PRICE GOUGING UNDER BRAZILIAN COMPETITION LAW: BETTER LEFT DORMANT?

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I. INTRODUCTION

Price gouging was, previously, a dormant theme in Brazilian competition policy and has now resurfaced in the midst of the COVID-19 pandemic (much like in other antitrust jurisdictions). Brazil's Competition authority – the Administrative Council for Economic Defense ("CADE") – has in the past pursued price gouging as a theory of harm in a number of cases (between 1994 and today, more than 60 cases where opened).[3] At the time of writing, there are still a few price gouging investigations being conducted, out of which at least one (a preliminary procedure targeting a number of companies in the healthcare/pharma sectors) was opened in the context of COVID-19.[4]

CADE has however never convicted companies for price gouging. The view in some of CADE's precedents – articulated by one of the authors of this brief piece[5] – is that economic theory simply has not, to date, developed to a point where there is wide consensus on the standards and approach that should be adopted by enforcers so as to assess whether a given price increase falls under the legal concept of abusiveness/exploitation. This in turn meant that the provision in Law nº 8,884/1994 – the Brazilian competition law in force at the time in which price gouging was a hot topic, later overhauled by Law 12,529/2011 – which specifically established price gouging as an antitrust infringement was legally ineffective. Whether or not such view ultimately influenced the Brazilian Congress, fact of the matter is that, in Brazil's current competition (Law 12,529/2011), there is no legal provision which unequivocally establishes price gouging as an antitrust infringement (as opposed to Law 8,884/1994).

However, price gouging can still technically be pursued as a theory of harm on the basis of the broad wording of Article 36 of Law nº 12,529/2011, which some suggest was intentionally left vague so as to ensure that Brazilian antitrust enforcers have the discretion to pursue new theories of harm backed by sound economic support but that may not have been specifically anticipated by lawmakers (and thus embodied in a specific legal provision).[6]

It has taken us the COVID-19 pandemic to put the following question back on the spotlight in Brazil: is it still worth having CADE open price gouging investigations, or should CADE adopt a policy of no longer pursuing price gouging claims (which is largely the policy being adopted in the

3 See Ribeiro, Eduardo Pontual & Mattos, Cesar, "The Brazilian Experience with Excessive Pricing Cases: Hello, Goodbye," In: Excessive Pricing and Competition Law Enforcement, pp.173-187, 2018.

4 See https://www.conjur.com.br/dl/cade-investiga-empresas-aumentando.pdf.

5 See Ragazzo, Carlos, "A Eficácia Jurídica da Norma de Preço Abusivo," Revista de Concorrência e Regulação, 2012, pp. 189-211.

6 See Mendes, Francisco Shertel, "O controle de condutas no Direito Concorrencial Brasileiro: Características e Especificidades," Master's dissertation submitted to the University of Brasilia, 2013, available at https://repositorio.unb.br/bitstream/10482/14731/1/2013_FranciscoSchertelMendes.pdf.

period after the enactment of Law 12,529/2011 and before the COVID-19 pandemic)?[7] We believe that the answer is affirmative: CADE should stop waiting for economic theory to catch up and acknowledge the limited relevance of price gouging as a standalone theory of harm worth pursuing. That does not mean we are suggesting that excessive pricing be left entirely unregulated – clearly some form of policy action may be required in certain circumstances, particularly in moments of acute crisis and artificial formation of monopolies like the COVID-19 pandemic. We just do not think that the right way forward is through Brazilian competition policy, and we point to other avenues in which we believe the many complex issues around price gouging might be more productively discussed and addressed.

II. PRICE GOUGING TODAY: STILL LARGELY THE SAME OBSTACLES FOR ENFORCEMENT?

As noted above, although the competition law currently in force in Brazil (Law nº 12,529/2011) contrasts with its predecessor by not specifically establishing price gouging as an antitrust offense, CADE may still pursue price gouging cases on the basis of the broad wording of Article 36, and the non-exhaustive nature of the list of competition offenses listed under paragraph 3º of said provision.[8] Notwithstanding, the fact is that there is still no sound economic theory which Brazilian enforcers can rely on when pursuing price gouging claims. More specifically, there is no economically sound way for enforcers in Brazil to assess whether a given price increase qualifies as "abusive" (which is broadly similar to the "unfairness," or "excessiveness," or "exploitative" standards that enforcers in other jurisdictions may rely on to assess price gouging cases). Further, it is unclear what Brazilian enforcers should actually do when there is a finding of price gouging: adequate remedies to address the problem are yet to be designed and tested. Recent developments regarding price gouging investigations in other antitrust jurisdictions seem to suggest that this is still largely true today.

The United Kingdom, for example, is arguably the jurisdiction where price gouging has in the recent past sparked the most attention from the competition community. This happened most notably because of an investigation opened by the Competition and Markets Authority ("CMA") into whether Flynn Pharma and Pfizer had engaged in price gouging: there was evidence that, between 2012 and 2016, Flynn (acting as Pfizer's distributor) increased the prices charged to wholesalers for Epanutin (used to treat epilepsy) by 2,680 percent. In 2016, the CMA fined Pfizer and Flynn Pharma a total of EUR 105 million upon concluding that the companies had engaged in excessive pricing. So as to verify whether the companies had engaged in excessiveness, the CMA relied on a cost-plus analysis – derived from the United Kingdom's voluntary Pharmaceutical Price Regulation Scheme – to set a benchmark of 6 percent profit on sales margin: on that basis the CMA concluded that Flynn charged between 31-133 percent above the benchmark for Epanutin. However, in 2018, the CMA's decision was overturned by the Competition Appeal Tribunal ("CAT"), which found that the CMA had committed factual and legal errors when concluding that Flynn's prices were excessive.[9] Earlier this year, the Court of Appeal of England and Wales held that the CMA did not adequately prove that Pfizer and Flynn had engaged in price gouging but concluded that the enforcer was not required to pull together a hypothetical benchmark price in order to assess whether a given price increase was excessive. The case was remanded to the CMA for further investigation, and its overall fate remains uncertain.

Despite the substantial criticism that the CMA's decision in *Pfizer/Flynn* attracted, the United Kingdom's enforcer opened, in the context of COVID-19, at least two price gouging investigations involving hand sanitizer products. In a statement issued in mid-July of this year,[10] the CMA announced that it was officially dropping the investigations after less than one month of analysis: although the enforcer is still investigating whether one pharmacy charged excessive prices and noted that it may reopen the investigations it drops in light of new evidence, the CMA acknowledged that there was no reason to continue investigating the companies given the available evidence. The opening of the investigations had been interpreted by the antitrust community as a "warning signal" from the CMA to deter companies from engaging in excessive pricing. While it

7 For instance, CADE's General-Superintendence dropped a price gouging investigation opened in 2014 after roughly one year, and explained that "*Regarding price gouging claims, CADE has adopted the position of rejecting them either because the investigated firms did not possess dominance or because of the principle that competition policy should not be confused with price control.*" See Preliminary Investigation nº 08700.007937/2014-34.

8 When opening a preliminary price gouging investigation in the middle of the COVID-19 pandemic, CADE cited items I, III and IV of Art. 36, which establishes generally that: "*The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively.*"

9 According to the CAT, the CMA was required to – and failed to – set a benchmark price using "*objective, appropriate and verifiable criteria*," and when comparing the benchmark price to the actual price charged, the CMA should have taken into account wider market conditions, the reasons for higher prices, and previous decisions finding excessive prices. The CAT also noted that the CMA must also consider whether the excessive price charged was unfair because it "*bears no reasonable relation to the economic value of the product*" – and that the enforcer had failed to do so.

10 See https://assets.publishing.service.gov.uk/media/5f0c5a7d3a6f40037ed4848c/Closure_Statement_.pdf.

is unclear to what extent the legal challenges to the CMA's approach in *Pfizer/Flynn* affected the enforcer's decision to drop these investigations, it seems reasonable to assume that the CMA has become more cautious in deciding whether or not to pursue price gouging cases given a lack of clarity on the legal grounds to support a finding of infringement.

The rest of Europe has been relatively more tepid in its pursuit of price gouging cases. This is not to say that price gouging cases are not being opened or ultimately resolved in European jurisdictions (including the European Commission).[11-12] In the specific context of the COVID-19 pandemic, several European enforcers announced concrete efforts to tackle price gouging. This has included approaches such as (a) the issuance of formal information requests to certain players suspected of price gouging; (b) the general policy statements warning companies of possible antitrust enforcement if abuses are identified; (c) the establishment of task forces to monitor specific sectors deemed particularly vulnerable to price gouging; and (d) the opening of formal investigations.[13]

Notwithstanding these recent developments – which are largely in line with that one can verify in the Americas more generally, and Brazil in particular – we do not believe that they have brought to light any major developments in economic theory that would suggest that this is a trend that will remain in place post-pandemic. In fact, it seems more likely to us that these recent developments boil down to institutional efforts to deter excessive pricing by way of "warning signals."

When it comes to price gouging, competition enforcers seem to be cautious of engaging downright antitrust enforcement via the issuance of fines following formal investigations. And there is good reason to adopt such an approach. Take, for example, South Africa's recent experience with excessive pricing investigations. The Competition Commission ("CC") has recently settled certain price gouging cases by requiring companies to adopt the following remedies: (a) to desist immediately from the price gouging conduct; (b) to reduce the gross profit margins of essential products to a percentage agreed upon by the CC, for the duration of the pandemic; (c) to pay the excess profits to the COVID-19 Solidarity Fund or to customers that purchased the excessively priced essential products; (d) to donate essential products to hospitals or charitable institutions such as old age homes; (e) to implement a competition law compliance programme ensuring future compliance with competition laws and the price gouging regulations; and (f) to communicate the contents of the settlement agreement to employees and management of the company.

The CC has also recently referred its first COVID-19 excessive pricing case to the Competition Tribunal[14] – and if it is successful, one can expect a combination of the above remedies to be imposed on the company under investigation. However, the economic soundness of the standard applied by the CC in order to identify price gouging is unclear. Furthermore, some might argue that at least some elements of the CC's approach to remedying excessive pricing may produce effects that are to some extent analogous to price regulation, which in turn raises the risk of distorting the market. Substantial economic inefficiencies may be produced when governments – rather than companies – engage in price regulation, particularly when the market at issue is not characterized by market failures that would render price regulation an appropriate remedy (e.g. a natural monopoly).

In the absence of robust parameters to pursue price gouging cases, the risk of government failure via antitrust enforcement in price gouging investigations is high, for two main reasons. First, enforcers risk convicting false positives: legitimate price increases may be erroneously interpreted as competition infringements. Second, even if enforcers end up convicting price increases that actually do distort competition (thus amounting to antitrust infringements), it is unclear what remedies should be designed so as to address the problem appropriately: the risk of competition enforcers producing significant market inefficiencies by engaging in price regulation is high.

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11 Commentators have noted that the European Commission's ("EC") so called "stand-still" approach to excessive pricing – which has been largely prevalent since the seminal *United Brands* decision in 1978 – was called into question when the EC launched an investigation into the pricing of five cancer drugs by Aspen pharmaceuticals (see further De Cononick, Raphael, "Excessive Prices: An overview of EU and national case law," E-Competitions: Antitrust Case Laws e-Bulletin, Concurrences, 2018, available at https://www.crai.com/sites/default/files/publications/Excessive%20Prices-%20Foreword.pdf). In mid-2020, Aspen Pharmaceuticals proposed a 73 percent price reduction for six off-patent cancer medicines to remove the EC's excessive pricing concerns. A final decision is yet to be issued.

12 Importantly, the same conduct currently under investigation by the European Commission in *Aspen* was assessed by the Italian Competition Authority, which in 2016 concluded that the company had indeed engaged in price gouging and imposed a EUR 5 million fine.

13 See further: "Exploitative Abuses, Price Gouging & Covid-19: The Cases Pursued by EU and National Competition Authorities," April 2020, available at https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/exploitative-abuses-price-gouging-covid-19-the-cases-pursued-by-eu-and-national-en.

14 The CC has concluded that a South African manufacturer of medical face masks charged mark-ups in excess of 500 percent between January 31, 2020 and March 5, 2020, by increasing the price of a box of face masks significantly. It also concluded that the manufacturer had increased its price by at least 888 percent during the period of December 9, 2018 and March 5, 2020.

III. IS THERE A FUTURE FOR PRICE GOUGING IN BRAZIL?

This leads us to what we believe is a somewhat overlooked question: what are the pros and cons of price gouging investigations being opened by CADE? The cons seem rather obvious: the unnecessary burden of legal costs for companies, and the public resources spent on what seem to be pointless investigations. There may however be pros: the mere opening of an investigation may have deterrent effects on companies worried about reputational damage. Albeit unclear whether this pro may in turn be mitigated by confidentiality rules applicable to CADE investigations, we believe that the core question that needs to be covered is whether price gouging cases occur at a rate high enough to deserve enforcement.

The only set of circumstances where it seems reasonable for an antitrust authority to pursue a standalone price gouging infringement case is where an unforeseeable event – such as, for example, a pandemic – allows firms that have artificially gained market power (e.g. because of restrictions on consumer movement) to charge clearly higher prices than those that were being charged before that event. This gaining of market power/dominance is in some cases temporary, thus making it unclear whether the increase would merit antitrust intervention.

For example, a retailer's decision to increase the price of a product which is in high demand during a moment of crisis may well be economically justified by the fact that demand for other products supplied by that retailer has decreased substantially: the price increase in this context might help offset the financial implications of an overall drop in demand, thus allowing the retailer to pay off fixed costs (which remain largely the same in moments of crisis) and remain in the market. The counterfactual here is important: if the price increase is banned, this might mean that the retailer will have to leave the market, thus reducing overall supply and resulting in increased market concentration (which may be hard to address post-crisis).

More broadly, a decision to intervene via antitrust enforcement to address what seem to be unreasonable price increases in the context of crises can backfire by unsettling investment incentives. Take the COVID-19 crisis. When it was arguably at its apex, the price of face masks and hand sanitizers experienced substantial increases in some countries/regions. That however encouraged a number of firms to shift production efforts to the manufacture of these products: firms originally outside the market became attracted by its increasing profit pool. As a result, in a relatively short period of time new players entered the markets for the manufacture of hand sanitizers and face masks, thus making it harder for incumbents to sustain price increases.[15] Had competition enforcers intervened as soon as substantial price increases were identified, the incentives to enter the market might have been disrupted, to the detriment of competition.

But in cases where there is a risk that the firm (which was either dominant before or became dominant) would maintain the price increases post-event, it does seem to be legitimate for antitrust concerns to arise. Even in these circumstances, the question of whether CADE should pursue the price increase remains. In addition to Brazilian Competition Law, price gouging can be pursued by Brazil's National Consumer Secretariat, a part of the Ministry of Justice, and by state-wide Procons. Together, they have the power to pursue consumer defense cases in Brazil: and one of the areas they have jurisdiction over is price gouging on the basis of art. 39, X of the Brazilian Consumer Code. There is an important discussion surrounding the correct application of this provision (particularly in light of recent policy action from Procon-SP, in the context of COVID-19),[16] and we believe that the core problem is that agencies that together form Brazil's consumer defense policy do not have the institutional capabilities required to adequately address whether a given price increase constitutes price gouging.

In our view, a suitable solution for price gouging concerns is one that is capable of dealing with the problem at the apex of the crisis (or unforeseeable event), but that does not, in doing so, lead to distortions in the medium and long-term by for example producing a "chilling effect" on market incentives to self-correct short-term distortions.[17] To this end, a productive analysis would be one that asked two questions: (a) is the product/service experiencing a price increase essential?; (b) is the increase the result of an access problem (e.g. there is only one supplier capable of serving a given geographic area), which can therefore be regulated on that basis?

15 This occurred in several jurisdictions, including Brazil and Europe. See: https://edition.cnn.com/2020/03/18/business/alcohol-companies-hand-sanitizer-scli-intl-gbr/index.html. See also: https://www.gazetadopovo.com.br/vozes/parana-sa/industria-se-adapta-producao-alcool-em-gel-parana/.

16 See: https://www.procon.sp.gov.br/procon-sp-aplica-mais-de-3-milhoes-em-multas-por-precos-abusivos/; https://agenciabrasil.ebc.com.br/justica/noticia/2020-07/procon-sp-aplica-r-3-milhoes-em-multas-por-praticas-abusivas#:~:text=O%20Procon%20de%20S%C3%A3o%20Paulo,R%24%202%2C3%20milh%C3%B5es.

17 As noted above, price increases in the COVID-19 pandemic, for example, quickly induced several entries in the markets for hand sanitizers and face masks.

Clearly, consumer agencies in Brazil are not equipped with the necessary resources/expertise – or legal power – to address these two questions. And neither is CADE.[18] These questions can, in our view, only be resolved if there is political engagement. New policy approaches and corresponding institutional arrangements need to be designed and implemented to address these problems in Brazil. In the United States, for example, the Defense Production Act of 1950 ("DPA") was invoked in order to adopt an executive order designed to respond to the COVID-19 pandemic. The DPA technically allows the U.S.´s administration to control the supply of products deemed essential during the pandemic. Under the DPA, firms may be ordered to prioritize the production of essential products over non-essential products, as defined by the government; firms may also be ordered to shift their production efforts to the manufacture of products deemed necessary to tackle national emergencies (even if they were not originally produced by these firms). The U.S. relied on the DPA to, amongst other things, contract with General Motors to produce ventilators.[19] This in turn has sparked a discussion around U.S.'s timid reliance on the DPA: some are of the view that it should be used more thoroughly to address the pandemic by for example aiding vaccine production.[20] It is an important debate, which has gained national attention – and corresponding public engagement – to an extent that antitrust investigations rarely do.

The correct approach to price gouging is one that addresses the problem on the basis of granting more access to the supply of those products and services that people simply cannot do about. There needs to be a democratic debate to help provide support for the criteria chosen to provide policy answers embodying an analysis of the two questions we pointed to above. That is not something that relatively insulated governmental institutions such as CADE and Brazil's consumer policy system cannot do this to an extent that would be deemed necessary given the importance of the issues at stake.

There are obvious risks associated with relying on members of elected bodies of government to find a solution for price gouging behavior in moments of crisis/emergency. A proposal under review in the Federal Senate for example intends on imposing a price freeze on the Brazilian pharmaceutical industry during the COVID-19 pandemic.[21] Similarly, in the U.S. over 24 state governments may rely on legislation prohibiting price gouging during emergencies or market disruption phases; standards for the verification of price gouging vary, ranging from the prohibition of "unconscionably excessive" increases to increases over 10 percent or 20 percent .[22] These legislative approaches might end up reproducing the same inefficiencies associated with addressing price increases via antirust policy or consumer protection laws. We however believe that even when blunt proposals are put forward, the fact that there is national debate on the issue is productive: it pushes price gouging to the spotlight of the political arena, and through opposition, it may be the case that a suitable policy approach is agreed upon.

18 CADE is an independent agency with high technical expertise, but low democratic accountability. This institutional arrangement makes sense when there are good reasons to believe that they are applying the law on the basis of sound economic theory, and that they have the necessary policy tools to address the issue effectively.

19 See https://www.theregreview.org/2020/04/15/sevener-covid-19-defense-production-act/.

20 See https://www.nytimes.com/2020/04/03/opinion/defense-protection-act-covid.html?action=click&module=Opinion&pgtype=Homepage.

21 See https://www12.senado.leg.br/noticias/materias/2020/03/31/projeto-congela-preco-de-remedios-durante-pandemia-do-coronavirus.

22 See Argiropoulous, Anthony; Woolson, Sheila, "Coronavirus Emergency Declarations Trigger Anti-Pricing Gouging Laws," National Law Review, March 13, 2020, available at https://www.natlawreview.com/article/coronavirus-emergency-declarations-trigger-anti-pricing-gouging-laws. See also: HBS Online, "Supply and demand or price gouging? An ongoing debate," Harvard Business School Online, Business Insights, April 1, 2020, available at https://online.hbs.edu/blog/post/supply-and-demand-or-price-gouging-an-ongoing-debate.

IV. FINAL REMARKS

We believe that Brazil needs to take a step back and rethink its approach to price gouging policy action. While there are clear positive externalities resulting from having CADE and Brazil's consumer policy system have the power to engage in enforcement proceedings (most notably, companies gain the incentive to self-assess their commercial policies so as to mitigate exposure), there are also costs (i.e. consistently erroneous decisions, unnecessary costs for companies, lack of suitable policy tools to address the problem, and most importantly the chilling effect resulting from antitrust intervention that distorts market incentives to self-correct). But the main cost is having an institutional arrangement that encourages the status quo, and not an open debate on the best way forward to adequately tackle excessive price increases in moments of crisis where people are the most vulnerable.

Given the sensitivities around criticizing the price increases of specific firms, it may be politically advantageous for an elected actor to not engage in a debate covering strategies to address the problem: and if jurisdiction to address the problem can be pointed to an unelected actor or independent institution, that is even more politically advantageous. However, moments of crisis subvert that state of affairs to a certain extent: during them it may become politically advantageous to condone clearly excessive price increases. That is why the COVID-19 pandemic is an unparalleled opportunity for Brazil to push forward on a sound agenda to address price gouging in the future.

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