

QUARTERLY REVIEW: ANTITRUST IN BRAZIL

2019, Volume 1

HIGHLIGHTS

CADE conditions Disney acquisition of Fox to divestiture of sports channels

CADE concludes long-standing cartel probes

CADE receives first-ever request to disclose evidence on cartel damages lawsuit

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.

www.ajdc.com.br

Merger Review

CADE conditions Disney's acquisition of Fox to divestiture of sports channels

In February, the Brazilian antitrust agency (CADE) conditioned the acquisition of Twenty-First Century Fox by The Walt Disney Company to the divestiture of Brazilian Fox Sports pay-tv channels¹. CADE's Tribunal sided with CADE's General Superintendence's Opinion issued late 2018, and reached the conclusion that the transaction would create a duopoly in the sports channels segment, comprising pay-tv programmers Disney/Fox and Globosat.

In a detailed analysis of the pay-tv market, CADE held that broadcast channels and over-the-top platforms (such as streaming and video on demand services) were not effective rivals to pay-tv sports channels. According to CADE, broadcast channels are not focused in sports-related content and over-the-top platforms are not perfect substitutes for pay-tv sports channels. Furthermore, CADE found that new entries in the Brazilian market of pay-tv sports channels were unlikely. Thus, Commissioners unanimously agreed that the transaction needed remedies to proceed.

CADE's Tribunal was however divided with regards to the appropriate remedies. A minority of two out of five Commissioners voted for conditioning antitrust clearance to behavioral remedies, alleging that a divestiture requirement would be unnecessarily burdensome. In their opinion,

concerns were limited to the exercise of market power by Disney/Fox in negotiations with medium and small pay-TV operators since the larger pay-TV operators had sufficient countervailing power to resist Disney/Fox. Therefore, a behavioral remedy tailored for protecting medium/small operators could be sufficient for eliminating competition concerns.

Nevertheless, this understanding did not prevail. With a majority of three Commissioners and CADE's President vote, the agency cleared the transaction conditioned to the Applicants selling Fox Sports channels in Brazil. According to the majority, the transaction would not merely increase Disney/Fox market power in negotiations with small and medium operators, but also reduce the diversity and quality of TV content

¹ Act of Concentration no. 08700.004494/2018-53. Our firm represented Associação NEOTV in an intervention in this matter.

available to consumers. Thus, a structural remedy was necessary to address the negative effects caused by the increase in pay-tv sports channels market concentration.

Under the consent decree signed with the Applicants, Fox Sports channels must be divested in Brazil with all its sports events broadcasting rights, all active contracts with pay-tv operators, all properties and broadcasting equipment and all key employees. Additionally, for an undisclosed period, the future buyer of Fox Sports channels shall be able to use Fox Sports' trademark, while Disney must not try and acquire sports events broadcasting rights currently owned by Fox Sports. The buyer must not be an affiliate of Disney's economic group nor control a high market share in Brazil, and must prove it has enough financial resources and expertise to effectively compete in the market.

CADE did not ask the Applicants for an upfront-buyer, as it typically does in divestitures involving high market concentration. However, Applicants agreed having a divestiture trustee handling the selling of Fox Sports channels while a managing trustee will control Fox Channels operations in Brazil. Trustees must seek the best deal for selling assets but are not bound by minimum prices and parties cannot interfere in the negotiations. This was likely the first case where CADE asked for a trustee to manage the divestiture without a previous attempt of a divestiture negotiation conducted by the Applicants.

The Disney/Fox case consolidates CADE's preference for structural remedies to address competition concerns arising from market concentration due to horizontal overlapping. It also shows that while CADE will not always demand an upfront-buyer to guarantee that divestitures will be effective, it expects parties to provide solutions capable of reducing the risks of remedies turning up ineffective.

Cartel investigations

CADE examining alleged exchange of information in the international market of aviation insurance

In January, CADE's Superintendence launched a probe to investigate alleged exchange of sensitive information among companies in the market of aviation insurance and reinsurance brokerage². According to CADE's General Superintendence, American International Group, Amlin, AON UK Limited, Aspen Insurance UK, JLT Speciality Limited, Liberty Global Group, Marsh Limited, Tokio Marine Kiln Group Limited, United Insurance Brokers Limited, XL Group plc and Willis Group allegedly exchanged detailed and strategic information about its operations between 1997 and April 2017. Information exchanged includes pricing processes and insurance/reinsurance contracts, which supposedly provided companies with better visibility of market conditions than their competitors.

This is not the first case where CADE investigates companies for exchanging sensitive information with rivals (i.e. absent price fixing agreements or other elements of typical hardcore cartels), which indicates that the agency will not refrain from further scrutinizing potentially illegal practices other than hardcore cartels (that has been the main focus in the past).

² Administrative Process no. 08700.000171/2019-71.

CADE concludes long-standing cartel probes; statements from leniency signatories not enough for convictions

In this first semester, CADE concluded several cartel probes. In January, the agency ruled on an international cartel in the market of optical disk drives (ODDs)³. The investigation started in 2011 after companies Philips & Lite-on Digital Solutions Corp., Royal Philips Electronics N.V. and Lite-On IT Corporation signed a Leniency Agreement. CADE convicted companies Hitachi LG Data Storage and Quanta Storage in roughly BRL 19.5 million (approximately US\$ 5.13 million) for exchanging sensitive information and entering into bilateral agreements to fix prices in private bids. The investigation was closed in relation to a few other investigated companies due to lack of evidence of participation in the cartel.

In February, CADE ruled on another international cartel investigation in the market of electric power steering (EPS) sold to Brazilian customers (automobile manufacturers)⁴. The investigation began in 2015 after a Leniency Agreement was signed with companies NSK Brasil and NSK Europe. During the investigation, companies TRW Automotive and Showa Corporation signed settlement agreements (TCCs) with CADE admitting participation in the cartel. However, CADE released the remaining defendants since there was not enough evidence neither in the Leniency Agreement nor in the TCCs to prove their participation in the cartel. More importantly, the Reporting Commissioner thus highlighted that “the mere narrative by a third party obtained during a negotiation with CADE about the participation of a defendant in a given conduct is not sufficient to, absent other evidence, support a conviction”⁵.

Finally, in late February CADE fined companies Chimei Innolux Corporation and Hannstar Display in roughly BRL 27 million (approximately US\$ 7.1 million) for participating in an international cartel of monitor and notebook’s LCD components⁶. Several companies signed TCCs with CADE. Aside from Chimei Innolux and Hannstar Display, CADE also closed the investigation in relation to other defendants for lack of evidence for a conviction.

It is important to point out that by releasing companies for lack of evidence in cartel investigations initiated based on leniency agreements that were later supported with additional documents and statements provided in TCCs, CADE indicates it is heading towards raising the bar on the evidence necessary for convictions in cartel matters. Additional time, however, will be necessary for understanding whether CADE will indeed keep this valuable trend and how this will impact ongoing investigations and leniency negotiations.

Single-firm conduct investigations

CADE issues preliminary injunction ordering automatic payment companies to end exclusivity clauses with parking lots

In 2015, companies Sem Parar and ConectCar filed a business review request asking CADE whether an agreement for jointly offering automatic payment services for parking lots was lawful. At that time, CADE

³ Administrative Process no. 08012.001395/2011-00.

⁴ Administrative Process no. 08700.003735/2015-02.

⁵ Free English translation. The original in Portuguese reads: “a simples narrativa por um terceiro, obtido em oportunidade de acordo com o CADE, acerca da participação de um Representado em uma conduta não consiste em elemento suficiente para ensejar, dissociado de outros elementos de prova, sua condenação”.

⁶ Administrative Process no.08012.011980/2008-12.

reviewed the agreement and reached the conclusion it was lawful, provided that Sem Parar and ConectCar do not use it to foreclose the market against its rivals.

However, rival company Veloe filed a complaint in 2018 arguing that Sem Parar and ConectCar were indeed entering into exclusivity agreements with parking lots in order to foreclose the market to rivals⁷. CADE's Tribunal found that Veloe's arguments were sufficient for a preliminary conclusion on the likelihood that Sem Parar and Conectcar's exclusivity agreements with parking lots led to market foreclosure, so they did not meet the parameters of the 2015 review to be considered lawful. Therefore, CADE issued an injunction ordering the companies to cease exclusivity practices with parking lots as well as any other practice raising obstacles to rivals within 30 days.

Although the specifics of this case were key to lead CADE to issue a preliminary injunction, it also serves as a reminder that the agency is inclined to review exclusivity contracts very prudently. Even when it is not clear whether a giving company holds a dominant position, it is critical to assess whether exclusivity agreements might be found to be anticompetitive on a case-by-case basis.

Institutional Developments

OCDE accepts Brazil as member in its Competition Committee

The Competition Committee of the Organization for Economic Cooperation and Development (OECD) accepted Brazil as a permanent member in February. Brazil started conversations with the organization to become a permanent member in the committee in 2017. After that, Brazilian competition norms went through a peer review assessment of its alignment with international best practices. With the approval, Brazil will be able to collaborate more actively with the Committee's work and further increase cooperation between CADE and foreign antitrust agencies.

CADE receives first-ever request to disclose evidence for lawsuit claiming cartel damages under the newly enacted regulation

In September 2018, CADE issued Resolution 21/2018 regulating how and when the agency would provide third parties with access to documents and information produced during its investigations, including documents submitted to support leniency agreements and TCCs. In February, the first request to access evidence obtained in a cartel investigation was presented to CADE.

The request has been made by Integral Engenharia, which alleges it was harmed by the so-called "Cement Cartel", convicted by CADE in 2015⁸. Integral claims the access to the evidence collected by CADE is essential to support the lawsuit against cartel participants. The request will be the first opportunity for CADE to clarify how it will grant access to documents and information collected in cartel investigations.

⁷ Administrative Inquiry no. 08700.006268/2018-15.

⁸ Administrative Process no. 08012.011142/2006-79.

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.

If you have questions, please contact the following people:

José Del Chiaro Ferreira da Rosa

Phone: + 55 11 30309000

E-mail: jdc@ajdc.com.br

Ademir Antonio Pereira Jr

Phone: + 55 11 30309007

E-mail: apj@ajdc.com.br

www.ajdc.com.br