

Unclassified

DAF/COMP/WD(2015)25

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

29-May-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT**

-- Note by Brazil --

**16-18 June 2015**

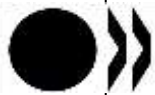
*This document reproduces a written contribution from Brazil submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm).*

**JT03377450**

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## BRAZIL

### 1. Competitive Neutrality in Brazilian competition legislation

1. The role of competition law is, among others, to ensure a level playing field in the market, which also means ensuring that there are no undue advantages when considering state-owned enterprises and private firms.

2. The need for equal applicability of antitrust rules to all economic agents, regardless of their nature, is explicitly set out in Article 31 of the Brazilian Competition Law n. 12.529/2011. This article, which was already present in the previous Competition Law, Law n. 8.884/1994, states that: “This Law is applicable to all persons, natural or legal, private or public, as well as to any associations of persons or entities, legally constituted or not, temporary or permanent, with or without legal personality, even if they exercise their activities under a legal monopoly”.<sup>1</sup> In other words, the Brazilian Competition Law provides that there shall be no differentiation between publicly and privately owned enterprises in the enforcement of antitrust rules.

3. There are also no immunities, exemptions or exceptions limiting the scope of CADE’s intervention as regards infringements to the Competition Law.

4. In Brazil, the Administrative Council for Economic Defense (CADE)’s sole and exclusive competence is the enforcement of antitrust rules. The issues of competitive neutrality which fall outside the scope of *ex post* antitrust enforcement will therefore not be discussed in this paper.

5. Firstly, this paper will set out the centrality of neutrality in the Brazilian competition law, followed by a historic contextualization of competitive neutrality in competition enforcement in Brazil, and, finally, CADE’s experience in enforcing competition rules with public enterprises.

### 2. Historical Context of Competitive Neutrality in Competition Enforcement in Brazil

6. Brazil saw a wave of privatizations during the 1990s, namely in infrastructure sectors. Sectors such as telecommunications, electricity and metallurgy underwent profound changes owing to their transfer to private parties. While this brought profound changes to the Brazilian economy, state-owned enterprises (SOEs) and semi-public corporations<sup>2</sup> still play an important role in the Brazilian economy today, though with a vastly different importance from the one occupied in previous decades.

7. This process of privatization was two-dimensional. On one hand, it reinforced the need for another form of economic supervision, which led to the creation of regulatory agencies. On the other hand, it put the importance to promote and defend competition on the public policy map,

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<sup>1</sup> Original in Portuguese: “Art. 31. Esta Lei aplica-se às pessoas físicas ou jurídicas de direito público ou privado, bem como a quaisquer associações de entidades ou pessoas, constituídas de fato ou de direito, ainda que temporariamente, com ou sem personalidade jurídica, mesmo que exerçam atividade sob regime de monopólio legal.”

<sup>2</sup> Semi-public corporations (or mixed-economy companies) are those composed of both public and private capital, but controlled by the State. Examples of Brazilian corporations that follow that model include Petrobras and Banco do Brasil.

strengthening the need for active enforcement, which led to the enactment of Law n. 8.884 in 1994, the previous Brazilian Competition Law.<sup>3</sup>

8. The former discourse on the building of national champions, present in the economic agenda of the 1970s and 1980s, was abandoned. What does exist are companies, with significant presence in the economy, mostly concentrated in strategic areas that usually count with some form of constitutional barrier to total privatization – the scholastic example is that of Petrobras. According to Article 177, I, of the Brazilian Federal Constitution, and to Law 9.478/1997, the Federation is the sole responsible for oil mining within national territory.

9. In order to better understand the change carried out by current legislation, it is necessary to briefly address the Brazilian context before 1994. At that time, Brazilian competition enforcement, though existent, was rather pro forma.

10. The establishment of some form of antitrust control took place in 1945. Decree 7.666/1945, sponsored by then Minister of Justice Agamenon Magalhães and approved by President Getúlio Vargas, was commonly referred to as the “Lei Malaia”. Lei Malaia aimed at protecting the country against acts contrary to national economic interests, and, in order to achieve that goal, it created the CADE (then called the Administrative *Commission* of Economic Defense, formally bound to the Executive, with powers to authorize or impede mergers and acquisitions). However, the legislation was much less concerned with neutrality, due to the historical moment Brazil was facing.<sup>4</sup> The Decree was enforced for less than a year, for in 1945 Vargas’s regime fell.

11. The Decree gave rise to powerful response in the economy, as anthropologist Darcy Ribeiro puts it: “Getúlio promulgated the Antitrust Law, provoking a strong reaction from international firms. Otávio Mangabeira went as far as asking for military intervention against its enforcement. (...) The Lei Malaia intended to reprehend conducts contrary to moral and economic order. Morality stirred no strong reactions, but economic regulation – inspired, in fact, in the American Sherman Act – resulted in revolt, mainly from foreign companies, that did not wish to find in Brazil the same kind of control they faced elsewhere.”

12. The Constitution of 1946, with its article 148 providing reprehension of the abuse of economic power, was followed by a 14-year long legislative debate, which culminated in Law 4.137/1962, re-establishing CADE (now as a Council, not a Commission). But Brazil entered into another dictatorship in 1964, and, despite the new Law, enforcement in the period was inexpressive. The controlled prices policy and the support of large national economic groups (the so-called national champions) by the government were incompatible with free competition. Moreover, CADE’s decisions faced constant judicial reexamination and were, more often than not, reversed by the courts.

13. It was only with democratization and the previous Competition Law, Law 8.884/94, that competition truly became part of the political agenda and concerns with neutrality were properly established. In spite of widespread privatization, important SOE and semi-public companies remain and the challenge, as regards competition enforcement in Brazil, is to ensure the equal and undifferentiated application of competition law to all economic agents in Brazil, regardless of their nature.

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<sup>3</sup> Legislation previous to Law 8884/94, namely Decree no. 7666/1945, was much less concerned with neutrality. Article 8 on that decree brought about the sectors of the economy that fell within the authorities’ jurisdiction, that is, it tacitly admitted some sectors were *not* subjected to the legal determinations.

<sup>4</sup> Article 8 on that decree brought about the sectors of the economy that fell within the authorities’ jurisdiction, that is, it tacitly admitted some sectors were *not* subjected to the legal determinations.

### 3. Competitive Neutrality and Competition Enforcement

14. As previously mentioned, then, the Brazilian Competition Law, Law n. 12.529/2011 does not differentiate between state and privately-owned enterprises. On the contrary, it is expressly foreseen in its Article 31.

15. In practice, when enforcing the competition law, CADE has been consistent with this when dealing with SOEs and semi-public companies. Two groups of cases can be mentioned as examples: those regarding the financial sector and those pertaining to the oil industry (more specifically, the ones involving Petrobras or one of its subsidiaries).

#### 3.1 Competitive Neutrality in the financial sector

16. For over a decade, there has been an intense debate between the Central Bank of Brazil<sup>5</sup> and CADE over competence to review mergers in the banking sector. The Central Bank of Brazil defends that it should have sole jurisdiction (including on competition matters) in the financial sector, for “prudential” reasons (namely, the security of the financial system)<sup>6</sup>. CADE, on the other hand, believes that, since the Brazilian competition law expressly reads that its provisions shall apply to all individuals, as well as public and private legal entities in all sectors, neither state-owned enterprises<sup>7</sup> nor companies from any sector of the economy are immune from its authority.

17. This position was reinforced by the 2010 OECD Brazilian peer review, which highlighted that the Brazilian competition law applies to all private and public entities economy-wide and, thus, to companies operating in regulated sectors, but that the only exception to this principle has arisen in the banking sector. The document also pointed out that there is a proposed legislation to be enacted that “would vest exclusive authority in the Central Bank to review mergers that involve a risk to the

<sup>5</sup> The Central Bank of Brazil (BCB) is an autonomous federal institution and part of the National Financial System (Law 4.595 of December 31, 1964).

<sup>6</sup> For more details about the history of this discussion: “In 2001, the Federal Attorney General’s Office issued a legal opinion concluding that the specificity of Brazil’s banking law took precedence over the more general language in the competition law, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes. (...) Nevertheless, in 2005 CADE and BACEN entered into a cooperation agreement providing for the exchange of information. The two collaborated on a set of merger guidelines for the banking sector, which were based on the SEAE/SDE merger guidelines. A bill resolving the jurisdictional dispute was sent to Congress in 2003, approved by the Senate in 2007 and now is pending before the House of Representatives.” (OECD, 2010: 69)

<sup>7</sup> The concept of state-owned and state-controlled enterprise (SOE) encompasses a broad range of entities united by the common feature of government control:

*“State-owned enterprises, also known as public enterprises, are as the name suggests entities controlled by the state rather than by private actors. There is no political agreement on how to define an SOE. The OECD does not offer such definition. The World Bank, however, uses the following definition: SOEs are “government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services”. At national level, there are a multitude of definitions of an SOE. Most of these definitions have been developed for administrative or national budget purposes or by state ownership agencies.<sup>2</sup> Even if there is no general agreement on what is an SOE, there is however some consensus on what are the key factors that distinguish SOEs from privately-owned firms:*

*SOEs generally face softer budget constraints than private enterprises because of (a) the possibility of infusions of government cash; and (b) cheaper financing due to perceived government guarantees;*

*SOEs are generally charged with the pursuit of a number of non-commercial objectives; and even where SOEs are not used by government to pursue public policy goals, they are shielded from the risk of takeovers and in practice will often be less commercially oriented than other companies because they are more easily captured by insider groups such as management or unionised staff.” (OECD, 2009: 27)*

overall stability of the financial system, while the two agencies would share jurisdiction in all other bank mergers”<sup>8</sup>.

18. This discussion highlights the importance of the application of principles of competitive neutrality by competition law, especially in the Brazilian financial sector where publicly controlled banks plays a special role, as it was the case after the 2008 financial crisis. The two following examples will show it.

19. In 2008, in the context of the economic crisis and following the enactment of Law n. 11.908/2009 which authorized Banco do Brasil and Caixa Econômica Federal, both publicly controlled banks, to acquire participation in other financial institutions, Banco do Brasil acquired approximately 72% of the share capital of Banco Nossa Caixa.

20. The operation was submitted by the parties to both CADE and Central Bank. CADE approved the operation under certain conditions that aimed at the reduction of switching costs for customers in the municipalities in which there was a high market concentration, in order to stimulate competition in the market.

21. In this sense, CADE’s decision, although not directly addressing the point, represents that there are no exemptions to antitrust review under Brazilian law, a position very much in line with other international positions<sup>9</sup>, including that of the OECD<sup>10</sup>, regarding competition in the financial sector, even in times of crisis.

22. More recently, still in the context of the financial crisis, CADE issued another important decision, once again involving Banco do Brasil<sup>11</sup>. In 2011, CADE launched an administrative proceeding<sup>12</sup> to investigate the contracts between Banco do Brasil and several public institutions. Those contracts established clauses that imposed exclusivity arrangements for the provision of payroll loans to civil servants. In other words, these clauses established territorial and negotiation exclusivity<sup>13</sup>.

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<sup>8</sup> OECD, 2010: 77.

<sup>9</sup> For example, Joaquin Almunia, in his speech “Competition among financial markets operators”, in October 17, 2013: “When it comes to competition control, financial markets are markets like any other. They will not receive special treatment from us, only special attention when financial stability is at stake.” Available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-834\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-834_en.htm).

<sup>10</sup> OECD (2009: 13): “While competitive neutrality is desirable in general, there are instances where its strict application may hamper the achievement of important societal goals, such as in crisis situations or when dealing with market failures. The recent bank bailouts are an example of state intervention in situations of crisis. Governments had to decide, often within days, which banks to rescue and which to allow to fail, in view of their resource limitations and keeping in mind various factors, such as the systemic importance of each bank to the financial system. Insisting on a strictly neutral approach under these circumstances may have prevented the government from responding effectively to the economic crisis. With respect to market failures, government intervention may be necessary to overcome the inefficiencies of entrenched oligopolistic markets. However, even in such a situation it is necessary to ensure that a government-backed enterprise does not displace competition from private actors.”

<sup>11</sup> It is not much to remember that Banco do Brasil is the largest Brazilian bank, controlled by the Brazilian government.

<sup>12</sup> CADE’s administrative proceeding 08700.003070/2010-14.

<sup>13</sup> The former Brazilian antitrust law (law n° 8.884/94) established: “*Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof: IV - to limit or restrain market access by new companies; V - to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service; X - to regulate markets of a certain*

23. Simultaneously, CADE issued an interim measure based on the concern that Banco do Brasil's conduct might cause irreparable damage before a final decision was rendered. The interim measure intended to promptly stop the signing of new contracts containing exclusivity clauses, as well as to suspend the effects of the clauses in any ongoing agreement.

24. Banco do Brasil claimed that (i) the practice did not have anticompetitive effects, as other banks also held contracts containing exclusivity clauses with public institutions, and that (ii) such contracts possessing exclusivity clauses represented less than 8% of the payroll loans market. But the main argument was based on CADE's lack of jurisdiction to analyze the case: Banco do Brasil claimed that the Central Bank of Brazil had full responsibility over bank matters, including on competition issues.

25. Despite this fact, in 2012 Banco do Brasil presented a settlement request to stop the investigation. CADE accepted the bank's proposal. The settlement established that all exclusivity arrangements for the provision of payroll loans to civil servants in Banco do Brasil's contracts (current and future ones) with public institutions had to be removed.

26. The importance of this case is twofold: first, it emphasizes once again the authority of the antitrust agency to control banks on competition grounds, and, second, it highlights CADE's commitment to the principles of competitive neutrality by imposing that the state commercial bank cease the conducts that have impact on competition through a settlement agreement.

27. It could be said that both of CADE's decisions were in line with the international efforts to increase competition in this sector, particularly relevant in light of the financial crisis of 2008 and the need to maintain the level playing field as one of the tools to path the way to economic recovery.

### **3.2 Competitive neutrality in the Fuel Sector**

28. As was the case with financial institutions, in the oil industry, state-owned enterprises also have a crucial role. The main actors in that sector are Petrobras and its subsidiaries, which are also part of other fuel industries.

29. CADE has analyzed several mergers which had Petrobras as one of the market players<sup>14</sup>, leading to approval decisions with restrictions. A notable case in that regard is that involving the company and Ipiranga S/A.<sup>15</sup>

30. Through the merger, which affected the oil distribution and resale business, Petrobras, Braskem S.A. and Ultrapar Participações S.A. intended to acquire Ipiranga. CADE authorized the operation, but imposed (i) geographic restrictions – namely to the markets of the Federal District and to the states of Mato Grosso and Mato Grosso do Sul and (ii) remedies, both structural and behavioural, which were negotiated via settlement.

## **4. Conclusions**

31. The Brazilian Competition Law clearly gives centrality to the concept of competitive neutrality, and has done so since the 1990s. Competitive neutrality is explicit in the Brazilian Competition Law as of 1994. Since then, CADE has maintained a consistent track record of competitive neutrality in its competition enforcement activities and will continue to do so.

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*product or service by way of agreements devised to limit or control technological research and development, the production of products or services, or to dampen investments for the production of products and services or distribution thereof.”*

<sup>14</sup> There are over seventy available for consultation on CADE's website, [www.cade.gov.br](http://www.cade.gov.br).

<sup>15</sup> AC 08012.002820/2007-93.

**REFERENCES**

OECD. State-Owned Enterprises and The Principle Of Competitive Neutrality. Paris, 2009, available at: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/46734249.pdf>.

\_\_\_\_\_. Competition and Financial Markets, Volume 2. Paris, 2009, available at: <http://www.oecd.org/regreform/sectors/43046091.pdf>.

\_\_\_\_\_. Brazilian Peer Review: 69, Paris, 2010, available at <http://www.cade.gov.br/upload/Peer%20Review%20OECD,%20Brazil%202010.pdf> PEER.

\_\_\_\_\_. Policy Framework for Effective and Efficient Financial Regulation - General Guidance and High-Level Checklist. Paris, 2010, available at: <http://www.oecd.org/finance/financial-markets/44362818.pdf>.

\_\_\_\_\_. “A compendium of OECD recommendations, guidance and best practices bearing on competitive neutrality,” working document. Paris, 2012, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CA/SOPP\(2011\)10/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CA/SOPP(2011)10/FINAL&docLanguage=En).