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Public Monopolies, Concessions and Competition Law and Policies

By

Brazil

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Public monopolies, concessions and antitrust policy and legislation

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Abstract: This article posits that public monopolies would be subject to antitrust policy, since complementarities exist between specific regulations and this policy in promoting efficiency through incentives to the behavior of agents. With this in mind, Brazilian cases are presented in which these complementarities can be observed.

Keywords: public monopolies, concession, antitrust policy.

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Introduction

As regards public monopolies, the role of antitrust policy is a relevant topic for reflection.

On the one hand, it is argued that these monopolies would be concessions granted by the State and that economic regulations elaborated specifically for this economic sector would deal with their structure, as well as the behavior of agents. Consequently, there would be no room for an antitrust policy or, more specifically, for entities charged with implementing that policy, since the appropriate regulatory agency would be responsible for administration of this sector.

On the other hand, one could argue as to the need for the antitrust policy implemented by antitrust entities, since regulations deal with specific questions, such as tariff regulations. Consequently, questions of competitiveness would still remain and would require analysis and resolution by antitrust entities. Thus, in dealing with public monopolies, complementarity exists between regulations and antitrust policy.

This paper raises the question of complementarity, briefly reviewing the aforementioned
concepts of public monopolies, concessions and antitrust policy, together with a discussion of the complementarity of these concepts. This review will be debated in item 2.

In order to illustrate the role of antitrust policy in relation to public monopolies, item 3 discusses several specific facts related to the Brazilian case in the sectors of transportation and telecommunications, raising such questions as concession auctions and analysis of anticompetitive practices.

Finally, considerations are presented on this topic, emphasizing the complementary nature of antitrust policy and regulation of public monopolies.

1. Public monopolies, concessions and antitrust policy

1.1. Public monopolies and concessions

Public monopolies involve specific goods or services - mostly services - exclusively provided on the basis of a government concession within a predetermined spatial and temporal framework. The rationale underlying this intervention by the State is justified by the existence of such market failings as natural monopolies.²

These public monopolies are included in concessions - a procedure through which the right to

² For a definition of natural monopoly see KUPFER and HASENCLEVER (2002).
provide a specific service is granted to private agents. Concessions are normally preceded by a process of selection and are regulated by the State. Some of the major aspects regulated by the State are as follows: tariffs, supply and quality conditions. Aside from this, other items, such as targets for investment in capacity expansion, may also be stipulated.

More specifically, with regard to tariff regulation, a variety of models exists, ranging from definition of a rate of return based on prices or revenue ceilings, in the form of a discount determined according to productivity gains. With regard to supply, conditions are defined for free nondiscriminatory access to third parties.

1.2. Antitrust policy

The objective of antitrust policy is to achieve enhanced efficiency and well-being by fostering competition among agents. It is a horizontal policy that encompasses various markets encompassed by a specific economy. Fostering of competition is normally instrumentalized through advocacy of competition, control of behaviors and structure control.³

The first case consists of dissemination of a competitive culture within society and the public sector in

³ For a description of antitrust policy, see VISCUSI et al. (1995).
such a way as to imbue the various public policies with the principle of competition.

The second corresponds to preventing anticompetitive practices on the part of market agents, including: cartelization, matched sales, abusive pricing, refusal to sell and vertical restrictions.

The third encompasses analysis of operations involving concentration among companies aimed at making it possible to achieve and to exert market power.

1.3. Relations between public monopolies and antitrust policy

As stated above, antitrust policy can be interpreted as a public policy of horizontal scope that seeks to generate the conditions required for competition in an economy as a whole and in each one of the markets of goods or services that make up that economy. Thus, economic efficiency in the allocation of resources and consumer well-being would be functions of the degree of competitiveness achieved in each market, together with insertion of that market in all areas of the economic system through, for example, upstream and downstream vertical linkages.

Public monopolies would be specific entities in which, at least in principle, no market competition exists.
However, whether due to the process of selecting the economic agents to whom the public monopolies will be granted or to vertical linkages with other markets, there is competition for these markets, thus creating room for antitrust policy.

More specifically, antitrust policy can play a role in the formatting of regulations on public monopolies, in such a way as to cope with the aforementioned questions, as well as in acquisition operations that involve public monopolies and result, for example, in vertical integrations.

Thus, antitrust policy can play a role in modeling the selection processes based on auctions or tenders, adjusting the rules and incentives in order to stimulate maximum participation of agents, while minimizing the possibility of collusion and thereby fostering market competition. With respect to the modeling of auctions, the following paragraph presents the definition found in LAFFONT and MARTIMORT (2002):

"Auctions are mechanisms by which principals attempt to use the competition among agents do decrease the information rents they have to give up to the agents they are contracting with. It requires a modeling of the relationship between bidders (the agents)
who bid under incomplete information about the other agents' valuations for the auctioned good or contract."

Competition for the market is relevant to the extent in which one assumes the existence of asymmetric information among economic agents, in detriment to the grantor.4

As regards the possibility of applying vertical restrictions consequent upon integration with a public monopoly, antitrust policy is able to generate ex-ante and ex-post and even complementary impacts:

- Ex-ante - criteria in formatting the regulatory framework that inhibits restrictive practices either through a structural approach (separation) or a behavioral approach (free nondiscriminatory access);
- Ex-post - analysis of operations that involve vertical integration with the recommendation of rejection, structural or behavioral measures, as normally done.

2. Concessions of public monopolies and antitrust policy in Brazil

Antitrust policy and, principally, public monopolies have existed in the Brazilian economy for

4 For a description of asymmetric information, see VARIAN (2000).
decades. In historical terms, their institutional frameworks have evolved in response to alterations in the economic and social environment. In the mid-1990s, significant institutional modifications occurred in the Brazilian economy. Among these, mention should be made of the processes of trade and economic liberalization and reform of the State. In this environment, reforms of legal and regulatory frameworks also took place, establishing the current context of antitrust policy and public monopolies.

With respect to antitrust policy, implementation is based on a three-pronged system: the Brazilian System of Defense of Competition - SBDC (Secretariat of Economic Rights - SDE, Secretariat of Economic Monitoring - SEAE and CADE), which, based on current legal provisions, is charged with activities related to the defense of competition. These activities can be broken down into the following areas:

- advocacy of competition - dissemination of the culture of competition in society, interaction with other public entities responsible for formulation of public policies and manifestations with respect to regulatory provisions related to aspects of competition;
- control of conduct - prevention of

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5 Brazil (1994).
anticompetitive practices on the part of economic agents, such as cartelization, abusive prices, refusals to sell, vertical restrictions and matched sales; and

- control of concentration - analysis of operations that imply horizontal or vertical market concentration and that make it possible to exercise market power.

Public monopolies are the object of concessions by the three levels of government (Federal, State and Municipal) in specific economic sectors, based on authority defined in the Federal Constitution.\(^6\) Examples of public monopolies would be: highways and railways, air transportation, electricity generation, transmission and distribution, fixed telephone services, working of oil deposits, transportation of piped gas, water supply and basic sanitation.

In general, there are no exceptions to the application of antitrust legislation in public monopolies. Despite specific regulations on each public monopoly, SBDC has used its authority to analyze operations and combat anticompetitive conduct. Aside from this, it interacts with regulatory entities in the sense of fostering integrated actions, whether in the analysis of operations or conduct, as in the case of fixed telephone services - in cooperation

\(^6\) Brazil (1988).
with the National Telecommunications Agency - ANATEL, or in manifestations regarding regulatory provisions. The latter occurs, for example, in public hearings sponsored by the National Land Transportation Agency - ANTT, regarding publication of tender notifications involving highway concessions.

Two cases are presented below in which one can observe aspects of competition in the case of public monopolies and interaction with antitrust policy.

2.1. **Highway concessions and market competition**

The Federal Government has a Highway concession program designed to provide and maintain the highway transportation infrastructure at a level consistent with current demand. In 2007, a tender was issued and the second group of concessions was approved, involving important roads located in the southeast and southern regions of the country.

The auction of this second group was interpreted in an optimistic manner by part of society, mainly because of the premium obtained in relation to the maximum tariff defined in the basic project. Table 1 below shows the highway segments granted, the premium obtained and the number of participants in each auctions.

**Table 1 - Results of the second group of**
### Federal Highway concessions

<table>
<thead>
<tr>
<th>Notice</th>
<th>Group</th>
<th>Segment</th>
<th>Winner</th>
<th>Tariff (R$)</th>
<th>Premium</th>
<th>Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>6</td>
<td>BR-116/SP/PR (São Paulo – Curitiba)</td>
<td>OHL Brasil S.A.</td>
<td>1.364</td>
<td>49.2%</td>
<td>13</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
<td>BR-381/MG/SP (Belo Horizonte – São Paulo)</td>
<td>OHL Brasil S.A.</td>
<td>0.997</td>
<td>65.4%</td>
<td>15</td>
</tr>
<tr>
<td>3</td>
<td>7</td>
<td>BR-116/376/PR e BR-101/SC (Curitiba – Florianópolis)</td>
<td>OHL Brasil S.A.</td>
<td>1.028</td>
<td>62.7%</td>
<td>17</td>
</tr>
<tr>
<td>4</td>
<td>4</td>
<td>BR-101/RJ</td>
<td>OHL Brasil S.A.</td>
<td>2.258</td>
<td>41%</td>
<td>8</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>BR-153/SP</td>
<td>Consórcio</td>
<td>2.450</td>
<td>40%</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>BR Vias</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>------------------</td>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>2</td>
<td>BR-116/PR/SC</td>
<td>OHL Brasil S.A.</td>
<td>2.54</td>
<td>39.4%</td>
<td>10</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>BR-393/RJ</td>
<td>Consórcio Acciona</td>
<td>2.94</td>
<td>27.2%</td>
<td>3</td>
</tr>
</tbody>
</table>

Fonte: Ministry of Transportation (2008).

Based on the table above, one can note very large premiums and a highly significant number of participants in the auctions. Mention should be made of the participation of the SBDC, based on an SEAE manifestation referring to the regulatory rules included in the auction notice. The objective of the manifestation was to achieve greater competition in the dispute, through adequate elaboration of the basic project so as to diminish regulatory asymmetry and provide greater reliability in terms of the sustainability of the concession and transparency in the process, together with added stimulus to increased participation. This stimulus is noted, for example, in the possibility of a greater number of pension funds participating in the competing groups.

2.2. Telecommunications sector and SBDC activities related to analysis of anti-competitive conduct

As regards the complementary activity of regulatory and antitrust entities, mention should be made of CADE Manifestations in Administrative Processes nos. 53500.001821/2002, 53500.001823/2002, and 53500.001824/2002. The common scope of these documents was verification of restricted behaviors in relation to interconnection services provided by fixed telephone concession companies: cross subsidies, price discrimination and price squeezing. Since it involves public monopolies - fixed telephone service concession companies, it is CADE's understanding that, despite the arguments submitted by the companies, there should be no restrictions on its authority to act in the analysis and prevention of anticompetitive conduct on the part of agents. Moving in the contrary direction, one should note the Vote put forward by Council member and Rapporteur Roberto Pfeiffer, in which he affirms that there was no legal provision circumventing CADE jurisdiction in these cases, adding that, in the case of ANATEL, the regulations issued by the regulator were not the subject of analysis by the antitrust entity.

3. Final Considerations

In this text, we presented a brief discussion on the relation between public monopolies and antitrust policy

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8 CHINAGLIA (2008).
9 PFEIFFER (2005).
and, more specifically, how some questions involving these monopolies are dealt with by that policy.

Several examples of the measures generated by Brazilian antitrust policy in cases related to public monopolies were utilized in order to demonstrate the role of that policy in disputes for concessions of monopolies and prevention of anticompetitive practices.

Therefore, one can conclude that antitrust policy and, more specifically, antitrust entities, have the potential to contribute to the process of defining and updating the regulatory provisions with which regulatory entities operate. Thus, one can observe a certain complementarity between regulatory and antitrust policies in the sense of generating and enhancing efficiency in so-called public monopolies.

4. Bibliographic References


KUPFER, DAVID and HASENCLEVER, LIA (2002). Economia Industrial: Fundamentos Teóricos e Práticos no Brasil (Industrial Economics: Theoretical and Practical


