

# QUARTERLY REVIEW: ANTITRUST IN BRAZIL

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## HIGHLIGHTS

*Coordinated effects continue to play a big role in CADE's investigations of mergers*

*Predictability and easy implementation are key in successful remedies negotiations*

*CADE closed a decade-long investigation shaping the intersection of IP and Antitrust in Brazil*

*CADE settled case involving the use of MFN clauses by online travel agencies*

This Quarterly Review is prepared by **Advocacia José Del Chiaro**. Its main purpose is to provide an overview of major developments in competition policy in Brazil to foreign practitioners. For a complete review of all cases in Brazil, please subscribe to our bi-weekly bulletin.

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## Merger Review

**CADE's tough approach on mergers continues; coordinated effects central in the analysis**

On February 8, CADE blocked the acquisition of Liquigás by its rival Ultragaz. In a 5 to 2 vote, CADE held that remedies offered by the Parties to divest the equivalent to roughly 40% of the target business were insufficient. To most Commissioners, only a divestiture of 60% of the target's business would sufficiently alleviate concerns around this deal. The deal involved the first and second biggest players in LPG markets in Brazil, and would result in aggregated market shares in regional relevant markets ranging from 20-40%.

The blocking of Liquigás/Ultragaz is CADE's fourth blocking decision in a period of twelve months and marks CADE's continuing trend of rigorous scrutiny of mergers based on theories of coordinated effects. Like in the previous cases, CADE raised several concerns regarding the deal's impact over rivals' ability to collude and the history of collusion in the industry played a great role.

**Predictability and easy implementation are key in successful remedies negotiations**

In early February, CADE cleared two complex mergers only after substantive remedies were offered by the parties followed by restrictive implementation conditions. CADE conditioned the clearance of the global merger of Bayer and Monsanto. In a 4x2 vote, CADE approved a consent decree with detailed remedies addressing concerns in several relevant markets (two Commissioners voted to block).

In ArcelorMittal's acquisition of Votorantim Siderurgia, a 4x2 vote approved a consent decree with two divestiture

packages addressing concerns in all relevant markets with horizontal overlaps (two Commissioners voted to block it). The deal involved the second and third biggest players in the long steel industry in Brazil, with joint market shares ranging from 35-60%. After the merger, ArcelorMittal became the leader in the long steel industry in Brazil (our firm represented ArcelorMittal in this matter). This is the first case in which CADE's Superintendence (investigatory unity) issued a report recommending a blocking decision that was later reversed by the Commissioners' decision.

In these two cases, the negotiation of detailed remedies followed by substantive guarantees in terms of implementation were key to support CADE's clearance decision despite concerns with coordinate effects. Commissioners showed severe concerns with implementation aspects that could impair the effectiveness of the divestiture, and required "upfront buyer" commitments in both cases (Parties can only consummate the original transaction after submitting binding agreements with acquirers of the divested assets). Furthermore, potential acquirers must meet high thresholds in terms of financial capacity and know-how in the respective industries. Finally, Commissioners were extremely careful in picking valuable assets that could effectively allow entry or consolidation of rivals.

### **Another vertical integration cleared with detailed behavioral remedies**

CADE has never blocked a vertical integration, but has often adopted extensive behavioral remedies to regulate future strategies of the merging parties – in this context, CADE has been criticized for acting more like a regulator than an enforcer. Once again, CADE imposed in a consent decree extensive behavioral regulation to deal with concerns related to the vertical integration of brokerage company XP Investimentos' with Itaú Bank (5x2 vote; two Commissioners voted to block the deal). The main concern was that Itaú could limit investment options in XP's innovative on-line platform, restricting access to investment alternatives not related to big commercial banks like Itaú. Remedies included corporate governance mechanisms to (i) restrain Itaú's ability to influence XP's decision-making and limit the offer of investment alternatives unrelated to Itaú; and (ii) prevent Itaú from transferring its clients to XP to leverage its position into the on-line investment platforms market. This decision raises a big question mark in terms of the adequate policy regarding vertical integrations. The remedies have the potential to eliminate several efficiencies often associated to vertical integrations, while concerns of potential anticompetitive conducts could be dealt with on a case-by-case basis in the context of behavioral investigations. This deal is still under review by Brazil's Central Bank.

### **Single-firm conduct investigations**

#### **Behavioral investigation originating from merger review of Bayer/Monsanto will be an opportunity for CADE to deal with rebates and licensing practices**

During the merger review of Bayer's acquisition of Monsanto, CADE's Superintendence found evidence that the companies allegedly: (i) offer non-linear discounts in licensing technology, (ii) prohibit licensees from combining technologies; (iii) delay the licensing of technologies to rivals. The Superintendence opened a preliminary inquiry to further investigate these conducts. The investigation is still at an early stage, but it may later provide helpful insight on how CADE will deal with rebates and licensing practices.

#### **CADE closed a decade-long investigation at the heart of the intersection of IP and Antitrust and shaped the standards for the application of the rule of reason**

CADE closed a decade-long investigation involving the intersection of IP and antitrust. CADE's Chairman referred to this case as the most relevant single-firm conduct case in Brazil in over a decade. It sets a precedent that will shape future prosecution of single-firm conduct cases and set parameters for the application of the rule of reason. We represented Volkswagen in this matter.

In 2007, an association of auto parts manufacturers (ANFAPE) filed a complaint accusing Fiat, Ford and Volkswagen of an anticompetitive conduct for bringing lawsuits to enforce design patents against infringement actions.

In 2010, CADE's Tribunal issued a statement of objections (SO) determining the launch of a full-blown investigation. The SO held that the enforcement of design patents (named "industrial design rights" in Brazil) may constitute abuse of dominance (or monopolization) if it has anticompetitive effects not compensated by procompetitive justifications. In other words, the SO used the Rule of Reason - ROR to analyze the enforcement of a lawfully obtained IP right. Please, note that the SO expressly recognized that the design patents were lawfully obtained (no fraud at the Patent Office) and that the lawsuits initiated were legitimate (therefore, this investigation does not follow a line of cases of sham litigation or of Walker Process claims). Furthermore, there was no request to license, preventing a refusal to license type of claim.

According to the SO, the enforcement of design rights by OEMs would be lawful only against companies acting in the primary market (sales of car) but not against auto parts manufacturers acting in the aftermarket. In sum, the enforcement against other OEMs allegedly had procompetitive justifications because it incentivizes the investment and development of new designs. On the other hand, the enforcement of the patents in the aftermarket against auto parts manufacturers would have substantial anticompetitive effects (aftermarket sales required a copy of the design) without procompetitive justifications, as the investment in new designs allegedly focus on sales in the primary market. This theory was similar to the theory adopted by the European Commission in the decisions of Renault v. Maxicar and Volvo v. Erik Veng, later reversed by the European Court of Justice.

CADE's Superintendence conducted discovery and, in 2016, issued a Technical Report that follows a line of arguments similar to the initial SO, recommending the condemnation of all three defendants. Based on this same theory, the Superintendence supported the initiation of other investigations against IP holders.

In March 2018, the case was finally decided by CADE's Tribunal. In a tight decision, the majority of Commissioners (4x3) voted to close the investigation. In brief the majority acknowledged that there was no unlawful use of the IP rights and therefore there could not be an antitrust violation.

The majority opinion held that the enforcement of lawfully obtained rights seeking to stop clear infringement situations does not constitute an unlawful conduct. Alleged impacts over the market resulted from the legal system (injunctive relief provided in the IP Statute) and could not be attributed to an unlawful behavior from defendants. Then, if CADE proceeded with an assessment of such effects, it would be putting the IP Statute on trial and not the conducts of private undertakings. Only if there was misuse of an IP right the rule of reason would be applicable. The recognition that the ROR cannot be applied to determine whether the enforcement of a lawfully obtained right is an abuse is extremely relevant and will have impacts over other investigations.

### **CADE settled a case involving the use of MFN clauses by online travel agencies**

Online travel agencies Booking.com, Decolar.com and Expedia settled CADE's investigation for their use of Most Favored Nation (MFN) clauses in agreements with hotels. Similar to probes in other jurisdictions, the Brazil's CADE looked into whether the adoption of MFN clauses in contracts with big hotel chains could harm competition. The Superintendence's report notes that MFN clauses can have procompetitive justifications and were acceptable to some extent to avoid free-riding – therefore, CADE agreed with the maintenance of these clauses to guarantee the best conditions in relation to other on-line platforms or travel

agencies. However, the companies investigated signed a consent decree to alter MFN clauses to exclude provisions that prevented hotel chains from offering more favorable conditions directly to consumers.

## **Institutional Developments**

### **Commissioner Farani takes office**

With a four-years mandate, Commissioner Paula Farani took office in February. She was a private practice before joining CADE and has extensive experience in antitrust matters. She holds a Bachelor Degree in Law – LLB from University Center of Brasilia (UniCEUB) and an LLM from Georgetown University.

### **CADE signed a cooperation agreement with the Brazilian Central Bank to deal with matters involving financial institutions**

CADE signed a cooperation agreement with the Brazilian Central Bank creating tools for cooperation in assessing mergers involving financial institutions. The agreement aims to solve a long dispute over which agency – CADE or the Central Bank – should have the final word on the assessment of mergers involving financial institutions. The agreement provides that mergers involving financial institutions shall be reviewed by both CADE and the Central Bank, which will carry out independent assessments. In specific cases involving systemic risk, the Central Bank can ask CADE to clear a merger despite antitrust concerns. Additionally, the agreement provides that behavioral investigations involving financial institutions must be conducted by CADE and the Central Bank independently.

#### **ABOUT ADVOCACIA JOSÉ DEL CHIARO**

Advocacia José Del Chiaro is a leading Brazilian law firm working in Competition/Antitrust and Commercial Litigation. For almost three decades we have advised major national and multinational companies and worked closely with several international law firms, handling some of the country's most complex competition cases.

With offices in São Paulo and Brasília, we have a highly specialized team with vast experience in a wide range of matters and industries. Our practice has been recognized as top tier in Brazil by sources like Legal 500, Global Competition Review and Chambers Latin America.

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