

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Brazil

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As part of the series of posts on the main developments in Competition Law, we are honored to present for the first time in the series an overview of the developments and trends in Brazilian Competition Law and Policy.

Brazil had two important landmarks in 2022: the 10<sup>th</sup> anniversary of the beginning of the validity of the actual Competition Policy Act ([Law nº 12.529](#) enacted on 30 November 2011 that started its effectiveness on 29 May 2012) and the 60<sup>th</sup> anniversary of the Brazilian competition authority CADE that was created in 1962, during João Goulart's presidential term.

In 2022, CADE faced a well-known challenge: to enhance competition in regulated sectors. The global topic of digital markets was not so present in the case law as it was in the last two years. Also, it was the first year of the four-year-presidential term of Alexandre Cordeiro, who has been already Commissioner and Superintendent General of CADE.

### Institutional Design

CADE, as other competition authorities, has developed a great number of soft law mechanisms and keeps evolving in the relationship with other agencies, especially the Judiciary. In a sign of deference to the regulatory agency's work, the Brazilian National Council of Justice (CNJ) issued a recommendation to all judges deciding matters related to competition law to demand a CADE opinion before issuing decisions, aiming to maximize legal security and minimize possible interference with cases being processed by CADE.

Another interesting aspect of antitrust in Brazil is gender equality. CADE published a feature with statistics showing that women represent 49% of CADE's working force, and, more importantly, they also represent 44% of the leadership positions. In this sense, there is an important initiative named Women In Antitrust (WIA) that works on different projects including academic books and a competition law moot.

### Legislative Agenda

Brazilian competition law was amended on November 17<sup>th</sup> (Law n° 14.470/2022) aiming to improve private enforcement in Brazil. The change includes a double compensation to be recovered by the harmed agents and a change in the time limit of issuing claims. The possible expansion of private actions, for instance in cartel cases, is supposed to deter the practice of anticompetitive conducts and enhance private enforcement in Brazil.

An attempt to regulate digital platforms was made in the House of Representatives through the impulse of Law Project n° 2768/2022. The Project intended to focus on online activities and the need for transparency in Big Tech companies, similar to the approach implemented in other countries. To do that, the Project indicated some general principles, but more detailed rules and enforcement will be made by the Brazilian Telecommunications Agency (ANATEL). In case it is finally approved, CADE will have to deal with ANATEL regulations as it already does with other regulated markets.

### Major Merger Cases

The practice of gun-jumping has been on the global antitrust radar over the past few years – this pre-closing conduct concerns a prior notification and control in M&A procedures. This year Brazil had two important cases related to the gun-jumping practice. In the [first one](#), CADE imposed a fine for an operation that occurred more than 5 years ago in the auto dealers' market. The Reporting Commissioner Victor Oliveira affirmed that while the activities resulting from the procedure continued, the conduct remained an illicit operation, and therefore could still be punished. The [second case](#) was related to the sanitary treatment of water and residues; in a unanimous decision the regulatory agency lay down the legal maximum fee (R\$ 60 million).

In the telecommunications market, the challenges with streaming and traditional players were on the radar with the [merger between Discovery and Warnermedia](#), that aimed to create a new player to challenge Netflix, Disney+, and Amazon Prime. Another CADE decision to be highlighted condemned three companies in the telecommunications sector, the [Oi Móvel case](#). Because the conduct related to the case was allowed by Brazilian competition law, which was an M&A movement made by the companies involved to participate in public bidding, the autarchy justified its decision mainly for the following reasons: (i) the market share between the participating companies is too high, allowing this conduct to harm the competition on the market; (ii) the non-complementarity between the companies' actions during the future service provision; and (iii) the lack of evidence surrounding the company's capacity to act alone in the bidding.

### Abusive Behaviour

Globally Brazil faced an increase in the gasoline price, which was addressed mainly with tax concessions. However, ever since the topic was relevant in the public debate, CADE's role was questioned throughout. The reason is that CADE continued to monitor the [remedies](#) implemented in an agreement with PETROBRAS[1] to avoid the abuse of its dominant position in the gasoline distribution sector and to enhance competition.

Moreover, old, but new, allegations towards Ambev for the usage of the dominant position were

raised to impose exclusivity to local sellers. Since 2000, when Antarctica and Brahma merged to become Ambev, the company has been recurrently present on CADE's radar, because of its huge market share, which compels the company to need the authority's approval for M&A procedures, but mainly because of its controversial exclusive contracts. This year was no different. CADE stipulated new terms as a [precautionary measure](#), in which the sign and renewing of exclusive contracts, was prohibited until the end of the investigation. This measure was understood as the prevention of the performance of special contracts during the FIFA World Cup in Qatar.

Regarding cartels in public bidding, Brazil imposed a [historical monetary sanction](#) (around 150 million Brazilian reals). This fee was imposed in the midst of a dispute between aviation fuel supplier companies at the Guarulhos Airport (GRU). The controversy goes back to 2014 and encompasses the complaint of the creation of artificial barriers to entry and the refusal to deal regarding airport space lots. The fine was imposed only regarding the claim of the creation of artificial barriers to entry without a reasonable justification, based on an infringement to the economic order, that justified the penalty.

## Digital Markets

In a multi-jurisdiction operation, Brazil already [ruled in favor](#) (with no restrictions) of Microsoft's acquisition of Activision Blizzard's whole social capital. It is well known that this operation encompasses horizontal overlaps from the activities in the gaming marketing, and vertical integration within the complementarity in the development, publishing, distribution, and merchandising of the games. Regarding the potentiality of the merger to produce damage into the market, CADE argued that, even though Microsoft had a great share of the market, there were no incentives to close the platforms to their rivals because it would reduce the quantity and variety offered in it. What can be seen as a sign of good faith or a blind decision when it comes to one of the Tech Barons expanding, even more, their ecosystem.

## Conclusion

By 2023, in Brazil, we should expect new directives and policies, not only but also due to the change in government. The autarchy will have to see old and new dilemmas from a new perspective. The first one is the implementation of competition policy in regulated sectors, a major question in Brazil with new challenges because of new regulatory policies. Also, important legislative progress may derive from the beginning of the effective use of the New Brazilian Law on Public Procurement ([Law n° 14.133](#), on April 1, 2021) and the questions of competition advocacy and enforcement in public procurement in the context of the new legislation. The advance and the emergence of global cases regarding tech platforms can be important, but the leading trends will probably keep coming from other jurisdictions.

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[1] As a part of the TCC terms the company will have to sell eight refineries, until now just one sale was [complete](#), and other three are with a signed contract but still under overhaul.

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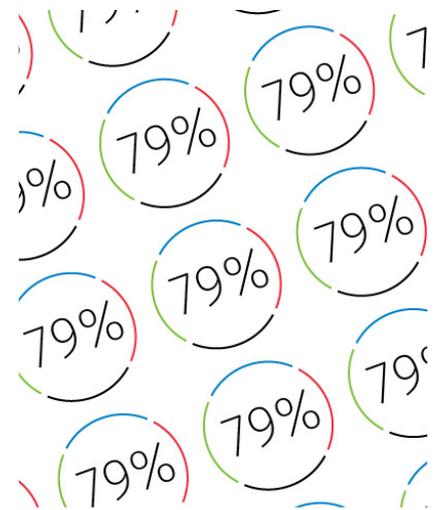
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