Antitrust enforcement of commercial agreements in Brazil as an Interest-Driven Process

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Abstract

This paper aims at understanding the challenges for antitrust enforcement of commercial agreements in Brazil, under a political economy perspective. Instead of normatively analyzing the characteristics of optimal enforcement of commercial agreements, the paper intends to positively identify the self-interest of the interacting groups of agents (antitrust authorities, lawyers, business people, associations) as a major-driving force of the regulatory process.

For this paper, the concept of commercial agreements is considered broad and very heterogeneous. These alliances among firms may take a variety of different configurations, such as research and development (“R&D”), marketing and distribution agreements, technology-development alliances, operation and logistics coalitions, single-country or multi-country alliances, licensing agreements. In the context of globalization, commercial agreements has triggered unease about the long-term anticompetitive consequences, which justifies the need of antitrust regulation.

Actually, the Brazilian Antitrust Agency (CADE) have been recently discussing and changing the policies of commercial agreements. The paper highlights three main recent changes in legislation: (i) the new Antitrust Law (No. 12539/2011) that foresaw the mandatory filing for commercial contracts, without clarifying the concept of “commercial agreements” or specifying the conditions for notification; (ii) the Resolution No. 10/2014 which was the first regulation that tried to clarify the conditions for notification for both horizontal and vertical agreements; and (iii) the Resolution No. 17/2016, which is the second regulation that tried to clarify the rules by removing the vertical relationship threshold for notification, for instance, in supply and distribution agreements.

The paper discuss that these recent reforms did not significantly improve the antitrust enforcement in Brazil. In particular, the reform has even been worsened the enforcement of vertical restraints. For these reasons, the following research question emerges: To which extent does the self-interest of the relevant actors serve to explain the recent changes in regulation oriented to commercial agreements in Brazil?

To answer to this question, the paper first illustrates an historical perspective of the Brazilian competition law and policy, focusing on the rules for commercial agreements and also on the historical participation of different groups in the law-making process. After that, the second section adopts the methodology of Anthony Ogus and Oliver Budzinski to help identifying who are the relevant actors to be considered in the analysis and what are the expected interests of each specific group regarding the antitrust regulation of commercial agreements (hypothesis). In the third section, two Public Consultations related to the above-mentioned Resolution No. 10/2014 and Resolution No. 17/2016 are qualitatively analyzed in order to test the theoretical predictions. Finally, I summarize the findings and outline prospects for further research.