



# Competition law and policy in **Brazil**: relevant developments and outlook

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# Introduction

This booklet summarizes the main aspects of current Brazilian competition policy, as well as the Administrative Council for Economic Defense's (Cade) decisions and approaches to specific cases. The articles also draw attention to trends and perspectives that companies should look out for when doing or planning to do business in Brazil.

The first chapter highlights the main developments in merger assessments, highlighting the growth in the number of transactions Cade analyzed in 2021. We also address expected trends for 2022, such as more in-depth assessments and greater emphasis on economic data, a potential increase in requests for Cade's Tribunal to carry out secondary reviews, and more detailed analyses of

merger remedies. The second chapter presents an overview of Cade's enforcement, with several new investigations launched and the resumption of dawn raids. Possible trends for 2022 are also outlined, including the possibility of applying the concept of 'supracompetitive profits' to penalty calculations. In the third chapter, we present the MSC/Log-In case, which saw Cade authorize MSC subsidiary SAS to exercise certain political rights in Log-In before its acquisition was cleared, subject to certain safeguards and monitoring commitments. Finally, in light of the judgment on a consultation Michelin conducted with Cade, we address trends in the review of resale price restriction policies.

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# — Main developments in merger cases and expectations for 2022

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If the number of mergers reviewed in 2020 was high, in 2021 it was higher still. Cade reviewed 454 transactions in 2020 – 391 via the fast-track proceeding and 63 via the ordinary proceeding.<sup>1</sup> The number of reviews trended significantly upward in 2021, totaling 610 transactions, 526 of which were submitted via the fast-track proceeding and 84 via the ordinary proceeding.<sup>2</sup>

Beyond the sharp rise in reviewed transactions, several cases involving important discussions on competition issues were reviewed both by Cade's General Superintendence (GS) and Tribunal. Cade has been requesting greater detail in the information parties present in these cases, with a growing emphasis on economic data. We have also noticed more in-depth analysis and remedy negotiations, which has increased the duration of

reviews in certain cases. Finally, Cade's scrutiny of the accuracy of the data provided by notifying parties has increased (with accusations of submitting misleading information), and there has been an increase in the number of requests by Cade's Tribunal to carry out secondary reviews.

## **INCREASING SHIFT TOWARDS IN-DEPTH REVIEWS WITH GREATER EMPHASIS ON ECONOMIC DATA**

Cade is known for its efficiency in clearing merger cases. However, the average review time can vary (especially under the ordinary procedure), depending on the level of detail in the GS's analysis, whether third-party intervention is involved, or possible requests for the tribunal to review the case.

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1. See: <https://publicacoes.mattosfilho.com.br/books/btqe/#p=14>

2. Data extracted on January 17, 2022, from the "Cade em números" tool, excluding a merger case that was archived due to loss of object.

Together with the increased number of filings, these factors seem to have impacted the merger review period in 2021, especially in sectors that have been undergoing consolidation, such as healthcare, pharmaceuticals, retail and financial services, agriculture, education, as well as sectors related to digital markets. This trend also comprises longer pre-notification discussions with Cade and a greater number of requests for additional information, such as in *Cogna/Eleva*<sup>3</sup> (with a 151-day review time), *Arco/Pearson*<sup>4</sup> (132 days), *Dasa/Leforte*<sup>5</sup> (138 days), *NotreDame/Serpram*<sup>6</sup> (201 days), *Serasa/Claro*<sup>7</sup> (145 days) and *Ânima/Laureate*<sup>8</sup> (144 days).

Furthermore, review periods are significantly affected when cases require remedy negotiations, which must be subject to approval by the Tribunal. For instance, the GS's opinion in the *Localiza/Unidas*<sup>9</sup> case (mentioned below) was published after more than 200 days of analysis. In another case involving Claro, Telefônica and TIM's acquisition of Oi Move! S.A., the GS requested Cade's Tribunal provide a 90-day extension to proceed with analyzing a remedy proposal – the first time this request happened at the GS level. Prior to this, such extensions only occurred in cases already under the Tribunal's final review.

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3. Merger Case No. 08700.002232/2021-50.

4. Merger Case No. 08700.002297/2021-03.

5. Merger Case No. 08700.001171/2021-11.

6. Merger Case No. 08700.006195/2020-78.

7. Merger Case No. 08700.006373/2020-61.

8. Merger Case No. 08700.006238/2020-15.

9. Merger Case No. 08700.000149/2021-46.

Companies should bear in mind that Cade is reviewing cases with a more detailed level of scrutiny, which may include using different relevant market scenarios as well as various proxies to measure the level of market concentration. As such, there is an increasing emphasis on economic data.

This trend also applies to transactions involving digital markets, which continue to gain the attention of international authorities and Cade. In August 2021, Cade's Department of Economic Studies released a new study titled "Digital Platform Markets" to identify precedents in the context of merger and anticompetitive conduct investigations, as detailed in the third edition of this booklet from 2021.<sup>10</sup>

In another important development, Cade is looking more closely into the accuracy of information and data that parties provide in merger filings, with investigations on deceptive or misleading information taking place, as the second edition of the 2021 booklet anticipated.<sup>11</sup> This issue was addressed in the *Delta Airlines/Latam Group* case – although the transaction was unconditionally cleared, the Tribunal also ordered a previous merger case between the same parties to be reopened following alleged inconsistencies noticed during the 2021 case. This re-examination is still ongoing.

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10. See [https://www.mattosfilho.com.br/Documents/210624\\_livreto\\_concorrencial\\_2021\\_3ed\\_EN.pdf](https://www.mattosfilho.com.br/Documents/210624_livreto_concorrencial_2021_3ed_EN.pdf).

11. See <https://publicacoes.mattosfilho.com.br/books/expv/#p=1>.

## INCREASING REQUESTS FOR SECONDARY REVIEWS OF MERGER CASES

The first edition of last year's booklet noted a relative increase in the number of requests by Tribunal Commissioners for secondary reviews of merger cases the GS had unconditionally cleared. A year later, this trend continues to hold true.

Despite the increase, these requests are still the exception – for example, when there have been actual concerns about certain markets or contrasting views between the GS and the Tribunal. Still, secondary reviews tend to impact the duration of the merger review, while demonstrating Cade's increased scrutiny in its analysis, even for non-complex cases.

In the *Delta Airlines/Latam Group* case<sup>12</sup> involving companies in the airline industry (among the sectors hardest hit by the pandemic), Cade's Tribunal approved the second review request in October 2020 and only published the final decision in March 2021, a period of 147 days. Ultimately, the Tribunal did not overrule the GS's prior decision to unconditionally clear the transaction.

In 2021, Cade's Commissioners submitted eight secondary review requests (up from five in 2020), but only one was approved by the Tribunal (down from three in 2020). This also demonstrates that Cade's Tribunal is analyzing these requests very carefully, focusing on cases where there may be actual concerns while avoiding unnecessary costs or damages to the notifying parties and the market to the greatest extent possible, for the sake of expediting the review:

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12. Merger Case No. 08700.003258/2020-34.



Merger Case (Parties) <sup>13</sup>	Time period between the approval of the request for review and the Tribunal's final decision	Decision
08700.000821/2021-01 (American Tower International, Inc. and Telxius Telecom S.A.)	N/A. Commissioner Lenisa Prado reconsidered her prior request for further review after clarification from the notifying parties.	N/A.
08700.000167/2021-28 (Rede D'Or São Luiz S.A. and Hospital América Ltda.)	N/A. Commissioner Lenisa Prado reconsidered her prior request for further review after clarification from the notifying parties.	N/A.
08700.001312/2021-98 (Smartfit Escola de Ginástica e Dança S.A. and Just Fit Participações em Empreendimentos S.A.)	N/A. Commissioner Lenisa Prado reconsidered her prior request for further review after clarification from the notifying parties.	N/A.
08700.006373/2020-61 (Serasa S.A. and Claro S.A.)	N/A, as the review request for review was not approved by the Tribunal.	N/A.
08700.004481/2021-80 (Americanas S.A. and Hortigil Hortifrutis S.A.)	N/A, as the request for review was not approved by the Tribunal. Cade's President cast the deciding vote against the request.	N/A.
08700.002747/2021-50 (Marfrig Global Foods S.A. and BRF S.A.)	N/A. Commissioner Lenisa Prado reconsidered her prior request for further review after clarification from the notifying parties.	N/A.
08700.002894/2021-20 (Mills Estruturas e Serviços de Engenharia S.A. and SK Rental Locação de Equipamentos Ltda.)	N/A, as the request for review was not approved by the Tribunal. Cade's President cast the deciding vote against the request.	N/A.
08700.002922/2021-17 (Sony Music Entertainment Brasil Ltda. and Globo Comunicação e Participações S.A.)	Request for review approved by majority vote on December 1, 2021. Final decision pending – the transaction was filed on June 3, 2021.	Pending.

13. Considering only requests for further review ruled on in 2021, in the chronological order they were submitted.

## INCREASINGLY IN-DEPTH REVIEWS OF REMEDY NEGOTIATIONS IN COMPLEX CASES

The analysis and negotiation of remedies have also come under greater scrutiny. In 2021, 'fix-it-first' and 'upfront buyer' types of remedies were common (as in *Hapvida/Plamed*<sup>14</sup> and *Hypera/Takeda*<sup>15</sup>). However, despite Cade's more recent preference for 'structural remedies' (e.g., asset divestiture) – as detailed in the second edition of the 2021 booklet<sup>16</sup> – there has been an increasing number of cases involving 'behavioral' or 'hybrid' remedies (as in *Hapvida/Plamed*, *Teksid/Tupy*<sup>17</sup>, *Danfoss/Eaton*<sup>18</sup>, and *Localiza/Unidas*).

One of the most anticipated cases in 2021 concerned car rental company Localiza's acquisition of Unidas. Clearance was made subject to adopting a remedy package comprised of strict structural and behavioral measures, including divestment of important assets, an obligation to file certain transactions before Cade regardless of whether they meet mandatory notification criteria, and a commitment to refrain from exercising non-competition rights that stemmed from an agreement Localiza had entered into with a foreign company.

Another case involved Tupy's acquisition of Teksid's iron casting business, previously owned by Fiat Chrysler (currently Stellantis). The transaction was

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14. Merger Case No. 08700.001846/2020-33.

15. Merger Case No. 08700.003553/2020-91.

16. <https://publicacoes.mattosfilho.com.br/books/expv/#p=2>.

17. Merger Case No. 08700.002569/2020-86.

18. Merger Case No. 08700.003307/2020-39.

cleared subject to adopting a set of measures for Brazil, such as the transfer of certain supply contracts to other players.

Finally, we highlight Danish multinational Danfoss' acquisition of Eaton's hydraulic solutions business. The decision and adopted remedies were announced following cooperation and coordination between Cade and certain foreign authorities, as the transaction had also been notified in the United States, the European Union, Ukraine, Egypt, China, South Korea, Mexico, Australia, and Turkey. Cade's joint review with other authorities sought to avoid remedies that would excessively burden the parties and maintain balance with the foreign authorities' positions, while still respecting the particular characteristics of the Brazilian market.

Cade's cooperation with international authorities should not be interpreted as merely deferring to other jurisdictions to decide. On the contrary, Cade has already demonstrated in other situations that

it will take a closer look at the local effects of any global deal. Therefore, any transactions with the potential to harm competition in Brazil in Cade's view are likely to come under scrutiny.

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# — Main developments in conduct control and expectations for 2022

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## INTRODUCTION

In 2021, Cade remained active in investigating anticompetitive conduct despite the challenges of the Covid-19 pandemic. The authority launched and concluded more investigations than in 2020, indicating a return to more intense activity in the wake of the improving scenario for the pandemic in Brazil. 2021 saw more active cartel enforcement resume – there were convictions in two bid-rigging investigations resulting in fines calculated using supracompetitive profits ('advantage gained') as the primary criteria to an unprecedented extent. Cade also handed down its first cartel conviction in the auto parts market and resumed dawn raids. The launch of the first antitrust investigation in the country involving allegedly anticompetitive practices in 'labor markets' was also noteworthy.

Cade's enforcement continued to target unilateral conduct, with the conviction of a logistics company for abuse of dominant position and the imposition

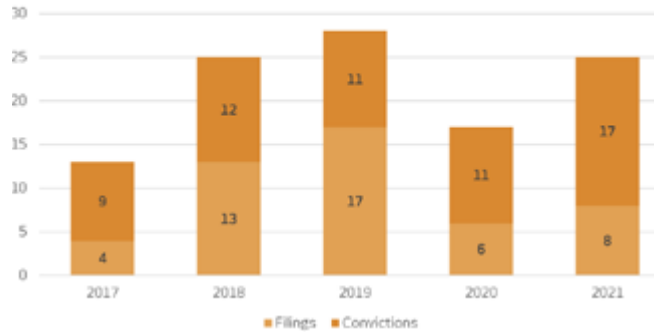
of interim measures in two cases of unilateral conduct and one case regarding uniformization of commercial practices.

The main conduct cases at Cade over the past year are summarized below.

## 2021 ENFORCEMENT STATISTICS: CONDUCT

Cade's statistics on conduct investigations reflect the authority's busy year in this area. Between preparatory proceedings, administrative inquiries, administrative proceedings and settlement agreements, the GS launched a total of 58 proceedings and closed 49, as indicated below:

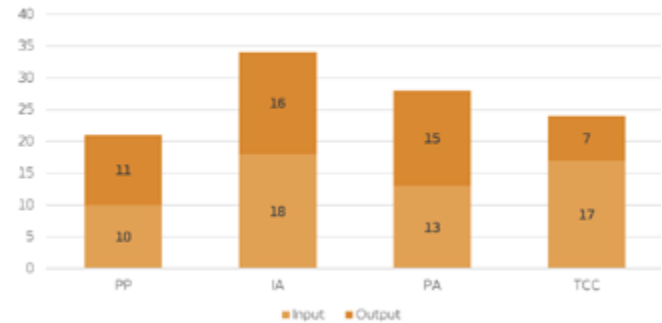
**Administrative Proceedings judged by the court**



Of the 58 proceedings, the majority (29) referred to cartel cases. In second place were unilateral cases (12), followed by uniform conduct (7).

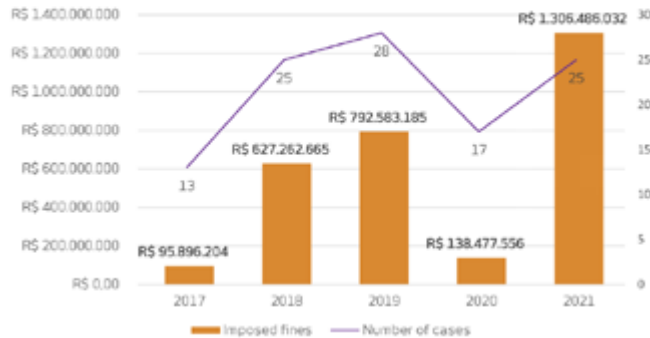
Cade’s Tribunal ruled on 25 administrative proceedings. Among them, eight were closed (full dismissal), and 17 resulted in convictions, in line with a trend toward increasing convictions vis-à-vis 2020:

**Process input and output**



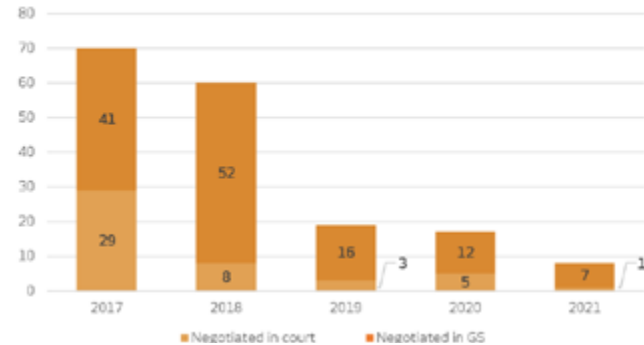
Fines for antitrust infringements amounted to BRL 1.3 billion (USD 232 million), a considerably higher level than in previous years and in particularly stark contrast to 2020:

### Fines applied in Administrative Proceedings



Finally, it is worth noting the reduced number of settlement agreements (TCCs) Cade’s Tribunal approved in 2021, reflecting a low level (compared to previous years) of pecuniary contributions that amounted to BRL 58.7 million (USD 10.5 million).

### Number of homologated TCC applications



The reduced number of settlement agreements stems from greater difficulty (from both the companies’ and GS’ perspectives) in calculating pecuniary contributions, which is due to a lack of consensus on the calculation parameters among Cade’s Commissioners.

## AUTO PARTS CARTEL CONVICTIONS

Cade concluded two investigations of cartel practices involving auto parts companies in 2021. In March, the authority convicted companies involved in a cartel in the automotive bearings market supplying the aftermarket (IAM) and original (OEM) sectors for the first time.<sup>19</sup> The fines amounted to BRL 88.2 million (USD 15.8 million), as well as more than BRL 74 million (USD 13.2 million) in pecuniary contributions via settlement agreements. In October, Cade convicted another auto parts cartel, setting fines of BRL 235 million (USD 42.1 million) for two companies and related individuals for anticompetitive practices in supplying the aftermarket (IAM) with automotive filters.<sup>20</sup> Other defendants' pecuniary contributions via settlement

agreements had amounted to more than BRL 51.8 million (USD 9.2 million).

## ADDITIONAL CARTEL CONVICTIONS WITH FINES CALCULATED BASED ON "SUPRACOMPETITIVE PROFITS"

In an unprecedented development in August 2021, Cade's Tribunal applied standards related to the estimated advantage gained as the primary criteria for calculating fines in two bid-rigging investigations, instead of setting fines based on a percentage of revenues – as set forth by the Brazilian Competition Law (Law No. 12,529/2011). The decisions were rendered by majority vote (four out of the seven Commissioners).

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19. Administrative Proceeding No. 08012.005324/2012-59.

20. Administrative Proceeding No. 08700.003340/2017-63.



Up to that point, as mentioned in the [first edition of our 2021 booklet](#), the few precedents within Cade where estimated advantage gained was applied related to cases with no information about the defendants' revenues. The majority of Cade's Tribunal (including the President) was not carrying out these calculations in light of controversy about the applicable methodology and a lack of necessary information.

In the first cartel case – related to school uniforms and materials<sup>21</sup> – most of the tribunal followed Reporting Commissioner Paula Farani de Azevedo's understanding, adopting standards related to the estimated advantage gained when setting fines for Capricórnio S.A. Based on specific data from price records and the subcontracting value of two public bids, the commissioner estimated supracompetitive

profits of 20.5%. The fine of BRL 9.2 million (USD 1.6 million) corresponded to the estimated advantage gained, which was higher than a potential fine calculated based on the defendant's gross revenue. As for Excel 3000 Materiais e Serviços Ltda., Cade's Tribunal instead applied the revenue criteria, leading to a BRL 19.1 million (USD 3.4 million) fine, as the estimated advantage gained (with a presumed 20% level of overcharge) was found to be lower. Meanwhile, the fines for the other defendants were calculated based on their revenues because they did not win any public bid affected by the cartel.

In the other case, involving a cartel for school and office materials<sup>22</sup>, most Cade's Tribunal followed Commissioner Sérgio Costa Ravagnani's understanding, calculating fines for four defendants based on their estimated advantage gained. The

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21. Administrative Proceeding No. 08700.008612/2012-15.

22. Administrative Proceeding No. 08700.004455/2016-94.

Commissioner adopted a 20% estimated overcharge on the values of public contracts obtained by the companies through the cartel. According to the Tribunal, the overcharge percentage was a *“relative presumption, subject to contrary evidence from the defendants” and would be supported by “empirical studies where such a percentage can be observed in several cases of national and international cartels.”*

It is worth highlighting that both decisions refer to bid-rigging cases, in which the transparency of the bids and the proposals offered by the companies facilitate estimating the advantage gained by the winning company.

In 2022, it will be important to continue following the discussion on the standards for estimated advantage gained amongst the Commissioners at Cade’s Tribunal, especially considering that two new Commissioners are expected to be appointed soon. The two unprecedented cases above demonstrate that factoring in the advantage gained may increase

the value of fines in cartel cases. However, fines imposed on this basis tend to lead to more litigation and discussions in the Brazilian Judiciary that can last for years. Furthermore, they can also create legal uncertainty, as calculating the advantage gained is considerably complex and often depends on information and data that Cade does not have access to.

## OTHER HIGHLIGHTED CASES

In April 2021, Cade convicted several companies and related individuals involved in bid-rigging for outsourcing school meal services, with fines amounting to BRL 340.8 million (USD 61 million). In a separate bid-rigging case related to the supply of PVC pipes and fittings in June, Cade imposed fines of more than BRL 192.2 million (USD 34.4 million), in addition to BRL 104.4 million (USD 18.7 million) in pecuniary contributions stemming from TCCs.

In May, Cade concluded two cartel and unilateral conduct investigations. The first related to anticompetitive practices in the international freight sector for air and sea cargo originating from or destined for Brazil, resulting in BRL 31.2 million (USD 5.6 million) in fines.<sup>23</sup> The second case consisted of antitrust infringements involving distributors, various gas stations and related individuals, as well as a collective entity in the fuel distribution and resale market in the Brazilian city of Joinville, with fines totaling more than BRL 38.7 million (USD 6.9 million).

Once again, Cade convicted a number of companies involved in charging port fees in 2021. In two cases ruled on in May and June, Cade's Tribunal concluded that the collection of start-up fees for new port operators constituted anticompetitive practice, setting fines of more than BRL 6 million (USD 1

million) against port labor management agencies and several port operators.

Finally, in November, Cade's Tribunal issued an important decision, determining that Rumo Logística Operadora Multimodal and América Latina Logística had abused their dominant position and created difficulties for a rival company in the logistics market for sugar exports. After a five-year investigation, the authority handed down BRL 247.1 million (USD 44.2 million) in fines – a significant amount when considering Cade's previous convictions for unilateral conduct. Federal prosecutors will also analyze whether the conduct was tantamount to a violation of the remedies agreement the defendant signed when a merger between Rumo and América Latina Logística was approved.

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23. Administrative Proceeding No. 08012.001183/2009-08.

## NEW INVESTIGATIONS

As mentioned above, the GS launched a total of 58 preparatory proceedings, administrative inquiries, administrative proceedings and settlement agreements in 2021. The main investigations that were launched are outlined below.

In March, the GS launched the first antitrust investigation in Brazil concerning alleged anticompetitive practices involving labor markets. The probe targets 36 companies and more than 100 individuals in the healthcare industry in the metropolitan region of São Paulo. According to a technical note from the GS, there is evidence that sensitive information was exchanged among the human resources departments of several companies, especially regarding remuneration, salary adjustments and benefits. The GS has also pointed out alleged coordinated practices in relation to hiring policies and people management, which would

have included coordination in union negotiations. This investigation has been instigated just as the relationship between human resources practices and competition law gains prominence in other jurisdictions, with discussions and investigations on anticompetitive labor practices such as no-poaching and wage fixing.

This type of investigation is unprecedented in Brazil. The proceeding is still in its early stages and may represent the beginning of Cade's increased focus on conduct related to Brazil's labor market, which is considerably different from labor markets in other countries. Considering the nature of Brazil's labor system, unions and the extent of antitrust enforcement, Cade's role in this matter is of great significance.

Other noteworthy investigations Cade launched in 2021 include an administrative proceeding against seven companies and individuals in relation to an alleged international cartel for pharmaceutical

products used in antispasmodic drugs<sup>24</sup>, as well as an administrative proceeding on unilateral information disclosure.<sup>25</sup> Cade has also launched an administrative proceeding against Globo for alleged abuse of dominant position in relation to advertising services and advertising time slots.<sup>26</sup> As for investigations of alleged antitrust infringements

in public bids, Cade opened at least fourteen administrative proceedings.<sup>27</sup>

## INTERIM MEASURES

Cade continued to impose interim measures in unilateral conduct cases with the purpose of

24. Administrative Proceeding No. 08700.004235/2021-28.

25. Administrative Proceeding No. 08700.005438/2021-31. The investigation was launched in December against a businessman from the sugar and ethanol market. While participating in a workshop attended by other competitors, he spoke in a way that could have caused potential anticompetitive effects in the opinion of the competition authority. For more details, see the article published by our Antitrust partner Eduardo Frade at <https://www.conjur.com.br/2021-dez-20/revelacao-unilateral-informacoes-conduta-anticompetitiva> (available in Portuguese).

26. Administrative Proceeding No. 08700.006173/2020-16, which originated from a preparatory proceeding launched in 2020.

27. (i) Administrative Proceeding No. 08700.000489/2017-91 (civil construction market and industrial assembly of bases for storage, distribution and fuel resale, which would have affected bids from Petrobras in yet another development of Operation Car Wash); (ii) Administrative Proceeding No. 08700.007277/2013-00 (a cartel in public bids for water and sanitation infrastructure, particularly in the State of Rio de Janeiro); (iii) Administrative Proceeding No. 08700.003341/2017-16 (anticompetitive conduct in Transpetro's bids in the industrial maintenance services market for pipelines, tanks and waterway terminals); (iv) Administrative Proceeding No. 08700.006861/2018-53 (domestic market of high-density polyethylene pipes and connections for gas infrastructure); (v) Administrative Proceeding No. 08700.008352/2016-01 (a cartel in the engineering services market for the constructing, expanding and renovating ports and public waterway terminals); (vi) Administrative Proceeding No. 08700.006871/2018-99 (a cartel in the domestic PVC pipes and fittings market); (vii) Administrative Proceeding No. 08700.004914/2021-05 (a cartel in public and private bids for outsourced services); (viii) Administrative Proceeding No. 08700.003252/2017-61 (a cartel for airport works and services in Infraero bids); (ix) Administrative Proceeding No. 08700.003244/2017-15 (anticompetitive conduct in DNIT bids, concerning construction, conservation and maintenance of highways and bridges in Brazil); (x) Administrative Proceeding No. 08700.005020/2019-18 (a cartel in public bids for small and medium-sized infrastructure works); (xi) Administrative Proceeding No. 08700.003247/2017-59 (a cartel in public bids for engineering works and services); (xii) Administrative Proceeding No. 08700.003249/2017-48 (a cartel in public bids for civil urban mobility infrastructure works); (xiii) Administrative Proceeding No. 08700.004172/2020-29 (a cartel in public bids of the Superior Court of Justice - STJ); and (xiv) Administrative Proceeding No. 08700.005876/2019-85 (a cartel in public bids for school transportation services in the state of São Paulo).

preventing potential harm to competition. In March, the GS imposed a preventive measure against the delivery company iFood as part of an investigation into exclusivity contracts with partner restaurants. Although the claimants asked Cade to terminate all exclusivity provisions between iFood and its partners, the GS only prevented iFood from signing new contracts with exclusivity provisions (except when renewing pre-existing contracts). In its decision, the GS mentioned the risk of tipping, considering iFood's high market share and the profile of the exclusive restaurants on the company's platform.

Another important case involving exclusivity provisions that saw interim measures imposed concerned an administrative inquiry into Gympass. Launched in September 2020, the investigation was based on a claim filed by TotalPass, which eventually filed an appeal with Cade's Tribunal after the GS failed to decide on interim measures. Although the Tribunal did not receive the appeal, it ordered the

GS to launch an administrative inquiry in order to continue the investigation. In December, the GS imposed an interim measure preventing Gympass from entering into new exclusivity contracts (in a similar manner to the iFood case) and declaring that the most favored nation clauses with registered gyms were unenforceable. In doing so, the GS also pointed out that the large scope of Gympass' conduct would risk making it impossible for competitors to do business.

In 2021, interim measures were also imposed during an administrative inquiry into the Artists and Entertainment Technicians' Union of the State of São Paulo (SATED). The inquiry investigated the adoption of a fixed price table for dubbing artists, along with the use of coercive behavior to foreclose the market for dubbing directors. In December, the GS ordered the union to refrain from drawing up, disclosing, and imposing the fixed price tables.

Cade's adoption of interim measures in 2021 reinforces its willingness to use these tools when deemed necessary, in order to preserve competitive conditions in the markets involved.

## EXPECTATIONS FOR 2022

In 2022, Cade is expected to continue its intense enforcement of anticompetitive conduct cases. Important appointments to strategic positions within the authority are expected this year – Commissioner Maurício Oscar Bandeira Maia's term ended in July 2021, and the position has been vacant since. Commissioner Paula Farani de Azevedo's term ends in February 2022, which will then leave two positions open at Cade's Tribunal. A new General-Superintendent is also expected to be appointed – the position has been vacant since July 2021, when former Superintendent Alexandre Cordeiro was appointed as Cade's President.

Setting fines based on the criteria of estimated advantage gained is expected to remain part of Cade's agenda, especially after changes to the Tribunal's composition. The controversy this issue has stirred means it is still uncertain when Cade's long-awaited guide on measurement of cartel fines will be published, despite the draft having already gone through public consultation in 2020. Still a largely unexplored issue in Brazil, anticompetitive practices involving human resources departments are set to remain on the authority's radar. The same can be said for unilateral conduct, notably that involving big tech, the financial sector, payment methods, as well as dominant players in regulated markets such as ports and airports. Cade's President Alexandre Cordeiro has stated that unilateral conduct can be more harmful to competition than cartels and must be tackled by the antitrust authority.

2021 was also marked by the resumption of Cade's dawn raids. By participating in an operation dubbed

“Mercado Pacificado” (Pacified Market) in December, it aimed to break up and investigate an alleged cartel in public and private bids in the hospital waste collection, transportation, treatment and disposal market. At this stage, Cade has not yet made the investigation public. With this type of investigatory process now having resumed, it may also represent an important trend to keep track of in 2022, especially considering the increased likelihood that Covid-19 isolation measures will be relaxed.



The background of the slide features a blurred, high-angle view of a multi-story apartment building with many windows. In the lower right foreground, a traffic light is visible, showing three lenses. The overall color palette is light and desaturated, with a soft orange-brown hue overlaid on the text.

# — Authorization to exercise political rights: the MSC/Log-In case

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The Brazilian Competition Law establishes a pre-merger control regime. However, an exception exists for transactions carried out on the stock exchange – the acquiring company can notify Cade post-transaction, but the purchaser is prohibited from exercising political rights in relation to the acquired shares until Cade formally clears the transaction. Still, if there is an exceptional need to “protect the full value of the investment”, Cade may allow for the immediate exercise of political rights.

In December 2021, Cade’s Tribunal authorized SAS Shipping Agencies Services SÀRL (SAS)<sup>28</sup> to exercise certain political rights before the latter’s acquisition of a controlling stake in cargo transport firm Log-In Logística Intermodal (Log-In) was approved. This decision sets an important precedent, considering

that this topic had previously only been discussed in relation to minority acquisitions.<sup>29</sup>

In general terms, Cade has permitted SAS to exercise the following political rights with respect to Log-In:

- Calling extraordinary general meetings to elect members of Log-In’s board of directors;
- Calling and voting at general meetings to resolve matters that alter the normal conduct of business, such as share capital increases and approval of important financial contracts;
- Authorizing voting rights for matters such as elections, removing or replacing members of

28. SAS is a subsidiary of MSC Mediterranean Shipping Company Holding (MSC).

29. See merger cases (i) No. 08700.000869/2015-63, related to Companhia Siderúrgica Nacional’s minority acquisition of Usinas Siderúrgicas de Minas Gerais S.A.; and (ii) No. 08700.003843/2014-96, related to Companhia Brasileira de Cartuchos’ acquisition of common shares up to the limit of 18% of the voting capital of Forjas Taurus S.A. In the case, CBC already held an equity interest of approximately 2% in Taurus.

Log-In's board, specific amendments to the company bylaws, and approving or amending Log-In's share-based compensation plan – potentially resulting in shareholder dilution.

In order to guarantee a competitive environment within the market and ensure the transaction could be reversed while still subject to the GS's review, SAS's political rights regarding Log-In are conditioned to specific safeguards. The safeguards require, for example, that Cade must be informed of any of Log-In's deliberative meetings that SAS participates in, as well as a guarantee that SAS-appointed directors on Log-In's board will act independently – monthly performance reports must be sent to Cade to assist with monitoring. Cade also required SAS to sign a term of commitment, stipulating a daily fine of BRL 200,000 if the company fails to comply with its conditions.

Reporting Commissioner Luiz Augusto Hoffmann emphasized that the approval for SAS to exercise certain political rights should not be understood as a form of precarious authorization to conclude the transaction.<sup>30</sup> However, in the absence of specific legal provisions, the Commissioner applied the procedure for granting precarious authorization as an alternative solution. Thus, the criteria for precarious authorization was used as a basis for assessing the political rights SAS could exercise, namely:

- No risk of irreparable damage to the competitive conditions in the market;
- Plausibility of the invoked right (*fumus boni iuris*), given the existence of a risk to the value of the investment, and;

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30. As provided in Articles 59, paragraph 1 of Law No. 12,529/2011, and 115 to 117 of Cade's Internal Rules.

- The urgency of the claim and danger of delaying a possible rejection (*periculum in mora*).

Both the authorization of political rights and precarious authorization offer urgent protection, yet they differ in regard to the legal interest they protect. While the former ensures a useful and effective outcome in the process to guarantee rights, precarious authorization anticipates the outcome of the final decision by allowing the transaction to be concluded. Notably, precarious authorization has been requested on only a few occasions since the current Brazilian Competition Law took effect in 2012, as Cade has been very strict in granting it.

To date, of the six requests Cade has received for precarious authorization, two were withdrawn

without analyzing the merits of the case, and only one was successful<sup>31</sup>– Excelente B.V.’s acquisition of the entire capital stock of Rio de Janeiro Aeroportos S.A.<sup>32</sup>, which operates the concession for Rio de Janeiro’s Galeão International Airport.

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31. Merger Case No. 08700.007756/2017-51.

32. Prior to the transaction, RJA was owned by Excelente B.V. (40%) and by Odebrecht Transport Aeroportos S.A. (60%).

The background of the slide features a blurred, high-angle view of a multi-story apartment building with many windows. In the lower right foreground, a traffic light is visible, showing three lenses. The overall color palette is light and muted, with a soft orange-brown hue overlaid on the text.

# — Trends in the assessment of resale price restriction policies

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In light of the increasing promotion and expansion of e-commerce in Brazil, resale prices have become a growing concern. Suppliers are worried that resellers are charging excessively low prices, incompatible with the quality and costs of their products. As a result, pricing policies and restrictions regularly appear on the antitrust authorities' agendas, both in Brazil and worldwide.

Cade reviews vertical price restrictions using the rule of reason, and as such, they are not considered illegal *per se*. Resale price maintenance cases are the exception, where the burden of proof is reversed, and the company implementing the pricing policy must prove that it creates efficiencies that outweigh the harm to competition.<sup>33</sup>

Generally speaking, vertical price restrictions occur when the manufacturer determines or sets a certain pricing policy that directly impacts how the product is sold at the retail level. Vertical pricing policies are implemented by suggesting or fixing resale prices and may result from manufacturers' or resellers' unilateral initiatives – in the latter case, as a way of facilitating collusion.<sup>34</sup> Besides the net negative effects for competition in a given market, additional factors such as monitoring and retaliation mechanisms can also reinforce the anticompetitive effects of vertical restrictions, as well as the type of suggested price (minimum or maximum).<sup>35</sup>

Michelin recently started a consultation proceeding at Cade that discussed this matter in great detail.

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<sup>33</sup> Unlike previous resale price maintenance cases, the majority of Cade's Tribunal decided to overrule the rule of reason during the 2013 analysis of SKF's conduct, considering it SKF's burden to prove possible efficiencies or even the pro-competitive nature of the conduct (Administrative Case No. 08012.001271/2001-44). The case is currently under judicial review.

<sup>34</sup> Conduct that involves price fixing is considered more harmful to competition than mere suggestions of prices.

<sup>35</sup> As raised by Commissioner Paula Farani during Consultation No. 08700.004460/2021-64, in general, maximum prices have been considered less problematic than minimum and fixed prices.

Michelin sought Cade's opinion for a minimum price policy (PMA policy) that its dealers intended to apply to the spare tires market.<sup>36</sup> The consultation was requested out of caution, given that Cade's Tribunal had already reviewed a very similar consultation for one of Michelin's competitors, Continental, in 2018.

<sup>37</sup>At that time, Cade found that Continental's PMA policy was presumably lawful, as long as:

- Continental unilaterally set the minimum advertised prices without the involvement of resellers; and
- The economic agents affected by the policy were not subject to discrimination.

The fact that Continental did not hold a dominant position in the spare tire market was another important factor in the Tribunal's decision.

Also present in Michelin's PMA policy, Cade considered these conditions sufficient for addressing competition concerns until recently. Yet when assessing Michelin's consultation, Cade's Tribunal reached a different conclusion, with a majority vote ruling against the policy.

Cade understood that the policy had the potential to increase the final price paid by consumers and hinder price competition among resellers, which would facilitate collusion in the tire replacement market. Notably, the authority claimed that there was no evidence in the case files that the PMA Policy would create efficiencies that could be passed

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<sup>36</sup>. Consultation No. 08700.004460/2021-64.

<sup>37</sup>. Consultation No. 08700.004594/2018-80.

on to consumers. In addition, PMA policies were considered equivalent to setting vertical restraints, despite only applying to advertised prices rather than the resale prices final consumers are actually charged (in other words, retailers would still be free to sell the products at different prices from those advertised and engage in alternative forms of advertising discounts and promotions).

According to Cade's decision on the Michelin consultation, PMA policies are especially problematic when applied to e-commerce. As this format removes the element of direct human communication between the retailer and final consumer, bargaining space does not exist in practice – if it did, it would allow the final price to vary from the advertised price. As such, PMA policies in e-commerce would theoretically have effects equivalent to resale price maintenance.

The fact that this was not the first time that Cade's Tribunal analyzed a similar policy within the spare tire market also had an impact on the authority's final ruling. When considered together, Michelin's and Continental's PMA policies would affect a significant portion of the market. Moreover, Cade was concerned that approving Michelin's PMA policy could also spark other competitors in the spare tire market to move toward implementing similar practices.

However, Cade's decision on Michelin's consultation does not mean that resale price policies are now understood to be unlawful by definition. Cade recognizes that the potential harm these practices cause can depend on different factors, including the nature of the price restriction, whether retaliation mechanisms exist, the supply and demand structure of the affected market, how the policy is implemented, and the efficiencies created and passed on to the final consumer.



In a recent example, Cade cleared a pricing policy for Brazilian fuel company Ipiranga<sup>38</sup>, which uses artificial intelligence to suggest a maximum price for fuel resale at the pump. Although Ipiranga was assumed to have a dominant position, Cade determined the policy did not create competition concerns as it would merely suggest (rather than set or impose) a maximum price, and did not set a fixed or minimum price. Ipiranga's policy also had other characteristics that were significant in qualifying it as lawful:

- The definition of price suggestions that were always lower than the resale price the retailer charged;
- Individualized, customized price suggestions based on the specific characteristics of each retailer; and

- Ipiranga would maintain exclusive ownership of the algorithmic system and the database that would feed it.

In any case, there is a trend toward a stricter position from Cade on the matter. Cade's Tribunal did not endorse Michelin's policy and has even decided to review its decision on the consultation for Continental's PMA policy, suggesting that the Tribunal's understanding in the Michelin case will not be an exception. Therefore, companies intending to develop policies that affect distributors' and retailers' advertisements or prices should look to increasingly explore alternative measures to motivate their retailer network. At the very least, they should define more robust price restriction policies, considering the variables analyzed in Michelin's consultation.

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38. Consultation No. 08700.002055/2021-10.

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