

MATTOS FILHO

**Competition  
law and policy  
in Brazil:** new  
developments

1<sup>st</sup> Edition 2023



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# Introduction

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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 three articles. The first article highlights the main developments in merger control cases, highlighting the growth in the number of transactions Cade reviewed in 2022. We also address expected trends for 2023, including the increased scrutiny of third-party intervention requests, digital market tests involving electronic form submissions, and greater concern about the exchange of sensitive information. The second article presents an overview of Cade's actions against anticompetitive conducts in 2022, which saw several cases judged, numerous settlement agreements,

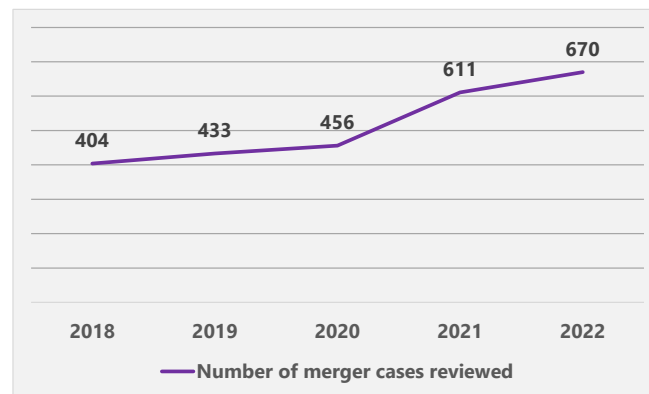
as well as a continued focus on unilateral conduct and the increased role Brazil's judiciary is playing in antitrust cases. The third and final article addresses a draft bill that seeks to regulate the operation of digital platforms offering services to Brazilian consumers.

# **Merger cases: recent main developments and trends for 2023**



Cade reviewed a significant number of transactions in 2022. In total, Brazil's antitrust watchdog reviewed 669 merger cases – 585 via the fast-track proceeding and 84 via the regular proceeding. This surpassed the number reviewed in 2021, when despite the uncertain political and economic outlook, Cade reviewed 611 transactions (526 via the fast-track and 84 via the regular proceeding).<sup>1</sup> These results are in line with the increasing trend in cases assessed by Cade over the course of the last five years, despite a series of local and global political, economic and public health challenges – 2022 saw a 65% increase in the number of transactions submitted to Cade in relation to 2018, and a 10% increase in relation to the (already high) number of transactions filed in 2021.

## Merger cases reviewed by Cade between 2018 and 2022

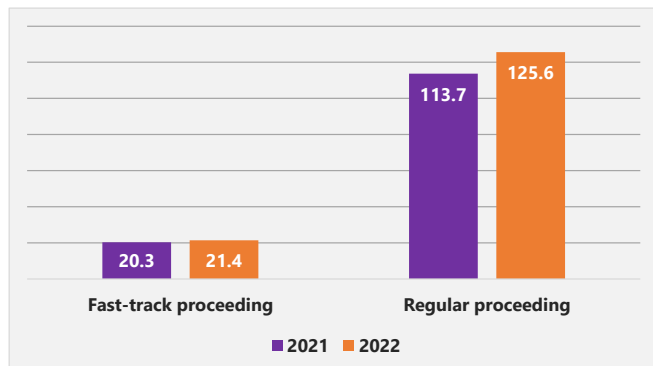


The total value of the transactions submitted to Cade in 2022 arrived at BRL 1.5 trillion, with power generation, real estate development, wholesale pesticides, fertilizers and soil correctives, and oil and natural gas extraction among the most prominent sectors. Cases submitted via the regular proceeding were assessed within an average period of 125.6 days, while the cases submitted under the fast-track

1. Source: Cade Yearbook (2022). Available at <https://indd.adobe.com/view/7ae16908-dc6c-4610-9ec4-4868c3f02f62>.

proceeding were cleared within an average of 21.4 days – a slight increase in relation to 2021:<sup>2</sup>

### Average duration of review period (days), 2021-2022



In 2022, the vast majority of transactions submitted to merger control review in Brazil were cleared

without restrictions (640). 21 transactions did not meet the mandatory notification requirements set forth in the legislation, and as such, Cade did not formally accept them, while one was dismissed after the notifying parties decided to give up on the transaction. On the other hand, six transactions required the negotiation of remedies<sup>3</sup> (with clearance conditioned to the parties signing a merger control agreement), and one was cleared after Cade's Tribunal unilaterally imposed conditions, only to be subsequently blocked after the companies involved failed to adhere to them.<sup>4</sup> The cases that were approved with remedies included the Atem Group's purchase of the Isaac Sabbá Refinery in Manaus (which involved behavioral remedies to guarantee third parties access to infrastructure linked to the refinery), as well as the purchase of Oi Móvel's assets by telecom companies Tim, Claro and Vivo,

<sup>2</sup> Source: Cade Yearbook (2021). Available at <https://indd.adobe.com/view/adfd8e43-0a8b-4b2d-be7c-75bf058a4239>.

<sup>3</sup> Merger Case No. 08700.007309/2021-88 (Parties: Bunge Alimentos S.A., Cervejaria Petrópolis do Centro Oeste Ltda. and Cervejaria Petrópolis S.A.); Merger Case No. 08700.006512/2021-37 (Parties: Petróleo Brasileiro S.A. and REAM Participações S.A.); Merger Case No. 08700.005053/2021-74 (Parties: Empreendimento Pague Menos S.A. and Ipiranga Produtos de Petróleo S.A.); Merger Case No. 08700.004426/2020-17 (Parties: Bus Serviços de Agendamento S.A. and J3 Participações Ltda.); Merger Case No. 08700.003654/2021-42 (Parties: Atacadão S.A. and Grupo Big Brasil S.A.); and Merger Case No. 08700.000726/2021-08 (Parties: Claro S.A., Oi S.A., Telefônica Brasil S.A. and Tim S.A.).

<sup>4</sup> Merger Case No. 08700.004293/2022-32 (Parties: BASF SE, BMW Holding B.V., Henkel AG & Co. KGaA, Mercedes-Benz AG, Robert Bosch GmbH, SAP SE, Schaeffler Invest GmbH, Siemens Industry Software GmbH, T-Systems International GmbH, Volkswagen AG and ZF Friedrichshafen AG).

which involved remedies facilitating the entry of new players and the expansion of competitors in the market for personal mobile services.

Cade's General Superintendence and Cade's Tribunal both assessed a number of different cases concerning important antitrust disputes, many of which also saw the active participation of interested third parties. This occurred not only in regard to the cases that involved remedies but also in some of the transactions that were cleared without restrictions, including:

A merger between Rede D'Or and Sul América S.A. – the decision to clear the transaction was appealed by eight interested third parties and involved disputes about the alleged risk of discrimination against rival providers of hospital medical services and of access to sensitive information; and

CSN Cimentos's acquisition of a controlling stake in LafargeHolcim Brasil – the decision to clear the transaction was appealed by an interested third

party and subject to a secondary review request from Cade's Tribunal, and also involved disputes about defining the relevant market and third-party access to essential facilities.

Key competition issues in 2022 and expected trends for 2023 are described below.

### **Cade's changed approach to its definition of 'economic group'**

In September 2022, Cade's Tribunal issued a unanimous decision that revealed its current position on the definition of 'economic group' in regard to merger control cases.<sup>5</sup>

Merger cases with effects in Brazil must be filed with Cade whenever the **economic groups** involved in the transaction meet applicable thresholds set forth in law – one of the groups involved in the transaction must have registered revenues in Brazil equal to or higher than BRL 750 million in the year prior to the respective transaction, whereas the other economic

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<sup>5</sup> Administrative Proceeding to Assess Gun Jumping No. 08700.006369/2018-88 (Defendants: MIH Brazil Participações Ltda.. (Naspers Limited) and Rocket Internet SE (Pedidos Já Divulgação e Tecnologia Ltda.. and Delivery Hero AG). Judged on September 21, 2022.

group must have registered a revenue equal or higher than BRL 75 million in the same period. Hence, the definition of economic group substantially affects whether a merger case meets the thresholds for mandatory filing.

In 2012, Cade enacted Resolution No. 2. One of its goals was to set objective criteria for determining when merger cases are subject to mandatory filing.

<sup>6</sup> According to the resolution, an economic group consists of the following:

- i. Companies controlled by the same controlling shareholder as the entity involved in the transaction; and
- ii. All companies in which either the entity involved in the transaction, or any of the companies subject to common control listed in item (i), directly or indirectly hold at least a 20% share in the voting or total share capital.

However, the decision Cade's Tribunal issued in 2022

extended the definition in Resolution No. 2, with the following entities now considered part of the same economic group:

- i. The party directly involved in the transaction;
- ii. Any shareholder holding at least 20% of voting or share capital of the party directly involved in the transaction; and
- iii. All entities in which the entities listed under items (i) and (ii) directly or indirectly hold at least 20% of the voting or share capital.

The change concerned the inclusion of minority shareholders with a 20% stake or higher in the company directly involved in the transaction, even if they do not have control over the company. In other words, Cade's Tribunal expressed its view that the entity directly involved in the transaction belongs to an economic group consisting of both its controllers and any minority shareholders holding at least 20% of its total or voting shares. Although Cade had seemingly applied this opinion informally in past

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<sup>6</sup> Currently regulated by Article 4, paragraph 1, item II of Resolution No. 33/2022.



cases<sup>7</sup>, the September 2022 decision marked the first time Cade formalized the change in definition.<sup>8</sup>

## Study on automatic identification of economic groups

Cade's Department of Economic Studies (DEE) has launched a study titled 'Methodology for Automatic Identification of Economic Groups in Antitrust Analysis'. The study proposes a methodology for automating the identification of economic groups based on data extracted from a public database of Brazil's Internal Revenue Service (*Receita Federal*). One of the main short-term objectives of the study is to minimize the time spent validating the economic groups that applicants of merger cases report to Cade.

The recent decision issued by Cade's Tribunal and the launch of the DEE study demonstrate that the topic of

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7 E.g., Merger Case No. 08700.005922/2021-61 (Applicants: Quality Software S.A. and ACCT Consultoria e Desenvolvimento S.A.).

8 Administrative Proceeding to Assess Gun Jumping No. 08700.006369/2018-88 (Defendants: MIH Brazil Participações Ltda.. (Naspers Limited) and Rocket Internet SE (Pedidos Já Divulgação e Tecnologia Ltda.. and Delivery Hero AG). Judged on September 21, 2022.

economic group definition is a current focus for Cade. As such, companies should be even more cautious when compiling information both for the purpose of analyzing whether their merger transactions meet Cade's mandatory notification criteria, and for filling out Cade's merger filing form.

## Third-party participation requests

Third parties can formally request to be admitted as formal participants (interested third parties) in merger control review in Brazil. This grants them the opportunity to present submissions during the review, as well as the right to appeal decisions issued by Cade's General Superintendence. Although third-party submissions can provide the authority with helpful insights, they can also delay the review period, which is a particularly sensitive issue for merger cases analyzed under the ordinary proceeding.

Two main trends were observed in 2022: (i) a significant increase in the number of third-party requests to intervene; and (ii) increased scrutiny in

the review and granting of such requests by Cade's General Superintendence (a trend that we reported in the previous edition of this publication).<sup>9</sup>

Requests for intervention under the regular proceeding have been consistently increasing over the years and are now common, especially in transactions that are widely publicized or complex from a competition perspective. Recent numbers reflect this trend – there were 34 and 33 requests for third-party intervention in merger cases before Cade during 2021 and 2022, respectively, while there were only 14 and 23 requests in 2019 and 2020.

As a result, Cade has applied more rigorous standards to granting third-party intervention. If, in the past, the lower number of requests were almost automatically granted (in 2020, all intervention requests were granted), the General Superintendence's assessment is stricter today – in 2022, almost a third of the requests were denied. For instance, in the Grepar/Petrobrás case, Cade denied

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<sup>9</sup> See: <https://www.mattosfilho.com.br/en/unico/competition-law-developments/>

all seven of the third-party intervention requests.<sup>10</sup>

Cade's General Superintendence has begun demanding third parties effectively demonstrate their interest in each merger case. Thus, although third parties who failed to provide the necessary information and documents to support their requests have been admitted on a provisional basis by the General Superintendence, some were eventually denied, as occurred in the Sonac/Gelnex<sup>11</sup> and XP/Banco Modal<sup>12</sup> cases. This trend is welcome as it helps filter out requests from third parties that do not effectively contribute to the analysis of the merger case, and avoids requests that only seek to delay analysis and/or private interests.

Given this situation, it is hoped that Cade's Tribunal provides a more detailed and objective indication of its view on the criteria that an interested third party

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<sup>10</sup> Merger Case No. 08700.004304/2022-84 (Applicants: Grepar Participações Ltda. and Petróleo Brasileiro S.A.).

<sup>11</sup> Merger Case No. 08700.008967/2022-78 (Applicants: Sonac do Brasil Indústria e Comércio de Subproduto Animal Ltda. and Gelnex Indústria e Comércio Ltda.).

<sup>12</sup> Merger Case No. 08700.001018/2022-67 (Applicants: XP Investimentos Corretora de Câmbio, Títulos e Valores Mobiliários S.A. and Banco Modal S.A.)

must meet to be formally admitted.<sup>13</sup> Article 50, item I, of the Brazilian Competition Law provides that third parties who are “holders of rights or interests that may be affected by the decision issued” may be granted admission to intervene.

Regarding the topic of third-party admission in merger cases, at the end of last year, Cade’s General Superintendent Alexandre Barreto declared that he would even be willing to grant untimely requests for third-party intervention<sup>14</sup>, as long as their participation was deemed useful for analyzing the case.<sup>15</sup> Even though the collaboration of third parties can be useful at different stages of the process, it is not necessary for third parties to be formally admitted as intervenients for them to be able to contribute to the assessment of the merger case, as this can be done during the market test. On the other hand, the possibility of formal intervention

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13 See: <https://mlexmarketinsight.com/news/insight/cade-tribunal-to-define-criteria-for-market-players-participation-in-brazilian-merger-reviews>.

14 As per Article 117 of Cade’s Internal Rules, requests for admission as third parties must be made within 15 days of the publication of the merger case’s transaction summary.

15 See: [https://content.mlex.com/#/content/1420434?referrer=content\\_seehereview](https://content.mlex.com/#/content/1420434?referrer=content_seehereview).

at any time can generate legal uncertainty and have unwanted effects, especially considering that formally admitted third parties have the legitimacy to appeal a clearance decision issued by the General Superintendence. Despite Barreto’s statement, all untimely requests have been denied to date<sup>16</sup> – in line with the stricter approach that the General Superintendence has taken toward intervention requests.

## Electronic market tests

Another highlight of 2022 regards Cade’s unprecedented use of electronic tools to run market tests during the assessment of merger control cases. This new tool was used to review the merger between BrMalls and Aliansce Sonae,<sup>17</sup> a very high-profile transaction involving the shopping center sector.

Traditionally, the requests for information Cade

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16 See, e.g., Merger Case No. 08700.002747/2021-50 (Applicants: Marfrig Global Foods S.A. and BRF S.A.) and 08700.006373/2020-61 (Applicants: SERASA S.A and Claro S.A.).

17 Merger Case No. 08700.005088/2022-94. Parties: Aliansce Sonae Shopping Centers S.A, Canada Pension Plan Investment Board, BR Malls Participações S.A.

sends in the context of market tests are responded to via specific documents prepared by the companies and submitted to the authority via e-mail (often with the assistance of outside counsel). However, in the BrMalls/Aliansce Sonae case, the questionnaires sent by Cade to the various market players were answered through a link and token that the authority provided to each individual company (for information security reasons, each company received a uniquely designed token).

As a result, the answers the companies submitted had a standardized format, which could arguably facilitate how quickly the case team can process the information. However, it still remains uncertain if and how Cade will continue to use the electronic market test, and its impacts on the speed of data collection and analysis.

## Electronic form

The high number of cases Cade reviews every year has been creating challenges for the speed of its review process. These challenges can be seen not only in the

review of complex cases (which require the authority to conduct in-depth assessments of a significant volume of data) but also in simpler cases, due to the significant number of cases that are submitted via the fast-track proceeding (as mentioned above, Cade assessed and cleared 585 fast-track cases were in 2022).

In this context, Cade has been considering the possibility of transactions that are eligible for the fast-track proceeding (which are simpler from a competition standpoint and require a lower volume of information from the parties) being submitted to Cade via an electronic form. While there is no official information regarding the implementation of this tool at this stage, Cade's representatives spoke about this trend at a series of public events in 2022.<sup>18</sup> It is expected that these discussions will continue and develop into a concrete action plan in 2023.

## Unilaterally imposed remedies

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<sup>18</sup> This included a speech from Cade's President, Alexandre Cordeiro, at the 28th International Seminar on Competition Policy (October 2022), as well as a speech from the former Deputy General Superintendent, Patrícia Sakowski, at the 2022 ICN Merger Workshop (April 2022).

In December 2022, Cade's Tribunal reviewed a transaction involving a proposed joint venture named Catena-X between the Volkswagen Group, Mercedes-Benz, BMW, BASF Group, Henkel, Bosch, SAP, Schaeffler, Siemens, T-Systems, and ZF<sup>19</sup>, which sought to create a digital platform to enable data exchanges in the automotive sector's supply chain. The transaction was also filed with the antitrust authorities of the European Commission, Germany, Chile, South Korea, and Poland.

Cade's General Superintendence approved the transaction without remedies. However, the Tribunal requested a second review of the case and came to the view that the transaction raised antitrust concerns related to the exchange of competitively sensitive information and the increase of coordinated power, mainly because the proposed platform would allow communication between different companies operating in the automotive sector, whose track

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<sup>19</sup> Merger Case No. 08700.004293/2022-32 (Parties: BASF SE, BMW Holding B.V., Henkel AG & Co. KGaA, Mercedes-Benz AG, Robert Bosch GmbH, SAP SE, Schaeffler Invest GmbH, Siemens Industry Software GmbH, T-Systems International GmbH, Volkswagen AG and ZF Friedrichshafen AG).

record already features several cartel investigations.

According to the reporting commissioner at Cade's Tribunal, concerns remained even though the parties proposed competition compliance guidelines, as these would represent mere 'promises' if there were no sanctions or tools for implementing them. In light of the Tribunal's concerns, the parties proposed a package of behavioral remedies, including:

- iv. Storing parameters and registered data exchanges between platform users for five years;
- v. Adopting a monitoring program with an independent auditor (trustee) and a chief compliance officer;
- vi. Adopting tracking software (screening) to identify potentially anticompetitive data and files, as well as conducting periodic audits;
- vii. Developing IT solutions in line with a compliance-by-design model, among others.

In a unanimous decision, Cade's Tribunal ruled that the proposed remedies were insufficient

for addressing its antitrust concerns. In doing so, it rejected the proposal and instead opted to unilaterally impose remedies – a relatively uncommon mechanism established by Cade’s Antitrust Remedies Guide.<sup>20</sup>

As per Cade Tribunal’s decision, the platform could only be launched after the safeguards provided for in the remedies were implemented, and each company’s participation in the joint venture would be subject to its individual compliance with the imposed remedies.

After the decision was handed down, the parties presented a submission to withdraw the merger filing and to inform the authority that they had abandoned the transaction.<sup>21</sup> However, at the same time, Cade became aware that the parties had launched Cofinity-X, a joint venture with a similar objective to Catena-X. In responding to questions from Cade, the parties claimed that Cofinity-X is a distinct

transaction with no effects in Brazil, as the new joint venture expressly excluded Brazil from its scope. However, Cade’s Tribunal unanimously decided that (i) Cade’s ruling on the merger was already final and, as such, the filing could not be withdrawn; (ii) as the parties did not comply with the imposed remedies, the transaction was blocked; and (iii) given that the Cofinity-X transaction had been conducted without Cade’s approval, the case should be sent back to the General Superintendence to investigate possible antitrust infringement by the parties (including for potentially providing misleading information to Cade, as well as for implementing the transaction despite the blocking decision).

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20 See: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Antitrust-Remedies.pdf>

21 See: [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?HJ7F4wnlPj2Y8B7Bj80hllskjh7ohC8yMfhLoDBLddZ\\_BHZsFvb2fcgRX0gAepd73qeAWu1dm-FguxbrOZtXAUXRZlB9Obja1qeAE9E9NPHsqvTQM2XoDyDolG5E3\\_S\\_](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnlPj2Y8B7Bj80hllskjh7ohC8yMfhLoDBLddZ_BHZsFvb2fcgRX0gAepd73qeAWu1dm-FguxbrOZtXAUXRZlB9Obja1qeAE9E9NPHsqvTQM2XoDyDolG5E3_S_)

**Anticompetitive  
conduct: 2022's  
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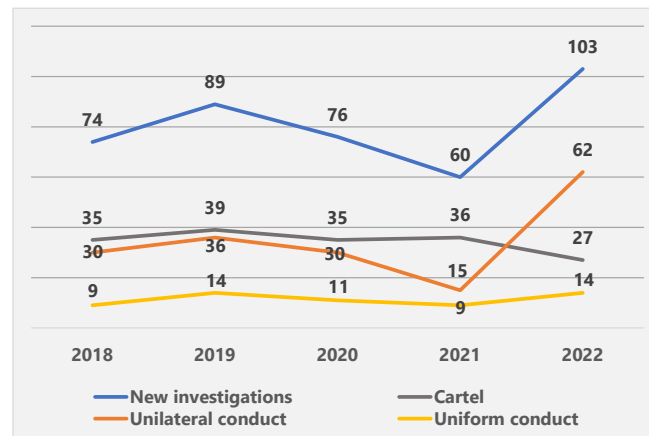


In 2022, Cade opened 103 anticompetitive conduct investigations, the highest number in the past five years. 62 of these investigations involved allegations on abuse of dominant position, a developing trend. Brazil's antitrust authority executed 37 settlement agreements, reducing the number of proposals awaiting approval by Cade's Tribunal. On the other hand, the Tribunal ruled on 13 administrative proceedings, with Cade executing only one leniency agreement – the lowest number in recent years. The year also saw Cade's Tribunal increasingly scrutinize the decisions handed down by the General Superintendence – particularly with respect to interim measures, which were adopted in three cases last year.

## 2022 conduct enforcement<sup>1</sup>

Cade initiated an impressive **103 investigations, the highest number in the last five years. This is largely due to abuse of dominant position cases, representing the highest number of new cases within**

**that period.** Of all the new investigations, 60% (62 cases) concerned unilateral conduct (abuse of dominant position), 26% (27 cases) concerned cartels, and 13% (14 cases) regarded uniform conduct:



The record number of new investigations on unilateral conduct in 2022 coincides with the first year of the existence of a special unit within the General Superintendence to investigate this

1 Source: Cade Yearbook (2023). Available at <https://indd.adobe.com/view/7ae16908-dc6c-4610-9ec4-4868c3f02f62>.



practice, in line with Cade’s agenda.<sup>2</sup> In its 2022 Yearbook, Cade did not disclose the breakdown of new investigations by procedure (preparation, inquiry, and administrative proceeding). Therefore, a considerable number of new unilateral conduct investigations may still be at the preparation stage – a fairly initial assessment of the case. It remains to be seen whether the General Superintendence will be able to efficiently handle such a significant number of cases.

**Cade’s Tribunal ruled on a total of 13 cases in 2022:**

11 were related to cartels, and only two were related to unilateral conduct. Considering Cade’s track record over the past five years, **fewer cases were judged in 2022;** however, this had no impact on the amounts raised from the fines it applied. On the contrary, Cade raised BRL 1.7 billion (USD 326 million)<sup>3</sup> in fines, even higher than the sum raised in 2021 (BRL 1.3 billion/

USD 232 million)<sup>4</sup> when Cade ruled on 25 cases (almost double the number of cases in 2022):

	2018	2019	2020	2021	2022
<b>Trials</b>	25	28	17	25	13
<b>Total fines</b>	BRL 627 mi/USD 161 mi <sup>5</sup>	BRL 792 mi/USD 196 mi <sup>6</sup>	BRL 138 mi/USD 26 mi <sup>7</sup>	Almost BRL 1.3 bi/USD 232 mi <sup>8</sup>	BRL 1.7 bi/USD 326 mi <sup>9</sup>
<b>Cartel</b>	20	15	14	22	11
<b>Unilateral conduct</b>	4	10	3	2	2
<b>Uniform conduct</b>	1	3	0	1	0

4 Exchange rate at December 31, 2021: USD 1.00 = BRL 5.58. Source: Brazilian Central Bank.

5 Exchange rate at December 31, 2018: USD 1.00 = BRL 3.87. Source: Brazilian Central Bank

6 Exchange rate at December 31, 2019: USD 1.00 = BRL 4.03. Source: Brazilian Central Bank.

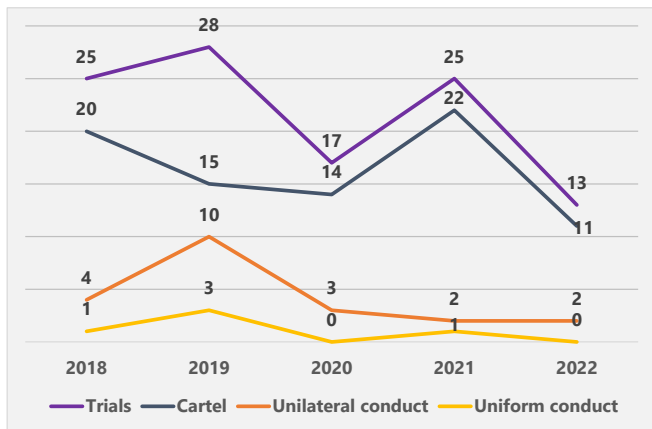
7 Exchange rate at December 31, 2020: USD 1.00 = BRL 5.19. Source: Brazilian Central Bank.

8 Exchange rate at December 31, 2021: USD 1.00 = BRL 5.58. Source: Brazilian Central Bank.

9 Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

2 See an article published by Cade’s president, available at <<https://www.conjur.com.br/2021-dez-07/conduta-unilateral-pior-cartel-concorrencia>>. Viewed on February 13, 2023.

3 Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.



Cade executed **only one leniency agreement in 2022**, a sharp drop in comparison with the annual average of six agreements in the four years prior.<sup>10</sup> This single agreement, coupled with the lower number of new investigations and trials involving cartels, may indicate Cade is decreasing the pursuit of collusion cases. It will be important to watch out for future developments to see whether this becomes a future trend.

<sup>10</sup> Six agreements were executed in 2018, eleven in 2019, two in 2020, and five in 2021.

However, **Cade's Tribunal approved a greater number of settlement agreements in conduct investigations.**

37 settlement agreements were approved in 2022 – a number well above the previous three years – with BRL 724 million (USD 138 million) in pecuniary contributions collected for the Fund for the Defense of Diffuse Rights, as outlined below:

	2018	2019	2020	2021	2022
<b>Settlement agreements</b>	60	19	17	9	37
<b>Pecuniary contributions</b>	BRL 1.3 billion/ USD 335 million <sup>11</sup>	BRL 167 million/ USD 41 million <sup>12</sup>	BRL 140 million/ USD 26 million <sup>13</sup>	BRL 58 million/ USD 10 million <sup>14</sup>	BRL 724 million/ USD 138 million <sup>15</sup>

As mentioned in previous editions<sup>16</sup>, only a few

<sup>11</sup> Exchange rate at December 31, 2018: USD 1.00 = BRL 3.87. Source: Brazilian Central Bank

<sup>12</sup> Exchange rate at December 31, 2019: USD 1.00 = BRL 4.03. Source: Brazilian Central Bank.

<sup>13</sup> Exchange rate at December 31, 2020: USD 1.00 = BRL 5.19. Source: Brazilian Central Bank.

<sup>14</sup> Exchange rate at December 31, 2021: USD 1.00 = BRL 5.58. Source: Brazilian Central Bank.

<sup>15</sup> Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

<sup>16</sup> See the first edition of the 2022 bulletin, available at: [https://www.mattosfilho.com.br/Documents/210624\\_livreto\\_concorrencial\\_2022\\_4ed\\_EN.pdf](https://www.mattosfilho.com.br/Documents/210624_livreto_concorrencial_2022_4ed_EN.pdf).

settlement agreements were approved in 2021, which may have reflected a lack of consensus on the parameters adopted for calculating the contributions.

**The notably higher number of settlement agreements in 2022 indicates that the Tribunal commissioners reached an agreement to reduce the number of proposals pending approval.**

### Closer scrutiny of cases involving interim measures

When there is evidence or well-founded indications of potentially irreparable harm, Cade normally adopts interim measures during its investigations. Between 2019 and 2022, the General Superintendence adopted six interim measures in investigations of alleged anticompetitive conduct.<sup>17</sup>

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17 See Voluntary Appeal No. 08700.005308/2019-84 (Appellant: Itaú Unibanco S.A. and Redecard S.A.); Voluntary Appeal No. 08700.006317/2020-26 (Appellant: Globo Comunicação e Participações S.A.); Administrative Investigation No. 08700.004588/2020-47 (Complaints: Rappi Brasil Intermediação de Negócios Ltda., and Associação Brasileira de Bares e Restaurantes – ABRASEL; Defendant: Ifood.com Agência de Restaurantes Online S.A.); Voluntary Appeal No. 08700.007228/2021-88 (Appellant: Total Pass Participações Ltda.); Voluntary Appeal No. 08700.001309/2022-55 (Appellant: Sindicato dos Artistas e Técnicos em Espetáculos de Diversões do Estado de São Paulo

Cade's Tribunal later adjusted two of them<sup>18</sup> and adopted five other measures in cases where the General Superintendence had decided not to apply them.<sup>19</sup> Such statistics demonstrate that the Tribunal has adopted a more rigorous stance on interim measures than the General Superintendence, imposing measures in cases that the latter did not originally deem necessary.

In 2022, the Tribunal continued to look closely at these issues. When investigating Gympass' exclusivity agreements, Cade took stricter measures than the General Superintendence.<sup>20</sup> Meanwhile,

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(SATED/SP)); Voluntary Appeal No. 08700.001884/2020-12 (Appellant: Marimex – Despachos, Transportes e Serviços Ltda.).

18 See Voluntary Appeal No. 08700.005308/2019-84 (Appellants: Itaú Unibanco S.A. and Redecard S.A.); Voluntary Appeal No. 08700.007228/2021-88 (Appellant: Total Pass Participações Ltda.).

19 See: Voluntary Appeal No. 08700.000989/2019-94 (Appellant: Companhia Brasileira de Soluções e Serviços); Voluntary Appeal No. 08700.003994/2020-92 (Appellant: Instituto De Hematologia E Hemoterapia De Curitiba S/C Ltda.); Voluntary Appeal No. 08700.004935/2020-31 (Appellant: Localfrio S.A. Armazéns Gerais Frigoríficos); Voluntary Appeal No. 08700.004943/2020-88 (Appellant: Localfrio S.A. Armazéns Gerais Frigoríficos); Voluntary Appeals No. 08700.005936/2022-65 and No. 08700.007547/2022-74 (Appellants: HNK BR Indústria de Bebidas Ltda. and AMBEV S.A., respectively. The cases were judged together).

20 Voluntary Appeal No. 08700.007228/2021-88 (Appellant: Total Pass Participações Ltda.).

after the General Superintendence declined to impose any interim measures on Ambev's<sup>21</sup> exclusivity agreements, Cade's Tribunal overruled the decision and adopted measures both against Ambev (the defendant) and Heineken (the plaintiff).

## New investigations and convictions

In 2022, Cade continued its investigations into companies in the Oil & Gas sector, opening five new investigations – three against Petrobras (ongoing), one against White Martins<sup>22</sup> (already closed), and one against ACELEN (ongoing) that the Tribunal has forwarded to the General Superintendence.<sup>23</sup> The new investigations involving Petrobras refer to the prices of oil and oil byproducts,<sup>24 25</sup> as well as access to

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21 Voluntary Appeals No. 08700.005936/2022-65 e 08700.007547/2022-74 (Appellants: HNK BR Indústria de Bebidas Ltda. and AMBEV S.A., respectively. The cases were judged together).

22 The claim concerned White Martins' alleged interruption of CO2 supply to certain companies that manufacture soft drinks and carbonated beverages and use the product as a raw material. See Preparatory Proceeding No. 08700.003341/2022-75.

23 Administrative Investigation No. 08700.001571/2022-08.

24 Administrative Investigation No. 08700.003785/2022-19.

25 Administrative Investigation No. 08700.000212/2022-25.

infrastructure.<sup>26</sup>

The payments sector also continues to be on Cade's radar. At least three investigations have been opened – administrative inquiries against ConectCar and Itaú,<sup>27</sup> Linx,<sup>28</sup> and Banco do Brasil, Banco Bradesco and Companhia Brasileira de Soluções e Serviços (CBSS).<sup>29</sup>

In December, the General Superintendence opened an investigation into Apple in light of a complaint filed by Mercado Livre.<sup>30</sup> Apple was accused of abusing its dominant position by setting rules for app developers that sought to distribute their apps via Apple's systems.<sup>31</sup>

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26 Administrative Investigation No. 08700.000211/2022-81.

27 Administrative Investigation No. 08700.001031/2022-16 referring to an alleged tie-in sales practices, cross-subsidization and sharing, and the use of personal data.

28 Administrative Investigation No. 08700.004226/2020-56 referring to alleged refusal to contract, tie-in sales practices, barriers for new companies, and price discrimination. The investigation was closed by Cade due to a lack of evidence.

29 Administrative Investigation No. 08700.001091/2020-77 referring to alleged tie-in sales practices, cross-subsidization, margin squeezing, an abusive cost increase for competitors' direct debit services, and the use of rivals' sensitive information.

30 Administrative Investigation No. 08700.009531/2022-04.

31 Mercado Livre has accused Apple of prohibiting app developers from

As for cartels, the General Superintendence filed an administrative proceeding in February 2022 to investigate a cartel scheme in the global market to acquire sports media rights, sporting events and provide consulting or counseling-related services, with potential effects in Brazil. In March, Cade sentenced an international automobile shipping cartel<sup>32</sup> to pay fines amounting to BRL 26.4 million (USD 5 million).<sup>33</sup>

Cade also executed two settlement agreements linked to an administrative proceeding that investigated an alleged cartel scheme involving the

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distributing third-party digital products and services, preventing the emergence of other distributors of products and services that use iOS (Apple's operating system) and restricting the growth of other app developers. Mercado Livre also alleges that Apple is forcing developers with in-app purchase features to only use Apple's programs for processing payments, upon commission and compliance with other rules. According to Mercado Livre, Apple's rules adversely affect and possibly prevent potential competitors from distributing third-party digital goods and services, and also block any of the competitors' distribution channels.

32 Administrative Investigation No. 08700.001094/2016-24. Hoegh Autoliners Holdings AS and one individual were convicted. The proceeding was closed in relation to Mitsui OSK Lines, Nissan Motor Car Carriers, Nippon Yusen Kabushiki Kaisha, Compañía Sud Americana de Vapores, Kawasaki Kisen Kaisha, Wallenius Wilhelmsen Logistics, Eukor Car Carriers and 54 individuals, who had settled with CADE.

33 Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

onshore foreign exchange market that took place within Brazil, involving the Brazilian Real (BRL).<sup>34</sup> Citibank and Banco Société Générale Brasil (BSGB) committed to paying more than BRL 71 million (USD 13 million)<sup>35</sup> and BRL 5 million (USD 958,000)<sup>36</sup>, respectively, which resulted in the investigations being suspended. Other financial institutions that were allegedly involved have yet to settle with Cade, and remain under investigation.

### **Important developments regarding the intersection of competition law and Brazil's judiciary**

Cade published Ordinance No. 21 in October 2022, determining that the General Superintendence may provide the Prosecutor's Office with its technical notes containing sentencing suggestions for cartel cases, even before Cade's Tribunal hands down its final decision. This ordinance could result in the

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34 Administrative Proceeding No. 08700.008182/2016-57.

35 Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

36 Exchange rate at December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

criminal prosecution of individuals investigated by Cade, with the Prosecutor's Office filing suits demanding those responsible for the alleged violation pay compensation.

In November, the First Panel of the Superior Court of Justice (STJ) annulled a decision Cade issued in September 2005<sup>37</sup> that required Gerdau to pay a fine equivalent to 7% of its gross revenue in 1999 (approximately BRL 100 million<sup>38</sup>, or USD 19 million)<sup>39</sup> for allegedly forming a cartel in the steel rebar market. The STJ found that by rejecting the company's request for economic evidence to be produced, Cade's reporting commissioner had violated his duty to provide adequate reasons to support the authority's decision, as well as the defendant's rights regarding the production of evidence. The case demonstrates that companies could look to the judiciary if seeking to overrule Cade's decisions, especially if a procedural violation

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37 Administrative Proceeding No. 08012.004086/2000-21.

38 Source: <https://valor.globo.com/legislacao/noticia/2022/11/08/stj-aceita-recurso-da-gerdau-e-anula-multa-milionario-aplicada-pelo-cade.ghtml>.

39 Exchange rate as of December 31, 2022: USD 1.00 = BRL 5.21. Source: Brazilian Central Bank.

occurred during the administrative proceeding.

Furthermore, Law No. 14,470/2022 also took effect in November 2022. It amends a section of Law No. 12,529/2011 (the Brazilian competition law) to facilitate competition damage claims arising from crimes against the economy, establishing tools to speed up these proceedings and improve the ability to predict their outcome. The main changes involve: (i) a five-year statute of limitations counted from the date Cade's final decision is published; and (ii) the affected parties being entitled to compensation equivalent to two times the value of the damage caused.

For more information on this specific subject, please read a [memorandum](#) we published when Law No. 14,470/2022 was enacted.

## Expectations for 2023

Cade is expected to be intensely active in anticompetitive conduct cases in 2023, especially in regard to unilateral conduct, given the high number of cases filed in 2022. As was the case in 2022,

Cade's Tribunal should pay particular attention to the General Superintendence' decisions, such as those related to interim measures and dismissal of investigations.

Practices that may be seen as involving abuse of dominant position, especially those related to digital markets, the financial sector, payment methods and dominant players in infrastructure markets (e.g., ports, oil and gas) should continue to remain on Cade's radar.

At this stage, it remains unclear to what extent Cade will address cartel enforcement. Given the significant number of pending cases, Cade will likely maintain its stance in favor of seeking settlements. However, the reduced number of new leniency agreements and new cartel investigations are also an important sign. Thus, it remains to be seen whether Cade will take a different approach in 2023 or if the level of enforcement against collusive practices will continue to decrease.

Several strategic appointments are expected to take place at Cade in 2023. Four of the authority's seven

commissioners will see their terms expire in the second half of the year, and the majority of Cade's Tribunal will then be made up of new members. However, these appointments may be affected if Bill No. 4,323/2019 is passed into law. As part of the changes the bill proposes, the number of the commissioners on the Tribunal would be reduced from seven to five.

# **Draft bill on digital platforms**





Draft Bill No. 2768/2022 (“[PL 2768/2022](#)”)<sup>1</sup>, currently being considered by federal legislators in Brazil, relates to the operation of digital platform services in Brazil and proposes granting powers to the *Agência Nacional de Telecomunicações* (the Brazilian National Telecommunication Agency “Anatel”) to regulate the operation of digital platforms, especially those considered to possess “the power to control essential access” (similar to the EC’s “gatekeeper” concept). According to PL 2768/2022, a digital platform<sup>2</sup> will be deemed as possessing “the power to control essential access” when the undertaking registers annual gross revenues equal or superior to BRL 70 million in the provision of services to Brazilians.

PL 2768/2022 proposes that digital platforms possessing the power to control essential access should be subject to greater scrutiny by Anatel and

to a number of requirements. Another novelty is the creation of a specific surveillance fee for digital platforms, to be charged annually from platforms possessing the power to control essential access that offer services to Brazilians.

PL 2768/2022 is largely inspired by foreign legislation, reports and articles (such as the Digital Markets Act, “DMA”<sup>3</sup>, approved in 2022 by the European Parliament). In this regard, the official explanation of the Brazilian draft bill mentions an academic paper by Tim Wu<sup>4</sup> and a well-known report organized by the Chair of the US competition authority (the Federal Trade Commission)<sup>5</sup>, Lina Khan, both related to market concentration resulting from the conduct of large players in the digital space. Both authors are influential advocates for more aggressive and interventionist competition

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1 Information on the Brazilian Draft Bill No. 2768/2022 (“PL 2768/2022”) is available at: [https://www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra?codteor=2214237&filename=PL%202768/2022](https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2214237&filename=PL%202768/2022)

2 According to PL 2768/2022, digital platforms mean any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) cloud computing services; (h) online advertising services provided by an undertaking that provides any of the services listed in points (a) to (g).

3 European Commission. The Digital Markets Act: ensuring fair and open digital markets. Available at: [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en#documents](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#documents)

4 Wu, T.: “The Curse of Bigness”. Antitrust in the New Gilded Age. Columbia Global Reports.

5 American Innovation and Choice Online Act. Available at <https://www.congress.gov/bill/117th-congress/house-bill/3816#:~:text=American%20Choice%20and%20Innovation%20Online%20Act%20This%20bill,the%20platform%2C%20or%20discriminating%20among%20similarly%20situated%20users.>

enforcement, especially in the digital economy.

The DMA, perhaps PL 2768/2022's main inspiration, is a European regulation the purpose of which is to identify digital platforms that act as "gatekeepers" in digital markets and to impose obligations and restrictions on these players. As proposed by the Brazilian Draft Bill, the DMA – published in the Official Journal of the European Union on 12 October 2022 and expected to gradually enter into force by May 2023 – provides tangible rules to be followed by the platforms and also authorizes the authorities (in the DMA, the European Commission, and, in Brazil, Anatel) to punish cases of non-compliance with such rules.

### **DMA vs. PL 2768/2022**

One of the differences between the Brazilian draft bill and the European regulation concerns the undertakings which will be subject to the regulation. DMA does not cover all digital platforms, only "gatekeepers" as per the definition established in the regulation. The requirements established by the DMA

to define the gatekeepers are mainly related to the consolidated position as a gateway for business users towards final consumers, that is, the DMA targets those agents who occupy a privileged and crucial position in the digital ecosystem. In addition, the DMA presumes that an undertaking is a gatekeeper when it meets specific thresholds of turnover and users, as well as when, based on the analysis of specific criteria, the company is identified as offering essential services.

The Brazilian draft bill, on its turn, applies to undertakings active in digital platforms market in general. Despite assigning specific obligations to digital platforms that control essential access, the Brazilian draft bill proposes an objective turnover based criteria (register annual gross revenues equal or superior to BRL 70 million in the provision of services to the Brazilian public) to establish which players possess that power and are thus caught by the regulation. This may unnecessarily cover a greater number of digital platforms, thus departing from the relevant discussion on the essentiality of the platform in the digital ecosystem.

Another distinction between the DMA and PL 2768/2022 lies in the *ex-ante* obligations imposed to platforms possessing the power to control essential access. While the DMA provides more concrete and specific rules, such as prohibiting such platforms from preventing business users from being offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the gatekeeper, PL 2768/2022 provides rules that, at first sight, seem more general, affording more discretion to the enforcer. Among these generic obligations brought by PL 2768/2022, it is worth highlighting the following: (i) transparency and the obligation to providing information to Anatel; (ii) non-discriminatory treatment of users; (iv) proper use of data; and (v) non-refusal of access to the digital platform to business users. These are wide-ranging and principle-based obligations, which, despite being inspired by the DMA, are not detailed. According to Cesar Costa Alves de Mattos, Consultant at the Brazilian Parliament involved in the

development of the draft bill<sup>6</sup>, there was a deliberate choice to keep the Brazilian regulation more open, as these are new markets that enforcers still have to go through a long learning curve to get familiarized with.

### Cade vs. Anatel

Another relevant aspect of the Brazilian draft bill are the powers granted to Anatel to monitor, prevent and prosecute anticompetitive conduct carried out by digital platforms, which under the current proposal would be concurrent to CADE's full enforcement powers. This proposal to have Anatel and CADE have overlapping enforcement powers raises questions on the scope of their respective enforcement actions and the risk of over-enforcement.

In his participation in the event "PL 2768/2022: the Brazilian project of Digital Markets Act (DMA)", organized in November 2022 by the Brazilian

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<sup>6</sup> Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade - IBRAC Webinar on PL 2768/2022: the Brazilian project of Digital Markets Act (DMA) - 11.30.2022. Available at <https://www.youtube.com/watch?v=vecOmG2qN5o>

Institute of Studies on Competition, Consumer Affairs and International Trade - IBRAC, the Parliament Consultant Cesar Mattos mentioned that the choice to grant powers to Anatel had the purpose of speeding the enforcement, since antitrust remedies would be overly delayed in the context of the digital economy. Nonetheless, it is important for effective regulatory coordination and internal dialogue in Public Administration to be articulated so as to avoid the costs and burden of double regulation to address the same conduct. This is also crucial to avoid possible regulatory abuses that, ultimately, could harm society.

PL 2768/2022 is currently at the Commission for Economic Development, Industry, Commerce and Services (CDEICS) in the Brazilian House of Deputies, awaiting analysis under the standard proceeding for draft bills and subject to conclusive review by the CDEICS and the Constitution, Justice, and Citizenship Commission (CCJC) in the Brazilian House of Deputies. After the approval by CDEICS and CCJC, the bill will be submitted to the Brazilian Senate.

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