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QUESTIONNAIRE ANSWERS¹

1. Please identify the statutory provisions concerning discrimination in your competition legal framework, as well as the potential soft law provisions that are relevant for discrimination cases.

The Brazilian positive law in article 36, paragraph 3, items III, IV, V, IX, X, XI, XII, XVII and XIX, of the Law 12.529 / 2011 (LDC)² provides that the practice of discriminatory conduct is an infringement of the economic order (antitrust violation). Contrary to what happens in other jurisdictions, Brazilian antitrust authority has not been devoted to the same degree as other countries in the discipline of vertical discrimination. Brazilian antitrust authority, following its tendency, as can be said, to avoid the confrontation of vertical conduct, which usually comes to the system by private demands and, which are largely filed, did not provide in its guidance on discriminatory behaviors, nor did it elaborate guidelines on the subject.

2. Which types of discriminatory practices (if any) are specifically mentioned in your competition legal framework?

The provisions found in Law 12.529 / 2011, clearly influenced in the caption of article 36 by the TCE text (the prior art. 85, 1, after 81.1, now renumbered only to 101.1) provide that the following practices infringe the economic order: to limit or prevent new companies from accessing the market; create difficulties in setting up, operating or developing a competitor or supplier, purchaser or financier of

¹ This work had the contribution of the debates under the auspices of the Antitrust Commission of the Brazilian Bar Association, Section of the Rio de Janeiro State, and the cooperation of the trainee in law Manuela dos Santos Severino.

² Art. 36. Infringement of the economic order, regardless of guilt, are acts in any form manifested, which have as their purpose or may produce the following effects, even if they are not achieved:

§ 3 The following behaviors, as well as others, to the extent that they constitute the hypothesis provided in the caput of this article and its items, characterize the violation of the economic order:

X - discrimination against purchasers or suppliers of goods or services by means of differentiated pricing or operating conditions of sale or provision of services;

XI - refusing the sale of goods or the rendering of services, within the normal payment conditions to commercial usages and customs;

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goods or services; to prevent competitor access to input sources, raw materials, equipment or technology, as well as distribution channels; to discriminate against purchasers or suppliers of goods or services by differentiated pricing or operating conditions of sale or provision of services; to refuse the sale of goods or the rendering of services, under normal payment terms to commercial customs and practices; to hinder or disrupt the continuation or development of indefinite commercial relationships due to the other party's refusal to submit to unjustifiable or anti-competitive commercial terms and conditions; to make the sale of a good subject to the purchase of another or the use of a service, or make the provision of a service subject to the use of another or the purchase of a good.

3. Is there other provisions covering the issue of discrimination in your commercial or business law that do not belong to competition law framework (i.e. provisions that predominantly pursue an objective different from that pursued by Article 101 and 102 of the Treaty on the Functioning of the European Union – thereafter "TFEU")?

The Brazilian Consumer Protection Code, Law 8,078/1990, in its article 39, items I, II and IX³, lists some conducts of discriminatory character as abusive practices prohibited to suppliers of products and services. These items were worded by Law 8,884/1994.

It is noteworthy that this practice of coordinating consumer law with competition law is recurrent in many legal systems around the world, not being peculiar to Brazil alone.

Law 12,865/2013 in its article 7, clauses III and IV⁴, presents as principles to be observed by payment arrangements and payment institutions the non-

³ Art. 39. The supplier of products or services is prohibited, among other abusive practices:

I - to make the provision of a product or service conditional on the provision of another product or service and, without cause, with quantitative limits;

II - to refuse to meet the demands of consumers, to the exact extent of their availability of stock, and also in accordance with uses and customs;

IX - to refuse the sale of goods or the rendering of services, directly to those who are willing to purchase them upon prompt payment, except in cases of intermediation regulated by special laws;

⁴ Art. 7 Payment arrangements and payment institutions shall observe the following principles, according to parameters to be established by the Central Bank of Brazil, in compliance with the guidelines of the National Monetary Council:

III - non-discriminatory access to services and infrastructure necessary for the operation of payment arrangements;

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discriminatory access to services and infrastructures necessary for the operation of payment arrangements and meeting the needs end-users, in particular freedom of choice, security, protection of their economic interests, non-discriminatory treatment, privacy and protection of personal data, transparency and access to clear and complete information about the conditions of service provision.

4. Does your competition courts/authorities have received complaints or investigated on their own initiative both "primary-line" and "secondary line" abusive discrimination conducts?

The Brazilian Antitrust Competition Authority - CADE, is responsible for investigating and prosecuting such practices. The jurisprudence⁵ of the entity confirms the analysis of discriminatory practices in the Brazilian market arising from external and ex officio complaints.

5. If yes, could you (i) indicate whether they reached any decision and (ii) provide us with figures (or best estimate) of the importance of these cases compared to the number of decisions that have been adopted on the basis of Articles 102 TFEU (or its equivalent under national law) by your national authority (and courts if any)?

The antitrust authority examined the following cases for, among other practices, discriminatory conduct: 08012.008024/1998-49 (SDE ex officio e Microsoft Informática Ltda.); 08700.009588/2013-04 (Sindicato das Empresas de Transportes de Carga de São Paulo e Região x ECT); 08700.002600/2014-30 (Companhia de Gás de São Paulo X Petróleo Brasileiro S.A.); 08700.011835/2015-02 (BT Brasil Serviços de Telecomunicações Ltda. X Claro S.A., Oi Móvel S.A. e Telefônica Brasil S.A.); 08700.001860/2016-51 (CADE ex officio x Banco do Brasil, Banco Bradesco S.A. e Itaú Unibanco S.A.); 08012.011881/2007-41 (Companhia de Gás de São Paulo - "Comgás" X Petróleo

IV - meeting the needs of end-users, in particular, freedom of choice, security, protection of their economic interests, non-discriminatory treatment, privacy and protection of personal data, transparency, and access to clear and complete information about the conditions of service provision;

⁵ Administrative Inquiry No. [08700.001860/2016-51](#); Administrative Proceeding: [08012.004551/2005-38](#)

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Brasileiro S.A. - “Petrobras”, White Martins Gases Industriais Ltda. - “White Martins” e GNL Gemini e Comercialização e Logística de Gás Ltda. - “GásLocal”).

No mention was made of the European legal standard in any of the above cases, nor its application. In spite of the fact that the Brazilian legislator was inspired by the points and commas of the Rome Treaty, the Brazilian police maker resists the use of European competition law, despite using as if, under domestic law, tests of US decisions.

6. When your competition authorities or courts have adopted specific decisions, could you indicate:

- a) **How many decisions give rise to sanctions? Could you distinguish between first line and second line discrimination?** To answer this question we will address some cases involving discriminatory practices that were considered by the Brazilian competition authority, or are under analysis, namely: Embratel, Intelig X Telemar; Companhia de Gás de São Paulo – Comgás x Petróleo Brasileiro S.A. ((Processo Administrativo nº 08700.002600/2014-30); Nu Pagamentos S.A. x Banco do Brasil S.A.; Banco Bradesco S.A.; Caixa Econômica Federal; Itaú Unibanco S.A.; and Banco Santander Brasil S.A;

The first of these was an administrative proceeding in which Telemar complained of the practice of artificially increasing competitors' costs by holding essential input, cross-subsidization and price discrimination. This case dealt with second-line discrimination and was filed unanimously by the CADE Court, for not proving the practices complained of.

The second case concerns sham litigation and abuse of industrial property rights. Such behaviors fit the definition of first-line discrimination under this questionnaire. In this case, Representative Warie Industrial Ltda. EPP denounced to CADE that the Representatives, JJGC Indústria e Comércio de Materiais Dentários S.A. and Straumann B.V would seek to achieve exclusivity and artificially raise barriers to entry into the dental implant market by using null, nullable or non-existent intellectual property rights based on conceptions in the public domain. In addition, the

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Representatives would also use judicial and administrative measures to distort competition by abusing their right to petition. CADE's General Superintendence recommended that this case be dismissed, as it was a private matter. However, the case was raised by a Court counselor, requiring further steps to be taken to hear the implant market. Thus, the Court's position regarding the new elements brought from this new diligence is awaited. The third case to be cited has not yet been concluded and concerns price discrimination and contracting conditions in the supply of natural gas by Petrobras to piped gas distribution concessionaires. In it, Petrobras would have granted unilateral discounts on the price of natural gas to only one type of contract, generating a competitive advantage to its subsidiary over the Representative. The rapporteur of the case recommended the filing of the case, alleging that there was no violation of the economic order.

The latter case is the result of recent action by CADE, which has filed a lawsuit seeking to analyze a complaint of discriminatory conduct of traditional banks against the incoming Nubank. In a nutshell, the Representatives misused their dominant positions in the banking market by refusing or acting discriminatory in hiring debit and intraday statement services, with the intention of harming Nubank.

- b) **Could you indicate the amount of fines that has been applied and whether the authorities/courts are more strict for one type of discrimination compare to the other one?**

Given the policy option of the policymaker not to give prominence to the administrative control of vertical acts and agreements, there are no guidelines that indicate different analysis criteria for both situations. This scenario tends to be reproduced in the meager decisions arising from complaints of individuals who, for the most part, tend to be shelved due to lack of evidence or the fact that the authority tends to perceive vertical behaviors (acts and agreements) as private issues.

- c) **Did they impose specific injunctions or remedies in addition or in substitution of fines? If yes, could you describe the remedies that**

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have been imposed (what kind of remedies, what was their objectives, etc...)?

In cases involving investigations of discriminatory conduct, it is possible to identify a tendency of the Brazilian antitrust authority to enter into Termination Commitment Terms - TCTs with the agents involved. In these agreements, CADE provides for the recognition of participation in the discriminatory conduct by the agents, imposes fines on them, as well as the cessation of practices determined by the administrative inquiry.

7. Under which conditions are discriminatory practices assessed by your national courts and authorities?

The Administrative Council for the Defense of Competition (CADE) understands that discriminatory conduct is not necessarily an antitrust offense and thus does not fit the classic definition of illicit by object. The jurisprudence of the municipality indicates that other aspects must be considered for these behaviors to gain contours and anti-competitive effects.

8. Can you give details on (a) the criteria applied by your national courts and authorities to establish the equivalence of the purchaser situations and transaction conditions (b) the tests used to assess the dissimilarity of transaction conditions? (Does that pertain to the nature of products supplied, their substitutability, the relation of prices to costs etc.)

In recent proceedings arising from allegations of discriminatory practices carried out in the domestic market, CADE stated that in order to delimit price discrimination, several factors should be considered as (i) the contemporaneousness of the various sales, (ii) the similarity (iii) the category of buyers, (iv) the geographic location of the buyer, (v) the quantity purchased and (vi) other factors that justify price differentiation. Having made this delimitation, the jurisprudence has established that for the characterization of anti-competitive offense, based on discriminatory conduct, the following requirements must be observed: (i) the discriminating economic agent must have a dominant position in the relevant market of origin; (ii) there must be potential damage to free competition; and (iii) there should be no objective justifications for the practice that demonstrate legitimate economic rationality in the conduct. Thus, it is

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possible to conclude that the agency makes a global analysis, taking into account the effects of the conduct and the possible efficiency gains resulting from it. Thus, it is not enough for discrimination to take place.

9. Is the analysis of the abuse of discrimination prohibited by itself or do legal provisions and/or case law impose an analysis of the effects of the practice?

Under the terms of the caput of Article 36 of the LDC, discriminatory practices are unlawful, regardless of guilt, in so far as they have as their purpose or may produce anticompetitive effects. Thus, the conduct of discriminatory conduct or conduct that produces this effect would already configure the illicit, dispensing with analysis of the effects. However, CADE does not interpret the law strictly, taking into account other factors, such as whether a discriminatory conduct produces benefits or gains.

10. In the second case, do your courts and competition authorities appraise the effects of discriminatory practices?

- **Do they look at actual effects or potential effects?**
- **What are the typical indicators used to demonstrate (actual) effects?**
Has the assessment of the effects of the practice evolved over time?

As answered in the previous item, the Brazilian antitrust authority analyzes the effects of discriminatory practices to consider them an antitrust offense. In the case involving Sindicato das Empresas de Transportes de Carga de São Paulo e Região and Empresa Brasileira de Correios e Telégrafos (Administrative Inquiry No. 08700.009588/2013-04), CADE's General Superintendence analyzed the products involved in discriminatory practice, the scale of and regularity of their demand, as well as the existence of reduction in the cost of service through the adoption of discriminatory practices. The conclusion, in this case, was that the determination made by the agency did not show any plausible economic justification for the discriminatory conduct, reflected in the refusal to contract, undertaken by the represented company.

11. What are the typical foreclosure behaviours that have been grasped under your national provisions (if any) sanctioning discriminatory practices

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(for example, price discrimination, quantity discrimination, discrimination in the access to an essential facility, etc)?

Law 12.529/2011 provides in its article 36, the conducts that constitute violation of the economic order, as already mentioned. From § 3 it is possible to identify the market foreclosure conduct that the national legislature sought to include as an antitrust offense in our system. Items III, IV and V deal with behaviors that impede competitors' access to the market, preventing them from developing, constituting, having access to inputs, infrastructure, and technology.

These conducts relate to the concept of essential facility and from this, we can identify typical market foreclosure behaviors associated with discriminatory practices.

In addition to the referenced conducts, others are described in items X, XI, XII, XVII, and XIX, which provide, by way of example, refusal to contract, price and sale conditions discrimination, as well as abuse of industrial property rights.

12. If these practices were also identified as specific types of abuses, such as rebates, refusal to deal, predatory pricing, etc, have your courts/competition authorities also relied on the tests applicable to these specific practices or only on the applicable test to discriminatory practices?

The Brazilian antitrust authority, when conducting the investigation and judging the cases under its tutelage, uses various tests to assess whether the reported practices occurred and had adverse effects on the competitive environment in which they were developed. In the case of sham litigation, for example, tests such as PRE and POSCO are used specifically. These would not serve as a method of analysis of other conducts.

13. Do you consider that the analysis of the effects of discrimination abuses should follow or match the analysis of the effects of other types of abuses (often stricter)?

Considering that in assessing the effects of discriminatory practices the Brazilian antitrust authority analyzes whether or not there is a dominant position, as well

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as the degree of concentration of the markets, it can be said that the analysis of discriminatory effects is similar to those performed for other types of abuse, at least in part.

14. Have you met specific cases in which national courts/competition authorities assessed a discriminatory behaviour yet without resorting to specific discriminatory provisions (possibly resorting to other Art. 102 provisions), for instance because the legal framework was not sufficiently helpful or past case law was too scarce? (for example, in the Google Shopping case, the Commission, although it has considered that Google treated differently its competitors against its own services, did not rely on Article 102 (c) of the TFEU, but rather it sanctioned Google because of the leveraging effect its conduct had on another market).

CADE's General Superintendence, pursuant to Administrative Proceeding 08012.010483/2011-94, investigated certain business conduct of Google Inc. and Google Brasil Internet Ltda., in light of indications of economic violations. In drafting a technical note giving an opinion on the case, it was made a collection of the behavior of other jurisdictions around the world facing similar allegations involving these companies.

In an item to report on European positioning, the document refers to a violation of Article 102 of the EU Treaty, as Google Inc. placed and displayed more favorably on its general search results pages, Google Inc.'s own price comparison service compared to competing price comparison services. However, CADE's entity did not use the legal provision as the basis for its decision, as it understood that there was no causality between Google's practices and possible losses to the market.

15. What are the typical exploitative abuses that are meant to be captured through your national provisions (if any) sanctioning discriminatory practices?

Article 36 of Law 12.529/2011, as stated above, lists a series of conducts that constitute an infringement of the economic order. Regarding discriminatory practices, the standard provides, among other behaviors, for repression,

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differentiated pricing, refusal to contract sales and services and obstructing competitors' access to essential facilities.

16. What kind of exploitative discriminatory practices has been most analysed and/or sanctioned by your national courts/authorities?

Discriminatory refusal to contract practices, including essential facilities, and the establishment of exclusivity agreements are recurring in the case-law of the Brazilian antitrust authority.

17. Would you say that the developments of the digital economy, thanks to which is now easier to discriminate, especially because of the algorithms and prevalent personalized pricing, have added to concerns to discrimination as exploitative abuse? Have your national courts/authorities been more preoccupied or alerted with these behaviours in recent years? Is there any on going investigation in relation to this?

It can be concluded that discriminatory behaviors in the digital market are a real risk and end up lighting the warning signal in CADE. In the recent case of the use of unfair parity clauses in contracts with hotel chains for the use of Booking, of Decolar and Expedia internet sales platforms, the Brazilian antitrust authority has faced this reality.

In addition, behaviors such as geopricing and geoblocking are beginning to emerge, see the case Decolar.com judged by the Department of Consumer Protection(DPDC), an agency of the Brazilian Ministry of Justice, indicating that such behaviors should be in the sights of the authorities competent to sue them.

18. Have you met (i) cartel, (ii) other kind of horizontal agreements or (iii) vertical restrictions cases dealing explicitly or implicitly with the notion of discrimination? (e.g. geographical discrimination, pricing discrimination, discrimination in the access to an organization or an association, criteria for accessing a distribution network, etc...)

The case is being prosecuted by the Brazilian antitrust authority through Administrative Proceeding No. 08700.011835/2015-02 in the case of coordinated

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conduct of telecommunications companies, through the practice of unilateral price discrimination and refusal to contract conducts. The companies represented acted in consortiums in public tenders to provide data communication services to Federal Administrative agencies and, to hinder the participation of other companies in the events and to benefit the group participants, they would have adopted practices of discrimination and refusal to contract with other competitors. In addition to this case, the municipality addressed vertical integration from Consórcio Gemini, in Administrative Proceeding No. 08012.011881/2015-41. In this case it was evidenced that there was discrimination on the part of Petrobras, in favor of the members of said Consortium in three ways: supplying natural gas at a lower value than that practiced in the market, establishing a set of more advantageous contractual clauses and closing the market by capturing the so-called anchor clients.

19. If yes, what are the typical cases of discriminatory practices dealt with under the provisions related to anticompetitive agreements?

In article 36 of Law 12.529/2011, mentioned above, we have, in item I, subparagraphs “a”, “b”, “c”, “d”, the conducts that from the agreement between competitors may constitute discriminatory practices. (IS IT NECESSARY TO COMPLEMENT?)

20. Could you describe the conditions (the tests) under which such discriminatory practices have been assessed by your national authorities/courts? Do these tests or conditions differ (and to what extent) from the tests and conditions used in relation to 7 EUS\351025689.01 the ones used under abuse of dominant position cases (as indicated in your previous answers)? Please be specific and illustrate as far as possible your answer.

As the dominant doctrine provides and accompanies the Brazilian antitrust authority, for a discriminatory conduct to be considered antitrust illicit it is necessary to consider other aspects of the context in which it was perpetrated, such as the existence of a dominant position of the perpetrator, existence of economic efficiencies, etc.

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21. Can you think of any circumstances in which discrimination has been discussed or taken into account in the competitive analysis of mergers?

In the case of the merger that gave rise to the aforementioned Consórcio Gemini, the Brazilian antitrust authority imposed restrictions on its approval, envisaging the potential for discriminatory conduct from the natural gas market. The requirement to publicize Petrobras' contractual gas supply conditions to the Consortium and its financial statements, as well explained by Paulo Burnier, Reporting Counselor of the proceeding that determined the discriminatory conduct resulting from this consortium, "was not intended to change the structure of pricing, but was intended to monitor the market for any discriminatory practices".

Regarding vertical integrations, Brazilian jurisprudence seeks to assess the net effects of mergers, weighing their competitive risks and their potential efficiencies. Considering that a number of discriminatory practices may occur in the context of verticalization, such as refusal to engage with competitors who need an important asset for their business,

Thus, we can see that the Brazilian antitrust authority discusses and considers discriminatory practices when performing its function of controlling structures.

22. For example, in the framework of the economic analysis of mergers, have you met circumstances where your national authorities have taken into account the ability of the merged entity to price discriminate (for the definition of relevant markets, the analysis of the market power of firms and the assessment of the effects of the merger, claimed efficiencies etc)?

In order to determine whether or not a market agent will be able to harm competition by certain practices, the standard analysis of the Brazilian antitrust authority involves the delimitation of the relevant market, market concentration analysis, as well as the place occupied by the investigated agent in the dynamics of the respective sector.

23. Under European law, some justifications to price discrimination are admitted (costs reduction and volume discounts, price reductions in return

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for services rendered (with conditions), new products and new markets (when a firm is launching a new product or entering a new market is represents a short term effort to increase demand for the new product), fixed costs recovery, charges according to intensity of use or value in use, price reductions for "special customer status", etc.). Do your national provisions or case law recognise that any such factor, alone or in combination with others, could justify discriminatory practices?

Brazilian competition law does not bring any caveats on efficiency gains when it provides for anti-competitive discriminatory conduct. Thus, from a purely legalistic perspective, national positive law does not admit justifications for adopting such practices, as European law does. In another sense, however, the Brazilian antitrust authority manifests itself, which considers the effects of these behaviors. In the existence of economic rationality that justifies discriminatory practices, CADE may not characterize the conduct as an anti-competitive offense.

24. Did it happen that your national courts/authorities did not sanction discriminatory practices under investigation, because those practices were shown to be objectively justified on one of the above grounds?

The Brazilian competition authority, as stated above, holds that it is possible that discriminatory practices do not constitute antitrust offenses if there are justified objectives, such as economic rationality, efficiencies, etc. To clarify the case we bring two CADE jurisprudences.

The first case was the sham litigation complaint filed by Representatives Vargas Marcas e Participações Ltda. and Phitoteraphia Biofitogenia Laboratorial Biota Ltda. against Niely do Brasil Industrial Ltda. This is a good example of the matter. It was filed based on the non-existence of a significant loss of share by the Representatives regarding the Representative's performance. According to charts collated in the instruction of CADE's General Superintendence, the Representatives had a slight loss of market, which was later replaced by gradual growth, which would be sufficient to rule out the discriminatory practice configuration according to the municipality. Thus, the possibility of sham litigation was ruled out, among other reasons, for not identifying the harmful effects of the practice. The Representatives rightly countered the thesis of the General

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Superintendence - CADE's entity - indicating that the market analysis undertaken was too simplified and that, because of its little or no depth, it would not account for the specific case.

Another pertinent case, already mentioned above, involving the alleged practice of unilateral conduct by Petrobras (Administrative Proceeding No. 08700.002600/2014-30) to favor its subsidiary over other players in the supply of natural gas, analyzed the efficiencies and justifications of the discriminatory practice that could weigh the eventual competitive damage. The aspect addressed by the Rapporteur, which is relevant to the present issue, was about the public policy character of Petrobras' system of granting discounts, since it envisaged giving concrete effect to the protection objective of the national natural gas industry. It should be noted that the discriminatory conduct, in this case, has not been configured, according to the Rapporteur. However, he chose to present this justification to indicate that if there was discriminatory practice, it could be dismissed from this.

25. If yes, can you please give details on the legal and economic effects analysis that has been undertaken to assess these positive effects?

As in the case cited above, the promotion of a public policy of valorization of the national industry can be used as legal and economic justification of a discriminatory practice.

In a case previously referred, involving postage and SEDEX services, the Brazilian authority analyzed the justifications presented by the Representatives for the refusal to contract conduct. The General Superintendence analyzed, based on the processing of data related to the volume and billing of SEDEX contracts, economic aspects related to the scale and regularity of the purchase of a certain service and reduction of the service cost.

26. Has the sanction of discriminatory practices been used as a tool to restore an effective competitive structure in a given market, i.e. sanctioning dominant operators that were excluding equally efficient rivals or even less efficient competitors that the incumbent operator?

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In part, yes. We consider in part to the extent that the change in conduct, although resulting from the antitrust investigation, on the other, that it was only altered as a result of not imposing a penalty, but the signing of a consent decree. In a recent case involving the means of payment market, the Brazilian antitrust authority, in view of the high concentration and verticalization of this sector, has signed termination agreements, called, in the Brazilian jurisdiction of Termination Commitment Terms (TCT), in this case, seeking to adjust the conduct of incumbent players in the face of new entrants.

The payment market in Brazil is made up of the following agents: payment flags/arrangements, accreditors, card issuers, cardholders, establishments, and facilitators. Regarding its structure, it can be organized in three or four parts. In the three-part configuration, a single entity assumes issuance and accreditation functions (for example, Diners and American Express). When dealing with the four-party relationship, these activities will be performed by different agents (for example, Mastercard and Visa).

As reported in a technical note from CADE's General Superintendence, this market is markedly concentrated and vertical in its stages, in Brazil, it has as its main flags, Visa and Mastercard.

In brief, the initial instruction found the following anti-competitive behaviors: refusal to contract/exclusivity; refusal to contract regarding the anticipation of receivables; and discrimination in the use of multi acquisition capture equipment (Pinpad bundling). Normally, when the complaint of vertical conduct, in particular, has an open investigation, it is due to a concentrated market structure and the characterization of abuse of dominant position or market power, which is complex and may lead to disagreement in innovation markets, where competition for overcoming occurs from innovation by micro and small businesses (for example, the NUBANK case). From these, established agents would be preventing or limiting the access of new competitors in the payment market. For Brazilian authorities these practices would contribute to the maintenance of the excessive concentration of this market that experienced a subtle opening in 2010.

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From this instruction, three administrative inquiries were opened and so far two Termination Commitment Terms - TCTs have been entered into, with the following objectives and determinations:

1. TCT – Itaú and Hipercard⁶ (Administrative Inquiry No. 08700.000018/2015-11): had the purpose to put an end to the current exclusivity between the Hipercard brand in relation to the accrediting company Rede, of the same economic group, and determined that Hipercard should enable other competing accrediting companies of Rede (Itaú) to capture debit and credit card transactions of its flag, ending the exclusivity maintained until then;
2. TCT – Rede⁷ (Administrative Inquiry No. 08700.001861/2016-03): aimed at allowing cryptographic keys from competing credentialers to be inserted into their Pinpad equipment⁸ (machines that capture debit and credit card transactions at retail) and determined that the Network give its Pinpads access to all other accrediting companies, indiscriminately, as long as these companies grant it the same treatment.

As a result, the administrative inquiries in which the TCTs were signed were suspended in relation to their representatives, while the others are still being investigated by CADE's General Superintendence.

It is noteworthy that CADE has adopted these measures with a view to greater insertion of smaller accrediting companies in this market, fostering competition, diversifying the offer for retailers and consumers. With this type of action, the

⁶ Credit card manager, with its own brand, whose control currently belongs to Grupo Itaú Unibanco. It has a relevant presence in the northeast region of Brazil, where it was created, representing about 4% of the country's credit transactions.

⁷ Market leader with Cielo - representing 88% of establishments able to capture card transactions in Brazil - Rede is an accreditation company controlled by Banco Itaú,

⁸ Responsible for about 40% of operations in the country, Pinpads are card readers that allow customers to make their purchases on credit, debit and/or food ticket payments safely and free of frauds. Unlike traditional POS, the standard machines, which only allow the configuration of an acquirer and accept only the flags that this buyer approves, the Pinpads are multi-purchasers, and thus allow several keys to be homologated within the same equipment". Thus, while the POS is exclusive to the provider that provides it, and only the flags to which that credentialer is linked are captured, Pinpad allows several credentialers to be on the same equipment, allowing the capture of all flags linked to the credentialers.

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municipality thinks of promoting considerable cost reduction, improving the market dynamics globally.

From this case it is possible to realize that the Brazilian antitrust authority uses the repression of discriminatory practices as an instrument to promote and stimulate effective competition in sectors that, despite efforts, are difficult to access and establish for new operators.

27. Has the sanction of secondary line discrimination also been used as tool to open market to competition, for instance by enabling market entry on customer segments that would have been targeted with low prices if discrimination had been possible?

The lack of guidelines setting analysis criteria for vertical conducts, including discriminatory conducts, results in, among other aspects, the lack of indications of dichotomous criteria on the part of the policymaker for both discriminatory lines of conduct (primary and secondary). However, it is possible to see the antitrust authority's action to open markets through the repression of discriminatory practices.

To illustrate the theme, it is possible to observe CADE's position in the Administrative Inquiry No. 08700.007130 / 2015-82, which was terminated after the signing of a Termination Commitment Term - TCT.

The case in point sought to investigate the alleged practices of anticompetitive conduct by Petrobras in the scope of the natural gas market. The complaint made by Abegás reported that the state company had abused its dominant position by discriminating between purchasers of goods or services through differentiated pricing and refusing to contract. The complainant believed that Petrobras sought arbitrarily to increase its profits from these conducts.

In a preliminary analysis of the evidence brought by the complainant, as well as the defense of the Respondent, CADE's General Superintendence pointed out concerns about the excessive concentration of the natural gas sector, not even recommending the opening or not of Administrative Proceeding, in view of the presentation of a proposal for a Conduct Termination Commitment by Petrobras.

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The main ⁹purpose of the document would be the divestment of assets¹⁰ in the natural gas sector, with a view to promoting deconcentration in the sector.

The proposal was accepted and signed by the Court in an effort to promote the opening of the natural gas market, characterized by the Monopoly of the Representative, as well as the markets of other substitute energy modes.

28. Is fairness a defined objective of your competition policy? Or do you think that the reestablishing of fair situation between competitors/trading partners was somehow a side effect of the sanction of a practice which was anticompetitive in itself?

To approach equity as a possible criterion of competitive analysis is to enter into what the objectives of antitrust policy are. In some ways there is consensus on antitrust policy to pursue consumer welfare and economic efficiency, however, the understanding about being another possible criterion/objective to promote equity is not peaceful. This theme involves the debate based on the question of whether it is the function of antitrust law to foster distributive law, promoting, among other things, equity in the competitive environment. This is a very current controversy that, in a context of Hipster Antitrust, divides legal operators and jurisprudence, as noted in the Facebook case analyzed by the German antitrust authority.¹¹.

Some authors advocate the application of equity as an antitrust analysis criterion, just as the economic efficiency criterion applies. On the contrary, others point out that it is not the function of antitrust law to resolve social issues of various kinds.

⁹ A. Commitments

2.1. The COMMITTED PARTY undertakes to dispose of (i) its equity interests in NTS and TAG; (ii) its ownership interest in TBG, after defining TBG's revenue upon the conclusion of the public call for contracting available capacity, whose public consultation took place in 2019; and (iii) its indirect equity interest in distribution companies, either by selling its shares in GASPETRO itself, or seeking the sale of GASPETRO's interest in the distribution companies, subject to the terms of the respective shareholders' agreements, at the discretion of PETROBRAS (assets mentioned in (i) to (iii) jointly "Disinvested Assets"), observing, in relation to all previous paragraphs, the applicable internal standards and procedures, and the approvals in accordance with the Company's internal governance must be obtained.

¹¹ BUNDESKARTELLAMT (Germany). Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing. 2019. p. 2 Available at: . Access on: August 05, 2019.

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In Brazil, the Brazilian authority does not understand that it is antitrust's function to promote distributive law, nor does it mention the word "equity" in any of its guides. The national antitrust law in its Article 1, when it sets out its purpose, is restricted to talking about consumer protection and the economic order as read below.

Art. 1 This Law structures the Brazilian Competition Defense System (SBDC) and provides for the prevention and repression of infringements against the economic order, guided by the constitutional dictates of freedom of initiative, free competition, social function of property, consumer protection and repression of abuse of economic power.

29. In this latter case, do you think that the prohibition of discrimination, which is aimed at sanctioning the treatment differences between partners in equivalent situations under competition law, introduces an implicit objective of fairness in the scope of your competition policy?

It does not necessarily seek to achieve the objective of equity in such cases. Brazilian antitrust law, when punishing discriminatory practices against agents under equivalent conditions, does so because other aspects, such as the position of the agent in that market, will reveal whether or not the practice is detrimental to competition, in view of the abuse of dominant position characterizing a typically competitive offense.

In a previous question, the elements analyzed by CADE to punish discriminatory practices were enumerated. Thus, when discrimination between partners is prohibited, the aim is to avoid abuse of dominant position and consequent damage, even potential, to free competition.

30. Has the notion of fairness already been used in the balancing between the procompetitive and anticompetitive effects of a discriminatory practice?

The jurisprudence of the Brazilian antitrust authority tends to avoid market interference that is not based on consumer harm and the strict economic order. Thus, the use of arguments based on the protection of legal assets of another nature is not widely used, and it is not worth mentioning the application of the notion of equity.

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31. Do you have in your legal framework provisions under which courts and authorities would be able to sanction some discriminatory practices that are sometimes grasped by competition authorities (restrictive practices, consumer protection, data protection, distribution law, IP law etc.)?

As stated in question 3 of this questionnaire, the Brazilian legal system in its Consumer Protection Code seeks to protect, among other things, consumers from possible abusive and discriminatory practices of market players. As noted, practices such as geoprising are blocked not only by the prism of antitrust law but also by consumerist legislation.

In the same way, we have the diploma that guides the regulation of the payment market. Law 12.865 / 2013, also referenced in question 3, will curb the restriction of access to infrastructure and technologies in the payment sector, thus preventing consolidated players from preventing the incoming agents from having the essential facilities necessary for the development of the economic activity. Overall, this is an originally competitive concern.

In these cases, the legislator is sensitive to the competitive demands that cross the norm established by them even if their object is not antitrust.

32. If yes, do you think that these legal provisions are more efficient and appropriate?

In the Brazilian telecommunications sector, it is possible to identify the actions of both the respective regulatory agency and the antitrust authority to promote openness to new entrants. In the case presented below, access was granted to the infrastructure necessary for the provision of telephone services to new entrants. If this access were not given, the exercise of the activity by the new telephone operators and increased competitiveness in the sector would not be possible.

33. Have your sectoral regulators intervened on an ex ante basis to impose an incumbent operator certain obligations necessary to open the market to competition (access to infrastructures regulations, unbundling, etc.) and prohibited it to discriminate against new entrants?

The Brazilian telecommunications market underwent a major restructuring in 1997 from the General Telecommunications Law (Law No. 9,472 - LGT), where it ceased to be a public monopoly and became a system of public concession to

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private operators. LGT paved the way for the privatization of the Telebrás system, provided the regulation and fostered the universalization of services, stimulating competition and technological development.

Assuming that telecommunications infrastructure was an essential input for the development of operators' activities and that only one player to hold it represented a competitive problem, the new entrants were gradually allowed free access to this network, promoting the sharing between the various agents. Thus, the market was prevented from being difficult to enter, given the complex and costly structure necessary for the development of the activity, fostering competition in the sector.

34. If yes, how do think that ex ante regulation and ex post control of anticompetitive practices should interact with each other?

Obviously, it is considered essential that these forms of regulation of the market agents act in a convergent and complementary manner. It is not prudent to establish a system of antitrust with only one form of regulation. It is necessary to appreciate the legal certainty brought about by *ex-ante* regulation, as well as the possibility of containing damages effects caused by practices already undertaken by market agents through *ex-post* control.

It is important to highlight that, as a rule, it is recommended to adopt *ex-ante* regulation only in markets with possible market failures, otherwise the dynamics of their development will be hampered.

35. Exploitative abuses are coming back in the decisional practice of the European commission. Did your national practice experience the same evolution? Did your national competition authority or national courts give specific reasons for this evolution or could you identify specific reasons?

36. Have you identified specific sectors/behaviours that could trigger discrimination cases issues in the future? For example, many competition authorities are now concerned with digital sectors. Do you think this will a particularly relevant area to analyse and possibly prevent new types of discriminatory practices?

Digital markets have been the subject of antitrust analysis around the world, no different in Brazil. Recently, the national Ministry of Justice held an international event entitled "Designing Antitrust for the Digital Era", promoted by CADE, where

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it was discussed precisely how to adapt the Brazilian competition defense policy to the digital markets.

The rapid development of this sector, with its increasingly refined and instant technological innovations, as well as its dynamism, make antitrust authorities around the world aware of the possible anticompetitive effects of the conduct undertaken by their players.

To illustrate the issue we can observe the environment of digital sales platforms that, from the network externalities, provides an “ideal” scenario for a series of antitrust offenses.

Among the possible anticompetitive practices that can be identified in this market are the abuse of market power, as the case of Booking.com and Expedia has elucidated; the discriminatory leverage identified in the Google Shopping case; and geographic price discrimination, geopricing, practiced by Decolar.com.

37. The European Commission is currently thinking about the adoption of specific regulations applicable to the digital sector (e-commerce and geo-blocking)? Do you think that such a regulatory tool will be more adapted than competition law rules to deal with discriminatory conduct in the digital sector?

According to antitrust experience in some European countries, Australia and Brazil agree that the general rules of competition law generally respond satisfactorily to market demands. Even with the peculiarities of digital markets, antitrust law is markedly adaptable, while retaining its applicability to them. However, in the face of specific cases, adjustments are necessary and antitrust authorities, as well as those submitted to it, need legislative parameters to guide them. Predictability has to be pursued and safeguarded. Thus, it is understood that it is necessary to establish minimum criteria for this adaptation of the traditional antitrust methodology.

38. How do you think that the developments of digital sectors will impact the economic analysis of market power (either in the framework of mergers or of abuses of dominance) of firms active in the digital economy, e.g. by making discriminatory (price and non-price) behaviour more suspicious and more prone to be sanctioned?

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In a report containing the contributions of eleven countries on the growth of digital platforms in the work “Antitrust Analysis of Online Sale Platforms and Copyright Limitations and Exceptions”¹², aspects of the competitive analysis in these countries in relation to the online shopping market were analyzed.

The following questioning would be noted in the responses considered in the report: "Does traditional antitrust analysis apply to online selling platforms?" Bringing this question to the present answer, we ask: Does the dynamics of the digital economy allow the same assumptions to be applied to more static and rigid markets?

From the contributions of this report it is possible to conclude that certain categories of antitrust analysis remain even in the digital sector, and are still essential.

“The respondents considered that the current legal framework (designed for more traditional industries) is sufficient to handle these new cases. In this sense, the respondents indicate that there are no cases which the court has recognized the existence of gap or suggested the modification of the existing competition law in the field of online sales platforms.”

By way of example, the demarcation of the relevant market had its essentiality reaffirmed by the jurisdictions consulted, both in the product dimension and in the geographic dimension, as well as in the cases of pipeline and structure control. For them, this definition process remains a condition for antitrust analysis even on digital platforms. However, we highlight the specificities in the case of multi-sided markets, which would require a refined definition that considers the various sides of the relationship.

On the other hand, other elements gain relevance, such as the analysis of network externalities or the “indirect network effect”.. From this phenomenon, which results from the new consumption pattern resulting from technological evolution and the lack of a marginal price in software, it is possible to create market power and dominant position, thus influencing the competitive dynamics in digital platforms.

¹²ASSAFIM, J. Marcelo. International Report. Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions.

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In the same vein, another element comes into prominence with the development of digital markets, big data.

With the large production, storage, collection and analysis of data we experience today, big data can be considered a competitive variable, becoming relevant in antitrust analysis. Through it is possible, among other things, to improve production processes, segment customers with advertising and predict market trends. Thus, it works as an instrument of operations optimization and business improvement, promoting a competitive advantage of its owners over other players. It is then discussed the extent to which the one who eventually exploits big data will have substantial market power.

In general, this new reality of digital markets impacts economic market analysis, although it does not require a structural change in the antitrust analysis model. Traditional economic analysis methods need to be calibrated using adaptations that can capture the subtleties of concrete cases, responding appropriately to sensitive aspects of digital markets, taking into account, in an integrated manner, the characteristics of elements such as data, algorithms, platforms, privacy, and even intellectual capture. As stated in the above answer, drafting a specific legislative act may be important to guide the process of adapting the general legislation.

Case Triunfo x Odebrecht

The merger between Braskem, Petrobras, Petroquisa and Odebrecht S.A. (“Odebrecht”) was an investment agreement aimed at continuing the important stage of the consolidation process of the national petrochemical industry through Braskem of petrochemical assets held by Petrobras and Petroquisa. These assets corresponded to the minority interests held by Petroquisa in Companhia Petroquímica do Sul (“Copesul”), na IQ Soluções & Química S.A., the current name of Ipiranga Química S.A. (“IQ”), Ipiranga Petroquímica S.A. (“IPQ”) and Petroquímica Paulínia S.A. (“PPSA”), as well as up to 100% of the total capital of Petroquímica Triunfo (“Triunfo”).

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This act of concentration involved two distinct corporate movements. The first concerns the sale of all Ipiranga Group assets to three other groups; Petrobras, Braskem and Ultra. The second, in turn, refers to Petrobras' purchase of equity interest in Braskem, in exchange for the incorporation of some of Petrobras' equity interests in other companies.

The Brazilian antitrust authority approved the operation with antitrust restrictions and remedies, in view of the concern with the formation of a coordinated duopoly between the Sociedade Petroquímica and Braskem, both with Petrobras' participation, in the supply of naphtha, and the creation and increase of structural incentives for discrimination against non-integrated companies.