MATTOS FILHO

Competition law and policy in Brazil: new developments

3rd Edition 2022

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Introduction

Comprised of four articles, our latest quarterly publication on the key aspects of Brazilian competition policy analyzes and provides a general perspective of the Administrative Council for Economic Defense's (Cade) recent activities.

The first article addresses new developments at Cade's General Superintendence (GS), which has established a new unit focused on investigating abuses of dominant position, as well as a working group for analyzing vertical relationships and drafting guidelines for cases involving vertical concerns. There have also been updates to Cade's internal procedures, such as those regarding deadlines and requirements for the GS to review cases.

The second article covers new trends in how Cade analyzes merger transactions. These include the increasing use of artificial intelligence and microdata in analyzing mergers, how merger transactions are negotiated (with a particular focus on the Carrefour/Grupo BIG case), and Cade's increased scrutiny of third-party intervention requests.

The third article addresses the rulings on 19 settlement agreements (TCCs) linked to Operation Car Wash (*Operação Lava-Jato*) at Cade's Tribunal. There were diverging opinions among the Tribunal's commissioners in relation to how the monetary contributions for these agreements should be calculated.

The fourth and final article addresses a bill that seeks to amend Brazil's competition law and incentivize private entities to claim damages for anti-competitive conduct.

New developments at Cade's General Superintendence

As reported in the last edition of this booklet,[1] Cade has recently seen changes to its membership. This includes the inauguration of former Cade president Alexandre Barreto de Souza as the authority's new General-Superintendent. Since then, the most significant and recent changes regard (i) the creation of a specific unit to investigate abuse of dominant position; (ii) the creation of a working group to address vertical relationships; and (iii) changes to Cade's management and internal procedures.

Abuse of dominant position: new investigatory unit

Abuse of dominant position continues to come under Cade's scrutiny. Some common examples of this practice include exclusivity clauses, discriminatory behavior, the refusal to deal, price parity (most favored nation) clauses, tying agreements, resale price maintenance and sham litigation.

Historically, Cade has had difficulty investigating such cases in a timely and focused manner. One of the possible reasons for this is that the technical teams responsible for these cases were also in charge of merger cases – which, given the specific legal deadlines involved, have tended to be prioritized.

In May 2022, a new investigatory unit was created within Cade's GS – the General Coordination Unit of Antitrust Assessment 11, or CGAA11. The CGAA11 is exclusively in charge of unilateral conduct investigations, and, differently from other units, reports directly to Cade's General Superintendent. The CGAA11 will be led by Carolina Helena Coelho Antunes Fontes, a government official, qualified network engineer and antitrust law specialist working within Brazil's Competition Defense System since 2009. Fontes has previously worked as a coordinator of other units within the GS.

With the new CGAA11, the expectation is that abuse of unilateral conduct cases will be examined more quickly, deeply and consistently. Current Cade president Alexandre Cordeiro has publicly stated that abuse of dominant position practices harm

1 See: https://www.mattosfilho.com.br/Documents/210624_livreto_concorrencial_2022_4ed_EN.pdf.

competition and will be prioritized in Cade's agenda. As such, now that it has a dedicated unit for these cases, Cade may launch additional investigations into the matter.

Vertical relationships: new guidelines and working group

In July, Cade announced the creation of a working group at the GS that is to be responsible for studying vertical relationships in merger cases and anticompetitive conduct investigations. The group also includes representatives from Cade's Department of Economic Studies (DEE) and the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (Ibrac).

Cade's working group also intends to draft specific guidelines on vertical relationships[2], in line with the interest other antitrust authorities have shown around the world.[3] The preliminary draft is expected to be available for public consultation by December 2022, which will give interested parties the opportunity to submit comments.[4]

These guidelines will not be binding for Cade's assessments. However, as the name suggests, they are expected to guide how the authority's analyses should proceed.

Changes to the GS management and internal procedures

There have also been changes to Cade's management and internal procedures for merger cases and anticompetitive conduct investigations.

2 In 2016, Cade published guidelines for the assessment of horizontal mergers, which is known as "Guia H".

3 In May, the European Commission published new guidelines about vertical relationships aiming to provide better guidance and clearer and simpler rules, especially considering the changes to markets due to the growth of online and marketplace sales. See: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2844. US antitrust authorities also declared their intention to review their vertical relationships guidelines. See: https://www.cnbc.com/2022/01/18/ftc-doj-seek-to-rewrite-merger-guidelines.html.

4 See: https://monitordomercado.com.br/noticias/31120-Cade-cria-grupo-de-trabalho-para-elabora.

The DEE is conducting technical studies on a possible review of the revenue threshold that would trigger the need for merger notifications in Brazil. With a record number of transactions submitted to Cade last year, the GS new management has indicated that it will seek to streamline working methods, redefine priorities and expedite the review process. This includes avoiding requests for information that are not strictly necessary for analyzing the case.

As mentioned by the General Coordinator Carolina Helena Coelho Antunes Fontes in a meeting at Ibrac, changes to Cade's internal procedures for anticompetitive conduct investigations may attempt to ensure that:

i. Preparatory proceedings for administrative inquiries to determine whether a case falls within Cade's jurisdiction are conducted in a short timeframe. At the end of this period, the case should either be dismissed or converted into an administrative inquiry;

ii. Administrative inquiries are launched to investigate whether there is evidence of anticompetitive conduct, allowing the defendants to submit information and documents to the authority; and

iii. Administrative proceedings will only be launched if the conduct falls within Cade's jurisdiction and there is sufficient evidence of potentially anticompetitive conduct.

With these guidelines, there is an expectation that the GS will conduct more rational, improved assessments of the cases it reviews, which could also contribute to speeding up the review process.

Trends in Cade's review of merger cases

The use of artificial intelligence and microdata

Throughout 2022, Cade reviewed transacions that resulted in relevant concentration in a substantial number of markets analyzed from a local perspective, requiring the collection, processing and analysis of a significant volume of data from the companies involved, as well as third parties. Mergers involving players in the online higher education, retail food and pharmaceutical markets are examples of recent transactions that have required detailed analyses of hundreds or even thousands of relevant markets in a limited, narrow geographic scope (such as radius of influence, neighborhoods or municipalities).

In such cases, Cade tested new artificial intelligence techniques to process market data, develop filters and use microdata to optimize the analysis. These techniques are described in detail in the DEE's Working Paper No. 003 – "Machine Learning and Antitrust", which it published in July 2022.[1] According to this paper, Cade has been applying a system known as Cérebro ('Brain') since 2013. This system combines statistical and microdata mining techniques, originally used to identify signs of anti-competitive practices in cartel cases. More recently, the Cérebro system was also adopted to analyze mergers, using artificial intelligence to develop filters derived from IT and statistical data tools for complex merger cases involving a significant number of relevant markets.

Vitru's acquisition of Unicesumar[2] (both significant players in Brazil's online higher education market) is the most recent example of a complex merger transaction for which Cade used artificial intelligence to refine microdata and develop analysis filters. 3,907 relevant markets were initially affected by this transaction, with 37 courses offered across 207 municipalities. After applying the filters developed by the Cérebro system and conducting empirical tests with DEE's support, the GS concluded that only 67 of the 3,907 markets showed potential competition

1 Available (in Portuguese) at: https://cdn.Cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2022/DOC_003-2022_Aprendizado-de-maquina-e-antitruste.pdf.
2 Merger Case No. 08700.006138/2021-70.

concerns, and after conducting more in-depth analysis, that these 67 markets showed no significant competition issues. Consequently, the GS cleared the transaction. The formal review process took a total of 172 days to be completed with a few weeks of pre-notification previously.

Negotiation and application of remedies

In line with the growing trend in negotiating hybrid remedies (noted in the first 2022 edition of this booklet)[3], Cade's Tribunal cleared Carrefour's acquisition of Grupo BIG[4], conditional on remedies including both structural and behavioral elements. Regarding the structural remedy – which involves the sale of certain stores within the scope of the transaction – Cade's Tribunal stressed that fix-it-first or upfront buyer mechanisms should be the rule with respect to structural remedies, making the fulfillment of the divestiture commitments the parties undertake under a merger settlement agreement a prerequisite for closing the main transaction. However, Cade's Commissioners pointed out that the Carrefour/Grupo Big case was an exception, as the main transaction was allowed to close before the remedies were implemented. This was because the stores that were to be divested represented a very small share of the total assets involved in the transaction. Moreover, Cade's Tribunal found these companies operated in an expanding, dynamic market that did not pose significant barriers for potential players, which helped assure Cade that the remedies could be properly implemented in a relatively short period.

The trend toward using fix-it-first or upfront buyer mechanisms was confirmed by Cade's Tribunal a few weeks after the completion of the Carrefour/Grupo Big case when analyzing PagueMenos' acquisition of the drugstore chain Extrafarma.[5] Even though the remedy was proportionally small in relation to total assets involved in the transaction, Cade required that the fix-it-first mechanism be applied, so that closing

3 Available at: https://www.mattosfilho.com.br/Documents/210624_livreto_concorrencial_2022_4ed_EN.pdf.
4 Merger Case No. 08700.003654/2021-42.
5 Merger Case No. 08700.005053/2021-74.

of the main transaction was subject to the conclusion of the divestitures, as there would be insufficient competition in the markets subject to the remedy. In addition, Cade established that the assets could only be sold to companies belonging to a Brazilian drugstore group, drugstore association, franchise group, or a regional player operating in Brazil's Northeast region.

Given these scenarios, companies involved in more complex transactions (from a competition standpoint) must acknowledge the potential impact of the fix-it-first mechanism on the time it takes to close the transaction when negotiating. It is always recommended that the potential challenges of Cade's approval process are considered in such cases to properly manage the potential consequences of remedy negotiations or unilateral restrictions.

Greater scrutiny of third-party intervention requests

A third trend concerns the GS' more careful approach to analyzing requests for companies to qualify as interested third parties in merger cases.

In a recent case involving XP Investimentos' purchase of Banco Modal[6], Arton Investimentos Agente Autônomo de Investimentos Ltda (Arton) requested to be considered as an interested third party. The GS provisionally granted the request given it met the timeliness and legitimacy requirements. However, it stressed that for the request to be properly granted, it would still be necessary to assess "the relevant link between Arton and the matter under analysis, as well as the relevance of Arton's contributions," after which Arton could still be disqualified as an interested third party in the proceeding (as per Article 118, paragraph 3 of Cade's Internal Rules).

6 Merger Case No. 08700.001018/2022-67.

The GS then granted Arton 15 days to provide further complementary information and evidence to support its original application. Once this period passed, however, the GS determined that Arton was unable to show it could contribute to the analysis, essentially resubmitting the material from the original application. Accordingly, the GS decided to disqualify Arton as an interested third party in the case.

The GS' decision demonstrates a move toward greater scrutiny of requests from companies to act as interested third parties, in which they must demonstrate a legitimate interest and the capacity to collaborate effectively in merger cases. The GS' stricter position is an important factor in avoiding the intervention of third parties who often seek to go beyond their legitimate role in order to delay the outcome of a case or in pursuit of private interests, as was already highlighted in a previous edition of this booklet.[7]

7 See: https://www.mattosfilho.com.br/Documents/210624_livreto_concorrencial_2021_3ed_EN.pdf.

Cade's Tribunal split on how to calculate monetary contributions in '*Lava Jato*' settlement agreements

In June 2022, 19 TCCs were approved in relation to investigations of cartel formation within public construction and procurements in several regions across Brazil as part of the country's 'Operação Lava Jato' (Operation Car Wash). During the hearing session, Cade's Tribunal was divided on the methodology for calculating monetary contributions required for TCCs involving cartel investigations.

The methodology the GS used to calculate the monetary contribution was based on the following assumptions: (i) the need for a sanction proportional to the conduct; (ii) the need for a fine that would act as a sufficient deterrence to the parties involved; (iii) legal certainty and equal treatment among the defendants in the case.

According to Cade's methodology, the monetary contribution the parties should pay in the event of a TCC is calculated based on an "expected fine" for the anticompetitive conduct under investigation. In order to determine the value of the contribution, a deduction is applied to the expected fine, which is calculated using parameters established in Cade's Settlement Agreement Guidelines (for example, the moment when the agreement was proposed, the existence of other agreements in the same case and the quality and extent of the settling parties' cooperation). In cartel cases, this deduction is usually between 15% and 20% (depending on the specific characteristics of each case).

The Brazilian Competition Law (Law No. 12,529/2011) provides that the calculation basis for a company's expected fine corresponds to its gross revenues in the line of business the violation occurred in during the year prior to the commencement of proceedings.[1] The amount of revenue considered in the calculation may be adapted to the specific nature of the conduct, so that the calculation basis is proportional to the seriousness of the offense.[2]

1 The calculation of the fine for individuals is obtained based on the amount of expected fine for the legal entity involved in the anticompetitive conduct, as set forth in in Article 37, II of Law No. 12,259/2011.
2 Article 2-A of Cade Resolution No. 3/2012 (amended by Resolution No. 18/2016) establishes that in cases where a company's revenue in the business area linked to the conduct is *manifestly disproportionate, Cade may adapt the applicable business area to the specific characteristics of the conduct.*

In certain settlement agreements linked to investigations within Operation Car Wash, the GS reached an agreement to base the monetary contribution calculations on the weighted average of revenues earned in sub-segments within the area of construction over the years before the beginning of investigations. At Cade's Tribunal, however, Commissioners Luis Braido, Sérgio Ravagnani and Lenisa Prado voted in opposition to this calculation method. They believed the calculation should be based on the parties' total gross revenues within the construction area.[3]

Commissioner Luis Braido was of the view that loosening the calculation basis by adopting business area sub-segments was unjustified, and highlighted that the expected fines were disproportionally low in relation to the advantage obtained from securing the contracts obtained while acting within the cartels. He argued that in cases involving cartels and public bids, the advantage obtained is equivalent to the extent the contracts were overpriced due to the rigged bids, multiplied by the value of the contracts. Thus, the resulting penalties would serve to sufficiently deter potential offenders in cases similar to Operation Car Wash.

Moreover, Commissioner Sérgio Ravagnani pointed out that the calculation basis should not be restricted to the companies' registered revenue in the year prior to the investigation, so as to properly reflect the dynamics of the cartels under investigation. According to the Commissioner, factoring in only one year's revenue disregards the medium-term contracts resulting from the bids (or any additional terms). As such, they do not reflect the full extent of the advantage sought by the violator, or the negative economic effects created in the affected markets.

Despite the considerations of Commissioners Luis Braido and Sérgio Ravagnani (supported by Commissioner Lenisa Prado), most of Cade's Tribunal was in favor of following the calculation methodology applied to previous settlement agreements linked

3 Business line No. 93 or No. 94 are mentioned in the annex of Cade Resolution No. 3/2012 (amended by Resolution No. 18/2016): (i) No. 93: Construction of buildings and housing (real estate development in general); and (ii) No. 94: Infrastructure works (railroads, highways, dams and urban and similar works) and construction services.

to Operation Car Wash. As a result, the calculation basis for the expected fine should correspond to the weighted average of the revenue earned in the line or sub-segment of business between the moment the conduct began and the year prior to the launching of the investigation.

Legislative amendments regarding antitrust damages litigation in Brazil

On July 12, 2022, the Brazilian House of Representatives' Committee on Constitution, Justice and Citizenship (CCJ) approved a bill (No. 11,275/2018) that proposes important amendments to the Brazilian Competition Law, aiming to promote incentives for antitrust damages litigation. The bill has been sent to the president's office to be officially sanctioned and will take effect once published in Brazil's Official Federal Gazette (DOU).

The bill's explanatory statement explains that despite being an important tool for deterring antitrust infringements, the private enforcement of antitrust law is still fairly nascent in Brazil, especially when compared to the United States. The legislative change, therefore, seeks to incentivize private enforcement in Brazil. At the same time, it looks to guarantee that such enforcement is compatible with Cade's leniency program and incentives for defendants to enter into TCCs with Cade, as these are recognized as important tools for detecting infringements – especially cartels.

The main changes proposed in the bill affect the following topics: (i) the statute of limitations for filing lawsuits; (ii) double compensation for damages; and (iii) procedural changes that aim to make antitrust damages proceedings more efficient and predictable.

In seeking to end debate and uncertainty about the initial statute of limitations for filing claims, the bill defines a five-year statute of limitations, counted from when the injured party becomes unequivocally aware of wrongdoing. This would also be the date considered in Cade's final decision, published in the DOU.

The injured parties would also be guaranteed the right to double compensation for the damages suffered due to the infringement. This measure aims to create an additional deterrence mechanism while incentivizing private enforcement.

However, in order to make this measure compatible with Cade's leniency program, the text approved by the CCJ also provides that the leniency applicants and defendants who enter into a TCC with Cade would

not have to pay double compensation for damages in court. Another protection also ensures that these applicants/defendants would not be jointly and severally liable with other defendants for the payment of damages caused and claimed in court.

Furthermore, the bill provides that private claims may be submitted to arbitration, including via an arbitration clause under the terms of the TCCs, which gives injured parties a more efficient and specialized alternative for exercising their claims. Finally, in a more controversial move, the bill would prohibit pass-on defenses (generally used by companies in cartel cases), which presumes potential damages should be transferred to the downstream stages of the production chain in the market directly affected by the conduct. If the bill is signed into law, companies will have the burden of demonstrating this transfer, with any presumption in this regard prohibited.

It is expected that the implementation of the bill would introduce major changes to the dynamics of the Brazilian Competition Defense System, in which private entities would be able to pursue damages stemming from anti-competitive conduct investigated by Cade.

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