

Competition Law at a Glance

Competition Law at a Glance is an online newsletter prepared by the Competition Law Practice Group of Pinheiro Neto Advogados covering the major developments in the antitrust law field in Brazil, including rulings on both Merger Review cases and Investigations into Anticompetitive Practices by the Brazilian competition authority, CADE. The Competition Law at a Glance also highlights some significant developments in antitrust enforcement for specific industries.

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MERGER REVIEW

The definition of investment funds' economic group is under review

CADE has recently discussed whether the turnover of investment fund managers should be considered when assessing the thresholds for mandatory antitrust filing. According to CADE's current regulation, investment funds' economic groups comprise: (i) *shareholders* that directly or indirectly hold at least 50% of the fund's shares; and (ii) *companies* in which the fund owns at least 20% of the shareholding (CADE's Resolution No. 9/2014). Although the rule does not include managers' turnovers in the economic group's turnover, CADE has decided in one specific case (see *Case No. 08700.000180/2020-04*) that—in addition to turnovers of the fund's shareholders and investees—the manager's turnover should be added up to the economic group's turnover because it controlled the investment fund. CADE verified the control by considering the manager's significant autonomy and decision-making power over the investment fund's strategies and portfolio companies and the lack of an investment committee to oversee the manager's decisions. While the CADE's Tribunal and the CADE's General Superintendence have reinforced in subsequent cases that managers are generally



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excluded from the group definition, the case in point has stirred up discussions as to whether CADE's rules should be changed in this particular aspect. In response, CADE's Tribunal has set up a study group to reassess the economic group's definition of investment funds. In parallel, lawyers and the industry are examining how they can contribute.

Why it matters

The possible change in regulation will directly impact the number and type of reportable transactions, which will then have to wait for CADE's approval before closing. Companies can actively contribute now to CADE's decision on whether the current regulation excluding managers' turnover from that of the investment funds' economic groups has to change.

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CADE puts an end to the question on whether state-owned companies are part of the same group

In February 2020, CADE upheld its previous decisions that two different state-owned companies controlled by the same state are usually part of different economic groups. Two state-owned companies have questioned CADE whether a transaction among them would be subject to antitrust merger filing review, considering that both ultimately belonged to the State of Minas Gerais (*Case No. 08700.003594/2019-43*). CADE decided that these two companies were part of different economic groups and should thus notify the transaction for merger review. CADE explained that state-owned companies are independent from the government and usually compete among them. According to CADE, the same also goes for foreign state-owned companies, in line with its past decisions on deals involving the Abu Dhabi and French Governments' state-owned companies (*Cases No. 08700.007229/2016-65 and No. 08700.008382/2012-86*). However, CADE clarified that the general rule establishing that different state-owned companies belong to separate economic groups has exceptions. Two state-owned companies are said to belong to the same group when there is a certain level of coordination between them – for instance, when they lack an independent decision-making process and there is substantial governmental influence.

Why it matters

Companies interested in engaging in negotiations with state-owned companies should be careful in assessing the turnover threshold for mandatory notification to CADE, in view of the fact that fines for failure to notify transactions may reach R\$ 60 million.

CADE imposes fines and new remedies in view of firms' non-compliance with merger clearance conditions

In April 2020, CADE decided that Videolar and Innova did not comply with the conditions it had imposed to approve the deal in the plastics market in 2014 (*Case No. 08700.009924/2013-19*). CADE then announced it

will change the behavioral remedies set forth in 2014 for structural remedies. Back in October 2014, the parties were prohibited from acquiring or leasing manufacturing plants for five years. Also, Videolar and Innova had to keep the prior production levels intact, create an antitrust compliance program, implement a plan to transfer the expected deal efficiencies to customers, put an R&D program in place, and license free-of-charge certain patents for the manufacturing of plastics. During the monitoring process, CADE verified that the parties failed to keep the production levels, to invest in R&D, and to pass the efficiencies to customers. CADE also identified an increase in the prices of the products of concern. As a result, in April 2020, CADE imposed a R\$9 million fine on the parties and indicated it will probably change the behavioral remedies to structural ones, meaning that the resulting entity will have to divest its business.

Why it matters

Companies that are currently monitored by CADE for remedies imposed or those negotiating remedies must bear in mind that non-compliance with the obligations might result in heavy fines and open the possibility of CADE reviewing the deal again. Also, the decision highlights the need for companies to demonstrate their efforts to achieve the efficiencies projected when designing the deals.

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INVESTIGATIONS INTO ANTICOMPETITIVE PRACTICES

A new precedent on the statute of limitations for CADE's investigations into cartels and sensitive information exchanges

In April 2020, when ruling on the Power Cables Cartel Investigation (Case No. 08012.003970/2010-10), CADE's Tribunal reaffirmed its understanding that the statute of limitations for CADE's cartel investigations is twelve years when there is no concurrent criminal investigation. CADE's Tribunal also ruled that the twelve-year term refers to individuals and companies alike, even though Brazilian law sets forth that companies are not criminally liable, except for crimes established under environmental law. Conversely, CADE's Tribunal ruled that a five-year limitation period should apply to bar investigations into illegal exchanges of sensitive information. The competition authority has also examined the initial term for calculation of the statute of limitations. For continuing violations, the law establishes that the initial term is the end of the conduct. In the Power Cables Cartel investigation, CADE examined the situations where the cartel behavior was not as frequent as in other periods. CADE then assessed some elements to determine whether the defendants participated in the same cartel during different periods or separate cartels in different periods.



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Why it matters

This decision will help companies to assess their antitrust liabilities for past cartel practices or illegal exchange of sensitive information and to define their litigation strategy in that it clarifies how companies should calculate the statute of limitations.



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CADE expands the use of AI and indirect evidence in bid-rigging investigations

CADE's Department of Economic Studies has recently released a study on the usage of the statistical method called Moran's I to identify and collect evidence of bid-rigging. The study is yet another indication that CADE is not willing to rely solely on the information brought by leniency applicants and is making efforts to use artificial intelligence more prominently in its investigations. The study relies on

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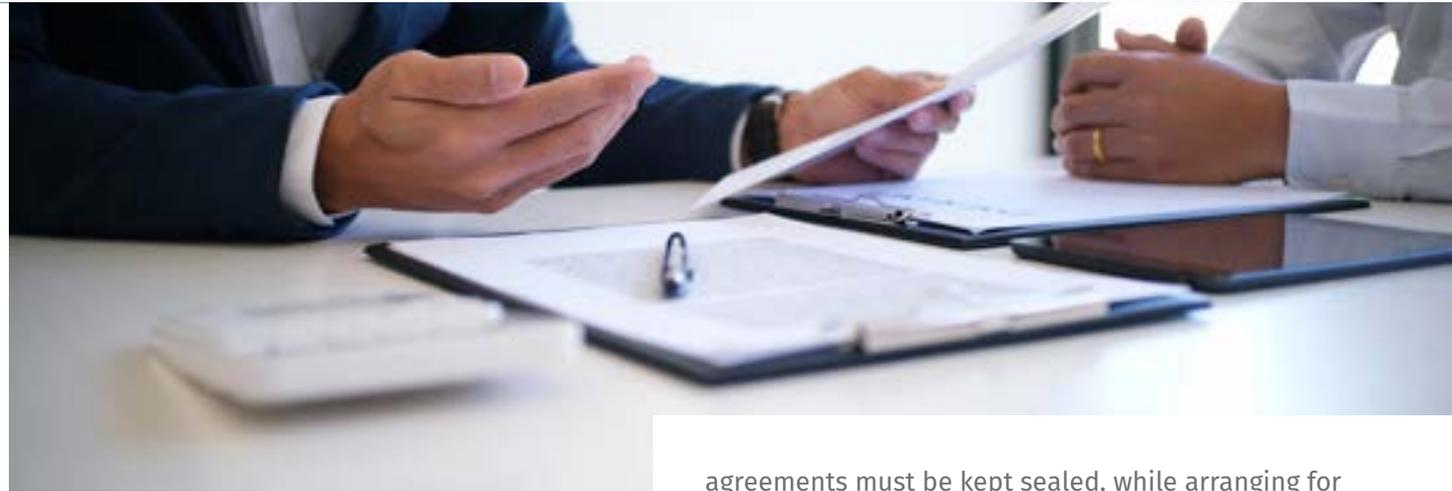
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CADE's incentives to civil antitrust litigation in Brazil

In eight out of ten cartel cases that CADE decided from 2017 to March 2020, the competition authority has forwarded its decisions to customers or the Public Prosecutors' Offices with jurisdiction to take criminal and civil actions against the defendants. CADE continues its efforts to promote private antitrust litigation that could lead to recovery of the damage caused by anticompetitive practices and could generate deterrence. CADE has been enforcing its regulations that allow the sharing of documents produced during its investigation with those who can file civil antitrust lawsuits, and is planning to expand its authority to become a plaintiff in this type of lawsuit as well. Since 2018, CADE has enforced a regulation by which leniency and settlement

agreements must be kept sealed, while arranging for public disclosure of exhibits and other documents attached to such agreements (CADE's Resolution No. 21/2018 and Ordinance No. 869/2019). In 2019, CADE's Attorney-General publicly stated he was planning to file class actions against defendants that had been convicted of cartel behavior by CADE's Tribunal, focusing on those cases related to diffuse rights—in which the injured parties are hardly defined individually.

Why it matters

Compliance officers must ensure that, in addition to instructing executives not to get involved in agreements with competitors, companies should be able to produce documents and justifications reflecting their independent or autonomous strategies when it comes to participation—or not—in public bids.

Why it matters

An effective private antitrust litigation in Brazil—yet to be seen—will increase the costs for antitrust offenders and will make antitrust compliance programs even more valuable. Therefore, companies should be attentive to new opportunities and possible risks in their operations in Brazil in the near future.

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AGRIBUSINESS

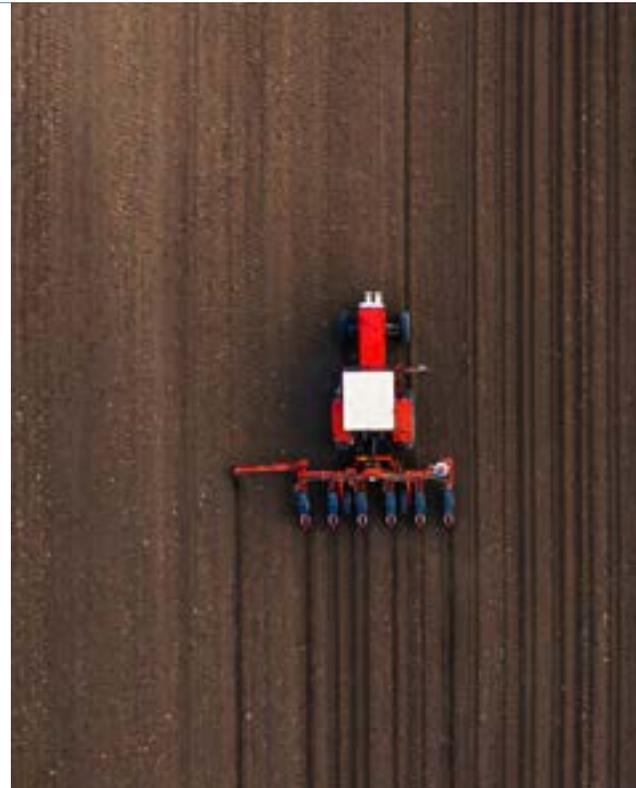
CADE releases study and launches investigation

- » CADE's Economic Department published the **10th edition of CADE's Notebook** ([Link](#)) focused on agribusiness, especially seeds, pesticides, fertilizers, machinery, and equipment accessories. CADE's Notebook organizes the knowledge acquired over the years, including the market definition adopted in CADE's precedents, the main points of antitrust concern, and expected developments.
- » In early March 2020, CADE launched a formal investigation against Bayer and Monsanto (*Case No. 08700.000270/2018-72*). CADE's investigation focuses on discount policies in the seeds sector, specifically on a loyalty program that established non-linear discounts to clients.

BANKING & FINANCE

CADE dismisses complaints against brokerage firm XP but starts a regulation review in the financial sector

- » In March 2020, CADE has confirmed that brokerage firm XP is compliant with the behavioral remedies agreed with CADE in the context of its merger with Itaú (*Case No. 08700.004431/2017-16*). BTG Pactual, an XP competitor, and an anonymous individual, had



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filed complaints stating that XP failed to comply with the CADE's decision in that XP Investimentos was purportedly creating obstacles for autonomous investment agents. While CADE has rejected the complaint, it saw the need to review the competition aspects of the regulation issued by the Brazilian Securities Commission and the Brazilian Central Bank. CADE's President ordered CADE's Attorney-General to lead this debate.

TRANSPORTATION

CADE favors entrance of low-cost airlines and reviews port operators' handling fee

- » In March 2020, CADE and the National Consumer Bureau promoted a public debate to discuss the antitrust aspects of the regulation authorizing the entry of low-cost airlines into the Brazilian market. CADE actively participated in the bill discussions that allowed these companies to access the market. CADE keeps close contact with the Brazilian Civil Aviation Agency to promote competition in the sector.
- » CADE's General Superintendence recommended CADE's Tribunal to fine companies that had charged clients with terminal handling fees from companies providing customs warehousing services in the port of Suape, State of Pernambuco (*Case No. 08700.005499/2015-51*). It has concluded that port operators' different fees charged to independent and integrated customs warehousing companies were anticompetitive. But it limited the charges to the facts predating the issuance of a specific regulation by the National Agency for Waterway Transportation.

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CADE and the Prosecutors' Offices strengthen their cooperation, except in merger reviews

CADE and the Prosecutors' Offices have been strengthening their cooperation in the last years, but CADE clarified in February 2020 that this cooperation does not give unlimited leeway to the Prosecutor's Office in relation to CADE's proceedings. CADE and the Prosecutors' Office have important roles in protecting competition and consumer welfare in Brazil. The Prosecutors' Office criminally prosecutes individuals and files class action against antitrust offenders. The Federal Public Prosecutor's Office (MPF) can also issue opinions on anticompetitive practice investigations carried out by CADE. CADE and the State Prosecutors' Office have formalized cooperation agreements to share information, data, and expertise. In 2019, CADE reached the historic milestone of establishing cooperation agreements with all State Prosecution Offices. On February 5, 2020, CADE and the MPF entered into an agreement that, among other aspects, obliges CADE to share documents, pieces of evidence, and information with the MPF, and vice-versa. While these bodies have a close relationship, on February 19, 2020, in the context of the Boeing/Embraer case, CADE's Tribunal decided that the MPF has no legal grounds to file appeals in merger review cases (*Case No. 08700.003896/2019-11*).



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Why it matters

When defining its litigation strategy, companies must take into account the civil and criminal liability imputable to them and to their employees in view of the Prosecutor's Office wide powers of investigation. However, companies involved in merger review cases should not expect the MPF's interference. This is good news in terms of legal certainty and predictability.

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CADE is quick to decide fast-track cases

CADE has approved non-complex mergers and acquisitions in c. eighteen days by average in 2020:



Under CADE's regulation, the CADE's General-Superintendence has thirty days to rule on a non-complex merger review case. CADE's General Superintendence has consistently beaten this limit.

CADE decides five antitrust cases from January to April 2020

CADE has decided the following cases in the last months:

Alleged practice	Fine
A cartel in the international market for the manufacture and sale of high and low voltage cables, from the 1990s to July 2004.	R\$ 22.5 million
A bid-rigging conduct practice in the business of blood products in Brazil, from 1997 to 2004.	R\$ 250 thousand (for an individual)
A cartel in the international market of hermetic compressors for refrigeration, from 1997 to 2008.	R\$ 130 thousand (for individuals only)
A cartel in the aftermarket supply of auto parts, specifically those for automotive engine valves, valve guides, and engine seat valves, in Brazil and Argentina, from 2007 to 2012.	Closed due to a settlement
A bid-rigging conduct in the market for solar heater kits for low-income homes built by the São Paulo State Housing Program, from 2009 to 2010.	R\$ 800 thousand

CADE enters into five settlement agreements in ongoing investigations

CADE entered into five settlement agreements with defendants accused of cartel or bid-rigging behavior from January to April 2020:

Alleged practice	Contribution
A cartel in the national and international clutch coverings market, from 1997 to 2010.	R\$ 3.2 million
A bid-rigging in the national market of Polypropylene and Polyvinyl Chloride connections used in water sanitation infrastructure, from 2004 to 2015.	R\$ 782 thousand
A cartel in the market for engineering services in ports and public waterway terminals in Brazil.	R\$ 8.2 million
A cartel in the market for Orthotics, Prostheses and Specialty Materials in the State of Rio de Janeiro, from 2002 to 2013.	R\$ 3.4 million R\$ 33.8 million

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COVID-19

AND ITS LEGAL IMPACTS IN BRAZIL

In view of the Covid19 pandemic, complex merger filings that require a market test might be delayed, deadlines in anticompetitive investigations have been suspended, and CADE has launched a preliminary investigation into the health sector. We have kept a close watch on those developments and published alerts covering the main news. You can find updates in antitrust and other areas on our **webpage**

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