor Fonseca declared that TV Globo dominated the aerial distribution of TV signals because it captured 50 percent of the audience and 70 percent of the TV advertisement revenues. He also relied on a report produced by Goldman Sachs for TV Globo for the purpose of selling depositary receipts of TV Globo in the US, which stated that only the TV Globo's subsidiary had access to TV Globo's programmes, whilst Directv was excluded.

Councillor Romano agreed that TV Globo had dominance in the aerial TV market, but highlighted that the same was not true in the subscription TV market, where TV Globo and Sky TV had similar market shares to TVA and Directv. Therefore, in her opinion, both of these corporate groups could be considered dominant, since each of them had market shares greater than twenty percent. It must be noted that the understanding that two competing companies can be dominant in the same market goes against the very concept of dominance. A dominant firm must be able to behave in the market with a considerable degree of independence from competitors and consumers. If a firm has a strong competitor, they are not both dominant.⁸⁹² Instead, there is an oligopoly and oligopolies can be competitive.

Councillor Romano also mentioned that Councillor Fonseca relied too much on the document prepared by Goldman Sachs and sustained that it was questionable if its data could be used to

⁸⁹² Except for the situation whereby both companies behave collectively in the market and therefore the competition authority could find collective dominance. However, this is not the case in TV Globo, given that the competitor is actually accusing TV Globo of abusing its dominant position.

determine whether there was an offence in the form of refusal to deal. However, it is worth noting that Goldman Sachs prepared the document on the instructions of TV Globo and the statements made in the document did show that TV Globo was using the licence to give a competitive advantage to Sky TV.

Councillor Campilongo omitted an in-depth analysis of TV Globo's dominance in his decision. He only made a remark that the '...indisputable market power of TV Globo would be able to limit competition in the satellite TV market'.

Councillor Neto did not consider that TV Globo was dominant in the subscription TV market. His findings were based on published studies from ANATEL which showed that the market share of Sky TV within the geographical regions where it distributed TV Globo's channel was not greater than those of the TVA/Directv group. Therefore, Councillor Neto concluded that TV Globo was not dominant in this specific case. This is an out of the ordinary approach to the definition of dominance. The Councillor did not take the steps of looking into the market share, then actual competition, followed by potential competition. He jumped all this analysis and looked at the changes in the market share of Sky TV where it had access to TV Globo's channel. It can be argued therefore that Councillor Neto skipped the analysis of dominance and went on directly to the analysis of the conduct.

Councillor Andrade did not deal with the definition of dominance. After defining the relevant market, he immediately started analysing the conduct, implying that he was of the opinion that TV Globo was dominant.

8.8.1.3 Abuse

Councillor Fonseca stated that Article 20 of Law 8,884/94 followed the parameters of the EU legislation in determining which types of conduct are abusive. He stated that there were two fundamental criteria for the prohibition of an abusive conduct under Brazilian competition law: (1) the company whose conduct is being examined must have dominance in the relevant market; (2) the company must abuse its dominance. Indeed, this is the abuse of dominance criteria under Article 102 TFEU. With respect to the application of competition law to the case in question, Councillor Fonseca decided that TV Globo was dominant and, by limiting or impeding the access of TVA into the relevant market, TV Globo was infringing Article 21(IV), (V), (VI), (X) and (XIII). TV Globo was allegedly creating difficulties to the function and development of a competitor, as well as impeding the access of a competitor to a source of materials, equipments or technology and refusing to sell goods or services under normal payment conditions in accordance with uses and consuetude. In essence, Councillor Fonseca was of the opinion that TV Globo's abuse consisted of the fact that it sought to maintain its dominant position by creating artificial barriers to entry and not competing on the merits.

Councillor Fonseca affirmed that TV Globo was refusing an essential facility.⁸⁹³ In his view, when a dominant undertaking controls an essential facility, it should not refuse its access; if it did, there would be a legal presumption of abuse. This reasoning implies the use of a *per se* approach when the product or service refused is deemed to constitute an essential facility. This follows principles formulated in the US decisions *Terminal Railway*⁸⁹⁴ and *Aspen*.⁸⁹⁵

⁸⁹³ See section 5.2.5.

⁸⁹⁴ *United States v Terminal Railroad Association*, 224:392.

⁸⁹⁵ *Aspen Skiing Company v Aspen Highlands Skiing Corporation*, 469:599.

However, Councillor Fonseca's reasoning appears deficient, as he failed to mention the existence of criticism to the essential facilities doctrine in the US.

Moreover, Councillor Fonseca stated that the US Satellite Home Viewer Improvement Act of 1999 forced satellite TV providers in the United States to transmit local TV programmes. Therefore, Councillor Fonseca's argument was based on the idea that the regulation of the satellite TV sector in the US rightfully dealt with many of the specific issues of this case. Although Brazil lacked such regulation, in his view the BCPS should step in and combat abusive practices which sought to foreclose the market via the application of competition law.

With respect to EU authorities, Councillor Fonseca mentioned the *Commercial Solvents*⁸⁹⁶ and *Sea Containers v Stena Sealink*⁸⁹⁷ decisions to reinforce the idea that the essential facilities doctrine was accepted in both sides of the Atlantic. Due to the popularity of TV Globo's programmes and the fact that consumers preferred integrated Satellite TV services that included programmes normally available via aerial TV, the licensing over TV Globo's programmes equated, in his view, to an essential facility as understood by the European Commission.⁸⁹⁸

It must be noted, however, that although the essential facilities doctrine has been adopted in the EU, the COJ restricted the ambit of the doctrine in *Bronner*,⁸⁹⁹ establishing that the refusal should not only create difficulties for the competitors. It should also result in the risk

⁸⁹⁶ *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities - Joined cases 6 and 7-73.*

⁸⁹⁷ European Commission, *Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v Stena Sealink - Interim measures)*, vol. 015.

⁸⁹⁸ See European Commission, "Commission notice on the application of the Competition Rules to access agreements in the telecommunications sector," 68.

⁸⁹⁹ *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs et al. - Case C-7/97.*

of eliminating them and should be indispensable, i.e. not economically viable for a firm with a similar capacity of the one refusing access to the facility. It is questionable if the refusal of TV Globo met these criteria.

Councillor Romano made some criticisms in relation to Councillor Fonseca's reference to EU competition law. According to her, the use of foreign decisions is a useful tool to aid the interpretation of Brazilian competition law, but EU law has a supranational aspect that Brazilian competition law does not. Although there is some truth in Councillor Romano's reasoning, her justification appears to be flawed. EU law is supranational in terms of its constitution and historic development, given that it is the product of international treaties amongst Member States that sought to achieve European unity in political, social and economic terms. However, this does not mean that legal principles formulated under EU law cannot be transplanted into the Brazilian legal system. If her statement was correct, it would lead to the result that only principles formulated under US antitrust law should be considered, given that the US and Brazil are both federal republics.

Both the EU and the US models of competition law influenced the development of Brazilian competition law and there are many reasons to seek inspiration from EU competition law. For instance, the historical development of EU competition law was heavily influenced by the competition law tradition developed in continental Europe and the Brazilian legal system is modelled on the continental European civilian tradition as well. Moreover, many European national markets are characterised by concentration of market power and the same can be said about many Brazilian markets.

Councillor Romano stated that all the cases cited by the presiding Councillor Fonseca regarded the elimination of competition. In her opinion, this was not the issue in this particular case as the Directv/TVA group were not being eliminated from the market because they had a similar market share to Sky TV/TV Globo group. Councillor Romano also disagreed with the citation of EU decisions regarding the essential facilities doctrine. Her judgment is nevertheless questionable, given that whether competition was eliminated or not was immaterial under Brazilian competition law, as TV Globo could have been in breach of Articles 20 and 21 of Law 8,884/94 if it committed an abuse of dominance, irrespective of whether competition was eliminated or not.

Councillor Romano's reasoning appears to be influenced by a *laissez-faire* ideological position, as she considered it better for aerial TV broadcasters and satellite TV providers to enter into agreements as they saw fit. According to the Councillor, the case regarded a mere commercial dispute between commercial parties, so there was no public interest that merited protection. Therefore, in her view the CADE should not intervene, given that a company that does not have the intent to create a monopoly is free to decide with whom it wants to do business.

To support her decision, Councillor Romano stated that Directv was the biggest provider of DTH services in the Americas and that there was no evidence of the adoption of illegal practices by TV Globo to acquire dominance. Once again, her reasoning merits criticism as a refusal to deal by a dominant undertaking may suggest the adoption of an anti-competitive strategy to maintain its dominance. Indeed, three years after the *TV Globo* decision, the

CADE has decided *Condomínio Shopping Center Iguatemi*⁹⁰⁰ where it was stated that a dominant undertaking can breach Brazilian competition law by raising artificial barriers to entry in order to maintain its dominance. Nevertheless, Councillor Romano did not deal with the strategy of the defendant in terms of maintenance of dominance.

One argument of Councillor Romano that influenced other opinions against Councillor Fonseca regarded economic efficiency and consumer welfare. The Directv group already enjoyed a considerable market share in the Americas and for this reason, in the view of Councillor Romano, it was acting unreasonably by insisting that TV Globo granted it licence rights of its television programmes, which were freely available to the general population via aerial transmission. According to Councillor Romano, it would have been preferable for Directv to invest in new programmes rather than merely duplicating the transmission of TV Globo's programmes. This argument was particularly important, given that it stated that Directv should invest in innovation, focusing on the goal of competition law in terms of consumer welfare that, in this case, would result from the creation of new television programmes.

Councillor Campilongo sided with Councillor Romano against Councillor Fonseca. He stated that the CADE should not establish a general obligation on all aerial TV broadcasters, but only analyse the factual situations of the specific case. He considered inappropriate the examination of foreign telecommunication legislation which supported Councillor Fonseca's arguments. Nevertheless, according to Councillor Campilongo, the fact that the Brazilian telecommunications regulation legislation did not oblige TV Globo to authorise the broadcast

⁹⁰⁰ See *Procuradoria Geral do Cade, Associação dos Lojistas de Shopping do Estado de São Paulo v Condomínio Shopping Center Iguatemi - 08012.006636/1997-43*.

of its signals by Directv did not mean that TV Globo could simply refuse licences to Directv from a competition law perspective. In his view, the central issue should be whether the refusal of TV Globo would cause or could potentially cause anti-competitive effects. In this respect, it was crucial to determine whether the transmission of TV Globo's programmes was so essential that as a result of TV Globo's refusal, Directv would not be able to operate in the market; in other words, if TV Globo's programmes could be considered an essential facility. The answer of the Councillor to this question was negative, justified by an explanation that the doctrine was developed in the United States for extreme cases where the exclusive ownership of a product, structure or infrastructure made it impossible for competition to exist, given that the product or service refused could not be replicated.⁹⁰¹ Therefore, although Councillor Campilongo acknowledged Councillor's Fonseca's arguments for the essential facilities doctrine, in his opinion TV Globo's programmes did not fulfil the requirements of an essential facility.⁹⁰² For TV Globo's refusal to be material in the light of the essential facilities argument, Directv would have had to demonstrate that it tried to offer different TV programmes but that this had not been enough to mitigate the essentiality of TV Globo programmes.

Although Councillor Campilongo found in favour of the defendant, his opinion was somewhat balanced and not as *laissez-faire* as that of Councillor Romano. He was against equating TV Globo's programmes to an essential facility in this specific case, but he stated that this finding was not absolute, so the outcome could be different under other

⁹⁰¹ In the sense that was a natural monopoly.

⁹⁰² In the sense that: i) [...] without the access to that structure there was no chance to competition, i.e., it was indispensable for competition; ii) that it was not economically efficient or possible, for new entrants, to duplicate the structure; iii) that the control of the structure gave to its owner the potential to eliminate competition; iv) that the facility was effectively essential, literally, and not only a mere convenience or a less costly opportunity to a competitor; v) that the refusal of access to the essential facility did not have an economic or legal reasonable reason.

circumstances. Councillor Campilongo also gave TV Globo and Sky TV a warning by stating that the CADE was well aware that their vertical arrangements were not ideal and could hamper competition in the subscription TV market.

Councillor Franco Neto did not analyse the conduct. As mentioned above, according to him TV Globo was not dominant. Since Directv's claim failed to pass the first limb to find TV Globo liable for abuse of dominance, there was no need to determine whether TV Globo's conduct was abusive.

Councillor Andrade established that the existence of exclusive licensing rights on certain channels or programmes in the subscription TV sector was a common market practice which supported the process of competition. Although TV Globo's programmes had a significant audience in the aerial TV market, Councillor Andrade considered it an overstatement to qualify them as an essential facility. According to him, an essential facility ought to be indispensable and impossible of being substituted. Therefore, there was no breach of competition law because Directv was able to compete in the market and TV Globo's programmes were not essential; thus, the former could overcome the latter's refusal by procuring licences over substitute TV programmes.

Councillor Andrade rebutted Councillor Campilongo's concern with the vertical arrangements between TV Globo and Sky TV. According to him, there was no concern under Brazilian competition law in regards to the fact that these companies sought to gain dominance artificially by vertical arrangements rather than via organic growth. The defence of TV Globo and Sky TV's vertical arrangements by Councillor Andrade went as far as to state that it did not impede the access of other satellite TV providers to the markets of aerial

and non-aerial TV channels. It may be true that dominance is not prohibited *per se*, but it seems that the intention of Councillor Campilongo was to warn in respect of TV Globo/Sky TV conduct, suggesting the existence of special responsibilities for dominant firms.

Following Councillor Romano's leading opinion, and contrary to the dissenting opinion of the presiding Councillor Fonseca, the CADE dismissed Directv's complaints and decided in favour of TV Globo. The decision was justified on the following grounds: (1) Directv had 'dominance' in the subscription TV market; (2) the licensing rights over TV Globo's programmes were not deemed to constitute an essential facility.

With respect to the first reason, it is incorrect to consider that Directv was dominant in the subscription TV market, given that according to the vote of Councillor Romano both firms were dominant. It must be highlighted that in any case this is an incorrect interpretation of the definition of dominance, as only one firm can be dominant, unless they behaved collectively and both are dominant in respect to all other firms.⁹⁰³

In regards to the second reason, under Brazilian competition law a refusal to deal by a dominant undertaking could be deemed abusive irrespective of the classification of the product as an essential facility. As long as the abusive conduct of a dominant undertaking harms free competition and free enterprise, such conduct should be considered an offence to the economic order under Brazilian competition law.⁹⁰⁴ Bearing in mind that the Brazilian competition law does not require the refused product to be an essential facility in order to find

⁹⁰³ See section 8.8.1.2.

⁹⁰⁴ See Articles 20 and 21. Brazil, *Law n. 8,884 of 11 June of 1994*.

an offence to the economic order, the focus of the decision should have been on the stimulus to innovation that the refusal could create and the benefits that this would bring to consumers.

8.8.2 MATEC

In *MATEC*,⁹⁰⁵ the claimant, Power-Tech Teleinformática Ltda (Power-Tech), brought a complaint against Matel Tecnologia de Informática SA (MATEC) for abusing its dominance by refusing to supply spare parts for telephone switchboards MD 110 from Ericsson. MATEC was the only company who had entered into licence agreements with Ericsson to manufacture and sell Ericsson branded products in Brazil. In its submissions, Power-Tech argued that as a result of MATEC's refusal to supply, it was not able to fulfil its contractual obligations in relation to technical assistance agreements with third parties, or to procure new clients. MATEC did not deny the refusal to supply. Its defence arguments were based on the existence of good reasons that justified the conduct.

The presiding Councillor, Roberto Augusto Pfeiffer, stated that MATEC was the only licensed producer and distributor of Ericsson products in Brazil and held the monopoly of the manufacture and sales of some parts of the telephone switchboards. Therefore, MATEC was declared dominant. Nevertheless, Councillor Pfeiffer acknowledged that the monopoly was a product of MATEC's own merits, as it had invested in patents, technical data and technology that allowed it to conclude the licence agreement with Ericsson.

With respect to the nexus between dominance and abuse, Councillor Pfeiffer was of the opinion that the dominant position of MATEC in the upstream market, i.e. the distribution and manufacture of Ericsson products, allowed it to leverage its economic power in the downstream market, i.e. the maintenance and repair of Ericsson products. There were two

⁹⁰⁵ *Power-Tech Teleinformática Ltda v Matel Tecnologia de Informática SA - MATEC - 08012.000172/1998-42.*

observations to support this view: (1) Power-Tech was the only company to participate in the intra-brand market and the difference in prices between Power-Tech and MATEC in the downstream market was considerable (Power-Tech's prices were much lower than MATEC's); (2) the refusal to supply spare parts to Power-Tech would also strengthen MATEC's economic power in the downstream market as consumers were locked-in and could not use maintenance services from other companies.

Councillor Pfeiffer stated that there was no evidence that competition in the upstream market would in itself be sufficient to impede an increase in prices in the downstream market. In this respect, he mentioned the US *Kodak*⁹⁰⁶ case when declaring that in theory low prices in the maintenance sector, i.e. the downstream market, could prove beneficial to increase the sales of products in the upstream market, but that, as in the Kodak case, the manufacturer was harming competitors in the downstream market because they were charging low prices.

Councillor Pfeiffer argued that MATEC was intentionally and deliberately abusing its dominance to maintain its position in the upstream and downstream markets to arbitrarily increase prices and exclude competitors in the downstream market.⁹⁰⁷ In addition, Councillor Pfeiffer stated that to avoid liability under Brazilian competition law, the refusal to supply of a dominant undertaking must be justified in economic terms. The Councillor seems therefore to require an objective justification to exclude the firm's liability. This view appears to follow the EU approach to abuse of dominance, where a conduct is considered a competition law offence when there is dominance and purpose to harm competition, unless there are objective

⁹⁰⁶ *Eastman Kodak Co v Image Technical Services Inc*, vol. 498.

⁹⁰⁷ Nevertheless, it should be noted that the *mens rea* of intention is not a required element of competition law offences in Brazil.

justifications. In fact, Councillor Pfeiffer mentioned that in the EU there are many judgments⁹⁰⁸ which prohibited conduct similar to the one in question. He affirmed that the essential facilities doctrine, although obviously applicable in respect of infrastructure such as ports and railways, could also be applied to products that are absolutely indispensable for the entry or survival of competitors in the market. Therefore it could be applied to the case in question.⁹⁰⁹

Councillor Pfeiffer rejected each of the justifications raised by MATEC in its defence. MATEC's arguments were based on product cross elasticity, i.e. that consumers would be able to switch brands if MATEC charged abusive prices in the downstream market. This was not accepted because the replacement of the products was not convenient, given that there were high replacement costs involved and consumers would be locked-in after purchasing products from MATEC. To counter this statement, MATEC argued that many of its clients were large corporations or public institutions, so they were aware of the costs involved beforehand. However, this argument appears to have backfired, as Councillor Pfeiffer stated that it was incongruent with another defence raised by MATEC. This was because its submissions alleged that the existence of competing maintenance companies in the downstream market would be harmful to its commercial reputation and goodwill if they did not perform their services properly. If MATEC's consumers were sufficiently knowledgeable of the complexities of the product and competitors in both upstream and downstream

⁹⁰⁸ To corroborate his statement, the Councillor mentioned some EU cases, such as *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities - Joined cases 6 and 7-73*, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities - Case 22/78* and *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) - Case 311/84*.

⁹⁰⁹ Therefore, Councillor Pfeiffer adopted the essential facilities doctrine, notwithstanding the fact that it is not expressly mentioned in the Brazilian competition law. In this sense, he adopted a similar reasoning to Councillor Fonseca in *TV Globo*. See *TVA Sistema de Televisão v TV Globo Ltda - 53500.000359/1999*. Section 8.8.1.2.

markets, then they ought to be sufficiently knowledgeable to avoid competing companies tarnishing MATEC's reputation.

MATEC brought a final argument based on the fact that Power-Tech had the option to purchase the spare parts directly from Ericsson. However, this justification was rejected given that maintenance services required the acquisition of spare parts as they were needed and it would take too long to import them. Therefore, it would have been inefficient for Power-Tech to import the parts directly from Ericsson; for instance, Power-Tech would need to purchase parts in bulk, setup logistical operations, and so on.

The decision was reached unanimously in favour of holding MATEC liable for refusing to deal. MATEC was deemed to be dominant in the upstream market and its conduct was considered abusive because the company was using its power to eliminate competition in the downstream market.

8.9 English Version of Competition Law 8,884/94

The following version of the Brazilian competition Law 8,884/94 was made available by the SDE⁹¹⁰ and does not substitute the original text in Portuguese.

Brazilian antitrust laws

Law n. 8,884

June 6th, 1994

LAW # 8884 OF JUNE 11, 1994

(OFFICIAL GAZETTE OF THE FEDERAL EXECUTIVE, JUNE 13, 1994)

Changes the Administrative Council for Economic Defence - CADE into an independent agency, regulates antitrust measures, and makes other provisions.

THE PRESIDENT OF THE REPUBLIC:

I hereby make known that the Congress decrees and I sanction the following Law:

TITLE I

GENERAL PROVISIONS CHAPTER I

OBJECT

Article 1. This Law sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.

Sole Paragraph. Society at large is entrusted with the legal rights protected herein.

CHAPTER II TERRITORY

⁹¹⁰ SDE, "Legislation."

Article 2. Without prejudice to any agreements and treaties to which Brazil is a party, this Law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein.

Sole Paragraph. Foreign companies that operate or have a branch, agency, subsidiary, office, establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory.

§ 1. A foreign company is deemed resident in the Brazilian territory if it operates or has a branch, affiliate, subsidiary, office, place of business, agent or representative in Brazil.

§ 2. The person in charge of the branch, affiliate, subsidiary, office, or place of business in Brazil shall be notified and informed on behalf of the foreign company of all procedural acts, notwithstanding any power of attorney or contractual or statutory provision"

TITLE II

THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE - CADE CHAPTER I INDEPENDENT AGENCY

Article 3. The Administrative Council for Economic Defence - CADE, an agency with authority throughout the Brazilian territory and created by Law # 4137 of September 10, 1962, shall henceforth become a federal independent agency (autarquia federal) reporting to the Ministry of Justice, with headquarters and jurisdiction in the federal district, and duly commissioned for performance of the duties set forth herein.

CHAPTER II

THE CADE BOARD

Article 4. The CADE Board shall be composed of a President and six Board Members chosen from among citizens older than thirty years of age reputed for their legal or economic

knowledge and unblemished reputation, duly appointed by the President of the Republic after their approval by the Senate.

Paragraph 1. The term of office of the President and Board Members shall be two years, one re-election being hereby permitted.

Paragraph 2. The President and Board Member duties shall be discharged on an exclusive basis; accordingly, no overlapping of positions will be permitted, unless otherwise provided for in the Constitution.

Paragraph 3. In the event of resignation, death or termination of a CADE President, the senior or eldest Board Member (in this order) will take office as President until further appointment thereof, without prejudice to his/her corresponding duties as Board Member.

Paragraph 4. In the event of resignation, death or termination of a CADE Board Member, a new Board Member shall be appointed for the remaining term of office of the replaced member.

Paragraph 5. In the events set forth in the preceding paragraph or upon expiration of the terms of office of the council members, the Council shall be reduced to less than the number established in article 49, the time frames set out in articles 28, 31, 32, 33, 35, 37, 39, 42, 45, 46, sole paragraph, 52, paragraph 2, 54, paragraphs 4, 6, 7 and 10, and 59, paragraph 1 of this law shall be considered automatically interrupted, and the case development shall be suspended, and the new terms shall begin immediately after restructuring of the quorum.

Article 5. The CADE President or Board Members may only be ousted by a decision of the Senate, a request of the President of the Republic, as a result of unappealable criminal sentencing of any such member for malicious crime, or in light of disciplinary action as set forth in Law # 8112 of December 11, 1990 and Law # 8429 of June 2, 1992, as well as owing to violation of any of the limitations dealt with in article 6 hereof.

Sole Paragraph. Any CADE Member's absence at three consecutive ordinary meetings, or twenty intermittent ordinary meetings, shall cause automatic termination of his/her term of office, except for leaves of absence duly approved by the CADE Board.

Article 6. The President and Board Members shall not:

I - receive fees, percentages or other compensation in any way or on any pretext; II - act as a self-employed workers;

III - participate--as controlling parties, officers, managers,agents or attorneys in fact-in any civil, commercial or like companies;

IV - render opinions on matters of their specialty, even if on a theoretical basis, or act as advisers to companies of any kind;

V - avail themselves of the media to render opinion on cases pending decision, or otherwise disparage orders, votes or sentences handed down by the courts, except for critique in case records, technical works or in the exercise of court duties; and

VI - carry out politics- or party-oriented activities.

CHAPTER III

AUTHORITY OF THE CADE BOARD

Article 7. The CADE Board shall:

I - ensure compliance with this Law and its regulations, as well as with the Board in-house rules;

II - resolve on purported violations of the economic order, and apply the penalties provided for by law;

III - resolve on proceedings instituted by the Economic LawOffice - SDE of the Ministry of Justice;

IV - resolve on ex officio appeals from the SDE Secretary;

V - order that action be taken in restraint of violations of the economic order within the term scheduled therefore;

VI - approve both the cease-and-desist commitment (compromisso de cessação de prática) and the performance commitment, as well as order SDE to monitor compliance therewith;

VII - judge appeals against preventive action adopted by SDE or by the Board reporting official;

VIII - make its decisions known to interested parties;

IX - request information from individuals, agencies, authorities and other public or private entities, with due regard for the confidentiality ensured such information pursuant to law, if any, as well as determine the investigations required for performance of its duties;

X - request from the federal Executive branch agencies and from state, municipal, the federal district and territorial authorities the taking of all acts required for compliance with this Law;

XI - retain the performance of examinations, inspections and studies, approving the respective professional fees and other expenditures on a case by case basis, all of which shall be borne by the company if it is eventually punished under this Law;

XII - analyze acts or conduct under any circumstance, subject to approval thereof pursuant to article 54 below, and establish a performance commitment as the case may be;

XIII - request court execution of its decisions pursuant to this Law;

XIV - request services and staff from any federal public agencies or entities;

XV - determine the adoption of administrative and court action by the CADE Attorney General Office;

XVI - sign contracts and agreements with Brazilian agencies or entities, and advance to the Minister of Justice for approval any such documents that are to be signed with foreign or international organisms;

XVII - answer consultations on matters within its sphere of authority;

XVIII - make the forms of violation of the economic order known to the public;

XIX - draft and approve its in-house rules on operations, criteria for resolutions, and organization of in-house services, including for the purpose of establishing the recess of the Board and the Attorney General Office on account of vacation; during such period, the statute of limitations as well as the term set forth in article 54, paragraph 6 hereof shall be suspended;

XX - draft the structure applying to the CADE staff, with due regard for article 37, II of the Constitution;

XXI - draft budgetary proposals pursuant to this Law; and

XXII - appoint the possible substitute of the Attorney General in the event of absences, dismissal or impairment.

CHAPTER IV

AUTHORITY OF THE CADE PRESIDENT

Article 8. The CADE President shall:

I - act as the CADE legal representative in and out of court;

II - preside over the CADE Board meetings, with the right to vote thereat, plus a casting vote;

III - distribute processes by lot at the Board meetings;

IV - call meetings and organize the corresponding agenda;

V - comply and cause compliance with the CADE decisions;

VI - determine that the CADE Attorney General Office take all court action required for execution of the CADE decisions and sentences;

VII - sign the cease-and-desist commitments, as well as performance commitments; VIII - submit to the CADE Board for approval the budgetary proposal, as well as the intended assignment of the staff that is to render services to CADE; and

IX - guide, coordinate and supervise the CADE administrative activities.

CHAPTER V

AUTHORITY OF THE CADE BOARD MEMBERS

Article 9 - The CADE Board Members shall:

- I - vote on cases and matters submitted to the CADE Board;
- II. - issue orders and decisions on the cases for which they act as reporting members;
- III. - submit to the CADE Board any requirements as to data and documents from individuals, agencies, authorities and other public or private entities, which data and documents are to be kept confidential pursuant to law, as the case may be, as well as order all investigations deemed required for performance of their duties;
- IV - adopt preventive action, and establish a daily fine for noncompliance therewith; and
- V - discharge all further duties ascribed thereto under the applicable rules.

CHAPTER VI

THE CADE ATTORNEY GENERAL OFFICE

Article 10. An Attorney General Office shall be commissioned with CADE to:

- I - render legal assistance to CADE, and provide for defence thereof in court; II - arrange for judicial execution of CADE decisions and sentences;
- III - subject to the CADE Board preliminary approval, request court measures with a view to curbing violations of the economic order;
- IV - arrive at court settlements for cases involving violations of the economic order, subject to the CADE Board preliminary approval after hearing a representative of the Attorney General of the Republic;
- V - render opinion on cases under the CADE authority; VI - ensure compliance with this Law; and
- VII - perform all further action incumbent thereon under the in-house rules.

Article 11. The Attorney General--appointed by the Minister of Justice, and duly commissioned by the President of the Republic after consultation and approval of the Senate--shall be a Brazilian citizen with unblemished reputation and renowned legal expertise.

Paragraph 1. The Attorney General shall attend the CADE meetings, with no right to vote thereat.

Paragraph 2. The Attorney General shall be subject to the same rules on term of office, re-election, disqualification, termination and replacement as those applying to the CADE Board Members.

Paragraph 3. In the event of absences, temporary separation or impairment of the Attorney General, the plenary body will indicate and the CADE President will appoint a possible substitute to act for a period not exceeding ninety (90) days, with no need for federal senate approval; such substitute shall be entitled to compensation for the position held during such substitution.

TITLE III

THE ATTORNEY GENERAL OF THE REPUBLIC AND CADE

Article 12. The Attorney General of the Republic, after hearing the Higher Council, shall appoint a member of the Attorney General Office of the Republic to handle the cases submitted to CADE for review.

Sole Paragraph. CADE may request that the Attorney General Office of the Republic cause enforcement of the CADE decisions or of the cease-and-desist commitments, as well as that it adopt all court action provided for in article 6, XIV (b) of Supplementary Law No. 75 of May 20, 1993.

TITLE IV

THE ECONOMIC LAW OFFICE

Article 13. The Economic Law Office of the Ministry of Justice - SDE, as structured pursuant to law, will be headed by a Secretary appointed by the Minister of Justice from among Brazilian citizens of renowned legal or economic expertise and unblemished reputation, duly commissioned by the President of the Republic.

Article 14. SDE shall:

- I - ensure compliance with this Law by monitoring and following up on market practices;
- II - provide for ongoing follow-up on business activities and practices from individuals or legal entities with overriding control over a relevant market for a certain product or service, in order to prevent violations of the economic order; for such purposes, all pertinent data and documents may be required, with due regard for the confidential status thereof pursuant to law, if any;
- III - carry out preliminary investigations on purported violations of the economic order, for further instatement of administrative proceedings;
- IV - acknowledge the lack of grounds or evidence, and shelve the preliminary investigation records;
- V - request data from individuals, agencies, authorities and other public or private entities, with due regard for the confidential status thereof under the law, if any, as well as determine the action required for exercise of its duties;
- VI - commence administrative proceedings intended to investigate and restrain violations of the economic order;
- VII - appeal ex officio to CADE for shelving of preliminary investigations or administrative proceedings;
- VIII - send on to CADE, for review, any cases commenced by SDE, if a violation of the economic order has been duly evidenced;

IX - sign a cease-and-desist commitment on the agreed conditions and submit it to CADE, as well as monitor compliance therewith;

X - advise CADE of certain conditions for signing of a performance commitment, and monitor compliance therewith;

XI - adopt preventive measures intended to cease the act characterized as a violation of the economic order, and establish the deadline for compliance therewith as well as a daily fine applying to default thereon;

XII - receive and substantiate cases to be judged by CADE, including consultations, and monitor compliance with the CADE decisions;

XIII - advise the public authorities as to the adoption of any action required for compliance herewith;

XIV - carry out studies and researches with a view to improving antitrust policies;

XV - advise the public of the various forms of violation of the economic order, as well as the means to curb such violations; and

XVI - perform other duties as provided for by law.

TITLE V

VIOLATIONS OF THE ECONOMIC ORDER CHAPTER I

GENERAL PROVISIONS

Article 15 - This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established de facto and de jure - even on a provisional basis - irrespective of a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.

Article 16. The company and each of its managers or officers shall be jointly liable to the various forms of violation of the economic order.

Article 17. The companies or entities within a same economic group de facto and de jure shall be jointly liable to violations of the economic order.

Article 18. The legal nature of any party charged with violation of the economic order may be disregarded whenever any such violation entails abuse of power and rights, violation of the law, illicit facts or acts, or any breach of bylaws or articles of association. This legal nature shall also be disregarded in the event of bankruptcy, insolvency, discontinuance or suspended operations of the underlying company owing to poor management thereof.

Article 19. The antitrust measures set forth herein do not exclude any punishment inflicted on other legal acts pursuant to law.

CHAPTER II VIOLATIONS

Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

I - to limit, restrain or in any way injure open competition or free enterprise; II - to control a relevant market of a certain product or service;

III - to increase profits on a discretionary basis; and

IV - to abuse one's market control.

Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.

Paragraph 3. The dominant position mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.

Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

I - to set or offer in any way--in collusion with competitors--prices and conditions for the sale of a certain product or service;

II - to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;

III - to apportion markets for finished or semi-finished products or services, or for supply sources of raw materials or intermediary products;

IV - to limit or restrain market access by new companies;

V - to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service;

VI - to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels;

VII - to require or grant exclusivity in mass media advertisements;

VIII - to agree in advance on prices or advantages in public or administrative biddings; IX - to affect third-party prices by deceitful means;

X - to regulate markets of a certain product or service by way of agreements devised to limit or control technological research and development, the production of products or services, or to dampen investments for the production of products and services or distribution thereof;

XI - to impose on distributors, retailers and representatives of a certain product or service retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties;

XII - to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions for the sale or performance of services;

XIII - to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;

XIV - to hamper the development of or terminate business relations for an indeterminate period, in view of the terminated party's refusal to comply with unreasonable or non-competitive clauses or business conditions;

XV - to destroy, render unfit for use or take possession of raw materials, intermediary or finished products, as well as destroy, render unfit for use or constrain the operation of any equipment intended to manufacture, distribute or transport them;

XVI - to take possession of or bar the use of industrial or intellectual property rights or technology;

XVII - to abandon of cause abandonment or destruction of crops or harvests, without proven good cause;

XVIII - to unreasonably sell products below cost;

XIX - to import any assets below cost from an exporting country other than those signatories of the GATT Antidumping and Subsidies Codes;

XX - to discontinue or greatly reduce production, without proven good cause;

XXI - to partially or fully discontinue the company's activities, without proven good cause;

XXII - to retain production or consumer goods, except for ensuring recovery of production costs;

XXIII - to condition the sale of a product to acquisition of another or contracting of a service, or to condition performance of a service to contracting of another or purchase of a product;
and

XXIV - to impose abusive prices, or unreasonably increase the price of a product or service.

Sole Paragraph. For the purpose of characterizing an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances:

I - the price of a product or service, or any increase therein, vis-a-vis any changes in the cost of their respective input or with quality improvements;

II - the price of a product previously manufactured, as compared to its market replacement without substantial changes;

III - the price for a similar product or service, or any improvement thereof, on like competitive markets; and

IV - the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs.

Article 22. (VETOED)

Sole Paragraph. (VETOED)

CHAPTER III PENALTIES

Article 23. The following antitrust penalties shall apply:

I - for companies: a fine from one to thirty percent of the gross pre-tax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable;

II - for managers directly or indirectly liable to their company's violation: a fine from ten to fifty percent of the fine imposed on said company, which shall be personally and exclusively imposed on the manager; and

III - in the case of other individuals and other public or private legal entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales

value, the fine will be 6,000 (six thousand) to 6,000,000 (six million) UFIR or any other index replacing it.

Sole Paragraph. Fines imposed on recurring violations shall be doubled.

Article 24. Without prejudice to the provisions of the preceding article, the fines listed below may be individually or cumulatively imposed on violations, whenever the severity of the facts or the public interest so requires:

I - at the violator's expense, half-page publication of the summary sentence in a court appointed newspaper for two consecutive days, from one to three consecutive weeks;

II. - ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the federal district authorities and related entities, for a period equal to or exceeding five years;

III. - annotation of the violator on the Brazilian Consumer Protection List; IV - recommendation that the proper public agencies:

(a) grant compulsory licenses for patents held by the violator; and

(b) deny the violator instalment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies;

V - the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

Article 25. If any acts or situations detrimental to the economic order are not discontinued after a CADE Board decision to this effect, or in the event preventive measures or any cease-and-desist commitment set forth herein are not complied with, a daily fine equal to or higher than 5,000 (five thousand) Fiscal Reference Units - UFIR or replacing index shall apply, which fine may be increased as many as twenty times in accordance with the severity of the violation and the violator's economic status.

Article 26. In the event any data or documents requested by CADE, SDE, SEAE or other public entity acting under this Law are unreasonably denied, concealed, tampered with or delayed, this shall constitute a violation subject to a daily fine of 5,000 (five thousand) UFIR, which fine may be increased up to twentyfold in keeping with the violator's economic status.

§ 1. The amount of the daily fine mentioned in the opening paragraph of the present article shall be included in the document containing the request of the competent authority.

§ 2. The fine provided for in the present article is calculated daily until ninety days after the date set in the document mentioned in the previous paragraph.

§ 3. The requesting authority is fully responsible for imposing the fine provided for in the opening paragraph of this article.

§ 4. The branch, affiliate, subsidiary or office of the foreign company in Brazil is jointly liable for the payment of the fine provided for in the present article.

§ 5. Should the principal or a third party unjustifiably fail to appear when summoned to provide oral clarification during the course of administrative procedure, preliminary inquiry or administrative proceeding, he shall be subject to fine ranging from R\$ 500.00 (five hundred reais) to R\$ 10,700.00 (ten thousand seven hundred reais) depending on his economic situation, which shall be imposed by means of a notice of violation issued by the competent authorities.

Art. 26-A. Any attempt to impede, hinder or prevent the inspection authorized by SDE or SEAE (the Secretariat for Economic Monitoring - Secretaria de Acompanhamento Econômico) under a preliminary inquiry, administrative procedure or proceeding shall subject the inspected entity to fine ranging from R\$ 21,200.00 (twenty-one thousand two hundred reais) to R\$ 425,700.00 (four hundred and twenty-five thousand, seven hundred

reais), depending on the offender's economic situation, by means of a notice of violation issued by the competent authorities.

Article 27. The penalties provided for in this Law shall apply with due regard for:

I - the severity of the violation; II - the violator's good faith;

III - the advantages obtained or envisaged by the violator; IV - actual or threatened occurrence of the violation;

V - the extent of damages or threatened damages to open competition, the Brazilian economy, consumers, or third parties;

VI - the adverse economic effects on the market; VII - the violator's economic status; and

VIII - recurrences.

CHAPTER IV

STATUTE OF LIMITATIONS

Article 28. (REPEALED).

CHAPTER V CAUSE OF ACTION

Article 29. Injured parties may - for themselves or for the privies under article 82 of Law #. 8078 of September 11, 1990 - defend their individual or diffuse interests in court by way of antitrust measures and the awarding of losses and damages suffered in connection therewith, irrespective of the corresponding administrative proceeding which shall not be stayed in view of the court action.

TITLE VI

ADMINISTRATIVE PROCEEDINGS CHAPTER I

PRELIMINARY INVESTIGATIONS

Article 30. The SDE shall carry out preliminary inquiries, in the discharge of official duty or upon written, justified request by any interested party, when all circumstantial evidence of the infringement of the economic order do not suffice for the institution of an administrative

proceeding. Paragraph 1. During the preliminary inquiries, the SDE Secretary is entitled to take any measures provided for in articles 35, 35-A and 35-B herein, including summoning the principal or third parties to provide explanations in writing or in person.

Paragraph 2. Commencement of administrative proceedings out of formal complaints addressed by the Senate or the House of Representatives is not conditioned to preliminary investigations.

Paragraph 3. At the discretion of the SDE Secretary, preliminary inquiries shall be kept confidential in the interest of the investigations.

Article 31. After conclusion of preliminary investigations within sixty days, the SDE Secretary shall order commencement of a corresponding administrative proceeding or the shelving thereof, subject to ex officio appeal to CADE in this latter case.

CHAPTER II

COMMENCEMENT AND DISCOVERY OF ADMINISTRATIVE PROCEEDINGS

Article 32. Administrative proceedings shall be instituted no later than eight days after cognizance of the underlying fact, formal complaint or closing of the preliminary investigations, as per order issued by the SDE Secretary providing for the facts to be verified there under.

Article 33. The defendant shall be summoned to file a defence within fifteen days. Paragraph 1. The initial summons shall bear the entire tenor of the order providing for institution of the administrative proceeding and the corresponding formal complaint, as the case may be.

Paragraph 2. The defendant shall be first personally summoned by mail against receipt or, in case of failure thereof, by notice published in the Official Gazette of the federal Executive and in a newspaper widely circulated in the state in which the defendant is resident or headquartered, with due regard for the periods required for attachment of the receipt notice or publication, as the case may be.

Paragraph 3. Any summons under subsequent proceedings shall be made by publication in the Official Gazette of the federal Executive, in which the name of the defendant and respective attorney shall be mentioned.

Paragraph 4. The defendant's holders, officers or managers, or duly appointed attorney, may follow up on administrative proceedings, with full access to the case records at SDE and CADE.

Article 34. Failure to file a defence in due course after duly notified to that effect will entail the defendant's judgment by default and acknowledgment of the charges against it/him, subject to all further terms irrespective of prior notice in that respect. The in absentia defendant may take part in any phase of the proceeding without recourse of preceding acts.

Article 35. Upon the end of the period for defence, the SDE shall call for investigations and the production of evidence in the interest of the SDE to be submitted within 15 days. The SDE is also entitled to exercise its fact-finding powers as provided for herein, maintaining confidentiality when necessary.

Paragraph 1. All investigations and evidence gathering procedures called for by the SDE Secretary, including the inquiry of witnesses, are to be concluded within 45 days, with the possibility of a 45-day extension if deemed justifiably necessary.

Paragraph 2. In compliance with the object of the preliminary inquiry, administrative procedure or proceeding, the SDE Secretary is entitled to authorize, by means of a substantiated decision, the inspection of the head office, place of business, headquarter, branch or facilities of the company under investigation. The company shall be given at least 24 hours' notice and the investigation shall not start before 6 a.m. or after 6 p.m.

Paragraph 3. Under the circumstances of the previous paragraph, inventories, objects, papers of any nature, books and records, computers and magnetic files are subject to inspection. In addition, copies of any document or electronic data can be made or requested

Article. 35-A. The Federal Attorney's Office (Advocacia-Geral da União), upon request by the SDE, may ask the courts to issue a search warrant to seize objects, papers of any nature, books and records, computers and magnetic files of individuals and corporations in the interest of the production of evidence under the administrative procedure, preliminary inquiry or administrative proceeding, with the enforcement, when applicable, of the provisions of article 839 and following articles of the Code of Civil Procedure, the proposal of main action being unclaimable.

Paragraph 1. During the course of administrative procedure aiming at the production of evidence for representation to be brought to SDE, SEAE may exercise, when applicable, the powers provided for in the opening paragraph of the present article and in art. 35 herein.

Paragraph 2. At the discretion of SEAE, the administrative procedure mentioned in the previous paragraph may be kept confidential in the interest of the investigations.

Article 35- B. The SDE, on behalf of the Brazilian federal government, may enter into a leniency agreement with individuals or corporations who have committed infringement of the economic order, which will either extinct the punitive action of the public administration or reduce one to two thirds of the applicable penalty, under the terms of the present article, provided that they effectively collaborate with both the investigations and the administrative proceeding and that such collaboration results in:

I - the identification of the co-authors of the infringement; and

II - the gathering of information and documents that are proof of the alleged or investigated infringement.

Paragraph 1. The provisions of the present article are not applicable to corporations or individuals who have been found to be the leaders of the conduct deemed illegal.

Paragraph 2. The agreement mentioned in the opening paragraph of the present article can only be executed if the following requirements are fulfilled cumulatively:

I - the corporation or individual is the first to qualify with regards to the alleged or investigated infringement;

II - the corporation or individual fully stops their involvement with the alleged or investigated infringement as of the date the agreement is proposed;

III - the SDE does not hold sufficient evidence to ensure the condemnation of the corporation or individual at the time the agreement is proposed; and

IV - the corporation or individual confesses to their participation in the infringement and fully collaborates with the investigations and the administrative proceeding by appearing at their own expense and whenever summoned until the conclusion of the proceeding.

Paragraph 3. The leniency agreement entered into by the SDE on behalf of the Brazilian federal government shall stipulate the conditions deemed necessary to ensure the effective collaboration of the beneficiary and the fruitful result of the proceeding.

Paragraph 4. The execution of the leniency agreement is not dependent on the approval by CADE. Nevertheless, at the time of the administrative proceeding trial, after the agreement is complied with, CADE is responsible for:

I - declaring the extinction of the punitive action of the public administration in favour of the offender in the circumstance that the agreement proposal was submitted to the SDE when it was previously unaware of the alleged infringement; or

II - in all other circumstances, reducing one to two thirds of the applicable penalties in accordance with the provisions of art. 27 herein. When deciding on the penalty, CADE must also consider the actual effectiveness of the collaboration and the good faith of the offender in the compliance with the leniency agreement.

Paragraph 5. Under the circumstances of item II of the previous paragraph, the reduced penalty shall not be severer than the mildest of the penalties imposed to the other co-authors

of the infringement taking into account the proportions set for the application of penalties provided for in art. 23 herein.

Paragraph 6. The effects of the leniency agreement shall be extended to the directing and managing staff of the eligible company involved in the infringement provided that they also sign the agreement along with the company and being observed the conditions mentioned in items II to IV of § 2 of the present article.

Paragraph 7. The corporation or individual that fails to obtain eligibility to enter into the agreement described in this article during the course of investigations and the administrative proceeding may enter into another leniency agreement with SDE regarding another infringement that the SDE was previously unaware of before the original case is sent for trial.

Paragraph 8. Under the circumstances of the previous paragraph, the offender shall benefit from a reduction of one third of the applicable penalty in the original proceeding without prejudice to securing the benefits provided for in item I of § 4 of the present article in relation to the new alleged infringement.

Paragraph 9. The proposal mentioned in the present article shall be kept confidential except in the interest of the investigations and the administrative proceeding.

Paragraph 10. The leniency agreement proposal rejected by the SDE Secretary, which shall be kept confidential, does not mean a confession to having committed the infringement or the acceptance of the unlawfulness of the conduct under analysis.

Paragraph 11. The enforcement of the provisions in the present article shall comply with regulation to be issued by the Ministry of Justice.

Article 35-C. In respect of crimes against the economy under Law No. 8137 of 27th of November, 1990, the execution of the leniency agreement, under the terms herein, calls for the suspension of the prescription period and prevents the case from being brought to court.

Sole Paragraph. Upon the fulfilment of the leniency agreement by the offender, the

punishability of the crimes listed in the opening paragraph of the present article is automatically cancelled.

Article 36. Federal authorities, as well as officers of independent agencies, federal government-owned companies and mixed-capital companies, shall render all assistance and collaboration required by CADE or SDE, including as regards preparation of technical reports on the matters under the authority thereof, under penalty of liability.

Article 37. The defendant shall produce any evidence within forty-five days after submission of defence, as well as put forth new documents at any time before the discovery phase lapses.

Sole Paragraph. The defendant may ask the SDE Secretary to set out a date, time and place for hearing of a maximum of three witnesses.

Article 38. The Economic Policy Secretariat of the Ministry of Finance (SEAE) shall be informed by official letter of the institution of any administrative proceedings, and the Secretariat may elect to render an opinion on the matters within its sphere of authority, before the discovery phase lapses.

Article 39. Upon conclusion of the discovery phase, the defendant will be summoned to put forth his/its final arguments within five days, after which the SDE Secretary will issue a substantiated report resolving on forwarding of the case records to CADE for review or shelving thereof, subject to an ex officio appeal to CADE in this latter case.

Article 40. The SDE Secretary, the CADE members, and their civil servants and officials shall exert their best efforts to develop and conclude preliminary investigations and administrative proceedings in the interest of proper expedition as required for clarification of the facts, under penalty of liability.

Article 41. The SDE Secretary decisions cannot be appealed to higher ranks.

CHAPTER III

CADE JUDGMENT ON ADMINISTRATIVE PROCEEDINGS

Article 42. Once the proceedings have been found admissible, the CADE President will randomly distribute such proceedings to the Reporting Official, who will be afforded a twenty day term to render an opinion thereon.

Article 43. The reporting official may order supplementary investigations or request further information pursuant to article 35 hereof, as well as allow for the production of new evidence to the case whenever he/she considers the existing data insufficient for a final determination on the case.

Article 44. Upon invitation of the CADE President in response to an indication of the reporting official, any person may provide CADE with clarifications on relevant matters.

Article 45. Upon board judgments--the date of which will be made known to the parties at least five days in advance--the Attorney General and the defendant, or his/its attorney, will be respectively offered the floor for fifteen minutes each.

Article 46. The CADE decision--which in any event shall be duly substantiated against violations of the economic order--shall contain:

I - a detailed report on the violating acts, and an indication as to the antitrust action to be taken by the proper authorities;

II - the terms for commencement and conclusion of the action referred to in the preceding item;

III - the applicable fine; and

IV - a daily fine to apply while the violation is in effect.

Sole Paragraph. The CADE decision shall be published within five days in the Official Gazette of the Federal Executive.

Article 47. CADE shall monitor compliance with its decisions.

Article 48. Total or partial noncompliance with the CADE decision shall be reported to the CADE President, who will ask the Attorney General to provide for execution thereof via court channels.

Article 49. The CADE decisions shall be taken by majority vote, with the attendance of a minimum of five members.

Article 50. The CADE decisions do not qualify for Executive Branch review; accordingly, any such decisions shall be promptly executed, the Attorney General Office being then advised in this respect for the purpose of taking all legal action within its sphere of authority.

Article 51. The CADE regulations and in-house rules shall further regulate administrative proceedings.

CHAPTER IV

PREVENTIVE MEASURES AND CEASE-AND-DESIST ORDERS

Article 52. The SDE Secretary or reporting official may--upon his/her own initiative or at the request of the CADE Attorney General--adopt preventive measures in any instance of administrative proceedings, whenever there are signs or sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective. Paragraph 1. The preventive measures issued by the SDE Secretary or reporting official shall order prompt cessation of damaging acts and the resumption of the preceding situation, if reasonably feasible, as well as impose a daily fine pursuant to article 25 hereof.

Paragraph 2. The SDE Secretary or CADE reporting official decision on adoption of preventive measures may be voluntarily appealed to the CADE Board within five days, without suspensive effects.

CHAPTER V

CEASE-AND-DESIST COMMITMENTS

Article 53. In any sort of administrative proceedings, CADE may seize from the represented the commitment of cessation of the acts under investigation or of its harmful effects, always when, in the sense of convenience and opportunity, understands that it meets the interests protected by law.

Paragraph 1. The commitment agreement shall provide the following clauses for:

I - The specification of the obligations of the represented to stop the acts under investigation or its damaging effects, as well as obligations considered appropriate;

II - The fixing of the fine value in case of total or partial breach of the committed obligations;

III - The fixing of the value of the contribution to a Fund for the Defence of Diffuse Rights when included appropriate;

Paragraph 2. Dealing with the investigation of infraction related to or stemming from conduct provided for in items I, II, III and VIII of art. 21 herein, among the obligations refer to in item I of paragraph 1 of the article figures, necessarily, the obligation to collect to the Fund for the Defence of Diffuse Rights a value that cannot be inferior to the minimum stated in the article 23 of this law.

Paragraph 3. The signing of the commitment agreement may be proposed until the beginning of the judgment session of the administrative proceeding related to the investigated act.

Paragraph 4. The commitment agreement constitutes an extrajudicial execution instrument.

Paragraph 5. The administrative proceedings will be suspended during the accomplishment of the commitment agreement and will be filed by the end of the fixed term if all the established conditions are attended.

Paragraph 6. The administrative proceedings suspension referred to in the paragraph 5 herein will affect only to the represented which has signed the commitment, while to the other represented parties the proceeding will follow its regular path.

Paragraph 7. Declared the non-fulfilment of the commitment, CADE will apply the sanctions therein stated and will determine the continuity of the administrative proceedings and other appropriate administrative and judicial measures to its execution.

Paragraph 8. CADE may change the commitment agreement conditions if proved an excessive burden to the represented, provided that the changes do not harm third parties or the society.

Paragraph 9. CADE will define the complementary resolution laws about suitability, time and manner of the signing of the commitment agreement of cessation.

Note: Article 53 was changed by law No 11.482/2007

TITLE VII.

MONITORING MECHANISMS

CHAPTER I.

MONITORING OF ACTS AND AGREEMENTS

Article 54. Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Paragraph 1. CADE may authorize any acts referred to in the main section of this article, provided that they meet the following requirements:

- I - they shall be cumulatively or alternatively intended to: (a) increase productivity;
 - (b) improve the quality of a product or service; or
 - (c) cause an increased efficiency, as well as foster the technological or economic development;
- II - the resulting benefits shall be rateably allocated among their participants, on the one part, and consumers or end-users, on the other;

III - they shall not drive competition out of a substantial portion of the relevant market for a product or service; and

IV - only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

Paragraph 2. Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers or -users.

Paragraph 3. The acts mentioned in the opening paragraph include those aiming at any form of economic concentration, be it mergers, incorporations, the creation of a society to control other companies or any other type of corporate grouping that guarantees for the resulting company or group of companies a share of at least 20% of a relevant market, or that results in a gross revenue of R\$ 400,000,000.00 (four hundred million reais) as shown in the most recent financial statement of any of the participating companies.

Paragraph 4. The acts dealt with in the main section of this article shall be submitted to SDE - duly accompanied by three counterparts of the corresponding documentation - in advance or no later than fifteen business days after the occurrence thereof, and SDE shall promptly forward one such counterpart to CADE and another to SEAE.

Paragraph 5. Noncompliance with the deadlines set forth in the preceding paragraph will be punishable with a fine in an amount between 60,000 (sixty thousand) UFIR and 6,000,000 (six million) UFIR, imposed by CADE without prejudice to the opening of an administrative proceeding pursuant to article 32 hereof.

Paragraph 6. Upon receipt of the SEAE technical report issued within thirty days, SDE shall pronounce thereon within this same period and then send the case and evidentiary documents on to the CADE Board, which shall resolve thereon within sixty days. Paragraph 7. The

effectiveness of any acts dealt with in this article will be conditioned to approval thereof, which approval shall be retroactive to the date of occurrence of such acts; if not looked into by CADE within the sixty-day period established in the preceding paragraph, the acts referred to above will be deemed automatically approved.

Paragraph 8. The terms set forth in paragraphs 6 and 7 hereof will be stayed while the clarifications and documents considered essential for review of the case by CADE, SDE or SEAE are not submitted as requested.

Paragraph 9. In the event the acts specified in this article are subject to suspensive conditions or have already caused fiscal or other effects to third parties, the CADE Board--if it elects to deny approval thereof--shall determine that all applicable action be taken to totally or partially revert - by way of dissolution, spin-off or sale of assets, partial cessation of activities, among others - any action or procedure damaging to the economic order, notwithstanding any civil liability for losses and damages caused third parties. Paragraph 10. Without prejudice to the obligations of the parties involved, any change in the stock control of publicly-held companies or registration of amalgamations shall be reported to SDE by the Securities Commission - CVM and by the Brazilian Commercial Registry Department of the Ministry of Industry, Trade and Tourism - DNRC/MICT, respectively, within five business days for the SDE review, if applicable.

Article 55. The approval dealt with in the preceding article may be reviewed by CADE ex officio or at the SDE request, if this approval was based on false or misleading information rendered by the interested party, in the event of default on obligations assumed hereunder, or if the intended benefits have not been attained.

Article 56. The commercial registries or corresponding state entities cannot file any acts related to organization, transformation, amalgamation, merger or grouping of companies, as well as changes in incorporation acts, unless all such acts contain:

I - a clear-cut and detailed statement as to the subject matter thereof;

II - the interest of each partner, and the term for capitalization thereof;

III - full name and identification of each partner;

IV - the place where the headquarters is located and its respective address, including as regards any declared branches;

V - full name and identification of the company's officers; VI - the term of duration of the company; and

VII - the number, type and value of the outstanding stock.

Article 57. Articles of dissolution shall state the reasons thereof, apart from a statement re the amount ascertained among the partners and an indication of the persons that are to assume the company's assets and liabilities.

CHAPTER II

PERFORMANCE COMMITMENT

Article 58. The CADE Board will define performance commitments to be assumed by any interested parties that submitted acts for review pursuant to article 54 hereof, so as to ensure compliance with the conditions established in paragraph 1 thereof.

Paragraph 1. Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

Paragraph 2. Performance commitments shall provide for volume or quality objectives to be attained within predetermined terms, compliance with which will be monitored by SDE.

Paragraph 3. Failure without good cause to comply with performance commitments shall cause the CADE approval to be revoked pursuant to article 55 hereof, followed by the opening of an administrative proceeding for the adoption of the applicable measures.

CHAPTER III CONSULTATION

Article 59. (REPEALED)

TITLE VIII

COURT EXECUTION OF CADE DECISIONS CHAPTER I

PROCESSING

Article 60. The CADE Board decisions imposing fines, as well as obligations to do or not to do, constitute an extrajudicial execution instrument.

Article 61. Executions exclusively intended to collection of fines shall be carried out pursuant to Law # 6830 of September 22, 1980.

Article 62. In the event of executions intended to collection of fines and compliance with obligations to do or not to do, the courts shall order specific performance of any such obligations, or otherwise provide for acts that ensure an outcome equivalent to compliance therewith in practical terms.

Paragraph 1. An obligation to do or not to do can only lead into a suit for losses and damages its specific performance or obtainment of an equivalent outcome in practical terms is not possible.

Paragraph 2. Losses and damages shall be paid without prejudice to any applicable fines.

Article 63. Execution shall be carried out by all means, including by way of intervention in the company, if necessary.

Article 64. The CADE decisions shall be executed at the federal courts of the federal district, or at the courts with jurisdiction over the executed party's headquarters or domicile, at the CADE discretion.

Article 65. Motions or like action against an execution instrument shall not stay the execution itself, unless an amount corresponding to the fines imposed is deposited in court, and a bond is posted as determined by the courts to ensure compliance with a final decision on the case, including as regards daily fines.

Article 66. Depending on the severity of the violation of the economic order, and should there be sound reasons to believe in irreparable or substantial damages, the courts may order prompt adoption of all or a portion of the action required under the execution instrument, notwithstanding the deposit of fines in court or the posting of bonds.

Article 67. Daily fines on an ongoing violation shall be apply as from the deadline established by CADE for voluntary compliance with the CADE decision, up to the day of actual performance thereof.

Article 68. The execution of CADE decisions shall be afforded priority over other kinds of action, except for habeas corpus and writ of mandamus.

CHAPTER II

JUDICIAL INTERVENTION

Article 69. The courts shall order intervention in a company whenever required to ensure specific performance hereunder, and appoint a receiver.

Sole Paragraph. The court decision on intervention shall be duly substantiated, as well as accurately establish the action to be taken by the appointed receiver.

Article 70. If the executed party rebuts a court-appointed receiver within forty-eight hours on the arguments of ineptitude or lack of good standing, and if this claim is duly evidenced in three days, the courts shall render a decision thereon within this same period.

Article 71. If the rebuttal is granted, the courts shall appoint another receiver within five days.

Article 72. The intervention may be terminated early if the obligation that gave rise thereto has been proven complied with in full.

Article 73. The court intervention shall be limited to those acts required for compliance with the court decision that gave rise thereto, and shall be effective for a maximum period of one hundred and eighty days; the receiver shall be held liable for his/her acts and omissions,

especially in the event of abuse of power and departure from the original purposes of his/her appointment.

Paragraph 1. The receiver will be subject to articles 153 through 159 of Law # 6404 of December 15, 1976, to the extent applicable.

Paragraph 2. The receiver will be entitled to a compensation stipulated by the courts, which may replace him/her at any time and whenever the receiver becomes insolvent, is charged with active or passive corruption or malfeasance in office, or violation of his/her duties.

Article 74. The courts may withdraw the company's managers from their duties if they are proven preventing performance of acts incumbent on the receiver. Any such managers shall be replaced as provided for in the company's bylaws or articles of association.

Paragraph 1. If any managers still prevent the receiver from taking proper action after adoption of the procedures set forth in the main section of this article, then the courts shall proceed as per paragraph 2 below.

Paragraph 2. If a majority of the company's managers deny assistance to the court appointed receiver, the courts shall order that the receiver take over the company's management.

Article 75. The receiver shall:

I - perform or order performance of all acts required under the execution process;

II -advise the courts of any irregularities committed by the company's management and of which the receiver may become aware; and

III - submit to the courts a monthly report on his/her activities.

Article 76. The expenses arising from the intervention hereunder shall be borne by the executed party.

Article 77. Upon lapse of the intervention, the receiver shall provide the federal courts with a detailed report on his/her action, and either propose the dismissal or shelving of the case or

ask for an extension of the intervention period should the execution decision have not been fully performed in due course.

Article 78. Whoever opposes or prevents any intervention or, after termination thereof, performs any acts that directly or indirectly annul its effects in whole or in part, or even fails to comply with legal orders from the court-appointed receiver, will be held criminally liable for resistance, disobedience or coercion under the execution process, pursuant to articles 329, 330 and 344 of the Penal Code.

TITLE IX

FINAL AND TEMPORARY PROVISIONS

Article 79. (VETOED)

Sole Paragraph. (VETOED)

Article 80. The CADE Attorney shall henceforth become an Attorney General official duly commissioned to the independent agency created hereunder, jointly with the CADE President and Board Member positions.

Article 81. The Executive Branch shall send to the Congress within sixty days a bill of law on the permanent staff of the new independent agency, as well as on the duties and compensation applying to the CADE President, the Board Members, and the Attorney General.

Paragraph 1. While CADE is not provided with staff of its own, civil servants may be temporarily assigned to this independent agency by commission or otherwise, without prejudice to the remuneration and other benefits originally afforded thereto, including for the purpose of representing this independent agency in court.

Paragraph 2. The CADE President shall prepare and submit to the Board for approval a list of servants required for the independent agency, who may be placed at SDE disposal.

Article 81 -The Administrative Council for Economic Defence - CADE, according to the article 37, item IX, of the Brazilian Constitution and in attention to the contents of the Law 8.745 of December 9th, 1993, may hire for a determinate period of time, 12 (twelve) months, technical personnel essential to the development of its institutional scope, not exceeding 30 people.

Sole Paragraph. The referred contracting caput may be postponed as long as its total duration does not surpass the time span of 24 (twenty four) months, with its validity limited in any situation to December 31st of 2005. It will take place through a simplified selective process, which must comprehend a written exam and an optional CV analysis without loss of others.

Article 82. (VETOED)

Article 83. The Code of Civil Procedure, as well as Laws # 7347 of July 24, 1985 and 8078 of September 11, 1990, also apply to the administrative and court proceedings set forth herein.

Article 84. The fines provided for herein shall be converted into Brazilian currency on the date of actual payment thereof, duly collected to the Fund dealt with in Law # 7347 of July 24, 1985.

Article 85. Article 4, VII of Law # 8137 of December 27, 1990 shall henceforth read as follows:

"Article 4. (...)

VII - increase without good cause the price of a certain product or service, in view of one's market control."

Article 86. Article 312 of the Code of Criminal Procedure shall henceforth read as follows:

"Article 312. - Preventive imprisonment may be decreed so as to safeguard public or economic order in the interest of the criminal process, or to ensure enforcement of criminal

laws, whenever a crime was proven committed, or if there is sufficient evidence as to its perpetrator. "

Article 87. - Article 39 of Law # 8078 of September 11, 1990 shall henceforth read as follows, with the additional items below:

"Article 39. The supplier of a certain product or service cannot, among other abusive practices:

(...)

IX - refuse to sell products or render services directly to whomever is willing to purchase them against prompt payment, except for intermediation cases duly regulated by special laws; and

X - increase without good cause the price of a certain product or service."

Article 88. - Article 1 of Law # 7347 of July 24, 1985 shall henceforth read as follows, with the additional item below:

"Article 1. - Without prejudice to class actions, this Law applies to actions for moral and property damages arising from:

(...)

V - violation of the economic order."

Sole Paragraph. Article 5, II of Law # 7347 of July 24, 1985 shall henceforth read as follows:

"Article 5. (...)

II - include in its institutional purposes the protection to the environment, consumers, economic order, open competition, or the artistic, aesthetic, historical, tourism, and landscape heritage;

(...) "

Article 89. CADE shall be invited to take part as assistant in court actions involving application of this Law.

Article 90. The periods for consultations submitted under article 74 of Law # 4137 of September 10, 1962, as amended by article 13 of Law # 8158 of January 8, 1991, are hereby interrupted, with due regard for Title VII, Chapter I hereof.

Article 91. This Law does not apply to dumping and subsidies cases dealt with in the Accords for Implementation of Article VI of the General Agreement on Customs Tariffs and Trade, duly enacted by Decrees # 93941 and 93962 of January 16 and 22, 1987, respectively.

Article 92. All provisions to the contrary are hereby revoked, as are Laws # 4137 of September 10, 1962; 8158 of January 8, 1991; and 8002 of March 14, 1990, except for article 36 of Law # 8880 of May 27, 1994, which remains effective.

Article 93. This Law takes effect on the date of its publication.

ITAMAR FRANCO President of the Republic

ALEXANDRE DE PAULA DUPEYRAT MARTINS Minister of Justice

R. Dir. Econ., Brasilia, ago./dez. 1998 25

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