

## **Brazilian Competition Policy in 2022: A Year with Lasting Impacts**

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# Brazilian Competition Policy in 2022: A Year with Lasting Impacts

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This article discusses key developments in Brazilian Competition Policy in 2022. Here, we present a short review of recent changes in the organization and decision practice of the Brazilian Competition Agency (“CADE”) in 2022, as well as new trends and perspectives for 2023.

## I. Organizational and Statutory Developments

2022 was marked by significant changes in CADE’s organizational structure. In April, Alexandre Barreto de Souza (Chairman between 2017-2021) took office as CADE’s General Superintendent (equivalent to chief investigator), and Gustavo Augusto de Lima took office as Commissioner, filling positions that had been vacant since 2021. In June, Victor Oliveira Fernandes took office as Commissioner, completing the full quorum of CADE’s Tribunal, which had vacant seats since mid-2021. In addition to changes in CADE’s leadership, 2022 was marked by the creation of a specialized unit to investigate single-firm conducts under CADE’s General Superintendence (“SG”). The creation of this unit was an important step and may help to develop CADE’s ability to handle complex investigations.

Furthermore, a new statute approved by Congress may change the landscape for private damage claims in cartel cases. Law no. 14,470/2022 introduced changes that seek to promote private damage claims, which are still scant in Brazil. The main changes to the applicable legal framework include: (a) double damages to victims; (b) signatories of leniency and settlement agreements with CADE, however, will be exempted from paying double damages and will not be held jointly and

severally liable for damages caused by other defendants, so as to preserve incentives for whistleblowers and consent decrees; (c) statute of limitations applicable to antitrust damage claims will be of 5 years counted from the publication of CADE’s final decision on investigations of coordinated behavior; (d) decisions issued by CADE’s Tribunal imposing fines and/or obligations will be deemed sufficient justification for Courts to grant victims preliminary injunctive relief; (e) defendants that resort to a pass-on defense will hold the burden of proving such claim. These changes may incentivize private parties to seek compensation and we may experience an increase in the volume of private litigation faced by companies accused of cartel violations in Brazil over the coming years.

## II. Developments in Merger Investigations

Data released by CADE provides interesting insights on CADE’s recent merger review regime, allowing a comparison between 2021 and 2022<sup>2</sup>:

|  | 2021  | 2022  |
|--|-------|-------|
| <b>Mergers reviewed</b>  | 611   | 669   |
| <b>Unconditional clearance</b>                                       | 95,7% | 95,7% |
| <b>Length of review (all mergers; average days)</b>                  | 33.1  | 34.5  |
| <b>Length of review of non-fast-track (average days)<sup>3</sup></b> | 113.7 | 125.6 |

The number of merger filings increased roughly 10 percent in 2022. On the other hand, the percentage of mergers cleared without remedies remained stable, indicating a

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<sup>2</sup> See <https://indd.adobe.com/view/7ae16908-dc6c-4610-9ec4-4868c3f02f62> for 2022 data; see <https://indd.adobe.com/view/adfd8e43-0a8b-4b2d-be7c-75bf058a4239> for 2021 data.

<sup>3</sup> Mergers not eligible for fast-track clearance are qualified as “Ordinary cases.”

consistency in CADE's practice. Also, the average days of review increased in 2022,<sup>4</sup> likely a result of the increase in the total number of mergers received and a potential increase in the complexity of the work conducted.

CADE investigated several complex mergers during 2022. As in previous years, CADE resorted to both structural and behavioral remedies to deal with competition issues. Despite growing skepticism towards behavioral remedies by certain agencies,<sup>5</sup> they continue to be particularly relevant in CADE's decision practice involving vertical mergers.

- In January, CADE's Tribunal demanded behavioral remedies to clear the incorporation of J3 Operadora, a Global Distribution System ("GDS") active in the intermediation of aggregated content between bus companies and online platforms, by Bus Serviços de Agendamento S.A., an Online Travel Agency ("OTA") that sells bus tickets. According to the Tribunal, the vertical integration between GDS and OTA could increase the abilities and incentives to deviate aggregated bus content to its own online platform, thus harming rival OTAs. The package of remedies included the end of exclusivity agreements signed by the companies, the adoption of non-discrimination obligations in relation to rival OTAs, and the implementation of governance rules to regulate how the companies should handle sensitive information obtained from rival OTAs that enter into agreements with J3's GDS platform.<sup>6</sup>
- In February, CADE's Tribunal conditioned the acquisition of national mobile carrier Oi Móvel by consortium formed by rivals Telefônica, TIM, and Claro to a set of

behavioral and structural remedies. National mobile carriers Telefônica, TIM, and Claro joined forces to bid for Oi Móvel and split its assets<sup>7</sup>. In practice, the deal reduced the number of mobile carriers in the country from 4 to 3 and drew severe criticism from consumer associations and regional competitors. While parties claimed that the joint bid was equivalent to a fix-it-first solution because the asset division was allegedly designed to result in a lower increase in concentration per region, the collaboration among the top 3 competitors to acquire the 4<sup>th</sup> player was subject to close scrutiny from various angles (including allegations of collusion). Following a challenge by the SG, which identified several competition concerns, the Tribunal cleared the merger in a very tight vote: three votes (including the Reporting Commissioner) were to block the deal, and other three votes (including Chairman Cordeiro, who broke the tie) were in favor of a conditional clearance. The remedies imposed by the majority vote included sale of infrastructure (cell sites) and a duty to offer access to radio spectrum, so as to foster rivalry by regional players and entry of new players.<sup>8</sup>

- In May, CADE's Tribunal conditioned the acquisition of supermarket chain BIG by its rival Atacadão, a company owned by the Carrefour Group, to the divestiture of retail units in a number of cities where the parties' combined market shares exceeded 60 percent and the likelihood of new entries was low.<sup>9</sup> In a similar case decided in June, the Tribunal conditioned the acquisition of drugstore chain Extrafarma by its rival

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<sup>4</sup> The average does not include the period of pre-merger filing interactions, commonly used in cases not eligible to fast-track review. The period of pre-merger filing typically takes 30-60 days.

<sup>5</sup> See, for example, Julie North and Jesse Weiss, *Behavioral Remedies in U.S. Merger Settlements: Past, Present and Future*, CPI, available at <https://www.competitionpolicyinternational.com/behavioral-remedies-in-u-s-merger-settlements-past-present-and-future/>.

<sup>6</sup> Merger Review no. 08700.004426/2020-17.

<sup>7</sup> Note that the bid took place in the context of a financial recovery plan filed by Oi Group under the judicial recovery and bankruptcy regulation. However, the failing firm defense was not formally introduced by the applicants.

<sup>8</sup> Merger Review no. 08700.000726/2021-08. For transparency, we note that we represented Associação Neo, an association of small mobile carriers and Internet providers, in a third-party intervention against the deal.

<sup>9</sup> Merger Review no. 08700.003654/2021-42.

Pague Menos to the divestiture of units in certain cities.<sup>10</sup>

- In August, CADE's Tribunal conditioned the acquisition of oil refinery Isaac Sabbá (owned by Brazilian oil state-company Petrobrás) by REAM Participações, a private oil refinery, to a package of remedies aimed at promoting rivals' access to a water transportation terminal operated by refinery Isaac Sabbá.<sup>11</sup> The transaction originated from a settlement agreement between Petrobrás and CADE in an investigation into alleged abuse of dominance by the company.<sup>12</sup> The settlement agreement provided that Petrobrás should divest certain assets (such as the Isaac Sabbá oil refinery) in order to promote competition in the market for oil refinery.
- In December, CADE's Tribunal conditioned the creation of a joint-venture based in Germany between Volkswagen, BMW, Mercedes-Benz, BASF, Bosch, Henkel, SAP, Schaeffler, Siemens, T-Systems, and ZF to a set of behavioral remedies. According to the companies, the JV would create a cloud platform based on Catena-X Association, an ecosystem that follows the principles of European management infrastructure Gaia-X Association, to promote the development of digital solutions for the automotive industry. The SG initially cleared the transaction without remedies, but the Tribunal asked to review the case. After a few months of additional review, the Tribunal rejected a package of remedies offered by the applicants, and conditioned the creation of the JV to additional behavioral commitments.<sup>13</sup>

### III. Single-firm Behavior

Following the creation of a unit specialized in single-firm conduct cases, CADE managed to

conclude several investigations that had been ongoing for years. The new unit also launched investigations and expanded investigative efforts, with new rounds of requests of information. Major cases with decisions issued in 2022 involved exclusivity agreements and alleged discriminatory practices, including the following:

- In February, CADE's Tribunal granted a preliminary injunction requested by gym aggregator TotalPass to suspend exclusivity provisions and Most Favored Nation ("MFN") clauses in agreements entered by rival (and alleged dominant player) GymPass with independent gyms.<sup>14</sup> In September, CADE signed a Settlement Agreement with GymPass to restrict the extent of exclusivity and MFN provisions in agreements to affiliate independent gyms.<sup>15</sup> Per the Settlement Agreement, GymPass (i) cannot introduce MFN clauses that prevent gyms from offering daily passes for lower prices than those charged by GymPass; (ii) must limit exclusivity agreements to a maximum of 20 percent of the total number of affiliated gyms in its network; (iii) must only renew or enter into new exclusivity agreements in case exclusivity is relevant to support investments made by GymPass on affiliated gyms.
- In September, the SG closed a long investigation against Google following a complaint from Yelp filed in 2016.<sup>16</sup> According to Yelp, Google allegedly deviated users of rival local search services due to self-preferencing of its Local Universal, a box with thematic local results placed on Google's search results page. After a detailed investigation, the SG found that, even if local search was considered a separate and vertically related market in relation to general search, the Google Search results page does not constitute an essential input for local search services.

<sup>10</sup> Merger Review no. 08700.005053/2021-74.

<sup>11</sup> Merger Review no. 08700.006512/2021-37.

<sup>12</sup> Administrative Inquiry no. 08700.006955/2018-22.

<sup>13</sup> Merger Review no. 08700.004293/2022-32.

<sup>14</sup> Administrative Inquiry no. 08700.004136/2020-65.

<sup>15</sup> Application no. 08700.006611/2021-19.

<sup>16</sup> Administrative Inquiry no. 08700.003211/2016-94. For transparency, we note that we represented Google in this investigation.

Furthermore, the SG found that local search services such as Yelp have other channels to reach users, so they are not dependent on the Google Search results page. Also, the SG concluded that Local Universal took limited space in Google Search's result pages, and did not prevent users from reaching competing local search services. Finally, the SG held that launching and positioning Local Universal in the Google Search results page was a legitimate design choice, with important benefits to users, while data on users' traffic over time showed there was no harm to competition.

- Still in September, the SG closed an investigation against Gilead Sciences for alleged excessive pricing and abuse of patent rights, following complaints from over a dozen medical and consumer associations.<sup>17</sup> The SG recognized that (i) Gilead faces competition as there are alternative treatments and suppliers available in the market; (ii) Gilead's prices to have decreased over the years and remained below the price cap set by a specific regulator of pharma products; and (iii) there was no evidence of abuse of patent rights.
- In October, CADE's Tribunal voted to confirm a preliminary injunction limiting exclusivity agreements for distribution of beer entered by brewery Ambev (part of the Anheuser-Busch InBev Group) with bars, restaurants, and night clubs. The investigation was initiated by a complaint from rival brewery Heineken, which alleged that Ambev's exclusivity agreements harmed competition and foreclosed the market for premium points of sales in various relevant cities.<sup>18</sup> The preliminary injunction prohibits Ambev from entering into or renewing exclusivity agreements in certain locations where a high degree of market foreclosure was identified. The decision is

also applicable to Heineken in locations where it holds a market share higher than 20 percent.

#### IV. Collusion

In 2022, CADE continued with its rigorous policy against collusion while raising the bar for evidence required to support convictions. Against this background, CADE's Tribunal consolidated the understanding that statements by signatories of leniency and settlement agreements unsupported by documentary evidence are generally not sufficient evidence of unlawful behavior. Furthermore, the analysis of alleged exchanges of sensitive information among rivals was an important topic under discussion. The following cases deserve special attention:

- In March, CADE's Tribunal fined three companies for participating in a cartel that affected the resin market.<sup>19</sup> According to the Tribunal, a consulting company facilitated the cartel by providing a venue for the exchange of sensitive information and monitoring compliance with anticompetitive agreements. However, unlike in previous cases against third-parties accused of facilitating a cartel, the consultancy company was considered liable for the cartel infraction, despite the fact it was not a competitor in the resin market.
- In September, CADE's Tribunal entered into Settlement Agreements with companies investigated over the alleged exchange of sensitive information related to HR data (including salaries, employee benefits, etc.) in the healthcare market.<sup>20</sup> In cases involving collusive practices, CADE requires the payment of a "financial contribution" to enter into consent decrees. Such contributions are calculated based on the revenue obtained by defendants from the economic activity affected by the cartel. In this particular case,

<sup>17</sup> Preparatory Proceeding no. 08700.005149/2019-18. For transparency, we note that we represented Gilead Sciences in this investigation.

<sup>18</sup> Administrative Inquiry no. 08700.001992/2022-21. For transparency, we note that we represented Heineken in this investigation.

<sup>19</sup> Administrative Process no. 08700.003718/2015-67.

<sup>20</sup> Applications no. 08700.001742/2021-18, 08700.001663/2021-02, 08700.001552/2021-92, 08700.002147/2021-91, 08700.002471/2021-18 and 08700.001017/2022-12, related to Administrative Process no. 08700.004548/2019-61. For transparency, we represented one of the companies under investigation.

however, CADE did not use revenue to calculate the fine; rather, the total amount spent by the companies on human resources was the basis for the calculations.

## **V. Agenda for 2023**

CADE's leadership will go through new changes in 2023. The newly elected Labor's Party government will appoint four Commissioners during the second half of the year, what could significantly change CADE's stance on controversial matters and enforcement priorities.

We expect that merger investigations will continue to gain in complexity, with extensive market tests and outreach to market players. This trend is likely to continue and gain force. Discussions that are part of the international

agenda, such as the interaction between antitrust and topics of data protection, labor regulation and sustainability, will continue to gain traction. With the creation of the new specialized unit, CADE is also likely to increasingly prioritize investigations of single-firm behavior, especially involving digital platforms. New investigations against Apple, Facebook, Google, and Ifood indicate that digital platforms will be a key topic in the agenda.

Regarding institutional aspects, CADE is expected to release its Guidelines for Vertical Merger Review in 2023, complementing the existent Guidelines for Horizontal Merger Review. Also, the changes introduced by Law n° 14.470/2022 mentioned above may result in a surge of private lawsuit claiming damage reparation for cartel infringements.