Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2022)6

Unclassified

English - Or. English

8 November 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS – Contribution from Brazil

- Session III -

1-2 December 2022

This contribution is submitted by Brazil under Session III of the Global Forum on Competition to be held on 1-2 December 2022.

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JT03507062

Interactions between Competition Authorities and Sector Regulators

- Contribution from Brazil [1] -

1. Introduction

1. In Brazil, the antitrust authority (CADE) and sectoral regulatory agencies act complementarily in enforcing and regulating the economy. Before understanding their dynamics, it is worth taking a brief look at the Brazilian institutional context.

2. The establishment of regulatory agencies in Brazil derived from a broad government restructure in the mid-1990s, which resulted in privatisations and de-nationalisations of businesses.[2] The background was a crisis related to rising government expenses and scepticism towards a government structure that regularly intervened in the private sector. At the time, many economic activities under government administration got privatised, which called for oversight. That was the context in which Brazil saw the creation of its first regulatory agencies.

3. CADE and the antitrust policy already existed by the time of the institution of sectoral regulation. Law 4,137 of 1962 established the Brazilian antitrust authority to prevent and repress abuses of economic power.[3,4] However, its operation grew exponentially by the 1990s after the economic opening.[5] In 1991, Law 8,158, which amended some provisions of Law 4,137/1962, came into force. Its main amendment concerned the role of CADE. In addition to the repression of anticompetitive conduct, the law introduced a preventive function of reviewing mergers and acquisitions.[6]

4. In 1994, Law 8,844 came into effect, consolidating the Brazilian Competition Defense System and making CADE an independent agency under the Ministry of Justice.[7] This change was a considerable step towards institutional strengthening as an independent

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[2] MAJONE, Giandomenico. *Do Estado positivo ao Estado regulador: causas e consequências de mudanças no modo de governança.* In: Revista do Serviço Público, v. 50, n. 1, p. 05-36, 2014.

[3] CARVALHO, Vinícius Marques de; RAGAZZO, Carlos Emmanuel Joppert (Orgs.) *Defesa da concorrência no Brasil: 50 anos*. Brasília: Administrative Council for Economic Defense (CADE), 2013, p. 36. See also: PEREIRA NETO, Caio Mario S.; CASAGRANDE, P. L. *Direito Concorrencial: Doutrina, Jurisprudência e Legislação*. 1. ed. São Paulo: Saraiva, 2016, p. 21 e 22; e FORGIONI, Paula A. *Os fundamentos do antitruste*/Paula A. Forgioni. – 7. Ed. rev. e atual. – São Paulo: Editora Revista dos Tribunais, 2014, p. 41.

[4] Article 1 of Law 4137/1962.

[5] PEREIRA NETO, Caio Mario S.; CASAGRANDE, P. L.; op. cit., p. 23.

[6] Ibid., p. 19. See also CARVALHO, Vinícius Marques de; RAGAZZO, Carlos Emmanuel Joppert, op. cit., p. 51.

[7] CARVALHO, Vinícius Marques de; RAGAZZO, Carlos Emmanuel Joppert, op. cit., p. 59.

agency is a legal entity with a larger budget and administrative autonomy from the government.

5. Later, the law was repealed by Law 12,529/2011 (the current antitrust law of Brazil), which came into effect on 29 May 2012. It was proposed by a 2005 bill and went through an extensive legislative process that resulted in the restructuring of the Brazilian Competition Defense System, which fortified CADE as an institution. The restructure caused two significant changes: CADE gained the functions of investigating mergers and acquisitions (previously performed by the Secretariat for Economic Monitoring of the Ministry of Finance) and potential anticompetitive conduct (previously carried out by the Secretariat of Economic Law of the Ministry of Justice). In addition, the law required the review of mergers before consummation.

6. Consequently, today there is institutional parity between the antitrust authority and sectoral regulatory agencies considering that they are independent and autonomous and operate under the same legal framework. The similarities in terms of where they fit into the Brazilian government organisation and their institutional legitimacy facilitate cooperation. To understand their interactions, we first present their legal framework, clarifying (i) the scope of the performance of the sectoral regulators compared to the antitrust authority and (ii) the cooperation provided by law. Then, we provide examples of this cooperation in proceedings involving mergers and anticompetitive conduct. Lastly, we conclude with some considerations on the interaction between the Brazilian antitrust authority and regulatory agencies.

2. Legal framework

7. First, we should note CADE does not play a role in any field other than antitrust policy. The Brazilian antitrust law grants CADE powers to prevent and repress economic crimes in regulated and non-regulated sectors. Thus, the antitrust authority's work is complementary to that of regulatory agencies and crosscutting to the market as a whole.[8] The regulatory agencies, in turn, have jurisdiction to regulate specific economic sectors, markets, or both. Although their performance usually covers competition concerns, they commonly deepen on other issues of public interest. CADE, on the other hand, covers the market as a whole (not a specific sector) and exclusively addresses competition issues.

8. Currently, 12 regulatory agencies are operating in Brazil[9]. Despite their different scopes of work, the regulatory agencies and the antitrust authority have some clear intersection points. In some cases, the antitrust policy is considered a guiding principle for agencies' rulemaking activities. In other cases, the promotion and protection of competition are goals of the regulatory policy to be ensured by the sectoral agency.

9. Some regulations subject the mergers of a sector to the approval of a regulatory agency or establish measures to deter abuses of economic power. Although similar to those carried out by CADE, these activities are performed with the criteria and methodologies of

[8] According to Article 31 of Law 12529/2011, the law applies to "individuals and legal persons governed by public and private law, or 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."

[9] This study analyses the Central Bank of Brazil, the Brazilian Institute of Industrial Property (INPI), and the Brazilian Data Protection Authority (ANPD). Although they are not regulatory agencies—but autonomous federal bodies—they were selected due to their relevant cooperation with CADE and a similar way of acting.

the regulatory body and are not contingent on or combined with CADE's analyses. It is worth mentioning the Brazilian healthcare sector, in which the regulatory agency can use competition legislation to fight antitrust violations. Thus, even though antitrust and regulatory agencies have autonomous and supplementary work, we observe that there are overlapping points in their jurisdictions in Brazil.

10. These overlaps can lead these bodies to take converging or diverging positions. Due to the coexistence of these legitimate public goals—and the need to compose them—the interaction and cooperation between these institutions are crucial to Brazilian law.

11. We can observe a formal or informal interaction between them as of 1994 when Law 8,884 entered into force and defined CADE as an autonomous body operating under a special regime. Formally, the legislation of some sectors provides for cooperation to promote competition. That is the case for the regulations of the civil aviation and mining sectors, which expressly require notifying the antitrust authority in the event of potential antitrust violations. As for the oil and gas sector, in addition to that obligation, CADE must report to the regulatory agency any decision it makes to penalise firms or individuals involving their fuel supply activities.

12. The provisions for cooperation are part of the Regulatory Agencies General Law (Law 13,848/2019), a piece of legislation aimed to systematise regulatory agencies' management, organisation, and decision-making process. The law has a section on institutional cooperation between the antitrust authority and regulatory agencies, outlining their cooperation to promote competition in regulated markets. Additionally, it established that the regulatory agencies are to monitor and track the market practices of players, assisting the antitrust authority and notifying it of any potential anticompetitive conduct.

13. Law 13,848/2019 also establishes that CADE may request technical opinions from the regulatory agencies on the markets they regulate—a provision also present in the Brazilian antitrust law. According to this law, the regulatory agencies are to provide all the assistance and cooperation requested by CADE—including preparing technical opinions on matters under their jurisdiction.[10] Moreover, Law 13,848/2019 establishes CADE is to notify the competent regulatory agency of its decision on any anticompetitive practices and mergers that happened in the regulated markets within 48 hours of its issuance.[11]

14. The law also requires regulatory agencies to incorporate in their annual management plans administrative and operational goals that cover cooperation with the antitrust authority. That includes the possibility of establishing committees to exchange experience and information with CADE and create standard guidelines and procedures to regulate a market. Moreover, the law provides that the bodies can consult each other whenever amending rules that imply changes to the conditions of the regulated sectors.

15. In practical terms, the law officialised practices that were already in place. There were technical cooperation agreements and memoranda of understanding on specific subjects[12] between CADE and regulatory agencies before the enactment of the Regulatory

[10] Law 12529/2011. Article 9(XIX)(III). Federal authorities and presidents of government agencies, foundations, state-owned companies, mixed-ownership companies, and regulatory agencies are required to provide, subject to liability, all assistance and cooperation requested by CADE, including drafting technical opinions on matters within their jurisdiction.

[11] In addition to cooperation, the antitrust authority has the duty of enforcing antitrust legislation in regulated markets, carrying out merger reviews, and launching administrative enquiries.

[12] For example, the Memorandum of Understanding between CADE and the Central Bank of Brazil was a way to jointly formulate rules for merger reviews and investigations into antitrust violations

Agencies General Law and, as already stressed, regardless of any provisions in the legislation of these markets.

16. Technical cooperation agreements are the primary legal instruments for the cooperation between the antitrust agency and other government bodies. Most agreements with sectoral agencies aim to coordinate the authorities to fight against anticompetitive conduct more effectively and foster free competition in regulated sectors. As to their goals, most attempt to enable or harmonise the work of the bodies to improve market regulation and keep competition in them.

17. Therefore, most of the agreements define cooperation as the following: (i) sharing information, data, documents, reports, analyses, and statistics; (ii) sharing technical opinions, studies, and research results; (iii) holding meetings or workshops; (iv) conducting technical visits; (v) arranging official visits of civil servants; (vi) working on joint studies and research; (vii) providing training for the personnel; (viii) developing other projects and specific activities defined in work plans. Consequently, the commitments made by the parties regard (i) providing requested information and operating based on the internal rules and procedures of each authority; (ii) ensuring technical qualified personnel and resources for supporting each needed activity; (iii) keeping the secrecy of information gathered upon cooperation, if necessary.

18. Below, we present examples of the interaction of antitrust and regulatory authorities; first, showing some main cooperation agreements on merger reviews.

3. Cooperation in merger reviews

3.1. Financial sector

19. A paradigmatic example of how cooperation between CADE and the sector regulator can bring about relevant changes in the regulation itself occurred in the financial sector. Until 2010, only two leading acquirers operated in the Brazilian financial market, i.e. Visanet and Redecard. They held exclusivity relationships with the major card brands, Visa and Mastercard, respectively. In addition, network services had no interoperability, suggesting barriers to market entry. Thus, CADE launched an administrative proceeding to probe the Visa and Visanet relationship.[13] As for Mastercard and Redecard, the authority did not start any proceedings because their exclusivity relationship was not set by a formal agreement – although they operated as if there was one. As a response to the end of the exclusive relationship between Visa and Visanet, agreed to by the parties in a cease and desist agreement signed with CADE, Mastercard also started to be accepted by other acquirers, whilst Redecard admitted other card associations.

20. Furthermore, in 2010, the Central Bank of Brazil issued a report on the market of payment instruments, demonstrating not only a detailed analysis of the practices in this industry but also the most significant aspects with the potential to cause inefficiencies and harm competition among players in this market. The report was part of a cooperation agreement the Central Bank of Brazil made in 2006 with the former Secretariat of Economic Law and the former Secretariat for Economic Monitoring. The cooperation aimed at joint studies regarding the Brazilian financial payment system. Once the Central

involving financial institutions as the legislation of the sector grants the regulatory agency power to handle these issues at the same time as CADE.

[13] Administrative Proceeding no. 08012.005328/2009-31.

Bank of Brazil found the exclusivity agreements resulted in entry barriers to new entrants, it determined (based on Law 12,865/2013) the card brands to disclose their rules, giving more transparency to the sector and promoting the entry of competing acquirers. The authorities' cooperation played a fundamental role in changing the overall context of the payment systems market in Brazil.

21. Cooperation with the Central Bank of Brazil was also crucial for solving a specific case involving agreements and the exchange of competitively sensitive information amongst rivals in the onshore and offshore markets.[14] The communication between rivals consisted of bilateral and multilateral conversations over Bloomberg's chat rooms, where the parties agreed on trade conditions, the fixing of prices and sharing sensitive information such as clients' data. During the investigation, a cease and desist agreement was negotiated. In this regard, CADE, through its Department of Economic Studies, actively cooperated with the Central Bank of Brazil to develop a calculation to define the sum of financial contributions.

3.2. Oil and gas sector

22. A complaint that the Brazilian Petroleum Agency (ANP) presented to CADE illustrates the joint work of these authorities within a case in the oil and gas segment.[15] Observing the already mentioned provision determining the notification of potential antitrust violations to CADE, the ANP reported a disproportional increase in gas prices and an alleged standardisation of prices.

23. CADE's investigation revealed evidence of cartel formation by the distributors and resellers of liquefied petroleum gas, mostly known as cooking gas. The cartel operated in two levels via the resellers and distributors. The resellers fixed prices of the resold gas and monitored compliance, penalising those that did not comply with it. On the other hand, the distributors, in addition to fixing prices, divided the market by allocating some resellers to certain distributors. Their roles in this anticompetitive set-up occasionally mixed, with the mutual effort of distributors and resellers to monitor the involved companies and penalise any disobedience, in addition to larger resellers providing gas not only to distributors but also to smaller resellers.

24. During the investigation, four companies signed cease and desist agreements with CADE: Companhia Ultragaz S/A, Copagaz Distribuidora de Gás Ltda., Liquigás Distribuidora S/A, and Supergasbras Energia Ltda. The agreements resulted in more than BRL 193 million as financial contributions to the Fund for De Facto Joint Rights of the Ministry of Justice. Besides, CADE convicted three companies (Nacional Gás Butano Distribuidora Ltda., Frazão Distribuidora de Gás Ltda., and Revendedora de Gás da Paraíba Ltda) and 11 related individuals. The fines exceeded BRL 600 million.

25. The Brazilian Petroleum Agency not only filed the complaint that initiated the investigation but cooperated during the administrative proceedings, submitting additional information required by CADE.

[14] Application no. 08700.000032/2017-86 (separate case of restricted access no. 08700.000031/2017- 31), related to Administrative Proceeding no. 08700.008182/2016-57 (separate case of restricted access no. 08700.005722/2016-41).

[15] Administrative Proceeding no. 08700.003067/2009-67.

3.3. Port sector

26. CADE launched an administrative proceeding to investigate the alleged abuse of a dominant position by Tecom Suape S.A in the sector of cargo storage in the port of Suape in the state of Pernambuco. The company allegedly charged abusive fees (terminal handling charge 2) for handling containers.[16] Cargo loading, unloading, inbound, management, and delivery are activities held by port operators. The storage can be in the operator's warehouse or independent bonded warehouses, whose facilities do not give direct access to the mooring docks. Consequently, the port operator is the one to handle the loads to the warehouses, for which some operators are charging an extra fee other than the regular terminal handling charge.

27. Therefore, CADE found port operators were abusing their dominant position in handling containers, charging inappropriate fees for the services. These fees were unjustifiable because these services included the terminal handling charge, characterising a discriminatory practice. In 2019, the Brazilian Agency for Waterway Transportation issued Resolution no. 34, which explicitly foresaw the possibility of charging the Terminal Handling Charge 2. However, that did not address the related competition issue.

28. Considering the nature of the practice of the specific case as anticompetitive, in 2021, the Tribunal of CADE convicted the parties and applied up to BRL 9 million in fines. Despite the settlement, concerns remained as to the extent of the illegality of the conduct. To mitigate these concerns, the Agency for Waterway Transportation and CADE signed a memorandum of understanding to establish cooperation in analysing charges for handling cargo in customs transit at port facilities. The memorandum states that although the fees are not illegal per se, they can be abusive in some contexts. For instance, when they involve high prices, discriminatory charges, lack of economic rationality, or duplicated charges already covered by the box rate or the terminal handling charge).[17]

29. The MoU established that the Brazilian Waterway Transport Agency (ANTAQ) should revise its methodology for identifying abusive prices with CADE's support. This methodology should provide the procedure for calculating the prices admitted for each port's services, which will be the parameter for abuse.

3.4. Data protection sector

30. Although incipient, the Brazilian agency for data protection (ANPD) has already entered into an MoU with CADE to establish an institutional partnership to defend free competition in services that require personal data protection. The Department of Economic Studies of CADE released a study on international benchmarking on the relationship between antitrust and data protection authorities. This work looked into data protection and antitrust institutions in 12 jurisdictions besides Brazil. It also addressed the structure and role of CADE and the ANPD, suggesting manners for them to interact.

31. The first cooperation between the bodies took place in 2021. That year, WhatsApp announced a change in its privacy policy, which would allow the processing of users' private data and sharing it with companies of the Facebook group (of which WhatsApp is part). The Federal Prosecution Services, the ANPD, the Secretariat for Consumer

[16] Administrative Proceeding no. 08700.005499/2015-51. Claimants: Atlântico Terminais S.A. and Suata Serviço Unificado de Armazenagem e Terminal Alfandegado S.A. Defendant: Tecon Suape S.A.

[17] Memorandum of Understanding no. 01/2021.

Protection (SENACON), and CADE worked together to offer WhatsApp and Facebook recommendations about their new policy. The bodies advised against WhatsApp's practice of preventing access to users that do not adhere to the new policy. Instead, the company should keep their old regime, maintain users' accounts and connections with the app, and ensure their access to messages and files. Moreover, the authorities recommended postponing the new policy until WhatsApp adopted the suggestions. WhatsApp, in response, undertook to cooperate with the authorities on these points.

3.5. Land transport sector

32. In the land transport sector, CADE collaborated with the Land Transport Agency (ANTT) to investigate the merged firms Rumo and ALL for abuse of dominance and hampering competitors' operations in the market of sugar export logistics via rail transport. The probe started in 2016 from a complaint filed by Agrovia, a company that operated in the same sector. Agrovia alleged to depend on the railways of São Paulo State to transport sugar to a port in the same state. Rumo-ALL, a company that controlled the routes, supposedly created hindrances to Agrovia's functioning, leading Agrovia to stop its activities and causing a considerable part of its demand to switch to Rumo-ALL.

33. Finding red flags of antitrust violations in an administrative proceeding under its review that involved the same companies, the ANTT communicated CADE. The investigations revealed that Rumo-ALL closed a rail yard under allegations that it posed safety risks due to poor maintenance. The same yard was essential to Agrovia's activities, and its closure made it impossible for the company to provide services in the off-season, which forced the company to offer road transport. Later, it could not sign contracts for the 2016/2017 harvest as it did not know if the rail yard would be available. According to ANTT, Rumo-ALL was in charge of maintaining the site. The agency found evidence the company attempted to discuss with Agrovia the responsibility for repairing the yard to delay its access to the infrastructure.

34. CADE concluded that Rumo-ALL blocked Agrovia's access to equipment and distribution channels essential to its core activities, which unreasonably hampered Agrovia's operation. The Tribunal of CADE convicted Rumo-ALL for abuse of dominance and fined the company BRL 247.1 million. The participation of the ANTT was crucial to prove the conduct.

3.6. Intellectual property sector

35. On 15 December 2010, CADE initiated a textbook case of jurisdiction over intellectual property. The antitrust authority found Volkswagen, Fiat, and Ford guilty of abusing intellectual property rights by preventing other companies from manufacturing and selling auto parts allegedly protected by industrial design rights.[18] The administrative proceeding stemmed from a complaint by the Brazilian Association of Auto Part Manufacturers. The association claimed two markets composed the industry: the foremarket, relating to the trade of new vehicles; and the aftermarket, relating to the manufacturing and trade of spare parts. In the aftermarket, independent auto part

[18] Administrative Proceeding no. 08012.002673/2007-51. Claimant: Anfape (Brazilian Association of Auto Part Manufacturers) Defendants: Volkswagen do Brasil Indústria de Veículos Automotivos Ltda.; Fiat Automóveis S.A.; and Ford Motor Company Brasil Ltda. Rapporteur: Commissioner Paulo Burnier da Silveira.

manufacturers competed with automobile manufacturers, limiting intellectual property rights to the foremarket.

36. The rapporteur of the case believed that exercising intellectual property rights in the aftermarket was abusive as it prevented or jeopardised independent auto part manufacturers' operation, amounting to an antitrust violation. One of the Tribunal's commissioners issued a dissenting opinion claiming there was no legal basis to differentiate between the two markets that justified applying property rights distinctly to them. In addition, the commissioner stated the evidence was insufficient to prove an abuse of industrial property rights since the companies did not adopt abusive prices or harm consumers. However, the majority proposed to dismiss the case and unanimously decided to submit it to INPI, the Brazilian Institute for Industrial Property.

4. Cooperation in merger control

4.1. Financial sector

37. In Brazil, one of the main instances of cooperation between CADE and sectoral regulators in merger control (including the creation and monitoring of remedies) happened in the financial sector. The case constituted bank Itaú Unibanco S/A's purchase of shares in XP Investimentos, an investment platform. In its case review, CADE found competition concerns as to vertical integrations in the market of distribution of investment products since XP held a dominant position as an open distribution platform. The concerns related to three allegations: (i) Itaú's discrimination against XP's competitors in the supply of investment products; (ii) Itaú's practice of directing its clients to XP, strengthening XP's dominant position; (iii) XP's discrimination against Itaú's competitors in the supply of investment products.

38. Additionally, the merger had certain particularities that increased its complexity. XP pioneered the disruptive movement the financial sector has seen in Brazil: the emergence of new competitors in markets where only banks traditionally operated. XP was growing by attracting traditional bank clients and causing large sums previously invested in these institutions to flow to companies such as XP, an open platform offering several financial products. In addition to being the pioneering and biggest open platform in Brazil, XP counted with lower fees than conventional banks for most of its services. Thus, it was a significant rival in the sector, with considerable power over the quality of products and the prices paid by consumers in the industry.

39. Another specificity is that XP's platform for investment product distribution is a two-sided market, which creates an interaction between two types of consumers: suppliers of investment products and investors. CADE identified XP had the potential to hamper multihoming on the supplier side through exclusivity clauses, which could lead to discrimination and even market foreclosure. That was even more of a possibility if the company worked alongside Itaú, Brazil's largest private bank.

40. Therefore, the first competition problem created by the transaction was reducing the competitive pressure XP exerted on the markets of brokerage and distribution of investment products. If Itaú tried to reduce XP's competitive pressure on this market after the acquisition, it would raise red flags since this pressure benefited consumers considerably. A second concern was that XP could require an exclusivity relationship with suppliers of investment products for using its platform—any limitations, in matters of fact or of law, potentially restricted the access of competing platforms to the investment products necessary to build a portfolio. A third concern is that XP could demand an

exclusivity relationship with financial advisors, who constitute a significant distribution channel in this market. A network of financial advisors is relevant for the operation of investment product distributors. The firm XP highlighted in the proceeding that, at the time, Brazil had around five thousand financial advisors and approximately 40% of those had connections to XP through a network of offices across the country.

41. The fourth and fifth concerns regarded the possibility of discrimination. On the one hand, XP could discriminate against banks that competed with Itaú in the supply of investment products, jeopardising these banks, benefitting Itaú, and foreclosing the upstream market. As XP was an important distribution channel, especially for fund managers and smaller banks, the risk was significant. On the other hand, in case Itaú decided to sell its products through XP in the future, the bank could discriminate against open platforms of investment product distribution that competed with XP. The bank could offer more advantageous conditions to XP and discriminate against competing platforms that wished to sell Itaú's investment products. Finally, additional danger lay in that Itaú could refer its clients to XP, strengthening its existing dominance over the open platforms.

42. As mentioned in section 2, besides CADE's clearance, players in the financial sector must seek approval from the Central Bank of Brazil. That was the first merger reviewed since the execution of the MoU between CADE and the Central Bank, whose main goal was coordinating actions to ensure more efficiency in their analyses. Their cooperation started in the probing stage and continued until the review by CADE's Tribunal. The dialogue between the institutions happened through their technical teams. The teams shared their thoughts about the work conducted and their concerns on review substantiality and possible remedies—always respecting their own limitations and jurisdiction.

43. The case led to the execution of two merger control agreements with the merging parties, one signed with CADE and the other with the Central Bank. In the agreements, the entities converged in their diagnoses and solutions, and there were no diverging rules or suggestions. Additionally, the bodies would supervise and regularly inform one another of the parties' compliance with the agreement. At the monitoring stage, the Tribunal of CADE recommended that the Office of the Attorney General at CADE issue a report with suggestions to the Securities and Exchange Commission and the Central Bank. That report aimed to improve regulation in the market from a competition perspective.

4.2. Oil and gas sector

44. As far as the oil and gas sector is concerned, two recent instances of interaction with the agency for oil, natural gas, and fuels (ANP) stand out. The first case was also the first time a regulatory agency appealed against one of CADE's merger decisions. The deal consisted of Compass Gás e Energia S/A—a company that operates in the distribution of piped gas in the state of São Paulo—acquiring a 51% equity share in Gaspetro (Petrobras Gás S/A)— a holding company that owns an equity interest in 18 piped gas businesses. Before, Petróleo Brasileiro S.A. (Petrobras) owned these shares.

45. The merger happened after Petrobras entered into a cease and desist agreement with CADE on 8 July 2019. Through it, Petrobras undertook to divest its stock in Gaspetro. CADE's investigative arm, the Office of the Superintendent General, decided to clear the deal unconditionally. However, the ANP appealed the decision in an unprecedented move—the authority had never had a merger decision appealed by a regulatory body. Article 65 of the Brazilian Competition Law sets forth that interested third parties and regulatory agencies—in case of a regulated market—are entitled to appeal rulings of the Office of the Superintendent General.

46. During CADE's administrative proceeding, the antitrust authority informed ANP of the transaction and requested an expert opinion. The regulatory body recommended blocking the merger as it believed it could have anticompetitive effects stemming from Compass' increased market power in the downstream natural gas industry, raising concerns regarding the upstream supply chain links. The agency considered the self-dealing effects of the merger and the expanded buyer power of the already dominant player especially problematic for competition.

47. When the Office of the Superintendent General issued its decision, the regulatory body noted that, although the agencies agreed about several structural aspects of the market and competition concerns, they disagreed about their conclusions. Later, the Tribunal of CADE examined the deal and decided to clear it unconditionally. However, the Tribunal's judgement stressed that the transaction included a regulatory restriction that prevented Compass and related companies from operating in other links of the natural gas supply chain. In addition, it established Compass needed to divest from natural gas distributors as per a divestiture package the company had proposed in the cease and desist agreement. Hence, the Tribunal determined it could reverse the clearance and even impose sanctions (based on Article 91 of the Brazilian Competition Law) provided Compass failed to honour its commitments in due time and lacked legal or economic justification to substantiate changes.

48. The second case was an example of cooperation between CADE and the ANP in formulating competition remedies. The merger consisted of Ream Participações, a company of the Atem group that operates mainly in the fuel business (including distribution), purchasing the refinery Isaac Sabbá and its logistics assets, owned by Petrobras. As in the previous case, the transaction happened through the execution of a cease and desist agreement between CADE and Petrobras in the scope of an administrative investigation into claims that Petrobras committed an abuse of dominance in the national market of oil refining. CADE approved in June 2019 the agreement in which it established Petrobras should divest from several of its refineries, including the Reman refinery.

49. During its analysis, CADE's Office of the Superintendent General informed ANP about the deal and asked for an expert opinion. The regulatory agency disagreed with CADE in the definition of relevant markets, believing there was a horizontal overlap in the primary fuel supply (premium gasoline and petrodiesel), which expanded Petrobras' market power. Moreover, the ANP found these markets were vertically integrated with markets of distribution of regular gas and biodiesel blend. That potentially exerted anticompetitive effects on the distribution of regular gasoline in Amazonas and of biodiesel blends in two other states. Because of that, the ANP recommended that CADE clear the transaction subject to remedies to ensure efficient rivalry in the primary supply of gasoline in the region.

50. Moreover, the agency indicated that, although the water transport terminal—one of the accessory logistics assets—was subject to sectoral regulations that made it freely accessible, the LPG distribution centres connected to the terminal should not be supplied because storage activities were legally part of the refinery. The ANP recommended CADE should negotiate the divestment of part of the LPG storage site owned by the refinery and integrate it into the structure of the water transport terminal. That would enable LPG distributors to purchase fuel from other primary supply sources, provided that activities of the refinery and terminal were considered safe and feasible.

51. The Tribunal of CADE unanimously decided to examine the deal and, by a majority, approved the transaction contingent on a merger control agreement. The agreement had obligations that ensured product transport firms had access to the terminal, and pipeline transport firms of the fuel distribution industry could also connect to it. The suggestions ANP offered were the basis for the remedies included in the agreement.

4.3. Telecommunications sector

52. The telecommunications sector has a relevant example of cooperation in a merger review: AT&T's purchase of Time Warner.[19] In Brazil, AT&T owned SKY, a pay television company. The transaction resulted in a vertical integration as Time Warner is a content producer, and SKY works in distribution and cable television packages. The merger entailed foreclosure risks. The Office of the Superintendent General issued an opinion stating the claimed efficiencies were unlikely or too specific, and SKY could discriminate against other content creators that competed with Time Warner. Moreover, there was a risk of foreclosure in the premium television market if Time Warner directed its content to SKY.

53. The review received inputs from the regulatory agencies for telecommunications (ANT) and cinema (Ancine). The ANT submitted considerations about the effects of the merger on the Brazilian premium television market: it could "possibly result in practices that jeopardise competition in the premium television market". Nonetheless, the agency believed remedies could mitigate these negative effects. On the other hand, Ancine stated the clearance and the consequent vertical integration between two leading economic groups in content creation and bundling were very likely to produce anticompetitive effects on the Brazilian premium TV market; therefore, the agency recommended its blockage. To prevent the competition issues of the merger, CADE and the parties entered into a merger control agreement. The terms of the agreement essentially established a non-discrimination obligation and the structural separation of the companies, precluding the exchange of competitively sensitive information. The Tribunal of CADE analysed the case and approved the merger contingent on the execution and proper implementation of the agreement.

5. Conclusion

54. In dealing with antitrust practices (especially unilateral conduct), the positions of antitrust and sectoral regulation bodies do not always concur. As far as merger control is concerned, CADE abstains from imposing sectoral restraints; instead, it confines itself to the competition aspect, over which it has jurisdiction. Furthermore, due to an ex-ante merger control regime, CADE usually anticipates the decision of sectoral regulators by requesting their input.

55. Against this backdrop, we can reach a few conclusions about the interaction between antitrust and regulatory bodies in Brazil. First, we should emphasise antitrust law and sectoral regulation are complementary. The Brazilian Competition Law mentions no regulated sector is exempt from antitrust law; CADE can scrutinise even activities under legal monopoly regimes. Therefore, the interaction between sectoral regulation and antitrust policy is inevitable. The cooperation between these two is a primary mechanism in aligning expectations and providing legal certainty, considering state entities' divergent decisions bring about a negative impact. It is no coincidence that the Regulatory Agencies General Law of 2019 dedicates an entire chapter to addressing the collaboration between sectoral agencies and the antitrust authority. In practice, this cooperation has always been necessary, and CADE has historically promoted technical cooperation agreements with regulatory agencies of different sectors.

[19] Merger no. 08700.001390/2017-14. Merger applicants: AT&T Inc. and Time Warner Inc.