

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Brazil

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In 2023, Brazilian competition policy celebrated three significant landmarks: first, the 20th anniversary of its first leniency agreement; second, the launch of CADE's cartel sanction calculation guidelines; and third, the establishment of a partnership between the Brazilian competition authority CADE and the Office of the Comptroller General (CGU) for efficiency improvements in the investigation of cartels.

Regarding the hot topic of digital markets, there were no significant changes in the CADE caselaw. Still, relevant cases were decided, and the authority developed the question of cartel harm in digital markets. Also, despite efforts to approve new legislation regarding digital platforms, Brazilian competition law remained the same. Another topic present in global competition forums is sustainability, and a relevant decision was issued by CADE this year.

In 2024, the Tribunal will work with a significant change in its composition since four new Commissioners have been appointed and approved at the end of 2023, after a period of recess in judgments that started at the beginning of November due to the delay in 1 Commissioner replacement by the Federal Government that lasted until December. The delay in the nomination process both in the choosing process by the President and in the approval by the Senate had already happened in 2019 due to political reasons with an impact on the approval of mergers that needed prior CADE approval.

Cartel detection and deterrence

Cartel detection and deterrence have been on CADE's radar ever since 1994. As the Brazilian antitrust authority, CADE was the first regulator to conduct a leniency program and truly own anticompetitive matters in the country.

Nonetheless, as some anticompetitive conducts are classified as crimes and associated with corruption practices, often CADE's competencies clash with those of other Brazilian entities. First, the Public Prosecutor's Office, the competent authority for crime prosecution. Second, the CGU (Comptroller General's Office), the Federal agency responsible for compliance and internal control, has an important role in corruption prevention and deterrence. In public procurement cartels, CGU conducts its own investigation and is competent to impose administrative sanctions

and to propose leniency agreements within the scope of anti-corruption practices.

In this scenario, CADE and CGU have established a partnership aimed at promoting an integrated approach and achieving greater efficiency in investigations, seeking increased coherence in the government's actions concerning acts of corruption and cartels.

Still, regarding cartel detection and deterrence, CADE released the Guidelines for Cartel Sanction Calculation. Aiming for transparency, proportionality, and uniformity of understanding, the Guidelines refer to “necessary, appropriate, and sufficient dissuasive actions to remove incentives for economic agents” involved in cartel activities. The guidelines aim to reduce uncertainty regarding the value of fines in cartel cases.

This movement adds to the legislative change mentioned in last year's post that focuses on improving private enforcement against cartels. However, until now, there have been no strong signals of a significant increase in Brazilian private law enforcement.

Antitrust Leniency Program

On 8 October 2003, CADE signed its first leniency agreement, within the scope of investigating a cartel in bids for private surveillance in the South. Last October 8th, a debate occurred commemorating the Leniency Program's 20th anniversary.

Aside from leniency agreements, the leniency program also includes a new form of settlement: a Commitment Term to Cease Potentially Anticompetitive Practices (TCC). In both cases, the program enables companies and/or individuals who participate in or have experienced a cartel or other anti-competitive practice to obtain, by reporting it to CADE, total exemption or mitigation of the fines and penalties applicable to them.

Due to said initiative, CADE has detected multiple cartels and other anticompetitive patterns throughout these two decades. In 2023, a major leniency-related case took place in February, and it was related to the automotive industry.

Non-horizontal mergers

Following the [2021-2024 plan](#), CADE released the preliminary version of the [V+ Guide](#), a paper on non-horizontal mergers/concentrations, this past November. Non-horizontal M&A operations are those in which the parties operate on distinct levels of the production chain (vertical integrations) or in complementary activities, and they may result in facilitating coordination among market agents.

In this context, the V+ Guide aims to provide clear guidelines to public authorities and market agents about the CADE process. This initiative was aligned with other antitrust authorities, such as the American FTC and DOJ, which released their updated [Merger Guidelines](#) in December 2023, and the British Competition & Market Authority pioneered this movement by releasing new guidelines in 2021.

Major Merger Case

After almost 20 years of process, CADE approved Nestlé's proposal to purchase the Brazilian chocolate company Chocolates Garoto Brazil in June this year. CADE initially blocked the operation in 2004 because the market share of the two merged companies in Brazil would be between 50 and 60%. CADE's decisions were challenged in the judiciary and disputed in the Brazilian courts until an agreement was reached in 2023.

With the agreement, the acquisitions were approved with conditions, including social and competition clauses, and Nestlé agreed not to acquire assets representing 5% of the market share for another five years. In 2004, the combined market share of the two companies in this segment was between 50% and 60%. Currently, Garoto and Nestlé would share between 30% and 40%.

Only three months after the decision, Nestlé made a new major acquisition: the CRM Group, owner of the Brazilian brands Copenhagen and Brasil Cacau. The operation is waiting for a decision by CADE, which is scheduled to happen at the beginning of 2024.

Digital Markets

On Digital Markets, CADE released a study regarding digital market platforms last August. Based on its transparency goal, CADE demonstrated in the handbook a step-by-step procedure on concentration act process analysis and anticompetitive conducts in markets that use digital platforms.

In the Legislative, some propositions regarding the regulation of Digital Markets, mainly the [Law Project n° 2768/2022](#), define the Telecom Agency (ANATEL) as the ex-ante regulator of digital gatekeepers, with CADE retaining its competence to assess cases ex-post. This legislative proposal is facing significant criticism. One of the arguments is the potential conflict of competence between CADE and ANATEL.

In the case law, CADE [punished](#) in 2023 a genuine hub-and-spoke cartel in public procurement, the first case of conviction of a cartel structured without direct communication between its members in Brazil. Another critical decision was about exclusivity contracts between Ifood and restaurants. CADE reached a 'cease and desist' agreement with Ifood to end the investigation that included a four-year period to be entirely implemented and caps on the duration, the number, and another limit for Ifood exclusivity agreements.

Sustainability

CADE issued an important decision on [sustainability](#) with the approval of cooperation between competitors in the agricultural markets regarding sharing sustainability data.

This represents an early indication from the Brazilian authorities concerning the growing overlap between competition advocacy and the advancement of sustainability. The insights shared in this

ruling provide a glimpse into the CADE Tribunal's perspectives on the risks often linked to the standardization of sustainability criteria among rivals and the necessary steps for effective mitigation.

The ESG topics are expected to become more relevant in the CADE case-law in the coming years, and CADE could become a leading figure in this matter.

Conclusion: what to expect from 2024

In 2024, we should expect the continuance of Brazilian Competition Law and Policy's protagonism in international forums, mainly amongst BRICS countries. Also, in attention to its four-year plan and the workgroups installed since 2021, CADE should register advances regarding the establishment of methods to evaluate decision accuracy and to analyze the impact on competition by unilateral conduct.

At last, in November, due to the end of the term for four of its seven counsellors and the lack of replacement nominations by the President of the Republic, CADE was left without the minimum quorum until the end of the year, which meant the shutdown of significant activities, such as the analysis by the Tribunal of M&A operations. With the appointment of the new Commissioners on December 27th, CADE's quorum was recomposed, and in 2024, the presence of a new Commissioner is expected to impact CADE's position in some issues including a more intense focus on digital markets interventions in line with the elected government.

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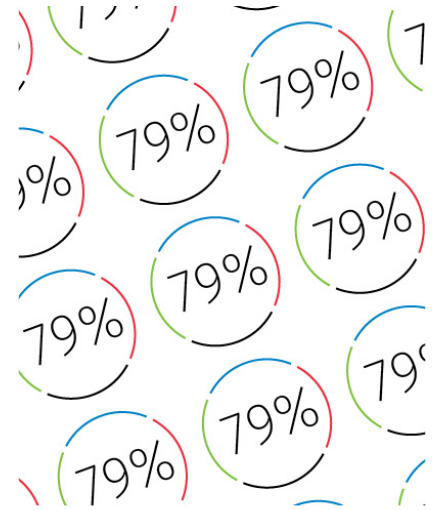
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