

Brazilian Competition Policy in 2021: Year in Review

*By Ademir Antonio Pereira Jr., Yan Villela Vieira & Gabriel de Aguiar Tajra
Advocacia Del Chiaro*



Edited By María Fernanda Vicens & Esteban Manuel Greco

Brazilian Competition Policy in 2021: Year in Review

By Ademir Antonio Pereira Jr., Yan Villela Vieira & Gabriel de Aguiar Tajra¹

This article discusses the main aspects of Brazilian Competition Policy in 2021. We present a review of institutional changes and the development of the decision practice of the Brazilian Antitrust Agency (“CADE”). We also highlight trends and perspectives for the upcoming year.

Institutional Developments

The year 2021 was marked by changes in CADE’s leadership. In July, former CADE’s General Superintendent (equivalent to the chief investigator) Alexandre Cordeiro replaced Alexandre Barreto as CADE’s Chairman. Former Chairman Alexandre Barreto was nominated General Superintendent by President Jair Bolsonaro in July but was held up in Congress, where it still waits for the confirmation hearing. Two other key positions remain vacant: a Commissioner seat² and the General Counsel’s Office.

In 2021, CADE released relevant guidelines and reports offering guidance on the agency’s view over certain topics. In October, CADE released the “*Guidelines for Evidence in Antitrust Leniency Agreement Proposals with CADE*,” which consolidates the standard of evidence required to negotiate leniency agreements in cartel cases. CADE’s Economics Department also released a report on digital platforms, with a summary of CADE’s decision practice in cases in the digital industry, and a new report on competition cases in the private healthcare market.

Other highlights include the signature of a cooperation agreement³ with the National Data Protection Authority (“ANPD”) to cooperate on cases that may involve violations to both competition law and the data protection regime and the release of the report “*International Benchmarking on Competition and Data Protection Institutions*.”⁴ Prepared as a benchmarking report, it compares the organization and mandates of foreign data protection agencies, as well as their connections with competition agencies in topics involving the intersection of competition and data protection.⁵

Mergers

In 2021, CADE reviewed complex mergers that resulted in considerable impacts on different markets. The following cases stand out:

– In February, CADE conditioned the acquisition of Plamed, a relatively small health insurance provider, by Hapvida, one of Brazil’s largest health insurance providers, to a number of remedies including the divestiture of certain assets.⁶ In November, however, CADE’s Tribunal blocked the transaction after parties failed to timely comply with the divestitures. This case indicates a tougher stance in CADE’s treatment of failures to comply with consent decrees. For instance, in Disney’s acquisition of Fox,⁷ even though parties continually failed to comply with a divestiture plan negotiated with CADE in 2019, CADE accepted a set of behavioral remedies in 2020 to address part of the competition concerns previously identified and did not move to block the deal.

¹ Ademir is a Partner and Yan and Gabriel are associates at Advocacia Del Chiaro. Note that the authors represent clients in some of the cases discussed. This article, however, exclusively reflects the authors’ own views.

² CADE’s Tribunal is formed by six Commissioners and the agency’s Chairman. The Tribunal issues final decisions in behavioral investigations and merger reviews.

³ Cooperation Agreement nº 5/2021. Available (in Portuguese) at <https://www.gov.br/anpd/pt-br/assuntos/noticias/act-tarjado-compactado.pdf>.

⁴ The *International Benchmarking on Competition and Data Protection Institution* (in Portuguese) is available at

<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2021/Documento%20de%20Trabalho%20-%20Benchmarking-internacional-Defesa-da-Concorrencia-e-Protecao-de-dados.pdf>.

⁵ The benchmarking report includes the analysis of 13 jurisdictions: Brazil, EU, France, Germany, Portugal, United Kingdom, U.S., Australia, Canada, Japan, South Korea, Singapore, and Chile.

⁶ Merger Review nº 08700.001846/2020-33.

⁷ Merger Review nº 08700.004494/2018-53.

– In June, former Chairman Alexandre Barreto issued an administrative decision relaunching the review of Nestlé’s acquisition of Garoto, 17 years after CADE blocked the transaction in 2004.⁸ This was one of CADE’s first blocking decisions in the old era of the post-merger control system. After several years of litigation, Nestlé’s latest motion for clarification was rejected by the Court of Appeals, confirming the Court of Appeals’ decision ordering CADE to reassess the initial blocking decision. Against this background, CADE’s Chairman ordered the review to comply with the Order. The review of a blocking decision over 15 years after its release is unprecedented and will generate relevant debates.

– In December, CADE’s Tribunal conditioned the acquisition of Unidas by its competitor Localiza, the country’s two largest rental car providers, to substantial remedies that include the sale of Unidas’ brand, stores, operational fleets, and the commitment of Localiza not to acquire other rivals in the car rental market for three years.⁹

Single-firm Conduct

2021 saw important developments in investigations involving digital platforms and media:

- In March, CADE initiated a formal investigation against leading food delivery app iFood following complaints from rivals Rappi and UberEats arguing that exclusivity contracts with key restaurants could foreclose rivals.¹⁰ CADE’s investigative unit (“SG”) indicated that, because iFood benefits from first-mover advantages and operates in a multi-sided market, its behavior may result in “tipping effects” as it would prevent rival apps from achieving critical mass. The SG indicated that exclusivity agreements targeted the main restaurants in terms of sales, and argued that certain famous restaurants would be “must-have” restaurants for competing platforms.

The SG also highlighted that, even though exclusivity agreements could result in efficiencies, the risk of harm to competition was significant in this case. The SG then issued a preliminary injunction that seeks to freeze current market conditions to allow CADE to conduct a more detailed assessment. In brief, iFood is prevented from entering into new exclusive arrangements and can only agree to one-year extensions of existing exclusivity clauses.

– In May, CADE joined forces with Brazil’s Data Protection Agency (“ANPD”), Federal Consumer Protection Bureau (“SENACON”), and the Public Prosecutors Office (“MPF”) to release a joint recommendation¹¹ to Facebook and WhatsApp regarding a change in the latter’s terms of service and privacy policy, including: (i) WhatsApp should postpone the launch of the new privacy policy; (ii) WhatsApp should continue providing service to users even if they reject the new policy, maintaining the same level of service they have today; (iii) WhatsApp should adopt changes related to data processing and transparency issued by ANPD in a report; and (iv) Facebook should not process or share data collected by WhatsApp based on the new privacy policy. CADE’s justification to assert its authority in that case was unclear, as the agency claimed that the “*rupture of continuity of a communications service essential to users in case they refuse to accept mandatory sharing of their data with Facebook and its partners*” could be an abuse of dominance, without detailing to what extent this behavior could be seen as exclusionary or which market could be affected by this behavior. In fact, while CADE has rejected purely exploitative theories of harm for the past two decades, holding that exclusionary effects are central in unilateral conduct cases, one could argue that CADE’s rationale in the *Facebook/WhatsApp* case was closer to the condemnation of a potentially (and future) exploitative abuse.

⁸ Merger Review nº 08012.001697/2002-89.

⁹ Merger Review nº 08700.000149/2021-46.

¹⁰ Formal Investigation nº 08700.004588/2020-47.

¹¹ The Joint Recommendation is available at https://www.gov.br/anpd/pt-br/assuntos/noticias/inclusao-de-arquivos-para-link-nas-noticias/recomendacao_whatsapp_-_assinada.pdf.

– In June, fuel distributor Ipiranga submitted a Business Review Request asking the agency to clarify whether a policy of suggesting maximum resale prices calculated by algorithms was lawful¹². In short, CADE held that merely suggesting resale prices (rather than fixing resale prices) is usually lawful, and Ipiranga could implement its policy. However, CADE maintained that employing algorithms to suggest prices could raise concerns regarding potential collusion among retailers (fuel stations). Similarly, it could lead to collusion among Ipiranga and rival distributors. Therefore, Ipiranga should adopt a number of measures to mitigate antitrust risks, including price suggestions specific to each fuel station, and avoiding sharing algorithms and data with rivals.

– In July, CADE launched a formal investigation against Globo, Brazil's biggest media group, for alleged anticompetitive volume rebates in contracts signed with advertising agencies.¹³ Under Brazilian law, volume rebates are usually lawful. However, CADE argued that, because rival TV broadcasters are forced to mirror Globo's rebates to attract ad agencies, Globo's dominance in the market for TV broadcasting allows the company to artificially raise the costs of rivals, which could result in harm to competition.

Cases in traditional industries also resulted in relevant discussions:

– In November, CADE fined Rumo and ALL a total amount of BRL 247.1 million (around USD 44.1 million) for refusing access to an essential facility.¹⁴ According to CADE, Rumo/ALL, which control the São Paulo railroad network, excluded a rival in the vertically related market for sugar transportation by refusing to repair a railway yard that was essential for loading cargo on trains in a timely manner.

– In December, in the context of a Business Review Request, CADE decided that a Minimum Advertised Price ("MAP") policy developed by tire manufacturer Michelin¹⁵ could not be recognized

as lawful. CADE held that MAP policies are presumably unlawful if implemented by dominant companies. In that specific case, while Michelin had a market share of less than 20 percent (the legal threshold for market power), rival tire manufacturer Continental also implemented a MAP policy – thus, CADE considered their combined market shares to conclude that over 20 percent of the market would be affected by MAPs. As a result, in a very controversial ruling, CADE found that Michelin's policy could harm competition.

Cartels

In 2021, CADE addressed relevant topics on cartel investigations. Main developments for case law include the definition of parameters for calculating fines. For the past few years, CADE's Commissioners have debated the interpretation of a specific provision on the antitrust statute, which provides that fines cannot be lower than the financial gain obtained through an infringement. For years, the position that CADE should calculate the financial gains obtained through infringements and use this as the basis for imposing fines was defended by a minority of Commissioners, but had been consistently rejected by a majority position that CADE should use standard criteria to apply fines, irrespective of the financial gain obtained by cartelists. Following the position that had prevailed for many years, fines in cartel investigations ranged from 10 to 20 percent of the company's turnover in the market impacted by the cartel depending on specific conditions like cartel duration, effectiveness, number of interactions, etc. A common argument in defense of standard criteria was that estimating financial gains for each specific cartel would be too complex and increase the chance that CADE's decisions would be overturned by the Courts, since econometric models used to estimate cartel gains could be easily challenged.

¹² Business Review Request n° 08700.002055/2021-10.

¹³ Formal Investigation n° 08700.006173/2020-16.

¹⁴ Formal Investigation n° 08700.005778/2016-03.

¹⁵ Business Review Request n° 08700.004460/2021-64.

However, by the end of 2020, the minority view gained force and CADE applied fines based on the estimated gains with a cartel in public purchases for the first time. In 2021, this methodology was further developed:

– In February, CADE fined companies for a cartel in the electronic components for the telecommunications market.¹⁶ In that case, CADE calculated fines for one of the defendants based on an estimate of the advantages achieved through the cartel.

– In June, CADE convicted a cartel for bid-rigging in the acquisition of scholar materials.¹⁷ CADE applied fines based on the financial gain obtained with the cartel (by multiplying the public tenders' values with the estimated overpricing). A similar logic was applied in the cartel for the acquisition of school and office supplies in the public biddings of Pernambuco State, decided in August.¹⁸

In 2021, CADE also launched its first investigation into alleged collusion in the labor market, involving the potential exchange of competitively sensitive information such as wages and benefits between HR employees of companies in the healthcare industry.¹⁹

Agenda for 2022

2022 will be another year of significant changes in CADE's leadership. The positions of General Superintendent, Chief Prosecutor, and Commissioner are still vacant, and yet another Commissioner's term will end in 2022.

CADE is expected to conclude relevant merger investigations in 2022, especially the acquisition of mobile carrier Oi Móvel by its rivals Telefônica, TIM, and Claro.²⁰ The case was declared "complex" in July due to high market concentration, as it qualifies as a "4 to 3 mobile merger" where the three remaining players are splitting the assets. CADE's Tribunal will also conduct a detailed review of the acquisition of record label Som Livre by its rival Sony.²¹

CADE is also expected to continue its investigations derived from Operation Car Wash and focus on single-firm behaviors, especially those related to digital markets and media. In 2022, CADE may also deepen its institutional cooperation with the Brazilian ANPD in cases involving the interplay between competition and data protection.

¹⁶ Formal Investigation nº 08700.000066/2016-90.

¹⁷ Formal Investigation nº 08700.008612/2012-15.

¹⁸ Formal Investigation nº 08700.004455/2016-94.

¹⁹ Formal Investigation nº 08700.004548/2019-61.

²⁰ Merger Review nº 08700.000726/2021-08.

²¹ Merger Review nº 08700.002922/2021-17.