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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -  
Contribution from Brazil**

**- Session III -**

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More documentation related to this discussion can be found at: [oe.cd/pcnca](http://oe.cd/pcnca).

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## *The Promotion of Competitive Neutrality by Competition Authorities*

### *The promotion of competitive neutrality in Brazil<sup>1</sup>*

#### **– Contribution from Brazil –**

## **1. Introduction**

1. Brazil is a complex country, comprising 26 states, a federal district, and 5,568 municipalities. Moreover, the country was traditionally a closed economy, with massive state intervention. Despite this background, Brazilian antitrust enforcement has made significant progress – but still has a long way to go.
2. In working towards competitive neutrality in the Brazilian government, the country faces strong lobby from small, organized groups that pursue their private gains based on state intervention to the detriment of the rest of society (rather than pursuing these gains through their own merit)<sup>2</sup>.
3. The Brazilian Competition Defense System (SBDC) is in charge of achieving competitive neutrality in Brazil, which comprises not only CADE but also the Ministry of Economy's Secretariat for Economic Monitoring (SEAE). The Ministry of Economy's role is of the utmost importance, due to its political power and technical expertise. Additionally, in theory, other government agencies have the task of ensuring competitive neutrality in Brazil, by law.
4. This paper includes an overview of competitive neutrality enforcement in Brazil, focusing on the government, and comprises two parts, in addition to this introduction. The first section outlines the main regulations that drive government actions as to competitive neutrality in the markets, whilst the following section includes a few instances of SBDC's actions to protect competitive neutrality in several situations.

## **2. Brazilian regulations on competitive neutrality**

5. Brazilian legislation includes two regulations that, amongst others, clearly mention competitive neutrality as a rule to be observed by both public and private sectors, except in specific cases: the Economic Freedom Law and the Competition Law.
6. The Economic Freedom Law establishes the government must avoid protectionism unless a specific statute directs otherwise, as per its Article 4, Item I<sup>3</sup>:

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<sup>1</sup> This document was written for the Global Forum on Competition — The Promotion of Competitive Neutrality by Competition Authorities – by Alexandre Cordeiro Macedo, CADE's President, and Daniel Silva Boson.

<sup>2</sup> As the enforcement of the competition law as to the state-owned enterprises has already been discussed at the OECD forum in 2018, these cases will not be covered in this contribution. The two exceptions are Petrobras' divestiture process in the oil and gas sector, in which the government (the competition authority included) took actions to create market structures that actually ensured competitive neutrality.

<sup>3</sup> Law 13874/2019.

*"Article 4. In formulating secondary legislation to enforce this Law, the government and the entities affected by this Law, except to strictly comply with an explicit legal provision, must avoid unduly abusing their rulemaking power to*

*1 - create protectionist measures that favour specific groups of companies or professionals to the detriment of other competitors."*

7. Another relevant article of the Economic Freedom Law is Article 5, which establishes that regulations must have a Regulatory Impact Analysis (RIA):<sup>4</sup>

*Article 5. Government agencies' proposals for amending regulations of general interest of market players or users of the provided services must be preceded by a regulatory impact analysis, including information and data on the possible effects and economic impact of the regulations.*

*Sole Paragraph. (...)*

8. Regulatory Impact Analyses are still new to Brazil, and it may take some time until government officials are trained to conduct them. In any case, several measures that undermine competitive neutrality are likely to be discarded after regulations undergo these analyses.

9. The Competition Law also does not allow giving differential treatment to different individuals or legal entities governed by public or private law, as set out in Article 31<sup>5</sup>.

*Article 31. This Law applies to individuals and legal persons governed by public and private law and to any associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, regardless of operating under a legal monopoly regime.*

10. Thus, with regard to the scope of enforcement, Brazilian antitrust legislation is broad and inclusive. However, with regard to public authorities, the SBDC lacks the power to impose sanctions on them and is limited to competition advocacy actions.

11. The Ministry of Economy's SEAE supports CADE in its advocacy work. Together, CADE and the SEAE comprise the SBDC. These bodies' cooperation is crucial, bearing in mind the Ministry of Economy's political power and expertise in competition enforcement<sup>6</sup>.

12. Thus, CADE is the competition authority that investigates and reviews antitrust and merger proceedings in Brazil. The SEAE, however, also has an important role in competition advocacy, working towards competitive neutrality, as it will be shown below. This work is carried out with bodies from different states and from the three branches of government – executive, legislative, and judicial<sup>7</sup>.

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<sup>4</sup> The Regulatory Agencies General Act (Law 13848/2019) is another law that stipulates the performance of Regulatory Impact Analyses.

<sup>5</sup> Law 12529/2011.

<sup>6</sup> Law 12529/2011. Article 3. The Brazilian System for the Defense of Competition is comprised of the Administrative Council for Economic Defense (CADE) and the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, with the mandates provided for by this Law.

<sup>7</sup> For instance, CADE filed an amicus brief in Appeal 597165, which challenged a district law that banned petrol stations, amongst others, from operating in supermarket car parks and similar places. In 2015, a new law allowed these operations.

13. In May 2021, the Ministry of Economy officially adopted the OECD’s Recommendation on Competitive Neutrality. Hence, Brazil has committed to remove distorted regulations and avoid offering special advantages that warp competition and favour some companies over others. These include state loans and guarantees given under conditions that betray market principles, in addition to a favourable tax treatment, subsidies, and goods or services provided by the government at better prices.

14. This commitment extends to three levels of government (federal, state, and local), and includes government procurement processes, which must be based on open, fair, non-discriminatory, and transparent competition to ensure no company, regardless of its property or nationality, gains any undue advantage.

### 3. Sectors with competitive neutrality issues

15. As seen before, Brazilian legislation pursues fair and efficient competition, without offering specific companies asymmetric advantages. However, on the grounds of price research, the adoption of measures detrimental to competitive neutrality is still common. Although socially beneficial in some cases, it is usually not, and there may be other means to achieve these goals without lessening competition.

16. These undue restrictions, well discussed in the antitrust literature, may occur in several different manners, but competition authorities have multiple ways to avoid them. In Brazil, as previously said, the SEAE and CADE are part of the SBDC, and the two bodies work proactively to preserve competition in governmental actions, in the branches of government, and in the Brazilian states.

17. Concrete examples of how the SBDC works to promote competitive neutrality are detailed below<sup>8</sup>:

#### 3.1. Taxi vs Uber

18. A global attempt to impose protectionist measures happened with the rise of Uber. The company affected the interests of taxi drivers, who organised a lobby against Uber and its drivers. In Brazil, given the strong mobilization of taxi drivers, there were calls for legislative bodies and others to tackle the issue<sup>9</sup>.

19. Therefore, the SBDC worked on many fronts, especially in a bill that resulted in Law 13640/2018, which reduced legal uncertainties for entrant companies. In addition, it was suggested that municipalities should not adopt measures to hamper the operations of ride-hailing platforms or make them infeasible. Moreover, the entity recommended

<sup>8</sup> For a summary of some of the following cases and others, see, in Portuguese, the “Guia de Advocacia da Concorrência” (guidelines on competition advocacy). Available at: <[https://www.gov.br/economia/pt-br/centrais-de-conteudo/publicacoes/guias-e-manuais/guiaadvocaciaconcorrencia\\_ascom.pdf/view](https://www.gov.br/economia/pt-br/centrais-de-conteudo/publicacoes/guias-e-manuais/guiaadvocaciaconcorrencia_ascom.pdf/view)>. [https://www.gov.br/economia/pt-br/centrais-de-conteudo/publicacoes/guias-e-manuais/guiaadvocaciaconcorrencia\\_ascom.pdf/view](https://www.gov.br/economia/pt-br/centrais-de-conteudo/publicacoes/guias-e-manuais/guiaadvocaciaconcorrencia_ascom.pdf/view)

<sup>9</sup> See, in Portuguese, the CADE Department of Economic Studies’ analysis “Efeitos concorrenciais da economia do compartilhamento no Brasil: A entrada da Uber afetou o mercado de aplicativo de táxis entre 2014 e 2016?”. Available at: <<http://antigo.cade.gov.br/noticias/dee-analisa-efeitos-concorrenciais-da-entrada-da-uber-sobre-mercado-de-aplicativos-de-taxi>>. <http://antigo.cade.gov.br/noticias/dee-analisa-efeitos-concorrenciais-da-entrada-da-uber-sobre-mercado-de-aplicativos-de-taxi>

regulations should be minimal, focus on safety, and address the company, not its drivers. Finally, municipalities should adopt measures to deregulate the taxi service, such as reducing barriers to entry and granting them freedom to set prices.

### 3.2. Payment of taxes through FinTechs<sup>10</sup>

20. The Federal Revenue Office of Brazil only accepted the payment of taxes through financial institutions, as set forth in the Ministry of Finance's Directive 479/2000. This rule forbid payment institutions, such as FinTechs (financial technology startups), from receiving these payments.

21. As the new companies could not offer this service, customers needed to have an account in a traditional bank to pay their taxes, which harmed FinTechs' competitive position.

22. At the initiative of the SEAE, the Federal Revenue Office issued Ministry of Economy's Directive 13/2020, allowing FinTechs, deemed as either financial institutions or payment institutions, to be part of the federal tax collection network. This strengthened FinTechs' presence in the financial market as a one-stop-shop platform with various financial services, such as current accounts, investment, insurances, pensions, payments, etc.

### 3.3. Passenger transport by road

23. Until 2012, services of intercity and international passenger transport by road were operated through government licences and charged regulated fares, according to the provisions of Law 10233/2001. When Law 12996/2014 came into effect, the service started to be operated through authorisations, with freedom to set prices and no barriers to entry. However, there is an exception for cases of "infeasible operations"<sup>11</sup>.

24. In drafting a regulation related to the law, the Brazilian land transport regulatory agency (ANTT) held an open court hearing in 2019, in which it was suggested that market entry should be limited in cases of low demand (in ruinous competition cases), based on the concept of "operational infeasibility".

25. The SBDC acted to remove this regulatory barrier to entry, deeming adequate only barriers related to physical limitations or legal barriers to the use of public spaces or of facilities intended for service provision. Finally, the federal government's council for investment partnership programmes issued a directive that restricted the number of granted authorisations contingent on physical limitations, except in situations of operational infeasibility.

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<sup>10</sup> See, in Portuguese, news article "Pagamento de tributos federais por Instituições de Pagamento (Fintechs)". Available at: <https://www.gov.br/economia/pt-br/aceso-a-informacao/acoes-e-programas/dois-anos-de-avancos/acoes-2020/pagamento-de-tributos-federais-por-instituicoes-de-pagamento-fintechs>.  
<https://www.gov.br/economia/pt-br/aceso-a-informacao/acoes-e-programas/dois-anos-de-avancos/acoes-2020/pagamento-de-tributos-federais-por-instituicoes-de-pagamento-fintechs>

<sup>11</sup> "Article 47-B. There will be no authorization limit to services of intercity and international passenger transport by road, except in cases of operational infeasibility."

### 3.4. The end of Petrobras's monopoly over the refined oil market

26. This is an unusual but paramount situation in which a Cease and Desist Agreement signed with CADE helped put an end to a state monopoly over the refined oil industry. Brazil did not have a legal monopoly but, as Petrobras owned 98.5% of the country's installed capacity, competition was virtually non-existent<sup>12</sup>.

27. To solve the situation, the government and Petrobras opted for a massive refinery divestiture process; however, there was a risk of exchanging a national monopoly for regional monopolies. The SEAE supported the Brazilian energy policy council (CNPE), which issued a resolution that mentioned competition as a factor to be considered, covering the disposal of refineries and other assets; the transfer of potentially competing refineries to different business groups; the removal of the divesting party's equity interest in these companies; and the transfer of internal transport assets, preferably to non-vertical business groups.

28. Taking this into consideration and the fact that Petrobras was being investigated for violating antitrust law, CADE and the company entered into an agreement aimed at the disposal of refineries to promote competition.

### 3.5. The end of Petrobras' monopoly over the natural gas market

29. A similar situation occurred in the natural gas industry, in which Petrobras also had a monopoly. The CNPE and the SBDC worked to make this industry more competitive.

30. The guidelines set out in the CNPE resolution included the non-discriminatory access to essential facilities; an easier verification of the available pipeline capacity; gas carrier autonomy; incentives and recommendations aimed at having other states improve their regulatory and competitive governance; easier importation; and competent authorities' oversight of actions intended for opening the natural gas market.

31. Although Petrobras had a divestiture plan aligned with CNPE's terms, the company also executed a Cease and Desist Agreement with CADE to end the authority's investigation into Petrobras' alleged anticompetitive practices<sup>13</sup>.

<sup>12</sup> See Administrative Proceeding 08700.006955/2018-22. Available at: [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOfbx5eD8vU7hfNPdc1HQ8Mo2wUUI\\_pMBwmHa9QywbQVDVJnIUCKbu0aQsg2fy2ggM6fjABY7XMTQWI3Q5i7QbJ](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOfbx5eD8vU7hfNPdc1HQ8Mo2wUUI_pMBwmHa9QywbQVDVJnIUCKbu0aQsg2fy2ggM6fjABY7XMTQWI3Q5i7QbJ)

<sup>13</sup> See Administrative Proceeding 08700.002600/2014-30. Available at: [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yM2Ur8iByH-Nu4yvA1cv\\_9inRMOg4J1hcDMIohDGroONKELtnpkMU8Pfaq47IACp\\_3Fd9iD44arSE934kMfAu8z](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yM2Ur8iByH-Nu4yvA1cv_9inRMOg4J1hcDMIohDGroONKELtnpkMU8Pfaq47IACp_3Fd9iD44arSE934kMfAu8z)

### 3.6. Mandatory distribution of hybrid set-top boxes

32. Another way to undermine competition neutrality is imposing compliance costs. A proposal for amending the rules of the SeAC (conditional access services) emerged in a public consultation conducted by the Brazilian telecommunications regulatory agency (Anatel). The proposal sought to require premium television providers employ Direct-to-Home technology to install Integrated Receiver Decoders (i.e. hybrid set-top boxes) in subscribers' homes.

33. According to the SEAC, this obligation would only apply to Direct-to-Home service providers, not to cable TV providers who are part of SEAC, which would create a strong competitive distortion. ANATEL properly decided not to make the installation mandatory.

### 3.7. Domestic coastal shipping

34. Brazil has a long coastline, with 80% of its population living up to 200 km from the coast. For this reason, domestic coastal shipping is pivotal to the country. According to EPL projections (a state-owned company in charge of planning integrated logistics in Brazil), domestic coastal shipping accounts for 11% of total movement of cargo in Brazil, possibly reaching 14% in 2025.

35. Nevertheless, the industry faces regulatory barriers to entry and to fleet creation, including a policy to prioritise ships built in Brazilian shipyards. Brazil's Ministry of Infrastructure has been discussing the "BR do MAR" proposal with the SEAE, which aims to diminish the barriers of this industry.

36. The proposal authorises operations that only have chartered (or "rented") ships; thus, charterers would not need to own their ships. In addition, it would grant a time extension for time charters, allowing foreign-flagged ships to keep flying their flags, which gives greater flexibility to this industry's operations. The measures await Congressional approval.

### 3.8. Open Banking

37. Open Banking, or Open Finance, enables users to share account information (credit and transaction history, amongst others), giving users ownership of their own banking data, which no longer belongs to the financial institution. As a result, it reduces the market power of these institutions<sup>14</sup>.

38. Initially, the Central Bank of Brazil opted for an industry self-regulation approach. Hence, banking institutions would be responsible for the standardisation of technology and operational procedures, for security certificates and their standards, and for implementing interfaces.

39. In a public consultation, the SEAE pointed out some limits to the scope of self-regulation: the higher the cooperation and coordination between players of an industry, the greater the risk of anticompetitive practices. Thus, the SEAE suggested a co-regulation regime, through which the Central Bank of Brazil would be the guardian of certain public policy objectives in order to ensure a competitive equilibrium amongst market players. In general terms, this was the model adopted by the Central Bank.

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<sup>14</sup> See the Joint Resolution 1/2020 of the Ministry of Economy and Central Bank of Brazil. Available at: <https://www.in.gov.br/en/web/dou/-/resolucao-conjunta-n-1-de-4-de-maio-de-2020-255165055>.

### 3.9. Selo Combustível Social

40. Another example of protectionism is the adoption of Selo Combustível Social, or "seal for socially concerned fuel", in translation. CADE and the Ministry of Economy understand this certification creates overcharges in biodiesel and is thus considered anticompetitive and harmful to neutrality, according to the OECD criteria<sup>15</sup>.

41. Implemented by an Executive Order in 2004, the seal is a certification granted by the Ministry of Agrarian Development to biodiesel producers that purchase a minimum percentage of raw material from family farmers and meet a few other requirements aimed at assisting these farmers. In return, the Ministry offers tax benefits, better loan conditions, and priority in biodiesel auctions held by the Brazilian oil regulatory agency (ANP). Not only were there benefits and protectionist measures in place, they were also permanent, reducing incentives to efficiency gains.

42. Another point that hinders competitive neutrality and, as a consequence, allocative efficiency and consumer welfare, is the fact that imported biodiesel is not an alternative, as is the case with fossil biodiesel. This is because the biodiesel mixed in the mandatory blend must come from Brazilian producers. With all these restrictions, there were times of shortage, which were tackled by allowing raw material to be imported and temporarily reducing the percentage of biodiesel in fossil diesel.

43. Despite the negative effects and the fact that there were no legal grounds to the measure, several bodies discuss whether the certification should be maintained, and CADE is working to reduce this asymmetry in competition.

## 4. Conclusion

44. This paper introduced the topic of competitive neutrality enforcement in Brazil. Brazil is a complex country, with a well-known history of harmful state interventions in competition. Changing this culture requires great effort, and, for this reason, enforcing neutrality demands a steady and broad enterprise.

45. The country has tried to legally protect the competitive environment, and the Brazilian Competition Defense System, comprised of CADE and the SEAE, has a leading role in this. This contribution introduced only a few examples of the multi-sided topic of competitive neutrality protection. This type of effort will certainly be necessary for a long time.

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<sup>15</sup> See Joint Technical Opinion 1/2021 SEAE/ME-DEE/CADE. This position of the Ministry of Economy and CADE's Department of Economic Studies was asserted on a Working Group presentation named "Priorização da Agricultura Familiar na Cadeia de Biodiesel".