Kluwer Competition Law Blog

Expanding Competition Law Goals: A News Report from Brazil

Vinícius Klein, Gabriela Pepeleascov Gomes (Federal University of Paraná) · Friday, November 3rd, 2023

Introduction

The debate about expanding competition law goals is a hot topic in the global competition policy agenda. The return of the antitrust debate in public opinion, due to the rise of Big Techs, opened the path to new proposals regarding sustainability, democracy, innovation, and inequality as competition goals or objectives. This new agenda has grown also in the literature with the rising criticism of consumer welfare standards and the neo-Brandeisian approach to competition law in the United States. The proposed insight in this post is not to directly face this question but to call attention to the recent development of this trend in Brazil.

The Labour Justice issued a recent and controversial decision in Brazil with a significant impact on competition law goals and the need to expand them beyond welfare or efficiency. The decision required the Brazilian Competition Authority (CADE – Administrative Council of Economic Defense) to consider labour conditions and unemployment effects when evaluating mergers or acquisitions. This ruling has surprised and stirred considerable debate within the realm of competition law experts. CADE also expressed its intention to appeal the decision.

First of all, it is important to understand some institutional features of Brazil. CADE is an administrative council with two characteristics: autonomy as an administrative agency and the ability to enforce its decisions without the authorization of legal courts. Companies can challenge CADE's decision before the courts. Still, the content of CADE's decisions is nearly never contested since the level of deference exerted is usually high.

The Labour Justice, on the other hand, has the competence to judge cases regarding labour relations. They are a specialized body of the Judiciary. The Labour Justice has three instances: a city court with a single judge, a regional Court for Appeals, and a Superior Court on Labour Relations in the capital of Brazil. Another relevant actor in the case is the Labor Prosecution Office (*Ministério Público do Trabalho – MPT*) which acts in the name of the work's collective interest and is also a specialised body from the Federal Prosecution Office. The plaintiff in the case was the Labour Prosecution Office and the decision was issued by the Labour Courts.

So, how do the Labour Courts become an agent of expanding competition law goals?

The case

The case started some years ago. The MPT had filed a civil lawsuit – in the city of Campinas, State of São Paulo – against CADE, alleging that workers' interests were not being considered in mergers that CADE analysed. Several employees were fired after the merger was cleared, such as Sadia/Perdigão or Embraer/Boeing. However, the loss of several jobs was omitted from CADE's reasoning. The lawsuit demanded that CADE include the merger's effects on employee conditions and labour markets. To do that, the decision imposed CADE an obligation to notify labour unions and incorporate the answers in the decision reasoning and motivation.

The case was judged in the first instance and recently decided by the Labour Regional Court of the 15th region. The regional court decided that the MPT was right, so CADE should start considering labour impacts when analysing mergers. CADE appealed to the Superior Court on Labour Relations, but at the time of writing, no decision has been issued yet.

The legal framework

To understand the debate and the decision, it is essential to point out that the Brazilian Constitution states several principles in the article dedicated to the economic order including the principles of free competition and worker protection. [1] So, despite the adverse reaction, integrating employee conditions and labour market effects in competition reasoning is compatible with the constitutional text.

However, traditional competition law methodology does not consider the variety of principles contained in the Brazilian Constitution and this reality is not unique to Brazil's competition reasoning, since its origins, and more intensely after the consumer welfare standard adoption and the Antitrust Revolution of the 1990s, uses economic tools that are incompatible with the several interests presented in the constitution, such as workers conditions, environment concerns and social goals in general, whilst ensuring predictability and legal certainty. This has led to a de-constitutionalization of competition law enforcement through guidelines and methodology. There are some exceptions in the case law, for instance, in a merger in the bank sector, CADE included as a remedy the obligation to promote qualification courses for the employers who lost their jobs. However, the case did not impact the subsequent decisional criteria of the competition authority.

The decision of the Labour Court demands the integration of constitutional considerations in competition law. Still, it does not present how to integrate the labour unions' answers on the competition enforcement methodology. The immediate compliance with the decision presented a risk of affecting legal predictability since there is no methodological consensus on integrating labour concerns in the competition analysis. This impending question is presented as the main reason to criticise the decision.

The road ahead

The courts may uphold the decision, but if it is implemented, there are two main pathways ahead of CADE and the evolution of the Brazilian competition law regime.

The first one would point towards CADE issuing notifications to all labour unions involved in a merger. However, the use of the information presented by the labour unions will not mean that labour effects will be more than rhetorical references. In that case, the decision can be implemented, but without effectively addressing labour effects and workers' conditions in the decision of the merger cases.

The second option is to develop tools to solve the trade-off between predictability/legal certainty and integrating workers' conditions in antitrust reasoning. If that succeeds, another step could be taken, and environmental issues and other constitutional interests in the analysis could be integrated, expanding competition law to assess conducts and mergers in light of the total welfare standard. Since CADE is appealing the decision and it has been subject to heavy criticism, this path is unlikely.

However, in the case of the development of an economic methodology that integrates employees' conditions and labour markets in competition law reasoning, this road could be more appealing. The expansion of competition goals – such as environmental issues – in the international literature with the rising of neo-Bradensians and in the case law of outside jurisdictions can make this road more appealing.

Conclusion

Competition law has several challenges ahead. Expanding the range of analysis to all the constitutional aspects of the economic order is considered impossible without minimizing the level of legal predictability/certainty.

The absence of an economic methodology and international practices capable of integrate employee conditions and labour markets in competition reasoning without reducing the level of legal predictability/certainty creates a waiver to not enforce to the full extent the constitutional economic order. With the waiver granted by the courts, at least until now, and the complexity of the task, CADE does not need to develop a new methodology as a priority or an urgent matter. So, the argument of the lack of appropriate tools in competition reasoning that could encompass several interests without losing legal predictability/certainty makes a change unlikely.

In this context, the decision, despite being incomplete, since it presents no methodology or mechanism to integrate employees' conditions and labour markets in competition law reasoning, can be the first move in undermining the waiver that makes competition law isolated in the constitutional economic order.

———

[1] The Brazilian Constitution states the following: "*The economic order, founded in the human work valorization and on free enterprise, has as purpose to ensure a dignified existence for all, by the dictates of social justice, observing the following principles: national sovereignty; private property; property's social function; free competition; consumer defence; environment defence; reduction of regional and social inequalities; pursuit of full employment; favoured treatment for Brazilian companies with small capital; favoured treatment for small companies incorporated*

under Brazilian laws. The free exercise of any economic activity is guaranteed to all, regardless of authorization from public agencies, except in the cases provided by law".

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Friday, November 3rd, 2023 at 9:00 am and is filed under Brazil, Labour market, Merger regulation, Source: OECD

">Mergers
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.