

Brazilian Competition Policy in 2023: A Changing Landscape

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This article discusses critical developments in Brazilian Competition Policy in 2023. We present an overview of organizational changes and key trends in the decision practice of the Brazilian Competition Agency – “CADE.” We conclude with a discussion of trends and perspectives for 2024.

I. Organizational Developments

2023 was marked by the end of mandates of four commissioners between October and November, resulting in the suspension of activities for CADE’s Tribunal due to lack of a minimum operating quorum. The situation was only normalized in late December, after Congress approved the nominations of four new Commissioners. As these four new Commissioners take office, we may see changes in the internal dynamics of CADE’s Tribunal and the formation of alliances between commissioners over the next several months.

CADE continued its efforts to develop and publish guidelines on relevant topics. In July, CADE released a draft version of its upcoming “Non-Horizontal Merger Guidelines,” containing the main theories of harm that CADE is expected to investigate in non-horizontal mergers (cases involving vertical integration or a “conglomerate integration,” defined in the draft guidelines as “*transactions in which the activities of the companies involved are somehow related*” but not in a horizontal or vertical sense).² The draft lists CADE’s main concerns with non-horizontal mergers, including risks of market foreclosure, bundling/mixed bundling, tying and “reciprocity negotiations” (where a “*buyer offers to buy goods from a seller under the condition that the seller buys other goods in return*”). CADE received contributions to the draft Guidelines from interested parties

until September, and a final version is expected in 2024.

In September, CADE released the “Guidelines for Calculation of Cartel Fines,”³ providing a comprehensive summary of its own decision practice between 2012 and 2022 on the calculation of fines applicable in cartel investigations. The competition statute provides that fines must range between 0.1-20 percent of the gross revenue obtained in Brazil through the activity impacted by the anticompetitive conduct. The Guidelines further specify that the baseline fine for cartel cases is of 17 percent when involving public bids, 15 percent in hardcore cartel cases, and 8 percent in cases involving other types of collusion (soft-core cartels, exchanges of information, unilateral disclosure of information, etc.), subject to specific conditions of each case that may require individual assessment and calibration (for example, fines can be higher in case of an aggravated offense).

It is also worth mentioning an interesting development resulting from a court decision issued in July.⁴ In short, a Public Prosecutor filed a suit against CADE in a Labor Court. The suit asked the Court to order CADE to consider the impacts of mergers in labor relations and prohibit mass layoffs following closing of mergers. CADE argued that the lawsuit should be dismissed because “*antitrust law does not assign to CADE the mission of ensuring the maintenance of employment levels,*” and “*the protection of labor relations is not within CADE’s scope of action.*” The Court of First Instance dismissed the case, but the Court of Appeals overruled the decision in July, holding that “*CADE must defend competition based on the principles of free enterprise and the social function of property, which includes the social value of labor.*” While “*CADE does not have the*

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² Available here: <https://www.gov.br/participamaisbrasil/guia-v>.

³ Available here: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guia-dosimetria-de-multas-de-cartel.pdf>.

⁴ Judicial Process nº 0012149-49.2014.5.15.0081.

legal power to prohibit mass layoffs,” it should ask labor unions for data about labor relations in the context of merger investigations and *“consider the social value of labor in mergers impacting labor relations.”* CADE filed a motion for clarification and may appeal the ruling. While CADE goes through the appeal process, the decision is suspended, and CADE has not changed its practice in merger investigations at this time.

II. Developments in Merger Investigations

The number of merger filings returned to 2021 levels, indicating that the M&A market in Brazil cooled down in 2023 after a record number of transactions in 2022. On the other hand, the ratio of mergers cleared without remedies remained quite stable, indicating a consistency in CADE’s practice.⁵

	2021	2022	2023
Mergers reviewed	611	669	612
Unconditional clearance	95.7%	95.7%	96.9%

There were not many large mergers involving significant market concentration over the year, a potential reflection of the uncertainty in Brazil’s economic environment. Nonetheless, CADE’s Tribunal issued important decisions on cutting-edge topics such as sustainability initiatives among competitors. The following cases deserve to be highlighted:

- In May, CADE blocked the acquisition of Grupo Smile, a relatively small health insurance provider, by Hapvida, one of Brazil’s largest health insurance providers⁶. The transaction resulted in horizontal overlaps in over 170 cities, with concentration levels increasing significantly in 30 cities. CADE’s Tribunal held that remaining competitors would not be able to prevent the exercise of market power by Hapvida. Given remedy negotiations were not fruitful, the acquisition was blocked.
- In June, CADE cleared the creation of a Joint Venture (“JV”) among agriculture commodities traders with the goal of developing a digital platform for standardizing sustainability metrics⁷. The transaction was initially cleared by the Superintendent General (“SG”), but the Tribunal issued an order to review the case

and investigate further. According to the Tribunal, JVs and other types of agreements between rivals to promote sustainability goals should be reviewed with caution as they raise concerns that (i) parties could foreclose rivals by denying them access to the platform; and (ii) collaboration may lead to sharing of competitively sensitive information. The deal was ultimately cleared after the Tribunal’s investigation confirmed that the JV would only organize pre-existing sustainability metrics rather than create new metrics, and that the parties had signed an “Antitrust Protocol” establishing that access to the platform would be granted to interested parties and setting governance measures to prevent the exchange of sensitive information through the JV.

- Also in June, CADE cleared the acquisition of chocolate manufacturer Garoto by Nestlé,⁸ marking the end of a historic dispute. The deal was originally notified in 2002 under a previous post-merger review regime, with CADE deciding to block the merger in 2004. Nestlé decided to challenge CADE’s decision in Federal courts, obtaining an injunction to suspend CADE’s decision. After almost two decades of litigation, the Court of Appeals ordered CADE to reassess

⁵ See: <https://www.gov.br/cade/pt-br/centrais-de-conteudo/cade-em-numeros>.

⁶ Merger Review nº 08700.004046/2022-36.

⁷ Merger Review nº 08700.009905/2022-83.

⁸ Merger Review nº 08012.001697/2002-89. For transparency, we represented a complainant in the case.

the initial blocking decision rendered in 2004. CADE then initiated a new merger investigation based on current market conditions, and in 2023, CADE and Nestlé reached an agreement to settle the case. The agreement provides that Nestlé can keep the assets acquired from Garoto, but is prohibited from completing new acquisitions of rivals with market shares of 5 percent or more in the market for chocolates, among other behavioral remedies, for a period of 5 years.

- In September, CADE placed conditions on the continued operation of a JV named Simba,⁹ imposing a number of behavioral remedies. Simba was created in 2016 by rival broadcasters SBT, Record, and RedeTV! with the goal of establishing a joint negotiation of licenses for their TV channels in deals with pay-TV operators. Back in 2016, CADE conditioned the creation of the JV to behavioral remedies seeking to prevent the exercise of market power by Simba against medium and small pay-TV operators and conditioned the JV's continued validity to additional review years later. As the time for a new review neared, Simba argued that CADE should clear the JV indefinitely and without restrictions because the audiovisual market had been disrupted by streaming platforms. CADE's Tribunal, however, found that Simba could still exercise market power against small pay-TV operators, so that remedies (including a "reverse MFN" clause providing that small pay-TV operators must pay Simba the same price paid by dominant pay-TV players for its channels) were necessary.
- In October, CADE ordered 123 Milhas to notify their acquisition of rival MaxMilhas (123 Milhas is a digital platform for purchase and sale of airline miles).¹⁰ The transaction did not meet the threshold for mandatory filing, so parties had no obligation to file. However, the Tribunal decided CADE should

review the deal because it could result in relevant market concentration in the space for digital platforms for airline miles. Furthermore, 123 Milhas is under investigation over alleged fraud affecting consumers. According to the Tribunal, "*if there is any doubt about the risks of a transaction (...) a principle in favor of society should apply.*"

III. Single-firm Conduct

In single-firm conduct investigations, CADE maintained a policy of entering into Settlement Agreements to quickly bring cases to an end (saving public resources) while obtaining remedies that alleviated concerns. The following cases should be highlighted:

- In February, CADE's Tribunal signed a Settlement Agreement with iFood, Brazil's largest online platform for food delivery, in an investigation concerning exclusivity agreements with restaurants.¹¹ Per the Settlement Agreement, iFood agreed to limit its exclusivity agreements to certain limits (pre-set degree of foreclosure) in terms of gross merchandise value, and committed to neither sign exclusivity agreements with franchise networks nor to offer discounts that could induce "de facto" exclusivity. iFood remains under investigation for allegedly leveraging its own food vouchers by discriminating rivals within its marketplace.¹²
- In August, CADE's Tribunal closed an investigation concerning an alleged RPM policy by wristwatch manufacturer Technos.¹³ In its decision, the Tribunal indicated that RPM policies by dominant firms (i.e. with market share above 20 percent) are likely to be anticompetitive, unless parties can present evidence of significant rivalry and/or lack of anticompetitive effects in the market. In this case, the Tribunal held that Technos faced strong rivalry and that prices did not increase

⁹ Merger Review n° 08700.009574/2022-81. For transparency, we represented a complainant in the review.

¹⁰ Administrative Process for Gun Jumping n° 08700.004240/2023-01.

¹¹ Application n° 08700.005597/2022-17 and Administrative Inquiry n° 08700.004588/2020-47.

¹² Administrative Inquiry n° 08700.001797/2022-09.

¹³ Administrative Process n° 08700.004563/2017-48.

because of its RPM policy, so it did not have a measurable anticompetitive impact. The SG closed a similar investigation against wristwatch manufacturer Orient in late December, holding that there was no evidence the company had enforced an RPM policy or that Orient's suggested pricing policy had resulted in price increases.¹⁴

- In October, CADE signed Settlement Agreements with companies related to the ClickBus group, an online marketplace for bus tickets, in the context of an investigation into exclusivity agreements with bus companies.¹⁵ Per the Settlement Agreements, parties were committed to cease exclusivity agreements with bus companies, ensure non-discriminatory access to their online marketplace, and take governance measures to prevent the exchange of sensitive information via the platform.
- Also in October, CADE signed a Settlement Agreement with Ambev, part of the AB inBev group, to limit exclusivity agreements with bars and restaurants to certain predefined levels¹⁶. The Settlement Agreement was reached after the Tribunal issued a preliminary injunction limiting exclusivity agreements in 2022, following a complaint from rival brewery Heineken, which alleged that Ambev's exclusivity agreements harmed competition and foreclosed the market for premium points of sales in various relevant cities. The *iFood* and *Ambev* cases consolidate the notion that CADE is unlikely to impose a complete ban on exclusivity agreements as the solution to investigation into exclusive dealing. Under these recent precedents, CADE has indicated that an acceptable remedy typically includes the reduction of the reach of exclusivity agreements to a predefined degree of foreclosure (based on relevant metrics to

each industry) that is deemed unlikely to negatively impact competition.

IV. Collusion Investigations

CADE continued to develop its decision practice regarding the appropriate analysis of evidence unilaterally produced by signatories of Leniency Agreements in cartel investigations. Also, CADE's Tribunal issued its first precedent convicting a "hub-and-spoke" cartel. We highlight the following cases:

- In March, CADE's Tribunal closed a cartel investigation against an individual defendant recognizing that pieces of evidence unilaterally produced by signatories of Leniency and Settlement Agreements (without participation from other alleged cartelists) are not sufficient to support a conviction. This decision further consolidates the Tribunal's view that pieces of evidence unilaterally produced (such as "*reports from collaborators or third parties, notes and internal communications*") must be corroborated by other pieces of evidence such as proof of direct communication between rivals.¹⁷
- In April, CADE convicted companies active in the market for the resale of digital boards involved in a "hub-and-spoke" cartel. The decision qualifies a cartel as "hub-and-spoke" when rivals (the "spokes") do not communicate directly, but rather via a vertically related company that serves as a focal point (the "hub")¹⁸ to exchange information and fix commercial conditions. In this case, the Tribunal held that a national distributor (upstream) disclosed to local resellers (downstream) sensitive information about other resellers (including prices) with the purpose of facilitating bid rigging in public and private tenders.
- In September, CADE reduced the fines previously applied to telecom operators

¹⁴ Administrative Inquiry nº 08700.006900/2017-31. For transparency, we represented Orient in the case.

¹⁵ Administrative Inquiry nº 08700.004318/2018-11.

¹⁶ Administrative Inquiry nº 08700.001992/2022-21. For transparency, we represented Heineken in the case.

¹⁷ Administrative Process nº 08700.010323/2012-78.

¹⁸ Administrative Process nº 08012.007043/2010-79.

Telefônica, Claro, and Oi for concerted practices in the formation of a consortium to participate in public bids.¹⁹ In response to a motion filed by the companies, the Tribunal indicated that the fines applied in 2022 were based on “estimated gains,” which is a method for calculation used in cartel cases only. The case, however, did not involve a cartel to fix prices or commercial conditions; the conduct at issue was therefore qualified as a generic and less dangerous type of collusion, deserving a more lenient treatment.

V. Agenda for 2024

CADE’s leadership went through significant changes by the end of 2023. The newly elected Labor’s Party government appointed four Commissioners in December, and they could fuel new discussions in CADE’s agenda, eventually changing CADE’s stance on controversial matters and enforcement priorities over the course of the next few months and years. Nominees include familiar faces in the competition scene, like Diogo Thomson (who has held various positions at CADE, including the position of Deputy General Superintendent for many years) and Camila Alves (an economics professor who has held the position of CADE’s Chief Economist in the past), in addition to names with strong academic backgrounds and prolific careers in public service (Carlos Jacques is a law professor and has been a consultant for the Senate for years; similarly, José Levi is a law professor and has held various positions in public service, including Federal Attorney General).

Alexandre Barreto de Souza’s term as General Superintendent will end in April 2024; while Barreto could be nominated for a second term, it is also possible that the new administration will select a different name for the seat (Souza was appointed by the previous administration). Because the General Superintendent makes the

final decision on new investigations and therefore can largely dictate enforcement priorities, a potential change in this position can have relevant implications and must be carefully monitored.

From an institutional perspective, CADE is expected to release the final version of the Non-Horizontal Merger Guidelines and to make available for public consultation a draft guideline for the analysis of unilateral behavior – a working group was formed in February 2023 to elaborate a preliminary version. CADE also announced the “e-Notifica,” a digital system that aims to facilitate the filing and review of fast-track mergers by automating certain steps, in November 2023, so it is likely that the agency will promote implementation of this new tool over the year.

Finally, controversial topics will remain on the agenda. CADE will continue the review of complex cases such as the acquisition of chocolate producer Kopenhagen by Nestlé, which was announced weeks after Nestlé signed its agreement with CADE that prohibited acquisitions of rivals with more than 5 percent of market share. CADE will also address the effects of Petrobras’ decision to terminate a contract to sell oil refinery Lubnor (Petrobras is a large state-owned oil company). The sale was cleared by CADE in 2023 as part of Petrobras’ commitments in a Settlement Agreement to end a behavioral investigation initiated in 2019; however, Petrobras decided last November it would not go ahead with the sale, what could be interpreted as a violation of the Settlement Agreement. CADE might also reach final decisions in several cartel cases resulting from the “car wash operation” in 2024. We also expect that discussions in the international agenda, such as those on the interaction between antitrust and data protection, labor regulation and sustainability, and digital platforms in general, will continue to gain traction.

¹⁹ Administrative Process nº 08700.011835/2015-02.