

MATTOS FILHO

Competition Law and Policy in Brazil: Relevant Developments and Outlook

2nd Edition 2022



Table of contents

Introduction	3
New names appointed to Cade	4
Formation of consortia on Cade's radar	7
Cade's view of recent developments in Brazil's music industry	11
Cade approves sale of Oi Móvel, subject to remedies	15

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.

This edition is comprised of four articles. The first concerns four recent appointments the Brazilian government made for the positions of General Superintendent, Commissioner and Attorney General at Cade. The second article provides an overview of how Cade has been approaching the formation of consortia, especially in light of the recent decision to fine a group of Brazilian telecom companies. In the third article, we analyze Cade's current view of the Brazilian music industry, considering the authority's recent review of Sony

Music's acquisition of Som Livre, a Brazilian record company and publisher. The final article addresses Cade's scrutiny of a high-profile transaction in the Brazilian telecom sector (the acquisition of Oi Móvel). The transaction was cleared after a thorough review, subject to certain conditions and remedies.

New names appointed to Cade



On April 6 and 7, 2022, Brazil's Federal Senate approved the nominations of Alexandre Barreto de Souza for the position of Cade's General-Superintendent, Victor Oliveira Fernandes and Gustavo Augusto Freitas de Lima as Cade's Commissioners, and Juliana Oliveira Domingues as Attorney General at Cade's Attorney General Office.

A four-year term applies to the positions of the new Commissioners. The General-Superintendent and the Attorney General will have two-year terms, and are both eligible for reappointment.

During hearings conducted regarding the new appointments – especially for Cade's General-Superintendent – the Senate's Economic Affairs Commission enquired about a cease and desist agreement signed with Petrobras for the divestment of eight refineries and an increase in fuel prices. Further questions were put to the other nominees that focused on Cade's practices in relation to digital markets, banks and the supplementary health market.

Most of these new names are already familiar to the antitrust community. Alexandre Barreto de Souza was Cade's President until 2021; Victor Oliveira Fernandes was chief of staff for a former commissioner, while Juliana Oliveira Domingues is known for her academic work in the field.

Alexandre Barreto de Souza served as Cade's President between 2017-2021. A doctoral candidate in Political Science at Universidade de Lisboa, Barreto de Souza holds a Master's Degree, Specialist Degree and Bachelor's Degree in Public Administration from the Universidade de Brasília. He has worked in the public sector since 1993, holding positions at Cade, the National Treasury, Federal Revenue Service, Federal Senate, and the Federal Audit Court, where he was chief of staff to Justice Bruno Dantas.

Victor Oliveira Fernandes holds a Ph.D. in Commercial Law from Universidade de São Paulo, with his doctoral thesis focused on digital platforms (abuse of dominant position and innovation) and antitrust theory in dynamic competition. He also holds a Master of Laws and Bachelor of Laws from

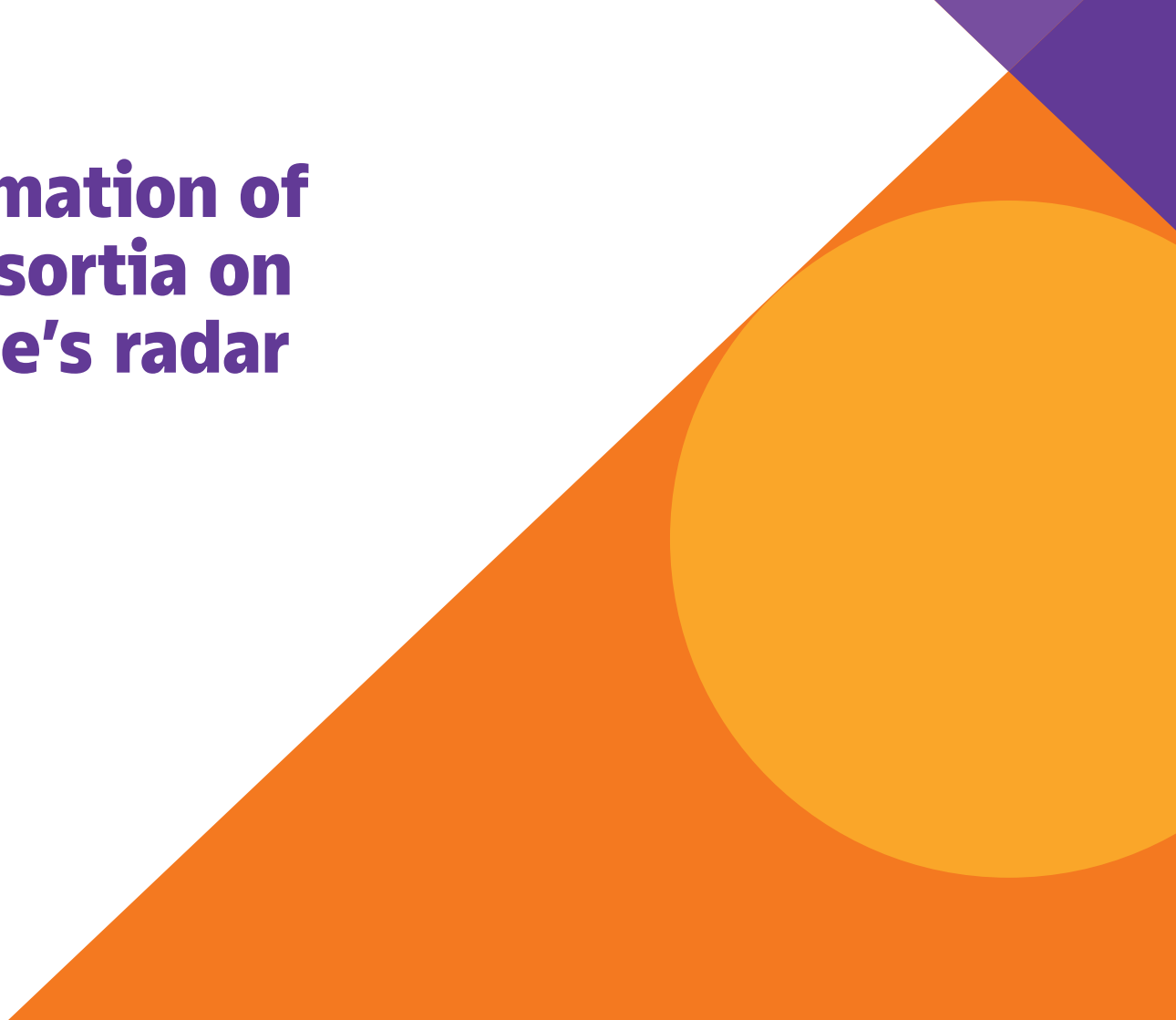
Universidade de Brasília. He has held several positions at the National Telecommunications Agency (Anatel) and served as chief of staff to a former Cade Commissioner, Paulo Burnier, between 2017 and 2019. Since 2019, he has served as chief of staff to Brazilian Supreme Court Justice Gilmar Mendes.

Gustavo Augusto Freitas de Lima holds a Master of Laws from UniCeub, where he wrote his thesis on regulatory agencies and judicial control. He has a Postgraduate Degree in Public Law from UNESA. Freitas de Lima has worked as a federal attorney at the Attorney-General's Office since 2006, where he currently heads the Litigation Department. Before being appointed to Cade, he was Deputy Chief of Economic Policy at the Presidency's General Secretariat.

Juliana Oliveira Domingues holds a Ph.D. in Law from Pontifícia Universidade Católica de São Paulo, and wrote her thesis on antitrust law. She also holds a Master of Laws from Universidade Federal de Santa Catarina, with a thesis about methods for combatting international cartels. She was previously National

Consumer Secretary at the Ministry of Justice and Public Security, president of the National Council for Combating Piracy and president of the National Consumer Protection Council.

Formation of consortia on Cade's radar



Brazilian competition law provides for the possibility of competitors forming a consortium, and also exempts consortia created for public bids from the obligation to file and receive prior approval from Cade. However, Cade's Tribunal recently reviewed this matter in two investigations related to the telecommunications sector.

The first investigation was opened in 2015 after BT Brasil Serviços de Telecomunicações (BT Brasil) filed a complaint against mobile operators Claro, Oi Móvel and Telefônica Brasil. BT Brasil's claim alleged the three operators had undertaken anti-competitive conduct when they created a consortium for a public bid to install a multimedia communication service (SCM) in the buildings of Brazil's state-owned postal service, Correios. In a hearing session held on May 11, 2022, Cade's Tribunal imposed a total of BRL 783 million (approximately USD 153 million) in fines on Claro, Oi Móvel and Telefônica Brasil¹.

In its analysis, the Tribunal clarified that forming a consortium is not a violation per se, nor is it the

same as forming a cartel. However, Cade noted that any consortium formed among competitors with an elevated market share must be analyzed with caution to clearly assess its pro-competitive nature. In the Tribunal's view, this could have been verified by the parties' complementary activities – either from a product or a geographical perspective, or by showing that each of the parties in the consortium would not have been sufficiently capable of fully meeting the bid's contractual obligations individually.

In this specific case, Cade's Tribunal took the view that the three consortium participants would have a combined share of about 90% of the SCM market, and that it was unable to identify practical reasons demonstrating a need for the three operators to take joint action, and that the parties did not provide evidence that they could not have participated individually in the bid. Cade's Tribunal thus regarded the creation of this consortium as an anti-competitive violation that would have harmed the market, creating greater barriers for new players to enter the

¹ Claro was fined BRL 395,228,792.70, Telefônica was fined BRL 121,721,935.70 and Oi Móvel was fined BRL 266,115,266.00.

market while closing out smaller players, which were prevented from effectively participating in the bid.

Cade's General Superintendence is also reviewing a second complaint filed in November 2020 by Algar Telecom SA (Algar). Algar claims that the TTC Consortium – a consortium formed between operators Tim, Telefônica Brasil, and Claro to compete for the acquisition of Oi Móvel – should have been filed and approved by Cade². It also alleges the consortium's presentation of a binding stalking horse offer³ would have guaranteed an economic advantage for the consortium (and its parties) over the bids of others, limiting their ability to participate.

In addition to requesting a gun jumping investigation (abbreviated as APAC in Portuguese), Algar requested that Cade issue precautionary measures to prevent TTC Consortium's acquisition of

Oi Móvel. Despite Cade's General Superintendence not analyzing the request and Cade having already reviewed the acquisition of Oi, the APAC proceeding was opened in March 2021, approximately five months after Algar submitted its complaint.

During a hearing regarding the review of Oi Móvel's acquisition, the Public Prosecutor's Office (MPF) also raised two other proceedings it had opened⁴ to investigate alleged anti-competitive conduct in the domestic mobile telephone market, including concerted practices between competitors and supposed exclusionary practices resulting from the TTC Consortium's formation.

Together with these ongoing investigations, the Tribunal's recent decision in regard to BT Brasil's claim shows that Cade and the MPF are carefully looking at consortia – especially those created among competitors with a high market share and activities

2 Algar claimed that the creation of the consortium itself could have only occurred after a previous clearance by Cade, an allegation which Cade is still reviewing.
3 The term "stalking horse offer" is used to describe an offer arranged prior to a court auction for the assets of bankrupt companies (or those undergoing judicial reorganization). The offer functions as an effective reserve bid, limiting the minimum potential value of other offers at the auction.

4 Internal Administrative Procedure No. 1.00.000.022265/2020-65, opened by Cade's Public Prosecution Office to investigate the partial auction of Oi SA's assets; and Proceeding No. 1.30.001.000424/2021-11, opened by the Rio de Janeiro Attorney General's Office to investigate possible irregularities in the consortium's conduct in the auction of Oi SA's assets

in consolidated sectors. In light of these cases, it is important for companies competing in the same market to carefully analyze whether they would be justified in forming consortia in order to avoid potential risks and questioning from Brazil's antitrust authority.



**Cade's view of
recent developments
in Brazil's music
industry**

Cade was recently prompted to carry out an assessment of the music industry in light of a case concerning Sony Music's full acquisition of Som Livre, a company that works with music recording and publishing music, as well as live events. After a thorough review by both Cade's General Superintendence and Tribunal – particularly focused on the increasingly digital competitive dynamics of the recording industry – the transaction was cleared without restrictions in February 2022.

It has been nearly ten years since Cade last reviewed major transactions involving the Brazilian music industry, which has since undergone a complete transformation. The most significant change regards the shift toward digitalization (which Cade already identified in 2013). In light of the substantial changes to the industry's structure and dynamics, Cade was required to review its previous position.

Cade last scrutinized the music industry in the Universal/EMI¹ and Sony/EMI² merger cases

between 2011 and 2013. In Universal/EMI, Cade defined the recorded music market as a domestic market, dividing it into music in physical formats (CDs, LPs, DVDs) and music in digital formats (downloading and streaming). At the time, digital music accounted for less than 29% of the Brazilian market's total revenue, of which 80% was from downloads and only 20% from streaming services – most of the major platforms operating in Brazil today had yet to enter the market.

With the shift toward digitalization in its early stages back then, Cade's view was that the recorded music market was competitive, players did not face high barriers to enter, and the level of competition would increase in line with digitalization. As such, Cade gave less weight to the relatively high market concentration and the significant market share the parties held at the time. This conclusion was also supported by the presence of several players that exerted strong competitive pressure, including a number of independent record labels that were

1 Merger Case No. 08012.012428/2011-39. Universal Music Holdings Limited and EMI Group Global Limited.

2 Merger Case No. 08012.012431/2011-04. Sony Corporation of America; Mubadala Development Company PJSC and EMI Group Global Limited.

streaming platforms and independent distributors are not direct competitors of the bigger labels, it was also acknowledged that the former exert considerable competitive pressure on the latter.

Cade's General Superintendence carried out a comprehensive market test as part of the recent assessment, consulting the two major and the main indie record labels, as well as publishers, streaming platforms, and independent distributors. It also analyzed statements from Universal Music, which opposed the transaction. The General Superintendence concluded that the 2013 market definitions remained accurate, and supported Cade's previous findings that barriers to entering the market were trending downward while competitive rivalry was increasing.

The General-Superintendence stated that the structural transformations in the market over the last decade had served to reinforce these trends. In one key development, increased digitalization and the growth of social media have reduced music production and distribution costs, facilitating the

entry and success of independent artists in the market – reducing their dependence on record labels while essentially turning them into rivals at the same time. Moreover, the General Superintendence concluded that this reduction in costs was also important for the growth of independent record labels, which are common in Brazil.

Although streaming platforms and independent distributors are not direct competitors of the bigger labels, it was also acknowledged that the former exert considerable competitive pressure on the latter.

In light of the General Superintendence's assessment, Cade's Tribunal determined that the transaction's effects on the recorded music market needed to be further scrutinized via a second-level review – particularly the exclusivity arrangements frequently signed between artists and record labels (artistic exclusivity). This is in line with Cade's broader focus on exclusivity clauses and agreements in various markets in regard to both potential anticompetitive practices and merger cases (as in the Som Livre/Sony Music case), one of the authority's most pressing concerns at the current time.

After further analysis, the Tribunal concluded the exclusivity arrangement present in the contracts between labels and artists was reasonable – its purpose was to ensure a return on investments and services the record label provided the artist, and therefore, did not raise competition concerns. It also concluded that the transaction would not harm Brazilian artists, nor result in the market's foreclosure to competing labels or distributors.

The Som Livre/Sony Music merger case represents an important precedent for the recorded music and music publishing markets, as it led to Cade updating its view of the current state of the music industry. In doing so, Cade has acknowledged the impact that certain technological developments can have on the structure and competitive dynamics of markets. This case is also important to the extent that it expressly confirms that exclusivity arrangements are a legitimate and effective tool for enabling investments that foster and strengthen partnerships while mitigating free-riding – provided they are employed carefully and with proper justification.

**Cade approves
sale of Oi Móvel,
subject to remedies**

A decorative graphic on the right side of the slide. It features a large orange triangle pointing towards the top right, with a purple triangle overlapping its top corner. A large, semi-transparent yellow circle is positioned in the lower right area, partially overlapping the orange triangle.

The first quarter of 2022 was marked by Cade's highly awaited clearance of the joint acquisition of Oi Móvel SA - Em Recuperação Judicial (Oi Móvel) by Claro SA (Claro), Telefônica Brasil SA (Telefônica) and Tim SA (Tim). The decision to approve the transaction was tightly contested at Cade's Tribunal, with three votes for clearance (with restrictions) and three against, with the President ultimately using his casting vote in favor of the transaction. The case involved a detailed, drawn-out analysis of the transaction and intense debates and disagreements among the commissioners.

In its decision, Cade adopted a new approach for analyzing Brazil's Personal Mobile Service (SMP), dividing it into two distinct markets – wholesale and retail – which is set to impact future merger reviews involving the mobile telecommunications industry. Cade also analyzed the impacts of a 4-to-3 transaction, counterfactual scenarios considering the target company's possible bankruptcy, and coordination risks in oligopolistic markets. The Tribunal only agreed to clear the transaction upon the negotiation of new a merger control agreement

with more severe remedies than those previously negotiated with the General Superintendence. These included the divestment of radio base stations, among certain other conditions.

Five intervening parties (Algar Telecom SA, Associação Brasileira das Prestadoras de Serviços de Telecomunicações Competitivas – Telcomp, Associação NEOTV, Instituto Brasileiro de Defesa do Consumidor and Sercomtel Telecomunicações SA) actively participated in the General Superintendence's investigation. They raised concerns about the high market and spectrum concentration, low levels of competitive rivalry, the facilitation of coordinated power, and a lack of pro-competitive effects or efficiency gains to counterbalance the harm to competition the transaction would bring, while also pointing out the possibility of other pro-competitive configurations for the sale of Oi Móvel. The parties also criticized the competitive effects of the transaction, especially smaller players and market entrants' lack of access to radio spectrum bands and Claro, Telefônica and Tim's infrastructure. As such, they actively participated

in designing remedies, and some of their concerns appeared in the General Superintendence's opinion and in certain commissioners' votes.

Cade's consolidated case law had previously pointed to a single SMP market (the relevant market in which mobile network operators are active), encompassing local, national and international calling services, SMS and MMS text messaging, and mobile internet access. With the sale of Oi Móvel, the General Superintendence – and the Tribunal in turn – redefined the relevant market, dividing it into two segments: (i) wholesale mobile network access (which includes the provision of infrastructure and networks, whether through RAN sharing, spectrum leasing, roaming, call termination and secondary frequency use); and (ii) retail mobile voice and data services (focused on the provision of mobile services, SMS, MMS, 3G, 4G and 5G services to end consumers).

From the General Superintendence's standpoint, changes to the structural configuration of the market have justified the new market segmentation.

The market is no longer only made up of large, verticalized mobile network operators who both own the telecommunications infrastructure and provide services to consumers. For instance, the case mentioned players that only operate on one side of the chain, such as Mobile Virtual Network Operators (MVNOs), which do not own any infrastructure but do provide services to consumers in the retail market. Cade also considered supply and demand for infrastructure and network elements, as different players have provided these assets or shared them with others.

During its extensive analysis of the case, Cade's main antitrust concerns related particularly to the vertical integration between the two markets (wholesale and retail) and to Claro, Telefônica and Tim's market concentration levels. The acquisition involved a "4-to-3" transaction in which the three largest competitors would acquire the fourth-largest, jointly holding almost 100% of the wholesale and retail market share. According to Cade, Claro, Telefônica and Tim would be able to limit access to the wholesale mobile network infrastructure, to the

detriment of regional operators and MVNOs, while also harming competitive rivalry in the retail market.

The commissioners against the transaction (Reporting Commissioner Luis Braido, Commissioner Sergio Ravagnani and Ex-Commissioner Paula Farani de Azevedo) believed the proposed remedies would not allow effective competitors to enter the market. They also pointed out that competition would not be harmed if the transaction was not cleared, as Oi Móvel's assets (especially spectrum bands) would return to the market and could be acquired by other players without leading to such significant market concentration.

Despite the conflicting positions within the Tribunal, the votes of Commissioner Lenisa Prado (who held the leading vote), Commissioner Luiz Hoffmann and President Alexandre Cordeiro (who had the casting vote) were enough to clear the transaction. However, these votes depended on the execution of a merger control agreement, whose negotiated remedies were considered to sufficiently address the competition concerns. Cade's President stressed

that a "cold analysis" of market concentration data was insufficient, arguing that it was also important to consider competitive dynamics and the state of the sector. In his view, a rejection would have caused negative socioeconomic effects, depriving Oi Móvel's current clients of its services and likely resulting in Oi Móvel's customers switching to established operators anyway – arguably a similar effect to clearing the transaction without any restrictions.

In general terms, the negotiated remedies include:

- RAN Sharing Offer: Tim and Telefônica agree to temporarily offer RAN sharing agreements to potentially interested parties under pre-established conditions.
- Radio Frequencies Offer: Tim and Telefônica agree to temporarily assign secondary rights to use radio frequencies they acquired from Oi Móvel that they would not have exploited in certain Brazilian municipalities.
- ORPA National Roaming: Claro, Telefônica and Tim undertake to submit new reference offers

for Anatel's approval to make roaming coverage available to competitors on an isonomic and non-discriminatory basis.

- MVNOs Reference Offer: Claro, Telefônica and Tim undertake to make new reference offers of voice, mobile data and derived services for MVNOs available on an isonomic and non-discriminatory basis.
- Base Stations: The divestment of a certain portion of radio base stations (ERBs) Claro, Telefônica and Tim acquired from Oi Móvel.

The majority of the Tribunal also held the view that the negotiated remedies mainly aimed to minimize concerns about the possibility of accessing mobile networks, creating incentives for Claro, Telefônica and Tim to compete in the wholesale market, and enabling new players to enter both the wholesale and retail markets.

Furthermore, with the backing of the majority of the commissioners, Commissioner Lenisa Prado ordered that Claro, Telefônica and Tim should comply with

specific criteria for pricing national roaming services and offering the wholesale virtual network, and that closing the deal would be subject to executing a part of the commitments in the merger control agreement. The legality of imposing restrictions beyond the merger control agreement led to an intense debate among the commissioners during a subsequent ruling session in March, resulting in a majority decision in favor of permitting the Tribunal to impose complementary remedies in en banc sessions. The parties agreed to the additional remedies, signing a new, consolidated agreement with the authority.

Our partners

Amadeu Ribeiro

amadeu@mattosfilho.com.br
+1 646 695 1101

New York



Eduardo Frade

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

Brasília



Lauro Celidonio

lauro@mattosfilho.com.br
+55 11 3147 7669

São Paulo



Marcio Soares

msoares@mattosfilho.com.br
+55 11 3147 2701

São Paulo



Michelle Machado

michelle.machado@mattosfilho.com.br
+ 55 11 3147 7639

São Paulo



Renata Zuccolo

rzuccolo@mattosfilho.com.br
+55 11 3147 7767

São Paulo



The logo for Mattos Filho, featuring the company name in a bold, sans-serif font. The letter 'A' is stylized with a blue triangle pointing upwards, while the remaining letters are orange. The background of the slide is composed of geometric shapes: a purple triangle in the top left, a dark purple rectangle in the top right, a large orange circle on the right side, and a white diagonal shape on the left.

MATTOS FILHO

SÃO PAULO CAMPINAS RIO DE JANEIRO BRASÍLIA NEW YORK LONDON

www.mattosfilho.com.br