Piercing the Corporate Veil: possibilities in Brazilian Competition Law

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The advent of the Car Wash operation, and more precisely its impact on Brazilian companies, has been long documented by the media and the judiciary. Several of the most important Brazilian infrastructure enterprises have undergone serious financial difficulties in recent years after signing billionaire deals with Brazilian and foreign institutions, and also (and perhaps primarily) due to the economic crisis the country now faces.[3] As reported by ABECIP, the Brazilian Association of Real Estate Credit and Savings, the largest infrastructure companies in the country shrunk around 85% in the last three years.[4] Odebrecht, the largest of this group of companies, has agreed to pay around 2.5 billion dollars to authorities in the United States of America and Switzerland, as well as Brazil, to resolve issues regarding corruption.[5] OAS, another relevant Brazilian infrastructure company, underwent a judicial reorganization after Car Wash took place.[6] Andrade Gutierrez had its credit rating reevaluated and dropped by Fitch Ratings due to liquidity problems.[7]

In June 2019, for the first time since the start of the operation, a Brazilian institution applied the piercing of the corporate veil to reach the goods of the individuals behind one of such corporations, and not the company itself, with the goal of repairing damages

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[3] As reported in a study conducted by McKinsey and requested by the BNDES and the IFC, the Brazilian levels of investment in infrastructure are below the global average and have decreased in the last years due to the economic crisis. Available at: https://economia.ig.com.br/2019-04-25/brasil-precisa-investir-47-do-pib-em-infraestrutura-para-atingir-media-global.html Access on Sept. 1 2019.

[4] The group of companies analyzed encompasses Odebrecht, Andrade Gutierrez, Camargo Corrêa, Queiroz Galvão, Galvão Engenharia, UTC Engenharia and Constran. Available at: https://www.abecip.org.br/imprensa/noticias/construtoras-encolhem-85-em-3-anos Access on Aug. 27 2019.

[5] Odebrecht Plea Agreement before the United States of America Department of Justice. Available at: https://www.justice.gov/opa/press-release/file/919916/download Access on Aug. 29 2019.

[6] Information from OAS regarding the judicial organization is available at: http://www.oas.com.br/oas-com/recuperacao-judicial/ Access on Sept. 3 2019.

[7] Available at: https://www1.folha.uol.com.br/mercado/2018/05/andrade-gutierrez-deixa-de-pagar-us-500-mi-e-nota-e-rebaixada-pela-fitch.shtml Access on Sept. 1 2019.

caused to the Federation due to overcharges in public contracts. Justice Bruno Dantas, from the Court of Auditors, argued that inasmuch as executives from Odebrecht were directly involved in the illicit behavior that led to the corrupt practices penalized by the authorities, they had in fact abused the legal protection offered by the corporation. In his words, "these were management actions that materialized in the undue use of the corporation, which authorizes the piercing of the corporate veil".[8] He determined that Odebrecht's controllers, more precisely Emilio Odebrecht and Marcelo Odebrecht, should be jointly and severally liable for damages.

The case gains particular relevance due to the characteristics of most companies involved in Car Wash. Largely, the main infrastructure businesses in Brazil were run by families, in closed, limited liability corporations. These individuals benefited from the growth of their companies, and though it is true several of them suffered severe consequences – many businessmen went to prison as a result of the investigations, including Marcelo Odebrecht, Otávio Marques de Azevedo, and Léo Pinheiro – up until June 2019 the discussion on whether they (and others against which there was no concrete proof of involvement in illicit activity) should also be financially responsible had not gained traction.

The goal of this paper is to discuss this topic in light of the Brazilian competition law, Law n. 12,259/2011, and the use (or lack thereof) of such mechanism by the Brazilian competition authority, the Administrative Council for Economic Defense (CADE). To do so, it will first present what the legislation says about piercing the corporate veil in antitrust cases, and then move on to analyzing the case law in order to verify if and how this discussion was brought forward in concrete cases. Lastly, it will present the new developments that may affect the use of such mechanism by the authorities, identifying possibilities and opportunities, as well as risks and limitations.

I. The piercing of the corporate veil in Law n. 12,529/2011

Law n. 12,529/2011 (also known as the Brazilian Competition Law) is a complex legal document that provides for the functioning the competition system in the country

[8] TC 036.129/2016-0, §40.

(the SBDC, in its Portuguese acronym). It sets forth the authorities of the SBDC and its tasks; among such tasks is the analysis and penalization of the infractions against competition. The law naturally also establishes what penalties may be applied by the authorities in case an infraction does take place.

The first thing that should be noted regarding the piercing of the corporate veil in this context is that the provision is not part of the chapter on penalties, but rather on the general dispositions regarding competition infractions. The law says, in article 34[9]:

> Art. 34. The company responsible for a violation of the economic order may have its corporate veil pierced, upon abuse of rights, abuse of power, violation of law, illegal act or fact, or violation of the bylaws or articles of association.
>
> Sole paragraph. The corporate veil may also be pierced in case of bankruptcy, insolvency, closure or downtime caused by poor corporate administration.

Secondly, it is also worth noting that as per the wording put forward by the article, the possibilities for piercing the corporate veil are varied. It may be pierced if one out of six conditions are fulfilled: (i) abuse of rights, (ii) abuse of power, (iii) violation of law, (iv) illegal act or fact, (v) violation of the bylaws or articles of association, or (vi) in case of bankruptcy. As noted by Tomazette, this wording is very similar to that of Article 28 of the Brazilian Consumer Law (Law n. 8,078/1990).[10]

Thirdly, though the application of the Competition Law is to be carried out primarily by the Administrative Council of Economic Defense (CADE for the Portuguese acronym), the content of each of these six conditions has been vastly analyzed and fulfilled by other legislation and by the authorities that apply such legislation, notably the judicial courts.[11]

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[9] The translation used throughout this paper is the one provided by CADE on its website. Available at: http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view The original in Portuguese reads: Art. 34. A personalidade jurídica do responsável por infração da ordem econômica poderá ser desconsiderada quando houver da parte deste abuso de direito, excesso de poder, infração da lei, fato ou ato ilícito ou violação dos estatutos ou contrato social. Parágrafo único. A desconsideração também será efetivada quando houver falência, estado de insolvência, encerramento ou inatividade da pessoa jurídica provocados por má administração.

[10] TOMAZETTE, Marlon. Curso de Direito Empresarial: Teoria Geral e Direito Societário, volume 1 / Marlon Tomazette. – 5ª Ed. – São Paulo: Atlas, 2013, p. 333.

[11] It is worth noting that CADE is an administrative body. According to Brazilian law, decisions by administrative bodies are always subject to review by judicial courts. Therefore, it is in CADE's interest, in order to legitimize its decisions, to have them confirmed by judicial authorities.

Finally, though these provisions are separate from the piercing of the corporate veil, it is important to note that the Brazilian Competition Law allows for liability of individuals as well as for the liability of legal entities, as expressly provided in Article 31. More than that, it puts forward joint liability for companies and for its directors. Also, some forms of competition infraction – notably, cartels – are also penalized by criminal law in Brazil. As legal entities are not criminally liable in the country,[12] this responsibility lies on individuals, who are subjected to Law n. 8,137/1990.[13] As will be seen ahead, these are important aspects that may influence how the competition authorities see the piercing of the corporate veil, and how this mechanism may be enforced in concrete cases.

II. The case law at CADE

In order to better understand how the piercing of the corporate veil has been understood by the SBDC, we have looked at all manifestations by CADE that somehow address the matter.[14]

In short, the conclusion is fairly straight-forward: the authority has never carried out an in-depth discussion about this provision, nor has it pierced the corporate veil in a concrete case. It is however useful to take a closer look at some circumstances in which the debate emerged and how CADE addressed it.

In Administrative Proceeding 08700.009509/2012-84, a case that investigated a cartel in the market for graphite electrodes, a company – the Carbide Graphite Group – went bankrupt while the investigation was underway. The General-Superintendence at CADE dismembered the original proceeding in order to allow for investigations to move

[12] There is one exception put forward by environmental law.

[13] More specifically, Article 4 of the law provides for the crimes against the economic order, and puts forward two categories of such crimes: (i) abuse of economic power, dominating the market or eliminating, in whole or in part, competition through any form of adjustment or agreement of companies; (ii) agreement, adjustment or alliance between providers, aiming at: a) the artificial fixing of prices or quantities sold or produced; b) the regionalized control of the market by company or group of companies; c) control, to the detriment of competition, of the distribution network or suppliers.

[14] The research was carried out at the Sistema Eletrônico de Informações (SEI) with the Portuguese expression for the piercing of the corporate veil, “desconsideração da personalidade jurídica”. It was able to find 16 documents, that were then analyzed. The documents include opinions by Commissioners, by the Attorney General at CADE, and also by the General-Superintendence and the Public Prosecutor’s Office at CADE. None of them, however, carried out a very profound analysis of the subject, as will be shown.

forward regarding other parties, and forwarded the specific case of Carbide to the Attorney General's office, inquiring about the consequences of bankruptcy, given that there was evidence Carbide was involved in the illegal conduct, but CADE had been unable to identify the legal entity that succeeded it.

The Attorney General was clear in stating that Article 34 of the Competition Law is very broad and allows for the corporate veil to be pierced in cases of bankruptcy. In his opinion, the wording of the law in fact allows for the application of the so-called "teoria menor" of piercing, instead of the "teoria maior" (in English, the terms could be roughly translated to "minor theory" and "boader theory", respectively). Basically, the "teoria maior" states that for the corporate veil to be pierced the partners of a company must intentionally want to harm a third party by means of the legal entity, or there must be a mixing of assets between the entity and its partners. The "teoria menor", on the other hand, does not require an abuse to be present, but simply for the legal entity to be an obstacle for the application of the law. This later theory is mostly said to be applicable to consumer relations, but CADE's Attorney General expressly affirmed its application as per Law 12,529/2011.

In other occasions, CADE dealt with the piercing of the corporate veil because it had to answer to arguments addressing the addition of individuals to the investigation. It did so by explaining that such addition had nothing to do with the piercing of the corporate veil, and took place because these people were themselves liable, given their individual acts. Specifically, in Administrative Proceeding n. 08700.000719/2008-21, Mrs. José Adir Loiola and José Jacobson Neto argued that they acted in their role as directors of an association, and were doing nothing more than fulfilling their obligation to such association. Therefore, their condemnation was not justified, given that no abuse of rights, abuse of power, violation of law, illegal act or fact, or violation of the bylaws or articles of association had been verified. Commissioner Ana Frazão clarified that the issue had already been addressed, and that these individuals were added to the investigation and later found guilty for their own individual actions.[15]

The same happened in Administrative Proceeding n. 08012.007818/2004-68, in which Mr. Eric Mignonat argued he could not be held liable given that he never acted by

[15] Opinion of Commissioner Ana Frazão, SEI n. 0026140.

abusing rights or powers of the legal entity he then represented, therefore the piercing of the corporate veil was not feasible. Again, Commissioner Márcio de Oliveira Junior was clear in stating that his liability ran not from the piercing of the corporate veil, but from his individual actions.[16]

II.1 The reasons for the lack of corporate veil piercing

Some authors have raised hypotheses as to why CADE has never pierced the corporate veil, despite the existence of a clear possibility in the law. One such hypothesis relates to the lack of clarity as to whether the Administration may indeed pierce the corporate veil, or if this disposition would violate the Constitution. Though the argument has been raised more than once, and gained some traction recently,[17] the fact is the Superior Court of Justice and the Supreme Court have both reinforced the legality of such provision in concrete cases. Most notably, in a preliminary ruling in MS 32494/DF, Justice Celso de Mello stated that not only is the piercing possible, it can be carried out, as per the "teoria menor", even in cases where no law expressly allows the Administration to lift the corporate veil.[18]

A different hypothesis is the one that emphasizes the existence of other dispositions in the Competition law that directly allow for liability of individuals. Because individual liability is expressly provided for and is indeed vastly applied by CADE, the use of the piercing of the corporate veil is naturally mitigated. Amanda Fabbri Barelli made a similar observation in her Masters dissertation, noting that:

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[16] Opinion of Commissioner Márcio de Oliveira Junior, SEI n. 0060235.

[17] Authors such as Modesto Carvalhosa have claimed that Brazilian Law does not allow for the Administration to pierce the corporate veil, and that only the Judiciary would have that power. See CARVALHOSA, Modesto. Considerações sobre a Lei Anticorrupção das Pessoas Jurídicas. São Paulo: Revista dos Tribunais, 2014.

[18] In his words: "De outro lado, e a despeito de o instituto da desconsideração da personalidade jurídica somente haver sido objeto de regulação legislativa em tempos mais recentes, como se verifica do Código Civil (art. 50) e dos diversos microssistemas legais, como aqueles resultantes do Código de Defesa do Consumidor (art. 28), da Lei nº 9.615/98 ("Lei Pelé", art. 27), da Lei Ambiental (Lei nº 9.605/98, art. 4º) e da Lei nº 12.529/2011 (art. 34), entre outros instrumentos normativos, parece-me que a ausência de autorização legal outorgando ao Tribunal de Contas da União competência expressa para promover "the lifting of the corporate veil" não violaria, aparentemente, o postulado da legalidade, eis que a aplicação, em nosso sistema jurídico, da "disregard doctrine", como sabemos, precedeu, em muitos anos, a própria edição dos diplomas legislativos anteriormente referidos, como resulta de decisões proferidas por nossos Tribunais judiciários (RT 511/199 – RT 560/109 – RT 568/108 – RT 654/182-183 – RT 657/86 – RT 657/120 – RT 660/181 – RT 673/160) e reconhece o magistério da doutrina (RUBENS REQUIÃO, "Abuso de Direito e Fraude Através da Personalidade Jurídica", RT 410/1-12; ROGÉRIO LAURIA TUCCI, "Direito Processual Civil e Direito Privado – Ensaios e Pareceres", p. 162/164, item n. 5, 1989, Saraiva, v.g.)."

> "the challenges related to the identification of sufficient evidence that allows the authority to verify the occurrence of fraud or abuse of power, to identify the people and legal entities that may be held liable, and the limits of their liability, add to the challenges already faced in identifying competition infractions. […] Moreover, the Competition Law already makes available, without the need for evidence of abuse or fraud, other mechanisms that allow liability to be extended to administrators and others (legal entities or individuals) that are part of the same economic group".[19]

Indeed, as the antitrust authority itself has clarified, there are several instances in which the parties argue that condemnation of individuals took place owing to the piercing of the corporate veil. They do so because they understand the piercing would follow stricter rules and only be applicable if an abuse of rights by the individual was proved. CADE, however, never has convicted a person resorting to the piercing of the corporate veil, it always holds individuals liable due to their own conducts as agents carrying out illegal activities.

III. New developments and possible uses for the piercing of the corporate veil

As noted, the corporate veil has never been pierced by Brazilian competition authorities. In fact, a broader research that also analyzed judicial debates regarding Law n. 12,529/2011 was equally unable to find any case where the debate came to fruition.[20] As seen above, there are some possible reasons why that is the case, and very likely the existence of a specific provision that allows individuals to also be held liable before the antitrust authority plays a relevant role.

What we have seen happen recently in Brazil, however, may change that scenario. As the case of the Court of Auditors illustrates, the issue is not precisely geared towards holding individuals liable, it has much more to do with the financial stability of the legal entities being investigated. The Car Wash operation added another layer of complexity to enforcement, because for the first time in Brazil the companies involved face real risk of

[19] P. 128.

[20] The judicial system in Brazil does not provide for a unified data-base where all case law can be researched. However, we have looked for cases at São Paulo's Supreme Court (the largest in the country), as well as for decisions at the Superior Court of Justice, and were unable to find cases in which the discussion emerged.

undergoing financial difficulties due to the penalties imposed by authorities, and the piercing of the corporate veil could serve as a way of effectively ensuring these entities' (some of which are major players in the Brazilian economy) continuity.

In other words, whereas in previous antitrust cases the individual was held liable alongside the company, both paid their fines and carried on their activities (often with great reputational impacts, sometimes with relevant financial consequences), we are now for the first time having to deal with potential bankruptcy owing to the application of fines. In other words, the diagnosis is that individuals might survive Car Wash, but companies might not.

In addition, Brazil recently underwent a change to its Civil Code, where the main provision regarding the piercing of the corporate veil is established. By means of Law 13,874/2019, which became known as the Law of Economic Freedom, article 49-A was added and article 50 modified. In short, the articles have reinforced the legal entity as a means of "risk allocation and segregation", and the separation between the entity and its administrators or associates, and aimed to provide more clarity as to when precisely the abuse of legal personality can lead to the piercing of the corporate veil.

What the new law says is that abuse means precisely "misuse" or "mingling of assets". It goes on to define misuse in §1, saying it is the "use of the legal entity with the goal of harming creditors and to carry out illicit acts of any nature". It also defines the "mingling of assets" in §2, as the "lack of de facto separation between the assets, characterized by (i) repetitive fulfillment by the company of obligations of the partner or director or vice versa; (ii) transfer of assets or liabilities without actual consideration, except for those of proportionally insignificant value; and (iii) other acts of non-compliance with patrimonial autonomy."[21]

[21] The full text of the articles, in Portuguese, reads as follows: "Art. 49-A. A pessoa jurídica não se confunde com os seus sócios, associados, instituidores ou administradores. Parágrafo único. A autonomia patrimonial das pessoas jurídicas é um instrumento lícito de alocação e segregação de riscos, estabelecido pela lei com a finalidade de estimular empreendimentos, para a geração de empregos, tributo, renda e inovação em benefício de todos."
"Art. 50. Em caso de abuso da personalidade jurídica, caracterizado pelo desvio de finalidade ou pela confusão patrimonial, pode o juiz, a requerimento da parte, ou do Ministério Público quando lhe couber intervir no processo, desconsiderá-la para que os efeitos de certas e determinadas relações de obrigações sejam estendidos aos bens particulares de administradores ou de sócios da pessoa jurídica beneficiados direta ou indiretamente pelo abuso.

Clearly, the goal of the legislation was to limit the possibilities for the piercing of the corporate veil, and to provide clearer criteria for doing so. As noted by Ana Frazão, however, the law still leaves the issue rather open-ended when it states that willful acts that aim to harm creditors are not the only reason why the veil may be pierced, and that the piercing may in fact happen due to any illegal activity carried out within the legal entity.[22] Despite that, it is equally important to note that the law brought some advances that may be particularly useful in the context of competition enforcement. Notably it states that the piercing will only affect those partners, administrators or directors that have directly or indirectly benefited from the abuse, which limits the reach of the provision and creates more legal certainty.

It is early to say what the impact of these modifications will be, given that the new provisions came into effect in late-September of 2019, but they may stir the debate and provide new judicial references for the discussion. Nonetheless, if CADE's Attorney General understanding is maintained, the authority may well understand that because the Brazilian competition law has a specific provision that allows for the piercing of the corporate veil and because the "minor theory" is applicable to such scenarios, nothing changes. The question then is if the authority has any appetite to change its current use of article 34, and if the new landscape provides enough of an incentive for it to do so.

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§ 1º Para os fins do disposto neste artigo, desvio de finalidade é a utilização da pessoa jurídica com o propósito de lesar credores e para a prática de atos ilícitos de qualquer natureza.
§ 2º Entende-se por confusão patrimonial a ausência de separação de fato entre os patrimônios, caracterizada por: I - cumprimento repetitivo pela sociedade de obrigações do sócio ou do administrador ou vice-versa; II - transferência de ativos ou de passivos sem efetivas contraprestações, exceto os de valor proporcionalmente insignificante; e III - outros atos de descumprimento da autonomia patrimonial.
§ 3º O disposto no caput e nos §§ 1º e 2º deste artigo também se aplica à extensão das obrigações de sócios ou de administradores à pessoa jurídica.
§ 4º A mera existência de grupo econômico sem a presença dos requisitos de que trata o caput deste artigo não autoriza a desconsideração da personalidade da pessoa jurídica.
§ 5º Não constitui desvio de finalidade a mera expansão ou a alteração da finalidade original da atividade econômica específica da pessoa jurídica."

[22] For full article in Portuguese, see https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/lei-de-liberdade-economica-e-impactos-sobre-desconsideracao-da-personalidade-juridica-21112019