CADE'S APPLICATION OF PECUNIARY PENALTIES AND PUNITIVE MEASURES: THE NEED OF ASCERTAINING ITS "STATE OF RIGHTNESS"

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The application of a pecuniary penalty is the main mechanism that CADE (Brazil's antitrust authority) has with which to punish companies found guilty of anticompetitive behavior and to deter these agents, and other potential infringers, from engaging in future illicit acts. And considering that CADE has imposed more and more of these fines in recent years – in 12 years, the amount of pecuniary penalties imposed by CADE increased around 13 times[1] –, we can see that its methodology for calculating such penalties is of crucial importance.

Article 37 of Brazil's Antitrust Act (Law 12,529/2011)[2] establishes that a company found guilty of antitrust violations will be subject to a fine of 0.1% to 20% of its gross revenues – specifically, those deriving from the offending business area and earned during the fiscal year just prior to the start of the administrative proceeding (the "gross revenues criterion"). Moreover, the article establishes that such a fine may never be less than the amount of gains

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1 Between 2002 and 2004, CADE imposed BRL 16,7 million in fines for anticompetitive conduct, while in 2016, this amount reached BRL 214 million (BRAZIL. MINISTRY OF JUSTICE. CADE. Management Reports from 2007 and 2016).

2 Law 12,529/2011 (Brazil's Antitrust Act) – Article 37. Antitrust violations will be subject to the following penalties: I – in the case of corporations: a fine of 0.1% to 20% of annual gross revenues of the corporation, group or conglomerate during the fiscal period preceding the start of administrative proceedings, in the business area where antitrust violations took place and which may never be less than the advantage obtained, provided it can be estimated.

improperly made from the infringement (the "advantage-obtained criterion"), *provided that such an amount can reasonably be estimated* (my italics).

With respect to the "gross revenues criterion" established at the beginning of article 37, CADE has been consistent in its decisions: fines levied upon companies that had violated antitrust law have unfailingly been a percentage of the designated year's gross revenues. Nevertheless, in recent years, lawyers, scholars, and CADE itself have been locked in a heated debate centered on CADE's apparent negligence vis-à-vis the estimation of the advantage obtained in cartel cases: from 1996 through 2013, in only 17% of cartel convictions did the antitrust authority even bother to estimate the advantage the cartelists obtained through their misconduct[3]. Only gross revenues were considered. Therefore, although CADE's fines have always followed to the letter article 37's gross-revenue aspect, thus establishing a vast number of precedents, antitrust community, especially CADE commissioners, have yet to come to any real consensus on how to punish wrongdoing.

That is because certain variables and distortions have made the fair application of punitive measures much harder to achieve than a superficial reading of article 37 might indicate. Take the socially beneficial "advantage-obtained criterion": by confiscating profits obtained through anticompetitive violations and imposing a fine, it aims to send present and potential offenders a clear message that "crime does not pay" – the deterrent effect. Moreover, since economic theory suggests that only 10-33% of cartels are ever caught[4], theoretically CADE should make an example of every malefactor: fines greatly inferior to the advantage obtained will (from a rational economic-behavior point of view) merely encourage economic agents to practice illicit behavior, provided it is feasible in the relevant market structure.

However, this criterion runs up against procedural difficulties. First, the estimation of a *specific* commercial gain resulting *exclusively* from the antitrust contravention demands information of difficult access – e.g., detailed datasets on the actual prices charged and volumes of output produced, as well as structural features of the market, such as the number of competing firms and

3 Santos, 2016: 173.

4 "Economic theory suggests that only 10-33 percent of illegal cartels are caught. Connor and Lande, 2006 cite several surveys that state probabilities of detection between 10 and 33 percent. A survey by Combe et al., 2008 for the European Market results in probabilities between 12.9 and 13.3 percent." SMUDA, Florian. *Cartel Overcharges and the Deterrent Effect of EU Competition Law*. ZEW – Centre for European Economic Research, Discussion Paper No. 12-050, 2012.

their relative sizes. In addition, any of several accepted methods and models (before-and-after method, statistical modeling, yardstick method, overcharges derived from costs of production or profits, and others) – each possibly resulting in a different number[5] – may be used to build a counterfactual scenario to imagine what the numbers would be in the market in general had the infringement never existed.

Such "deal breakers," in CADE jargon, are the main reason for the supremacy of the "gross revenues criterion." CADE's commissioners argue that properly calculating advantage obtained requires financial and human resources (it was estimated the need of three CADE's economists in addition to the reporting-commissioner and his two-member staff[6]) that the authority, chronically short-handed and under-funded, simply cannot afford. Moreover, the commissioners argue as well that until concrete evidence proves otherwise, it must be assumed that their current *modus operandi* is indeed deterring future misconduct.

The fact that estimating the advantage obtained from anticompetitive infringements entails hard work is not a valid reason to avoid doing it: the benefits of a fair but implacable competition policy are manifold. Nevertheless, it is also necessary to consider that CADE, in its historical and present-day context, is stretched to the limit in addressing numerous other legitimate topics related to the implementation of antitrust policy in Brazil. In addition, relying on only one of several accepted methods and models to estimate the advantage obtained may encourage appellate judges to overturn CADE's rulings; this in turn can undermine CADE's effectiveness in deterring anticompetitive behavior and discredit its decisions before the Judiciary and society in general.

In an informal but very real sense, it is not that CADE is necessarily wrong, we just do not know whether it is right. And ascertaining that "state of rightness," or at least creating conditions to achieve it, must not be delayed. Therefore, to guarantee both the effectiveness of CADE's punitive efforts and the enhancement

5 "The most widely used is the before-and-after method, in which the price during the episode is compared to one of three but-for or base prices. The second most popular method is statistical modeling, which accounts for 20% of the estimates. The yardstick methods accounts for about 10% of the sample. Overcharges derived from costs of production or profits are the least frequently employed method (about 3%)." Connor and Lande, 2008.

6 "It was estimated the need of three CADE's economists in addition to the reporting-commissioner and his two-member staff." Commissioner Paulo Burnier da Silveira's Dissenting Vote, Administrative Proceeding nº 08012.002568/2005-51.

of its reputation, I suggest the following measures: In Brazil's top universities, undergraduates and graduate students, led by professors and CADE personnel, could undertake a nationwide research effort to get hard facts on *every* cartel process and resultant CADE decision. This would establish a public database that could help to pinpoint strengths and weaknesses in methodologies and establish once and for what way or ways can most effectively estimate the advantage obtained, in cases both judged and to be judged by CADE. Such an *ex post* evaluation would comprise establishing a consensus-based preferred method to calculate the illicit advantage, revisiting all past decisions and calculating the infringement-generated commercial gains in each specific case, and then comparing those new numbers with the fines imposed by CADE. The result would provide CADE the legal certainty that the imposed fines either have or have not included fair elements of punishment for the detected misconduct and have or have not provided a deterrent for future misconduct. With such knowledge, CADE can do its job and be respected and juridically unassailable in the application of penalties.

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