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Judicial Perspectives on Competition Law in Brazil¹

-- Brazil --

1. Introduction

1. This contribution analyses important aspects of judicial adjudication of competition law in Brazil. First, it provides a brief overview of the Administrative Council for Economic Defense (CADE) and of the Brazilian Judiciary Branch. Next, it will examine the interaction between the CADE with the Brazilian Courts. This section provides some statistics related to this interaction between CADE and the Courts, including the number of judicial cases and average rate of success in judicial review. Finally, the contribution will address the recent decision to create specialized courts to deal with competition law in Brazil.

2. Overview of CADE and the Brazilian Judiciary

2. CADE is an independent competition agency reporting to the Ministry of Justice, with its headquarters in Brasília. The authority has jurisdiction over all national territory. Its main mission is to ensure market competition. As an independent agency linked to the Executive branch of the Brazilian government, CADE is responsible for investigating and deciding antitrust matters, in addition to merger review. Furthermore, CADE is also responsible for fostering and promoting the culture of competition in Brazil, alongside with the Secretariat of Economic Monitoring (SEAE) of the Ministry of Finance.

3. The Brazilian Judiciary Branch is present at both federal and state levels, and is divided into ordinary (civil and criminal) and special courts (electoral, labor and military). Competition matters normally fall under the Federal Justice's jurisdiction. In addition, there are two high courts in the country: the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). While the STF decides constitutional matters, the STJ provides a uniform interpretation of federal law.

4. There are many situations in which competition issues may be brought to Courts in Brazil. The Judiciary can be called to decide on matters relating to the enforcement of competition laws even before CADE issues its final decision, as individuals and companies are entitled to challenge administrative measures undertaken CADE during investigations. Besides that, private parties that do not agree with a decision issued by CADE can challenge such decision in Court. CADE's decisions are always subject to judicial review, in respect to the constitution principle that all acts that may directly or potentially violate rights are subject to the control by the Judiciary Branch (Brazilian Federal Constitution, Art. 5º, XXXV).

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5. CADE, in its turn, can also bring matters to court whenever a judicial measure is necessary to enforce its decision (i.e. the payment of an administrative fine). When it comes to the private enforcement of competition laws through Courts (individual and collective actions), the Brazilian system allows both the so-called follow-on damage claims (filed after a decision from competition authorities) and for independent lawsuits seeking injunctions and/or claiming damages caused by anticompetitive practices. Last, but not least, criminal sanctions to individuals – which apply to cartels only – are also enforced in Courts.

6. For clarification, an important distinction must be drawn between implementation and review of CADE's decisions. In the first case, CADE's decisions may be judicially enforced. That means that a judicial measure may be taken directly at the enforcement stage, that is a judicial measure to enforce CADE's decision (i.e. again, to compel a company to pay an administrative fine). In the second case, however, the judicial proceeding will begin at the first instance level and often rises to second instances and higher courts.

3. Interaction between CADE and the Judiciary

7. The interaction between CADE and Brazilian Courts is assured by the *Procuradoria Federal Especializada do CADE* (known by its acronym ProCADE). It corresponds to the General-Attorney's Office at CADE. ProCADE has the duty to provide CADE with legal representation before Courts.

8. Since CADE is the agency in charge of issuing final decisions on both merger cases and antitrust investigations, it is ProCADE who ends up handling most of the discussions relating to competition matters in the Judiciary.

9. As mentioned above, there are two different situations normally involving CADE in the Judiciary: (i) enforcing its own decisions, where CADE will act as plaintiff; and (ii) having its decision challenged, when it will act as a defendant.

3.1. Structure of ProCADE

10. ProCADE is composed of public attorneys lead by a General-Attorney, who is appointed by the President of the Republic after Senate's approval. The body has three main functions: (i) providing legal opinion in all cases submitted to CADE; (ii) preparing and following CADE's defense before Brazilian Courts, and (iii) enforcing CADE's decisions. The Office is considered of highest quality in Brazil, in particular due to its very qualified staff. In its last Peer Review from 2010, OECD stated that the public attorneys from ProCADE are, besides professional and hard working, respected by courts and private bar.

3.2. Increasing central role of ProCADE

11. CADE's standing before the Judiciary Branch has been strengthened in the past years, which contributed significantly to the effectiveness of the coercive measures established by CADE. In addition, ProCADE has become more proactive by proposing an increasing number of lawsuits either to require the payment of fines imposed by CADE or to obtain a judicial order to compel with the remedies imposed.

12. Furthermore, the follow-up of judicial procedures involving CADE has become a priority, and frequently CADE's attorneys (sometimes accompanied by the Commissioners) appear personally before courts to explain the merits of the decisions. Such initiatives contribute to strengthen the relationship between judges, the legal community and CADE, as well as to promote an increasing recognition of the work done by CADE.

13. One of the most important positive outcomes of this proactive role of ProCADE is the change in the case law regarding judicial deposits as a condition to the suspension of CADE's decisions.

14. Indeed, in the last decade, there has been a substantial change in the case law of the Regional Federal Tribunal of the 1st Region in regards to the judicial deposit of fines or the offer of a suitable guarantee to suspend CADE's decision until the issuance of a decision by courts. Previously, the Judiciary Branch suspended CADE's decisions through the concession of injunctions, without requesting any judicial deposit from the interested companies.

15. Nowadays, as a result of competition advocacy made by ProCADE before judges, these precedents were overruled and injunctions which suspend the liability of the penalties and decisions adopted by CADE are conditioned to the judicial deposit, by the interested party, of an appropriate amount before courts. This decreases the company's incentive to delay a final decision, therefore favoring the effectiveness of competition policy.

3.3. Examples of successful judicial cases

16. The central role of ProCADE may be confirmed by three important cases with successful outcomes: the "Owens Corning" case, in the field of merger control, and the "TV Jacarandá" and "ABAV" cases, in the field anticompetitive conducts.

17. In 2006, the companies *Owens Corning* and *Saint-Gobain* announced the intention to enter into a merger agreement that would create a new company named *Cetrotex*. In Brazil, the merger would mean the acquisition by *Owens Corning* of the *Saint-Gobain*'s plant named *Capivari*. This acquisition would raise, however, strong competition concerns. CADE decided to block the merger, backed by favorable opinions from the Secretariat of Economic Law (SDE) and SEAE. The new company *Cetrotex* challenged this decision before the Judiciary, but first instance courts confirmed CADE's decision. In 2011, *Owens Corning* finally sold the *Capivari* plant for a third company from a Chinese group, and the merger was then cleared by CADE. At this moment, Brazil was still under its former competition legislation with a post-merger control system.

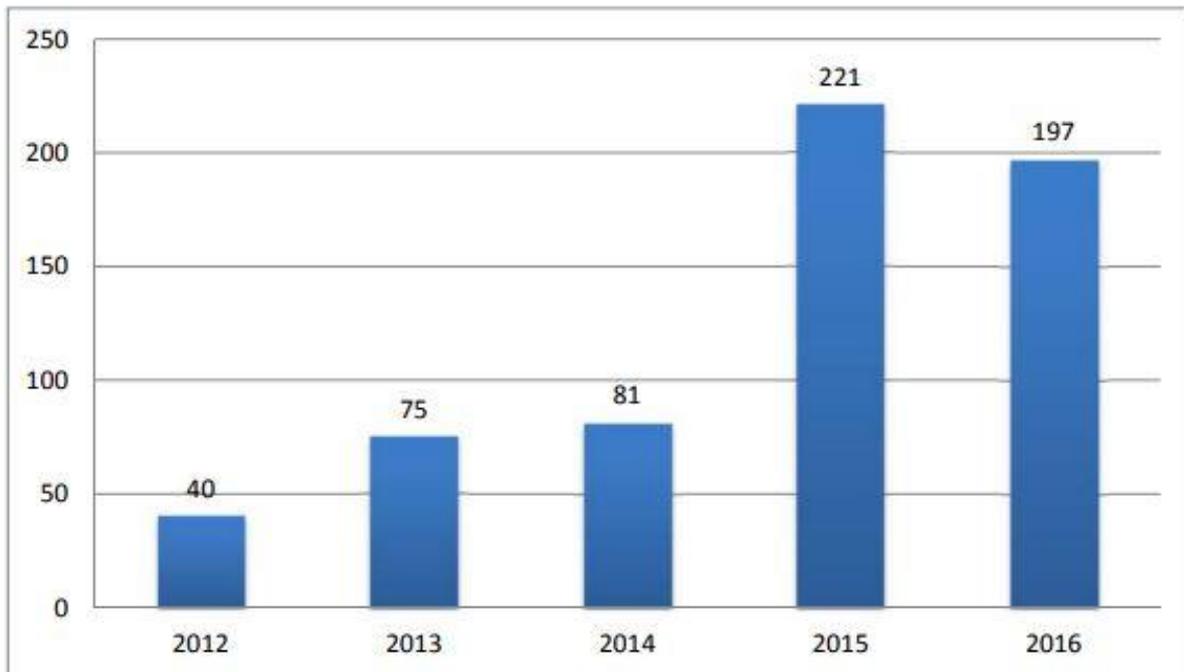
18. In regards to anticompetitive conducts, there are several examples. Two of them are briefly described below, both from 2011. In the first case, the 14th Federal Court from the Brazilian Federal District confirmed CADE's ruling in the Administrative Proceeding N° 53500.002956/2004. In this file, CADE had condemned the company *TV Jacarandá Ltda* for untimely notification of a merger to CADE. While the company attempted to judicially invalidate the condemnation and CADE's Resolution N° 36/04, the federal judge understood that the CADE's decision was rendered in solid grounds and ruled to the maintain the condemnation. In the "ABAV" case, the 8th Federal Court from the Brazilian Federal District also confirmed CADE's ruling in the Administrative Proceeding N° 08000.007754/1995-28. CADE had condemned the Brazilian Association of Travel Agents of the Federal District (ABAV) for anticompetitive practices, when establishing a "Code of Ethics" that restricted its members' rights to offer "predatory"

discounts in biddings. The federal judge considered invalid the plaintiff's requests and maintained CADE's decision.

3.4. Statistics of judicial cases involving CADE

19. The statistics below demonstrate some aspects of the judicial cases involving CADE.² Table 1 indicates the evolution of the number of judicial cases brought *by* CADE, i.e. when CADE acts as plaintiff, from 2012 to 2016:

Table 1. Judicial Proceedings brought by CADE since 2012



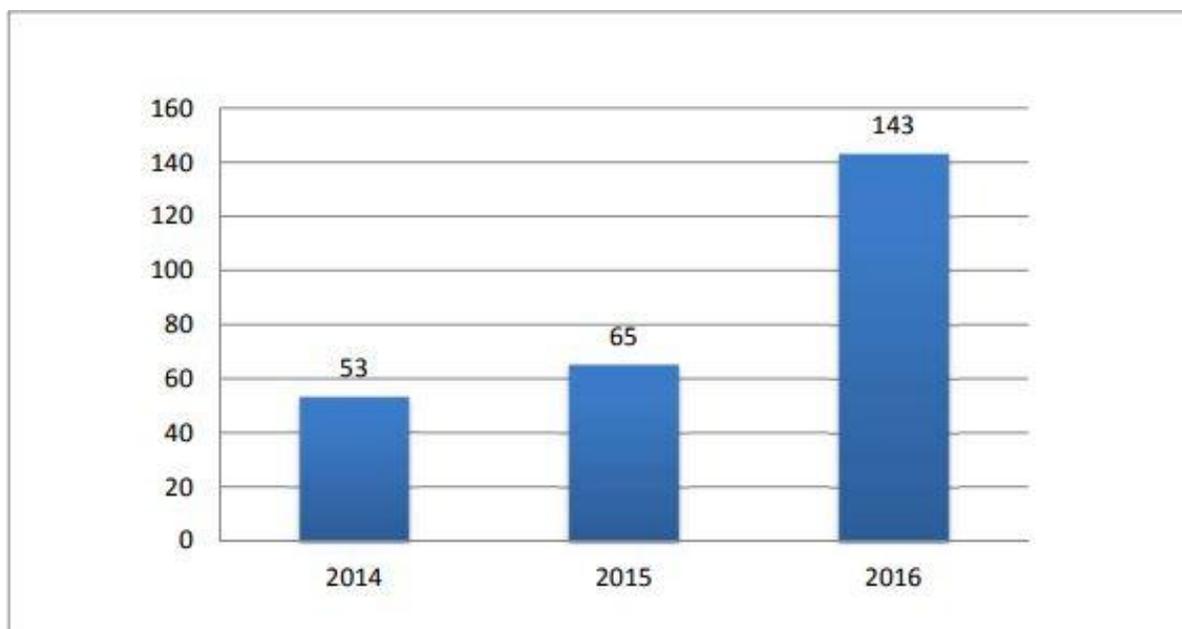
Source: CADE.

20. In 2016, as shown in the table above, CADE initiated 197 judicial action. Most of which (84%) comprises enforcement of fines. The minority (16%) refers to specific performance of obligations.

21. It is possible to note an expressive increase in the quantity of judicial actions brought by CADE since the current Competition Law started to be in force (2012). This fact may be explained by the increased importance and actions of CADE in enforcing competition policy in Brazil.

22. The table below indicates the evolution in the number of actions brought *against* CADE since 2014:

² All the data mentioned in this section was taken from CADE's annual management report of 2016. Available at <http://www.cade.gov.br/aceso-a-informacao/auditorias-1/relatorio-de-gestao-2016-versao-final.pdf>.

Table 2. Judicial Proceedings against CADE since 2014

Source: CADE.

23. As described, in the last year 143 judicial actions were initiated against CADE. Among those, 79 were ordinary actions, two were injunction requests, 10 were of a sort of writ of mandamus, 1 collective damage action (similar to a class action), 32 were in response to fine enforcement and the other 21 were not related to competition issues, such as labor cases.

24. It is interesting that 22% of the cases were responses to a fine enforcement action brought by CADE (“*embargos à execução*”), which under Brazilian Law amount to a new action. However, they are not challenges to CADE decisions.

25. Another relevant information is that 20% of the cases against CADE were brought before courts outside the Federal District, where CADE has its headquarters. Brazilian law allows the private party to choose the court where it intends to bring action against the Federal Government. This fact may have impact on the discussion of the next section, regarding the creation of specialized competition judicial courts.

26. Regarding the decisions issued by the Judiciary in 2016, 68% were favorable to CADE. However, when considering only final decision in the first instance, CADE has a 84% rate of success.

4. Creation of specialized Courts in Brazil

27. The creation of specialized competition courts is currently the topic of a vivid debate in Brazil. In May 2017, the Federal Justice Council approved a resolution

recommending that the Regional Federal Tribunals create specialized courts to decide competition and international commerce cases.³

28. The proposal of the resolution was discussed at different occasions, in particular during an academic seminar about the “challenges of the judicial review of competition law, regulation and international commerce law” held in 2015.

29. As mentioned in the decision of the Federal Justice Counsel to approve the abovementioned resolution, experts affirm that cases involving competition and international commerce law are often characterized by complex discussions. Therefore, a non-specialized judge normally does not have the necessary expertise regarding the rules and methods applied by specialized agencies, such as CADE and the Brazilian Chamber of Foreign Trade (CAMEX).

30. Furthermore, the Governance and Strategic Secretary of the Federal Justice Council argued that the main reason why specialized courts should be created is that ordinary courts normally take a longer time to decide cases regarding competition law, which harms legal certainty.

31. The Federal Judges Association and the Ministry of Development, Industry and Foreign Trade were also favorable to the proposal. They argue that an increased expertise of the judges would promote better and more consistent decisions.

32. The proposal was sent to all five Regional Federal Tribunals for an opinion. Four of them were favorable and one did not provided an opinion.

33. The data analyzed showed that the number of cases involving competition and international commerce law is not so expressive compared to other matters. However, according to the decision of the Federal Justice Counsel, this shall not be an obstacle for the creation of specialized courts. The solution proposed by three Regional Federal Tribunals to address the relative small number of competition and international trade cases is to create non-exclusive specialized courts. In other words, the specialized court would decide all cases regarding competition and international commerce, but it would also decide other matters. The result is that competition law and international commerce cases would be concentrated in a few specialized judges and courts.

34. The Federal Justice Counsel decision to approve the resolution affirms that this model – non-exclusive specialized courts – already exists and has proved successful in other cases, such as the specialized courts to apply the Hague Convention on the Civil Aspects of International Child Abduction.

35. Moreover, the decision argues that the non-exclusive specialization would not increase public expenditure, since existing courts would be specialized.

36. Due to those reasons, the Federal Justice Counsel approved the resolution recommending the Regional Federal Tribunals to create specialized courts to decide competition and international commerce cases.

³ <http://www.cjf.jus.br/cjf/noticias/2017/maio/especializacao-de-varas-federais-em-direito-da-concorrencia-e-comercio-internacional-e-aprovada>. Vote provided by Judge Mauro Campbell Marques.

37. In September 2017, following this resolution, the Regional Federal Tribunal of the 3rd Region created a working group to study the practical implementation of specialized competition and international commerce law courts within the region.⁴ Other Regional Federal Tribunals should follow in the next year.

38. Therefore, the creation of specialized competition courts is an ongoing process in Brazil and the trend is towards specialization. Many relevant actors of the Federal Justice agreed that specialization of judges would lead to benefits for competition policy.

5. Conclusion

39. This contribution described the institutional and procedural aspects of the relationship between the Competition Authority and Courts in Brazil. The interaction between CADE and the Brazilian Judiciary is assured by the General-Attorney's Office in CADE, the ProCADE. The role of ProCADE has increased in the past years, since it plays an essential role in the confirmation of CADE's technical decisions before Brazilian Courts.

40. In addition, some relevant numbers related to the judicial review of CADE's decisions were analyzed. The data was extracted from last year's annual report carried out by CADE, which analyzed the judicial proceedings involving CADE. The data demonstrates a considerable rate of success of CADE's decisions in the Judiciary.

41. Finally, the paper addressed the recent proposal to create specialized courts to deal with competition law and international commerce in Brazil. It showed that specialization would lead to judges with the required expertise to better review complex competition law cases. Regarding practical implementation, it seems that the Federal Justice would prefer to use the non-exclusive specialized court model, that is to say, the specialized courts would also adjudicate other matters. This would be a solution to address the relative small number of competition law and international commerce cases brought to the Judiciary.

⁴ Portaria PRES N° 794, de 04 de setembro de 2017. Available at: <http://web.trf3.jus.br/diario/Consulta/VisualizarDocumento?CodigoTipoPublicacao=1&CodigoOrgao=1&CodigoDocumento=0&IdMateria=498706&NumeroProcesso=0>.