Competition Law and Policy in Brazil: Relevant Developments and Outlook

3rd Edition

MATTOS FILHO > Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

Contents

Introduction

This document summarizes the main aspects of current Brazilian competition policy, as well as the Administrative Council for Economic Defense's (Cade) approach and decisions in specific cases. It also draws attention to trends and perspectives that, in our view, should be on the radar of companies that are doing business or interested in doing business in Brazil.

This edition is comprised of five articles. The first covers a discussion on cartel penalties, focusing on whether "supracompetitive profits" should be factored into penalty calculations and whether individuals in non-managerial positions can be convicted. The second article discusses the different ways that third parties can participate in merger control cases, and how in certain cases, third parties have attempted to excessively intervene in merger control proceedings. The third article addresses Cade's position on the reference date for calculating turnover, clarifying when parties should consider the structure of each economic group involved to calculate turnover for merger control purposes in Brazil.

The fourth article analyzes the intersection between environmental, social and corporate governance and competition law, comparing discussions that have taken place in Brazil with those in other jurisdictions. Finally, in the fifth article, we cover Cade's initiatives in relation to studying digital markets – particularly the Digital Platforms study, in which Cade conducted an extensive survey of its decisions in cases involving digital markets and platforms between 1995 and 2020.

Quarterly Report: Recent Debates on Cartel Sanctions

In recent times, Cade's Tribunal has had a series of intense – though inconclusive – debates regarding the sanctions applicable to cartels. Rather than seeing a convergence of opinion or progress in discussions, these debates are only increasing in intensity. Some prime examples include a long-running debate about whether financial gains obtained from competitive misconduct (known as supracompetitive profits, or *vantagem auferida* in Portuguese) should be factored into calculations when setting fines; a new argument in favor of fining companies above the legal threshold of 20% of annual revenue if financial gains stemming from the conduct surpass this threshold; and a new thesis against convicting individuals in non-managerial roles, contrary to precedents.

Moreover, the Brazilian Congress is currently debating bills proposing changes to the Brazilian Antitrust Law[1]. This includes changes to calculating sanctions for competition infringements, so that not only the company's revenues in the year prior to the investigation are considered, but also the sum of the revenues throughout the entire anticompetitive practice period. These discussions are outlined below.

As reported in the first edition of this booklet[2], the debate about whether to consider estimated financial gains occurs recurrently at Cade. Up to December 9, 2020, this was only a minority thesis. The Tribunal applied it to only three convictions[3] – the most recent of these only because of the

1. See: http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view

2. See: https://publicacoes.mattosfilho.com.br/books/btge/#p=34.

3. Administrative Proceeding No. 08012.009611/2008-51; Administrative Proceeding No. 08012.001029/2007-66; and Administrative Proceeding No. 08012.009732/2008-01.

difficulty in determining the revenue of those investigated.

However, as of February 3, 2021[4], most of the Tribunal's members have been defending certain aspects of this thesis (e.g., combining the traditional calculation threshold with estimates of financial gains from public tenders). Led by Commissioners Lenisa Prado, Luis Braido, Paula Farani and Sérgio Ravagnani, this majority group has factored in financial gains (when possible to estimate) in one way or another in four cases[5].

The discussion is grounded in disagreements on the interpretation of the Brazilian Antitrust Law's Article 37, item I, which stipulates that the fine must not be less than the offender's estimated financial gains, capped at 20% of the company's gross revenue. Thus, in some corners, a lingering doubt remains: is this 20% threshold indeed valid when the estimated financial gains are calculated to be higher?

In one of the cases – concerning a cartel in public bids for school uniforms and supplies – a company's estimated financial gains were indeed considered when determining a fine equivalent to 20.5% of annual turnover, slightly beyond the 20% threshold. This ruling was a highly relevant development, as previously Cade had previously always kept fines below the threshold.

Another debate refers to the conviction of individuals in non-managerial positions. This

4. From the decision given in the Administrative Proceeding No. 08700.000066/2016-90.

5. Administrative Proceeding No. 08700.000066/2016-90; Administrative Proceeding No. 08012.010022/2008-16; Administrative Proceeding No. 08700.008612/2012-15; and Administrative Proceeding No.08700.004455/2016-94.

discussion was instigated by Commissioner Sérgio Ravagnani, who disagrees with the Cade case law interpretation of the Antitrust Law's Article 37, item II, which provides for fines for individuals and non-commercial legal entities in general.

According to the Commissioner, this provision does not justify imposing separate fines on individuals in non-managerial roles. Rather, it only justifies "*fines for individuals dissociated from a company or for non-commercial legal entities (...).*" However, this argument has been dismissed by the majority of the Tribunal so far. During a judgment regarding collusion in acquiring electronic components for telecommunications in the domestic market[6], the other commissioners supported Commissioner Luiz Hoffmann's vote to impose a BRL 100,000 fine on an individual in a non-managerial position.

With explicitly dissenting positions and slight majorities among the commissioners, these multiple theses seem to point to greater instability at the Cade Tribunal rather than a more unified position. This possibility becomes even starker when considering the commissioners' terms of office have either already expired or are due to expire soon, leading to imminent changes in the Tribunal's makeup.

In the short term, the issue of how Brazil's competition authority imposes cartel sanctions remains inconclusive and demands further attention. However, ongoing parallel legislative debates bring yet an additional level of uncertainty, and real prospects for an increase in applicable fines.

6. Administrative Proceeding No. 08700.000066/2016-90.

Excessive Third-Party Interventions and Legal Wrangling: A New Trend?

When analyzing mergers, competition authorities are responsible for defending the public interest, which takes precedence over the private interests of the parties involved in the transaction – i.e., protecting competition in the associated market. For this purpose, various third parties (competitors, clients, associations and others who may be affected by the merger, though are not parties to the filing) can often play an important role in analyzing merger cases.

In Brazil, Cade frequently collaborates with third parties during the fact-finding phase of merger control proceedings. However, in certain recent cases, third parties have overstepped the legitimate role they can play in Cade's merger analyses – including in the judicial sphere.

Recently, two specific trends have been observed. Firstly, third parties have tried to appeal against Cade's General Superintendence approving certain decisions, clearly intending to delay Cade's review. This occurred even when third parties were not cleared to intervene in the transaction and thus had no legal standing to appeal. Secondly, third parties have filed lawsuits in an attempt to reverse Cade's legitimately adopted decisions through the courts. Both situations have created legal uncertainty in regard to Cade's prior notification system for merger transactions, which has been working well since it was first implemented ten years ago.

Third parties can legitimately participate in merger control proceedings when Cade issues official requests for information as part of a so-called 'market test', an additional step in the fact-finding phase under the purview of the General

Superintendence, as per Article 54, item II of the Brazilian Antitrust Law[7]. A second possibility for third parties involves a voluntary intervention – as per Article 50 of the Brazilian Antitrust Law, regulated by Article 118 et seq. of Cade's Internal Regulations (Ricade).

Voluntary intervention in a given transaction requires interested third parties to submit a request for admission within fifteen days of Cade publishing a notice of the transaction in the Brazilian Official Gazette. The request must set out the relevance and reasons for the third party's intervention, demonstrating the connection between its activities, the possible approval of the transaction and the competitive effects on the market as a whole. Only an admitted third party has the right to appeal to Cade's Tribunal in cases where the General Superintendence decides to clear the merger or classify it as not notifiable (as per Article 121 of the Ricade). Moreover, if the applicants appeal the General Superintendence's decision to block a transaction at Cade's Tribunal, admitted third parties will also have the right to make submissions.

The legal provisions notwithstanding, it is not uncommon for third parties to make voluntary submissions in merger control cases, presenting considerations they deem relevant for analysis. These may or may not be taken into account by Cade, considering merger control is an administrative process aiming to protect collective rights, as opposed to a litigation proceeding with the scope to analyze private disputes.

In two recent cases, non-admitted third parties overstepped their legitimate roles during merger

7. See: http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view

investigations by submitting illegitimate 'appeals' against decisions to approve transactions, despite not having the legal standing to do so. In the first case, the Union of Oil Workers of Bahia – a non-admitted third party – tried to appeal against the decision to approve the Petrobras/Mubadala transaction. Through an order issued by then acting president Commissioner Maurício Bandeira Maia, Cade adopted an emphatic position: "considering that the union is not an admitted third party in the process under the statutory terms, it is not entitled to file the appeal." [8]

In another merger case involving companies in the agribusiness and agrochemicals sectors, an appeal by non-admitted third party Aprosoja (the Brazilian Association of Soy Producers) resulted in a similar decision.[9] Aprosoja, which had already made a submission to the case files in response to a request for information from Cade, tried to file an appeal against the General Superintendence's unconditional approval decision, even without having the legitimacy to do so. Cade's Tribunal unanimously rejected it.

Third parties have also filed lawsuits to try to revert decisions adopted by Cade in merger cases. After Aprosoja's attempt to appeal against the approval of the case mentioned above was rejected, it filed a writ of mandamus seeking to suspend the General Superintendence's decision. Furthermore, CervBrasil (the Brazilian Beer Industry Association) recently managed to obtain an injunction suspending the unconditional approval of a merger whose market test it participated in. The association alleged a series of formal issues occurred that prevented it

8. Merger Case No. 08700.001687/2021-58. Parties: MC Brazil Downstream Participações SA and Petróleo Brasileiro SA

9. Merger Case No. 08700.001901/2021-76. Parties: BASF SA, Monsanto do Brasil Ltda, Du Pont do Brasil. SA, Dow Agrosciences Industrial Ltda., Syngenta Seeds Ltda

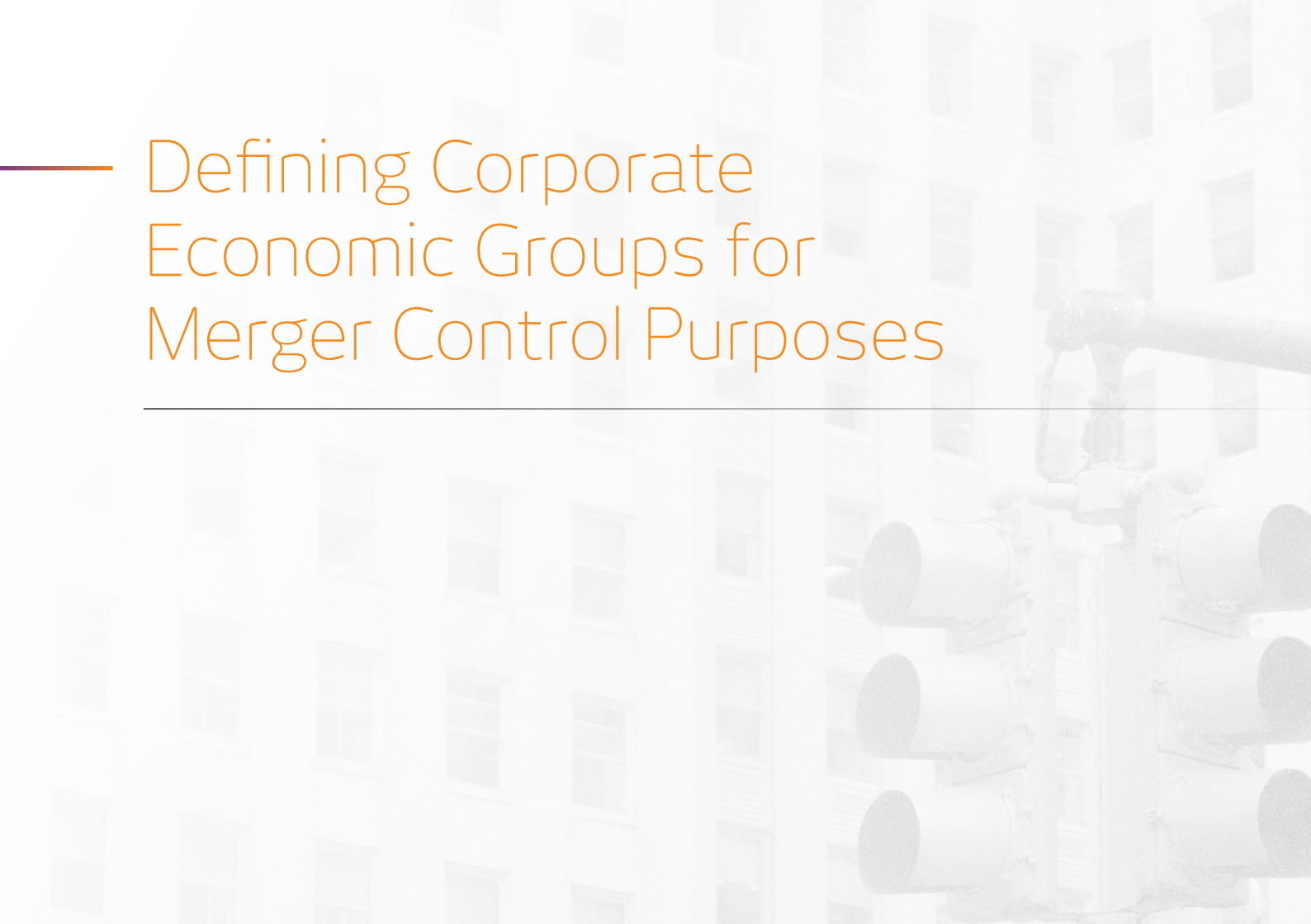
from participating properly in the fact-finding phase of the case. [10]

Regardless of the adopted course of action, third parties are undoubtedly willing to play an important role and can significantly contribute to the fact-finding phase of merger control proceedings before Cade, whether they are properly admitted as interested third parties or simply respond to the authority's information requests. They can also effectively influence the result of the assessment – which is usually a welcome contribution, as long as the third parties respect the legal limits of the roles assigned to them.

However, third parties (especially non-admitted ones) must not be allowed to exceed these limits by taking the lead in cases and transforming merger case analysis into private disputes, generating legal uncertainty about Cade's decisions and unduly delaying legitimately approved transactions. Indeed, if they are allowed to do so, the effectiveness of Brazil's pre-merger controls could be called into question, despite their success over the last decade. Considering Cade's decisions in recent cases, it is expected that this trend will not prevail, at least in the administrative sphere.

10. Merger Case No. 08700.002605/2020-10. Parties: Bunge Alimentos SA and Grupo Imcopa

Defining Corporate Economic Groups for Merger Control Purposes



As the authority responsible for overseeing competition matters in Brazil, Cade requires parties involved in M&A transactions to notify it in certain circumstances. Two key factors must be taken into account to determine whether a transaction is subject to merger control filing with Cade – the parties' economic groups, as well as their respective revenue in Brazil. According to the Brazilian Antitrust Law[11], if during the fiscal year immediately prior to the transaction, at least one of the involved economic groups registers at least BRL 75 million[12] in gross revenue in Brazil while another group registers at least BRL 750 million[13], the transaction must be filed with Cade[14]. Thus, the question of calculating this revenue becomes highly relevant for certain transactions.

The first step in assessing if the stipulated revenue thresholds are met involves definitively determining the entities that make up the economic groups involved in the transaction. However, Brazilian merger control regulation does not clearly determine the precise moment when parties must define the makeup of their economic groups in order to assess if filing a given M&A transaction is required.

Considering the lack of a specific rule, companies have sought guidance from decisions issued by

11. See: http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view

12. Approximately USD 14,432,236, considering the exchange rate on December 31, 2020 of BRL 1.00 = USD 0.192, according to the Brazilian Central Bank.

13. Approximately USD 144,322,359, considering the exchange rate on December 31, 2020 of BRL 1.00 = USD 0.192, according to the Brazilian Central Bank.

14. Please refer to Article 88 of Law no. 12,529/2011 and Regulation No. 994/2012. Please note that the Brazilian merger control regulation also establishes two other criteria to establish whether a transaction is subject to merger filing: the transaction produces actual or potential effects in Brazil and it is considered a "concentration" under the Brazilian merger control regulation.

Cade's General Superintendence (GS) and Tribunal. A decision issued by the GS on August 17, 2021, has offered a new understanding of the matter, which companies should take into account going forward. The main discussions addressed in the decision are outlined below.

The recent decision concerned SMR Participações e Investimentos' (SMR – an acquisition vehicle of Brazilian private equity firm Pátria Investimentos Ltda) acquisition of Irmãos Boa Ltda (Irmãos Boa) and Santa Rosa Comércio Atacadista de FLV Ltda (Santa Rosa). [15] The three parties argued that the transaction was not subject to mandatory merger control filing with Cade, as SMR's economic group did not meet the applicable revenue threshold on the date the acquisition agreement was signed. This conclusion was based on the understanding that Tiscoski Distribuidora Ltda (Tiscoski) – a company in the process of being acquired by Pátria – should not have been considered part of the same economic group as SMR, as this acquisition had not yet been closed. Consequently, it was argued that Tiscoski's turnover should be excluded from the total gross revenues of SMR's economic group – and thus, the transaction would not trigger the need for merger control filing in Brazil.

In light of this situation, the GS discussed two questions concerning the definition of economic groups for assessing applicable revenue thresholds. Firstly, when determining which companies make up an economic group in order to calculate its gross revenue, what should the cut-off date be? Secondly, if 'Company A' already signed a prior agreement to acquire 'Company B' that has yet to be closed when the other relevant M&A deal is signed, should Company B's revenue be taken into account for the

15. Merger Case No. 08700.002141/2021-14.

filing assessment of the second deal? This latter question has also raised a third one – if 'Company C' already signed a prior agreement to *sell* 'Company D' but closing is still pending when the relevant deal in question is signed, should Company D still be considered part of the same economic group as Company C at the time Company C signed the second deal?

Over the past few years, varied answers to these questions have appeared in CADE's decision-making, as discussed below.

1. At which specific moment should economic groups be defined in order to assess their gross revenue?

In the HNA/Azul case[16], the GS decided that the parties should consider the cut-off date to be the end of the year immediately prior to the date the relevant transaction was signed. On the other hand, in the Rede D'Or/GSH Participações case[17], the GS deviated from the previous decision, ruling that the economic groups should be assessed in accordance with the date the relevant transaction was signed.

In its most recent decision concerning the SMR/Irmãos Boa/Santa Rosa case, the GS proposed yet another approach to the same question. This time, the parties should define their respective economic groups considering the situation at the "moment of the transaction" – meaning the date Cade was notified of the transaction.[18] In practical terms, if

16. Merger Case No. 08700.000478/2016-20 (Parties: Hainan Airlines Co. Ltd and Azul SA). Cade issued the decision on February 4, 2016.

17. Gun Jumping Investigation No. 08700.000631/2017-08 (Parties: Rede D'Or São Luiz SA e GGSH Participações SA). Ruled by Cade's Tribunal on August 8, 2018.

18. As stated by Cade: "The definition of the economic group, with the delimitation of the companies in which the parties have shareholding interest, should consider the situation at the moment of the transaction." and "The moment of the transaction means the notification date."

the economic group's makeup changes between the signing date and the date the transaction is submitted to Cade for review, such changes must be considered to determine whether the economic groups would actually meet the applicable revenue thresholds.

2. What should the parties do if a related deal still awaits closing at the time the parties sign (and close) the transaction that may require filing with Cade?

Until the GS' most recent decision in the SMR/Irmãos Boas/Santa Rosa case, the predominant understanding was that a company should only be considered part of the acquirer's economic group after closing. For instance, in the HNA/Azul case, the GS concluded that the transaction did not require filing in Brazil because HNA's acquisition of Swissport was still awaiting regulatory approval in other jurisdictions. The HNA group would have only surpassed the revenue threshold in Brazil if Swissport were already considered part of its group.

However, the recent SMR/Irmãos Boa/Santa Rosa decision offered a different interpretation of a similar situation, thus inferring that the opposite should also be true. According to the GS:

> ***"A company will be considered as part of one of the groups involved in the transaction when the acquisition of shares/quotas of that company is pending completion, especially if the previous transaction has already been submitted to Cade.*** *In this case, the moment to define economic group configuration is the date the transaction is submitted to this Authority, and* ***newly acquired companies in deals awaiting closing will be considered*** *(to be treated as a mere condition of effectiveness)."*

In other words, a company in the process of being sold should not be considered part of the seller's

economic group once that sale is signed, even though closing may only take place at a later stage. This understanding is similar to the GS's decision in the Rede D'Or/NEOH case, in which Cade indicated that its approval of a previous sale transaction would mean the seller's economic group was no longer comprised of the divested company. [19]

The main development introduced by the GS' decision in the SMR/Irmãos Boa/Santa Rosa case is that for all intents and purposes, when assessing the need for filing a transaction with Cade, any prior transaction linked to the economic groups that has been signed should be considered closed, even if in fact it is still awaiting closing – or even Cade's prior approval.

As can be seen, the GS' understanding in regard to the cut-off date for defining economic groups to assess the need for merger control filing has evolved over the years. Going forward, the understanding expressed by the GS in the SMR/Irmãos Boa/Santa Rosa case should guide filing assessment for future transactions.[20] Therefore, when assessing if merger control filing is required in Brazil, companies in the process of being acquired should be considered part of the acquirer's economic group, even if the closing has yet to be finalized.

19. Merger Case No. 08700.007317/2016-67. (Applicants: Rede D'Or São Luiz SA, NEOH - Memorial Núcleo Especializado em Oncologia e Hematologia Ltda). Cade did not recognize the transaction. Decision published on November 24, 2016.

20. In this regard, the decision states: "As guidance for future situations, the economic group's composition in a merger filing must consider companies whose transfer has not been previously filed with CADE, even if the transaction is pending effectiveness, for the purposes of Article 88 of Law No. 12,529/2011 and Article 4 of CADE Resolution No. 2/2012."

Competition Law and ESG

In recent times, discussions in the corporate world on the need to redefine companies' environmental, social and corporate governance (ESG) policies and standards have been gaining increasing relevance and momentum, leading to clear intersections with various areas of law. Competition law is no exception to this trend.

While still emerging in Brazil, debate on how competition law connects with ESG has reached considerably advanced stages at the international level. As such, studies put forward by competition authorities in several European countries, and the European Commission itself, address questions such as how – and if – sustainability[21] factors should be taken into account or included in competitive assessments of corporate transactions and conducts. Moreover, these authorities have been intensifying their analysis on the competitive impact of certain ESG-related initiatives.

Certain concerns have arisen about how competition rules could hinder corporations or create disincentives for adopting sustainable practices – including via cooperation. However, competition authorities are also studying mechanisms that may prevent socially and environmentally beneficial measures from harming markets' competitive dynamics.

Although cooperation between private players could potentially favor these types of measures – such as investments in greener technology or agreements to replace the use of specific products and resources within production chains – there is also a fear that these measures may infringe

21. Please note that the word "sustainability" is used here in a broader sense, encompassing environmental, as well as social and economic factors, as described in the UN's General Assembly's Resolution No.66/288 of 2012. Available at: (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf). Accessed on September 20, 2021.

on competition rules by creating incentives for competitors to exchange information or adopt similar production patterns. At least hypothetically, this could facilitate collusive behavior. Furthermore, there is an ongoing discussion about whether social and environmentally positive effects stemming from corporate transactions should be considered in merger reviews as merger-related efficiencies.

In light of these varying discussions and debates, a series of relevant initiatives has been implemented in Europe, mainly prompted by commitments undertaken within the European Green Deal.[22] As a case in point, the European Commission has already announced that it will consider sustainability benefits in its competitive assessments and its guidelines on horizontal and vertical agreements.[23] Nevertheless, the European Commission has already stated that competition law should not be viewed as the main tool for promoting sustainability – rather, it should be regarded as merely one of many ancillary instruments. In the European Commission's view, tax and regulatory measures are more appropriate for this purpose.[24]

Despite rising support in favor of more flexible competition rules to accommodate social and

22. Competition authorities in Europe have published several documents on this subject: Greece's Hellenic Competition Commission (HCC) published a study titled Staff Discussion Paper on Sustainability Issues and Competition Law in September 2020; in turn, the UK's Competition and Markets Authority (CMA) has produced an information sheet titled Environmental Sustainability Agreements and Competition Law; the Netherlands' Authority for Consumer and Markets (ACM) is currently developing Guidelines on sustainability agreements to provide assurances to competitors seeking to cooperate in social and environmental initiatives; and, finally, the OCDE has also issued a report on 'Competition and Sustainability', examining these matters from both legal and economic standpoints.

23. See https://www.whitecase.com/publications/alert/eu-horizontal-rules-under-review-european-commission-publishes-staff-working; and https://www.lw.com/thoughtLeadership/eu-distribution-rules-under-review.

24. See https://ec.europa.eu/competition/information/green_deal/call_for_contributions_pt.pdf. Accessed on September 20th, 2021.

environmental considerations, there is also a growing awareness of the potentially negative effects that this trend may lead to. Perhaps the most notable risk relates to greenwashing, i.e., using the idea of sustainability to cover up anticompetitive conduct, which may be aggravated by the lack of objective standards for evaluating exactly how sustainable certain practices are, allowing for excessively broad interpretations of this concept.

In Brazil, Cade has yet to release a specific study on how competition law could affect ESG, nor has it taken a clear stance on the subject to date. The theme has been discussed on only a few occasions in merger cases where the parties' sustainable practices were brought up. Cade has assessed cases of this sort exclusively based on their competitive implications, and any reference to sustainability aspects is usually made under the economic perspective of traditional competitive assessments. [25]

In this regard, Cade's position when examining Vale SA's acquisition of Ferrous Resources Limited was particularly symbolic.[26] On that occasion, Cade made it clear that its activities would remain confined to competition law-related matters, thus excluding regulatory, social and environmental issues, among others.

25. Examples of this approach include an assessment of Cargill Agrícola SA's acquisition of a stake in Zero North A/S, with the subsequent provision of eco-friendly software (Merger Filing No. 08700.009764/2015-70), as well as the ISP Marl Holdings' acquisition of Schulke & Mayr GmbH's personal care business (Merger Filing No. 08700.012602/2015-19). Although both transactions resulted in more sustainable practices being implemented, this aspect was not taken into account by the Cade's General Superintendence, whose favorable decisions were based exclusively on the absence of negative impacts on competition.

26. Merger Filing No. 08700.007101/2018-63.

Beyond general guidelines, no specific guidance from Cade currently exists on the precautions that companies should take when implementing certain social and environmental initiatives. There is also no indication that Cade's merger reviews will eventually integrate social and environmental aspects. However, considering the relevance and importance foreign competition authorities have already placed on ESG, we expect deeper and more frequent discussions to start emerging in Brazil in the future.

Cade Releases New Study on Digital Platform Markets

In light of ongoing global discussions, Cade has launched several initiatives for studying digital markets over the past few years, reflecting the authority's growing interest in the topic. In 2019, Cade held an international conference called 'Designing Antitrust for the Digital Era', also publishing a report titled 'BRICS in the Digital Economy: Competition Policy in Practice'. In June 2020, Cade began a broad consultation process to gather information on transactions involving companies in digital markets.[27] In August of the same year, Cade released a working paper that reviewed reports on the sector published by other authorities or research centers.

Published in August 2021, Cade's latest study – an initiative of its Department of Economic Studies – analyzes a wide array of Cade's decisions in relation to digital markets and platforms between 1995 and 2020.

This new study has adopted a rather broad definition of 'digital platform markets'. Despite the considerable number of cases it addresses, the study does not differentiate digital platforms from other types of digital business models, nor inherently digital markets from those currently undergoing a digitalization process or that merely have certain online features. Thus, in several cases, there is only a partial digital or online aspect to the products and services offered by the parties.

Moreover, as the period analyzed in the study dates back to a time when the internet was still in its infancy, it covers old cases concerning markets that have since undergone considerable changes

27. Communication No. 08700.002785/2020-21, in which 19 companies were consulted: Amazon, B2W, Booking.com, Decolar, Google, iFood, Mercado Livre, Magazine Luiza, Facebook, Grupo Netshoes, Twitter, Microsoft, Submarino Viagens, Apple, Uber do Brasil, 99Taxis, Via Varejo, Walmart Brasil, Tencent.

since Cade analyzed them – such as online music and video-on-demand markets. As such, certain understandings linked to older decisions analyzed in the study will be reassessed and updated in the future (including criteria for defining relevant markets and the degree of market rivalry).

Cade identified 143 merger control cases involving digital markets, most of them related to the online advertising and retail sectors. Only two cases were cleared with remedies – Nike/Centauro and Itaú/XP. [28]

The study also includes 16 investigations involving digital markets over the last 25 years involving services such as online price comparison tools, online advertising, passenger transportation applications, online tourism, online retail and online music. The main competition concerns that Cade raised involved exclusivity agreements and abuse of dominance.

Altogether, ten of the investigations have already been closed, with nine being dismissed without penalties. Because of this, the cases included in the study do not provide any real idea of the penalties Cade would currently apply in such markets, nor what evidence would be considered sufficient to prove antitrust infringements.

Despite an absence of consolidated precedents in Brazil, the Cade's study demonstrates a high level of analytical scrutiny in cases involving digital markets, with an extensive fact-finding phase and requests for information sent to several market players.

Given that practices in technology markets tend to cut across different countries, Cade is

28. Merger Cases No. 08700.000627/2020-37 (Parties: Grupo SBF S.A. and Nike do Brasil Comércio e Participações Ltd) and No. 08700.004431/2017-16 (Parties: Itaú Unibanco S.A. and XP Investimentos S.A).

always inclined to consider decisions from other enforcement agencies, where applicable. For example, Cade followed the European Commission's position in allowing strict parity clauses in cases involving the online tourism market. It entered into agreements with the investigated companies to limit how parity clauses could be used in order to avoid free riding.

On the other hand, Cade's decisions have also taken the particular characteristics of the Brazilian market into account, as well as the specific conduct carried out in the country. In contrast to the position adopted by the European Commission, the Google Shopping [29] and Google AdWords[30] cases were both dismissed in Brazil. On both occasions, Cade concluded that Google's conduct in Brazil was not the same as its conduct in Europe.

Most cases identified in the new study are related to traditional markets that have become more digitalized in recent years, such as tourism, retail, and music. In these cases, competitive analysis was conducted using traditional antitrust tools, with market digitalization discussed as a factor that expanded the reach of the business. The cases indicate that traditional antitrust analysis is capable of addressing problems in markets undergoing digitalization. As such, Cade reaffirms that its antitrust regulations are adaptable to a diverse range of business practices.

It is worth noting that the study does not aim to provide guidelines on how Cade should address challenges posed by innovative markets. Indeed, several open questions remain – how and when Cade should intervene in dynamic markets, how to estimate an intervention's long-term effects, how to adapt traditional tools to the specific

29. Administrative Proceeding No. 08012.010483/2011-94.

30. Administrative Proceeding No. 08700.005694/2013-19.

characteristics of platforms, and how to identify and address anticompetitive practices. There are also no hints about how the relationship between privacy and competition policy may eventually be addressed.

Nevertheless, the new study is very useful as a tool for reviewing Cade's past decisions and as a guide for assessing digital markets. Furthermore, the study shows Cade's commitment to constantly assess and seek technical qualification for its own decision-making processes. With wide-ranging technological evolution and a spike in the growth of online products and services (further accentuated by the Covid-19 pandemic), we can expect Cade to be asked to address these types of matters more and more frequently, as well as to more clearly define criteria for analyzing mergers and practices in digital markets in its future decisions.

Our partners

Amadeu Ribeiro
amadeu@mattosfilho.com.br
+1 646 695 1101
New York

Lauro Celidonio
lauro@mattosfilho.com.br
+55 11 3147 7669
São Paulo

Eduardo Frade
eduardo.frade@mattosfilho.com.br
+55 61 3218 6095
Brasília

Marcio Soares
msoares@mattosfilho.com.br
+55 11 3147 2701
São Paulo

Michelle Marques Machado
michelle.machado@mattosfilho.com.br
+ 55 11 3147 7639
São Paulo

Renata Fonseca Zuccolo Giannella
rzuccolo@mattosfilho.com.br
+55 11 3147 7767
São Paulo

MATTOS FILHO > Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

/company/mattosfilho

/mattos_filho

/mattosfilhoadvogados

/mattosfilho

www.mattosfilho.com.br

único The Mattos Filho news portal

access our portal

listen to our podcast

V2-210705