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Competition in the Food Supply Chain – Contribution from Brazil

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Competition in the Food Supply Chain

- Contribution from Brazil¹ -

1. Introduction

1. In the last decades, Brazilian agribusiness went through an intense modernization process resulting in the transition of a sector marked by low and insufficient productivity, incapable to supply the national food demand, as it was observed until the mid-1970s by Embrapa (2018), to the third largest exporter of agricultural products worldwide, behind only the United States and the European Union (FAO, 2018).

2. The agriculture sector has steadily represented about 5% of the Brazilian GDP since 2010. However, in the last years, the production has increased considerably. In 2023, the Brazilian GDP increased 2.9% in comparison to 2022, reaching BRL 10.9 trillion, approximately 2.2 trillion U.S. dollars. Agricultural activities registered a growth of 15.1% during the same period, significantly impacting the global performance of this index.

3. The importance of the sector for the Brazilian economy demands CADE's special attention. The Brazilian antitrust authority aims to ensure free competition. Nonetheless, unlike other authorities which have extensive duties, the Brazilian regulatory scenario comprises various government agencies including regulatory agencies and ministries, and all of them with distinct responsibilities. Regarding the preventive control, a quick internal review revealed that, between 2013 and 2023, mergers in the agricultural sector represented 8% of the total amount of mergers notified to CADE. Notably, half was related to food. Besides, approximately 500 mergers were registered during the period considering the retail market, supermarkets included. It corresponds to 10% of the total amount of mergers.

4. As for the Brazilian authority's repressive function, from the beginning of 2019 to the end of 2023, it reviewed potential cases of abuse of dominant position in at least 13 submissions especially in the agrochemicals, seed, retail (supermarkets), and beverage sectors.

5. Moreover, there were cartel investigations in the irrigation and water storage, cold store, grocery, school meal, salt market and prison food sectors, among others. Many of them involved practices like bid riggings, price fixing, market allocation, and exchange of competitively sensitive information.

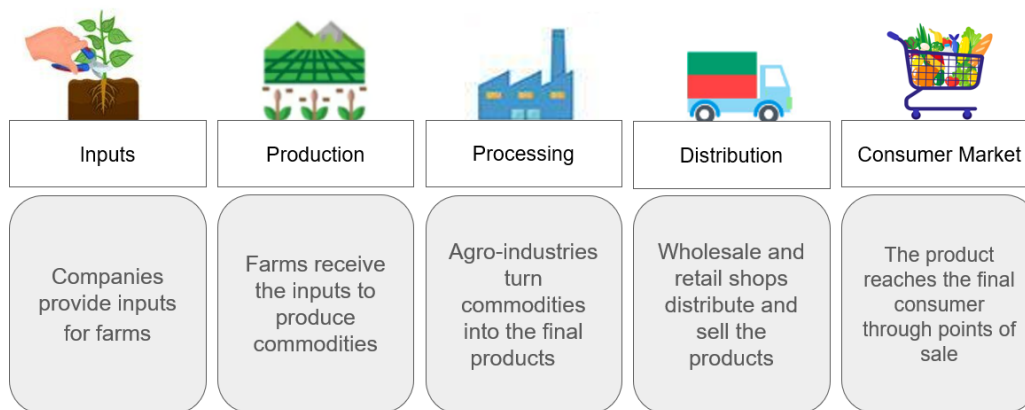
6. In addition, CADE is consistently engaged in efforts to strengthen competition in collaboration with other organisations that make public policies. This proactive approach highlights the commitment to ensure a competitive environment.

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2. The food supply chain

7. The food market consists of an extensive series of transactions which begins with the supply of inputs and is concluded when the final product reaches the consumer. This chain developed over time through technological advancement, and the simple consumer relations (farmer to table) became more complex. This can be attributed either to the increase in the number of transactions in the production chain (See Figure 2.1 or to market failures that emerged in the period. The development of the sector can be related to research and development activities (R&D) in all the stages of the production chain.

Figure 2.1. Agribusiness supply chain.



Source: Prepared by the author.

8. The agriculture and livestock production have represented approximately 5% of the Brazilian GDP in the last decade. In 2023, the Brazilian GDP increased 2.9% in comparison to 2022, reaching BRL 10.9 trillion, approximately 2.2 trillion U.S. dollars. In the same period, the agricultural sector registered a growth of 15.1% significantly impacting the global performance of this index.

9. The agricultural commodities culture achieved successive production records presenting positive balances in the trade balance from 2010 until 2023. These results can be explained mostly by the Brazilian agriculture productivity gains derived from the intensive use of inputs whose efficiency has increased due to constant technological advancement.

3. The Brazilian experience

3.1. The agricultural inputs market

10. From 2011 to 2023, CADE reviewed 214 mergers in the agricultural inputs market. Between 2020 and 2022, the number of cases increased totalling 36%. And in 2022, CADE analysed the largest number of cases within the last 12 years. In this period, 85% of the mergers were reviewed through summary procedures, and only 15% through ordinary ones.

11. Regarding the nature of the transactions, CADE analysed 112 acquisitions which represent 52% of the cases. Acquisitions of assets and acquisition of shares represented 29% of the reviews, each.

12. As for anticompetitive practices, CADE reviewed 71 administrative proceedings² in the agricultural market between 2011 and 2023. The creation of entry barriers to new competitors was the most analysed alleged anticompetitive conduct in the last 12 years, with 13% of the cases. Investigations on alleged abusive prices represented 8% of the cases while price differentiation and price-fixing represented 4% each. Besides that, there were claims related to predatory prices in 2 cases.

3.1.1. Bayer and Monsanto – Case no. 08700.001097/2017-49

13. On 20 February 2017, CADE received the merger notification about the full acquisition of the Monsanto Company (“Monsanto”) by Bayer Aktiengesellschaft (“Bayer”). Bayer AG operated in the agricultural sector, specially in the production and trade of agricultural pesticides and seeds, in 75 countries. Before the merger, Monsanto was the global leader in technological solutions development and in the supply of agricultural products like seeds, biotechnology crops, herbicides, and precision agriculture products. Moreover, it operated in 67 countries worldwide.

14. In Brazil, the group used to produce and trade seeds (corn, soybeans, cotton, sorghum, vegetables, and fruit), biotechnology crops, herbicides and respective active ingredients (glyphosate-based herbicides and glyphosate acid), and precision agriculture products through subsidiaries.

15. The transaction consisted of the full acquisition of Monsanto by Bayer through the acquisition of the company’s controlling interest. The Office of the Superintendent General of CADE recommended that the transaction was directed to the Tribunal for analysis and a final decision due to competitive concerns. The case was adjudicated by the Tribunal, and the approval was conditioned to the signing of a merger control agreement (ACC in its acronym in Portuguese).

16. The transaction resulted in horizontal overlaps in the markets of seeds for soybeans, cotton, lettuce, onion, carrot, watermelon, melon, cucumber, bell pepper, cabbage, and tomato (genetic improvement, production, and commercialisation). In addition, there were horizontal overlaps in cotton and soybeans biotechnology crops markets (research and licensing).

17. Moreover, there were also vertical integrations involving seed markets like: (1) products for seed treatment, production and commercialisation; (2) supply of agrochemicals for crops, seeds production, and commercialisation; (3) development of transgenic events and genetic improvement, and (4) genetic improvement, and seed production and commercialisation.

18. The geographic dimension covered markets related to the production of agricultural pesticides, intermediates, or formulations, and markets of production, commercialisation and seed processing which were all considered of national scope. The market of development of transgenic events was regarded global, given that companies in the sector compete globally. The more successful they are in the opinion polls, the more they try to disseminate their technology worldwide.

19. The horizontal integration in the (1) soybean biotechnology, (2) cotton biotechnology, (3) soybean seeds, and (4) cotton seeds markets raised some significant concerns. The other horizontal integrations observed did not raise competition concerns.

² It is important to emphasise that these results represent cases assessed and not necessarily convicted by the agency.

20. Additionally, it was understood that there were relevant competition concerns derived from the effects of the vertical integration increase among the activities performed by the petitioners in the following markets: (1) soybeans and soybeans seeds biotechnology; (2) cotton and cotton seeds biotechnology.

21. Finally, the SG considered that there were concerns derived from conglomerate effects of the transaction, especially related to the portfolio and increase of the petitioners capabilities to use integrated solutions. According to the Caderno de Mercado de Insumos Agrícolas (CADE, 2020, in Portuguese), an edition of a series of publications entitled "Review of CADE's Decisions", the SG appointed some concerns raised by competitors during the production of evidence. They were related to the involvement of the petitioners in all the stages of the same value chain like the biotechnology development, seeds production and commercialisation, seed treatment, agrochemicals, biologicals, and digital agriculture.

22. Hence, the portfolio reinforcement derived from the transaction was likely to result in access restrictions to distribution channels for competitors that did not have extensive portfolios. Furthermore, regarding the increase of the capacity of petitioners to offer integrated solutions comprised by highly complementary products, it was assumed that the transaction would strengthen the capacity to create new integrated technological solutions. This would be possible due to the combination of Monsanto's strong capacities with transgenic seeds and events and Bayer's capacities with agrochemicals. Also, it is worth mentioning the digital agriculture segment in which Monsanto had strong influence as a relevant part of these integrated solutions.

23. In this scenario of competition concerns, the petitioners submit the proposal of remedies to mitigate anticompetitive effects like: (1) structural solutions; (2) acquisition of relevant capacity of R&D assets; (3) acquisition by a single buyer capable of exercising effective rivalry.

24. The structural remedy consisted of the divestiture of all the Bayer's assets related to cotton and soybeans seeds businesses, and to the non-selective herbicides based on glufosinate-ammonium. This divestiture would occur through the already publicised global transaction of the selling of seeds and herbicides businesses by Bayer to BASF. So, the remedy was about a previously announced buyer which had already signed an agreement that could grant its implementation.

25. Besides the structural remedies, some behavioural remedies were negotiated: (1) wide and non-discriminatory licensing of biotechnology and non-selective herbicides based on glufosinate-ammonium events; (2) prohibition of the imposition of exclusivity on the sales channel; (3) transparency of commercial policies regarding sales channels; and (4) prohibition of tying sales and bundling.

26. Thus, the measures proposed in the merger control agreement (ACC) would solve competition concerns related to horizontal overlaps and vertical integrations derived from the transaction, allowing its approval.

3.1.2. Bayer and Monsanto – Case no. 08700.000270/2018-72

27. During the review of the merger Case no. 08700.001097/2017-49 in which Monsanto Company was acquired by Bayer Aktiengesellschaft, CADE became aware of the practices that could be later classified as antitrust violations.

28. For this reason, an administrative enquiry was launched. Three other complaints were received along the inquiry. The SG analysed ten allegedly anticompetitive practices

carried out by the defendants. Conclusions were that 3 of the practices induced the continuity of the analysis in the context of an administrative proceeding. They are:

- **Breeding Incentives** (incentives to the adoption of the Intacta technology (RR2 IPRO)): Incentives to holders to produce cultivars through the Intacta technology and license, preferably, these cultivars to the detriment of those produced through no technology or the Roundup Ready technology (RR), whose patent had expired;
- **Monsoy Multiplica Programme** (loyalty programme): Discount programme created by Monsoy, a Bayer/Monsanto Group company which operates in the seed market. The programme was aimed at soybean seeds multipliers. According to the complaints, there were non-linear discounts in the payment of royalties. It was an incentive to the acquisition of Monsoy seeds with the Intacta RR2 PRO technology whose ownership belongs to Bayer/Monsanto.
- **Mandatory acquisition of 15% minimal volume of Monsoy parental seed production fields**: In the licensing agreements there were provisions for the licensor to acquire, in the following harvest, the number of parental seeds correspondent to, at least, 15% of its production fields previously cultivated with Monsoy seeds.

29. During the evidentiary stage, the Department of Economic Studies of CADE (DEE), held an economic analysis of the practices investigated, as requested by the SG. The DEE carried out econometric studies that demonstrated how breeding incentives adopted by Bayer/Monsanto in the acquisition market can affect profits perspectives about cultivars with different technologies. This affects holders' decisions regarding technology choices for their cultivars. Specifically, the effects of such incentives in the number of cultivars with RR technology were tested via econometric models.

30. The analysis of the DEE demonstrated that the concession of breeding incentives resulted in the decrease of the number of cultivars developed through alternative technology (Roundup Ready). That is, results showed that the breeding incentives discouraged the holders to develop cultivars with other technologies, and contributed to lessen the availability of seeds with alternative technologies to Intacta in the Brazilian market. The administrative proceeding is still under the investigation of the SG.

4. Food retailers

31. CADE analysed 77 mergers in the food retail sector from 2010 to 2023. Between 2020 and 2021, there was an increase of 62% in proceedings regarding these mergers in the food retail market. The past three years (from 2021 to 2023) represent 58% of the 77 cases reviewed in 12 years. Furthermore, 74% of the proceedings were analysed through summary procedures.

32. Of all the mergers reviewed by CADE between 2011 and 2023, 47 regarded the supermarkets sector, that is, 61%, followed by the hypermarkets one, approximately 25%. Smaller segments, convenience stores, grocery stores, and warehouses amounted to circa 12% of the mergers in the past 12 years.

33. From 2011 to 2023, CADE investigated 53 cases regarding alleged anticompetitive practices in the food retail market. Among these, the three main investigated practices were: Unilateral conduct, representing 15% of the proceedings; abuse of dominant position, and discrimination of buyers or suppliers, representing 13% each. Only 6% of the proceedings were related to excessive price or price-fixing (cartels) allegations.

4.1. Atacadão S.A. (Carrefour) and Grupo BIG Brasil S.A – Case no. 08700.003654/2021-42

34. Atacadão S.A., which operates through the brand Atacadão, is a company of the Grupo Carrefour. It operates in the wholesale self-service segment in Brazil. Besides this affiliated company, Grupo Carrefour operates in delivery wholesalers, hypermarkets, supermarkets, and convenience stores. Grupo Carrefour has self-service retailers in all the 26 Brazilian states, and in the Federal District. The group also operates through shopping malls e-commerce, drugstore chains, and gas stations both near their self-service units and in some shops. Additionally, it is important to highlight the credit to consumer services offered by Grupo Carrefour via Banco CSF.

35. Grupo BIG was a Brazilian company which operated in the self-service retail, wholesale distribution, and fuel retail markets. In the self-service retail market it operated through buying clubs, atacarejos (large shops that sell wholesale and retail and have more checkouts than supermarkets), hypermarkets, and supermarkets. Moreover, the group offered e-commerce services, and soft discount shops.

36. The transaction regarded the full acquisition of Grupo BIG assets by Atacadão. The case was adjudicated by the Tribunal, and the approval was conditioned to the signing of a merger control agreement (ACC in its acronym in Portuguese)

37. The transaction did not result in vertical integrations and there were no claiming from third parties about any businesses affected by the transaction. Thus, the horizontal overlaps were the exclusive reason for the imposition of antitrust remedies.

38. During the analysis about a potential exercise of market power, the SG indicated that the transaction did not incur anticompetitive concerns in the wholesale distribution market focused on the food sector. The petitioners combined participation was insufficient in any geographic scenario, not surpassing 20% in any case. Also, there were several competitors in the market, including the ones pertaining to recognized Brazilian networks, and other important regional players which kept on exercising effective competitive pressure over Grupo Carrefour even after the clearance of the transaction. Nor competition concerns were observed relatively to the risk of abusive practices related to the exercise of the petitioners buying power.

39. Regarding the gas station market, there were no anticompetitive concerns either. The wholesale distribution and fuel retail markets' mergers could be approved under the provisions of CADE Resolution 02/2012, Article 8 (5), as summary procedure.

40. As for the analysis about a potential exercise of market power in the self-service retail sector, there was the need for a more in-depth examination to define the relevant market of 127 units acquired by Grupo Carrefour.

41. Observation of the remaining rivalry and the entries occurred in the respective markets eliminated competition concerns resulting from the horizontal overlaps among the petitioners in the self-service retail sector.

42. The relevant markets in question were not exempt of investigation to find the possibility of abuse of market power exerted by the petitioners. After the analysis of efficiencies that could compensate the negative effects of the transaction, the conclusion was that the lack of remaining competition pressure would reduce the incentives for petitioners to pass on the earned gains directly to consumers of relevant markets where the competition concerns were raised. The

gains referred to would have been transferred in a diffuse manner considering the approximately four hundred self-service retail units involved in the transaction.

43. Thus, to mitigate possible anticompetitive concerns regarding the self-service retail units, the Tribunal of CADE decided that the clearance of the transaction would be subject to the signing of a merger control agreement between the petitioners. The business combination between the Carrefour and BIG groups, involving supermarkets, hypermarkets, atacarejos, and buying clubs, had the potential to result in the exercise of market power in nine locations.

44. Therefore, CADE predicted the divestiture of self-service retail units held by BIG in nine Brazilian municipalities. The agreement also established companies commitments to some behavioural requirements. Carrefour and BIG groups committed to preserve the viability, attractiveness, and competitiveness of the divestiture until it was concluded. Thus, Carrefour committed to manage the assets of the divested business until the effective transference to the buyers.

45. Additionally, the companies could not attempt to acquire back the divested assets for a given period of time, whose deadline is confidential. They must notify any transactions involving supermarkets, hypermarkets, atacarejos, and buying clubs, even when these do not meet the merger notification requirements.

46. CADE has monitored whether the companies comply with the agreement. This is done along with the monitoring agents who can, at any time, request that the signatories (or the monitoring agents themselves) submit data needed to monitor the meeting of the obligations established in the ACC as long as it is in force.

5. Final considerations

47. The observation of CADE's performance aimed at the competition in the Brazilian food supply chain reveals the importance of the agency to ensure a competitive and fair environment in the sector. CADE has taken a crucial role for the competition defence in the Brazilian food market through its performance in fighting anticompetitive practices like abuse of dominant position and cartel formation.. The proactive approach aligned with the compliance of the antitrust regulations has contributed to ensure the competition and the healthy development in the sector.

48. The case studies analysed, like the merger between Bayer and Monsanto and the acquisition of Grupo BIG by Atacadão S.A, illustrate the complexity of the challenges CADE faces to assess and clear transactions that could possibly generate anticompetitive effects. The need to mitigate anticompetitive concerns, whether through structural or behavioural remedies, demonstrates CADE's commitment to ensure compliance with the competition environment, and protect consumers interests.

49. Hence, CADE's role in preserving competition in the Brazilian food supply chain highlights the relevance of an effective and attentive control of the market dynamics. CADE seeks to ensure that competition is preserved through highly discerning analysis of mergers and acquisitions, and by promoting innovation, economic development, and consumers welfare in the country's food supply chain.

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