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Environmental Considerations in Competition Enforcement – Note by Brazil

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>.

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1. Introduction

1. Climate change, the environmental impact of human activities, and the consequent ESG culture spreading across the public and private sectors have introduced new aspects into the dynamics of economies and economic decisions that now influence nations' choices. The recent generalised COVID-19 crisis made sustainability and its interface with economic development an urgent topic. Naturally, all these factors affect competition enforcement, a relevant part of the institutional framework related to economic development. Today, jurisdictions throughout the world have deepened the debate over the interaction between sustainability and the role of antitrust authorities.

2. In light of this, antitrust authorities, governments, and academics alike have discussed relaxing competition legislation or granting exemptions from competition law to satisfy a demand for sustainability and to incorporate exogenous factors into antitrust analysis, such as the environment, diversity, and labour relations. The debate unfolds into questions about the role of antitrust authorities and the risks incurred in diverting from their original functions and technical analyses.

3. This paper examines and explores the role of enforcement concerning the environmental aspect, that is, whether antitrust rulings and the decision-making process should consider these issues in merger review and antitrust proceedings. Against this backdrop, although the debate is refreshed and all the more urgent with the climate and COVID-19 crises, the interaction between environmental concerns and antitrust law is not exactly new to antitrust authorities at large – including to CADE. It could not be any different, since environmental protection is sided by free competition as an economic principle established in the Brazilian Constitution (Article 170 of the Federal Constitution of 1988).

4. Moreover, environmental issues are an integral part of economic activities and decisions, and directly affect costs, prices, and quality, in addition to common topics in antitrust analyses, such as rivalry, market entry, and efficiencies. In this context, the next section presents several instances of environmental concerns that emerged in CADE's probes over time and the role they played in each case's decision-making process.

2. Review of cases adjudicated by CADE that included environmental considerations

5. Environmental issues have been part of antitrust discussions for a long time. These matters are actually part of daily life in several industries and influence market decisions and enterprises' economic activities. For instance, these factors can be the very reason for companies to merge. New regulatory requirements, methods to enable more sustainable operations, and products focused on environmental protection are a few examples of what

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can generate, on the demand and supply sides, the necessity to adapt, develop, and create new products, services, and ways of operating.

6. Naturally, these dynamics can affect competition, creating competitive advantages and business opportunities, but also risks, such as competitors' "need" to share information or to align with each other towards meeting environmental regulations, for instance. Hence, in researching CADE's precedents to exhaust all the instances in which the authority showed concern with the environment, we found disparate situations. To better present this information, we chose to categorise them into three groups.

7. First, the indifferent cases, in which parties or the authority mentioned environmental factors (in an argument, a reasoning, or a clarification) that played a neutral role in the decision-making, i.e. were superfluous for the decision. Second, the soft cases, in which these factors directly influenced the decision, whether as part of the traditional elements of antitrust analyses (such as entry barriers) or as aspects reinforced in making a stronger case (such as efficiencies). Third, the hard cases, in which environmental and antitrust matters closely interacted, and the decision or the decision-making process was strongly influenced by this interaction. We will elaborate on each of these categories:

2.1. Indifferent cases:

Case No. 08700.003713/2015-34. Factory sale. Suzano Papel e Celulose S.A and Ibema Participações S.A.

8. The parties stated green polyethylene, used to produce plastic used in packages, is a renewable input and meets "sustainable requirements". Moreover, they argued that choosing a product's package depends not only on costs but on environmental or sustainable matters.

Case No. 08700.002165/2017-97. Acquisition. Votorantim S.A; Votorantim Siderúrgica S.A; and ArcelorMittal Brasil S.A et al.

9. The parties stated that to operate in the ironworks industry, the law requires they have environmental permits; however, they did not believe these constitute barriers to entry, as the requirement is common to all sectors of the economy and is a standard rule for every company to operate in the market. An interested third party raised questions about the lower environmental impact of scrap-recycling plants, pointing to the "strong ecological appeal" involved in cutting power consumption and carbon emissions in the reduction stage. Moreover, the party was in favour of the extensive use of recycling and residues in the ironworks industry, mentioning the ecological benefits of scraps for the steel production chain.

Case No. 08700.002997/2017-11. Acquisition of a controlling interest. Ternium S.A and CSA Siderúrgica do Atlântico Ltda.

10. The parties stated carbon steel "can be recovered at the end of its life and recycled without losing its intrinsic properties, being both environmental friendly and competitive".

Case No. 08700.001097/2017-49. Full acquisition. Monsanto Company and Bayer AG.

11. The parties affirmed the transaction "would enable bringing together the companies' scientific research and solutions to increase productivity in a sustainable way and to provide farmers with advice", increasing competitiveness and sustainability and reducing environmental impact. The proceeding mention "fine tuning to enhance

agronomic, environmental, and economic factors"; that "acting in a sustainable manner includes making progress in new areas in a restrained way, since environmental impact should be heeded"; and that it serves as an "incentive for the entire network to act in an ecologically responsible way".

Case No. 08012.003711/2000-17. Commercial agreement. Monsanto Do Brasil Ltda and Cooperativa Central Agropecuária De Desenvolvimento Tecnológico e Econômico Ltda.

12. The parties argued their technical cooperation would allow for technological development and lead to a greater diversity in soy bean cultivars through genetic modification. Consequently, this would reduce the use of fertilisers and pesticides, result in higher yields, reduce the need for farming fields and for expanding the agricultural frontier and, finally, have less impact on the environment, thus creating positive externalities and environmental benefits.

Case No. 08700.002975/2014-09. Memorandum of Understanding. TIM Celular S.A and OI Móvel S.A.

13. The parties claimed the transaction would bring positive effects to users and society by weakening the environmental impact of installing telecommunications equipment separately, reducing the areas used for this activity, raising awareness on the use of electricity, and improving sustainability standards.

Case No. 08700.009764/2015-70. Creation of association. Alumbra Produtos Elétricos e Eletrônicos Ltda and LPS Distribuidora De Materiais Elétricos Ltda et al.

14. CADE analysed an association formed by the two companies to manage reverse logistics activities for the environmental-friendly disposal of companies' final residues and, hence, fulfil the requirements of the Brazilian policy for solid residues. The parties contended the transaction would help their adherence to the policy with maximum efficiency and speed, producing environmental advantages through diminished environmental impact and integrated residue management.

Case No. 08012.004808/2000-01. Commercial agreement. Monsanto Do Brasil Ltda and Embrapa.

15. With regard to the deal's efficiencies, the parties claimed the agreement would disseminate technology that, when applied, would reduce the use of herbicides and bring about environmental benefits as a result.

Case No. 08700.010965/2015-10. Acquisition of a controlling interest. Solvay S.A and Cytec Industries INC.

16. The Office of the Superintendent General incorporated into Technical Opinion No. 43/2015/CGAA3/SGA1/SG/CADE an extract of a form that addressed the topic of sustainability. However, the case's ruling did not include anything on this matter.

Case No. 08700.004230/2012-12. JBS's purchase of the SSB Group's unit for industrial refrigeration and other covenants.

17. The parties undertook to have business relations only with players that observe environmental regulations and adopt sustainability standards – or at least to give these players preference. They have a history of discriminating based on environmental issues.

Case No. 08700.010123/2013-04. Acquisition of minority voting stock. Extrafruti S/A Comércio de Hortifrutigranjeiros and Hortigil Hortifruti S/A.

18. Medium to large supermarkets have a tendency to demand environmental respect from producers, a trend that already exists abroad, as in the Fair Trade initiative, for instance.

Case No. 08700.004226/2012-46. Purchase of facilities. JBS S.A.; Tiroleza Alimentos Ltda.; and Rodo GS Transportes e Logística Ltda.

19. JBS purchased two distribution centres and a refrigeration unit from Tiroleza and Rodo GS, which included the real properties, assets, and equipment. One of the companies have alleged environmental legislation, amongst other factors, is crucial for its productive capacity.

Case No. 08700.001145/2017-07. The Mosaic Company's acquisition of VALE Group's entire direct and indirect stake in VALE Fertilizantes S.A.

20. CADE received a notification from the municipality of Patrocínio, state of Minas Gerais, informing about a breach in a merging party's environmental permit. Fearing for environmental harm, Patrocínio's Attorney General requested CADE suspended its merger clearance procedure until the town's administrative bodies reached a final decision on a proceeding against that party. In its response, the Acting Superintendent General mentioned the law did not provide for the possibility of suspending or postponing that time limit, and that the "authority's decision is circumscribed by competition policy and does not clear or block transactions on account of tax, labour, or environmental issues, for example. Thus, environmental permits are only examined from the perspective of competition law and their effects on end consumers."

21. This last decision establishes two intriguing points about how CADE regards the interaction between environmental and antitrust concerns, which have been guiding the authority's operations. The first one is that a company's non-compliance with rules, regulations, and environmental requirements does not represent an antitrust violation by itself, nor does it preclude merger clearance. This does not mean competent authorities should not probe these actions or that the parties should not meet these obligations for clearance purposes where necessary. It just means that CADE does not consider them decisive factors. The second point is that, when requirements, rules, and regulations are part of an antitrust review, as in determining the relevant market or entry barriers, we regard their competitive components, and not their original legal nature.

2.2. Soft cases:

Case No. 08012.007378/2011-78. Acquisition of controlling interest. Companhia Metalúrgica Prada; Taquiri Participações; and Elizabeth S.A Indústria Têxtil.

22. CADE requested information from a third party company about product substitution of bottles made from different types of materials. The company answered that the criteria for substitution involved, amongst other factors, pleasing customers and protecting the environment, and that PET bottles were the "environment's greatest enemy". The stamping trade association of the state of São Paulo (Siemesp) has filed a request within the scope of the proceeding attaching a copy of an opinion by CADE's Office of the Attorney General issued in a different case. The opinion mentioned steel cans have reached their maturity stage and are only in the market for their environmental advantages. It also stated that in Europe metal sheets used for metal packaging tend to stay longer in the market, as they are highly recyclable and more environmentally correct than other packaging materials, such as plastic. The appellate decision pointed out metal packages are losing market to substitutes, possibly due to consumer choice, alleging consumers value a package's characteristics over the material used to make it, using Abeço's data to found this position. Abeço (a trade association for steel package producers), produced a table presenting worldwide packaging data, which shows packaging trends are driven by the choices of consumers, who place more value on characteristics such as package transparency and weight. The table split consumers' most valued features into three great sets; one of them being environmental aspects, and within this category, 100% recyclability was the number one. In sum, the appellate decision was not founded on Abeço's data, but we can say from the decision that CADE had the initiative to investigate whether consumers were concerned with the environmental characteristic of products.

Case No. 08012.007776/2008-99. Acquisition of Hybro Broiler Breeder operations. Hendrix Genetics B.V. and Cobb-Vantress, Inc.

23. As demonstrated by the rapporteur's opinion, the environmental concern (under the name "biodiversity"), was regarded in the decision-making process. The transaction involved the relevant market of bird genetics, at the international level, and of DNA replication, at the national level. The rapporteur of the case clarified in his opinion that, although there were efficiencies in terms of costs and rivalry, the antitrust authority may look into product variety and "can also analyse the impact of other issues of national interest". Moreover, the rapporteur questioned, "If a transaction lessens production costs considerably whilst puts biodiversity in jeopardy, should competition law be indifferent to it?"²

² "On this regard, I consider Biodiversity a right of the third generation, which is even above short-term market interests, measured by the present generation's merely static analysis and the dynamics of supply and demand curves. Therefore, we should protect the right of future generations to see the genetic inheritance of human beings preserved. According to the principles that base the Brazilian economic regime, the principle of Free Competition (set forth in Item 4 of Article 170 of the Brazilian Constitution) is sided by the principle of Environment Protection (set forth in Item 6 of the same article). The environment is, moreover, deemed across the globe as a Human Right, and Sustainable Consumption is expressly recognised as an International Principle. Thus, it is not necessary to quantify efficiencies with precision to find out the companies cannot and should not forgo the purchased germelines in the short term, even if the decision is the most "efficient" from the perspective of cost. [...] According to articles 16 to 19 of the Convention on Biological Diversity, the international community recognised the importance of access and transfer of "technologies that

Case No. 08012.000640/2000-09. Stock purchase agreement and investment agreement. Companhia VALE do Rio Doce S/A and Mineração Socoimex S/A.

24. In their votes, the commissioners considered the licences, permits, and authorisations environmental bodies requested from the applicants were barriers to entry – a matter also mentioned in the opinions issued by the Secretariat of Competition Advocacy and Competitiveness (SEAE) and the Secretariat of Economic Law (SDE). Theoretically, however, the environmental aspects of these licences, permits, and authorisations are irrelevant to antitrust analysis; in fact, CADE did not even mention them in its decision. The fact those concerns are deemed as barriers to entry bears antitrust relevance when a player violates the applicable regulations and gains undue competitive advantage. SDE Opinion No. 450, of 13 January 2005, indicated the environmental costs of the transaction should be deducted from the profit accrued from the transaction. The rapporteur of the case mentioned in his report a study carried out by a consulting firm suggesting reduced pollution as one of the transactions' efficiencies, but also that such efficiency was not quantified, and that the SEAE did not consider it because the same benefit could be achieved without the transaction. Additionally, the vote of Commissioner Roberto Augusto Castellanos Pfeiffer also alluded to the environmental impact of the accumulated waste.

Case No. 08700.005937/2016-61. Merger. The Dow Chemical Company and E.I. Dupont De Nemours and Company.

25. In part of his vote, the rapporteur of the case mentioned the effects of the transaction on aspects other than price that incorporate consumer welfare, such as innovation. The rapporteur referenced part of a speech of the European Commissioner for Competition that contends innovation is "particularly important in the agrochemical sector", and that "less-toxic and more-efficient products should be created and developed. [...]". The agrochemical industry has a role vis-a-vis consumers, farmers, and the environment." According to the rapporteur of the case, the Merger Control Agreement (ACC) signed in the scope of the proceeding would preserve consumer welfare, including innovation, and incorporate commitments related to research and development (R&D) in the affected markets. The decision, however, did not expressly mention the environmental issue.

Case no. 08700.010688/2013-83. Lease of deboning units. JBS S.A.; Rodopa Indústria e Comércio de Alimentos LTDA; and Forte Empreendimentos e Participações Ltda.

26. The transaction was cleared subject to a Merger Control Agreement, which, amongst other commitments, imposed companies the obligation to keep a minimum level of production in their cold stores. The companies did not comply with the agreement and, as a result, CADE revised the established commitments and fined companies for providing misleading information during merger review. The authority did not elaborate on the environmental aspect brought by the parties, which made adherence to the agreement impractical and would allow for sanctions. Despite not delving into the environmental issue, CADE agreed to have its role in the case restricted, at the request of environmental bodies. Additionally, in view of these bodies' environmental requirements, the authority

are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment" [...] CADE was asked about how to resolve the contradiction between a possible loss in biodiversity, reducing the information and the variety of products available vis-a-vis the transaction's efficiencies [...] To preserve biodiversity and prevent excessive concentration of economic power is in the common interest of all countries [...]"

decided to establish new obligations to the parties rather than to enforce the original agreement.

2.3. Hard cases:

The VALE-Ferrous case

27. Although this merger case underwent our in-depth review due to a horizontal overlap in the market of iron ore pelletising and vertical integration in this market, the transaction did not raise other competition concerns, suggesting it would end up being unconditionally cleared within the 30-day average time frame of fast-track cases.

28. Nonetheless, during the review, a dam owned by VALE used in its mining activities burst in the city of Brumadinho. Coincidentally, the assets of the company Ferrous, acquired by VALE, were located in the same region where the environmental disaster took place. Despite that, the environmental issue and the merger had no connection; however, given the direct involvement of one of the applicants (VALE) and the size of the disaster, which was likely to have economic consequences to VALE, the merger review was delayed a few days until proved there was no relation between the events.

29. Nonetheless, given public knowledge of the transaction and the tragedy's public clamour, considering it was VALE's second dam burst in less than five years, two class action suits were filed with the judiciary and interfered directly with the course of proceedings at CADE. The first interference regarded a preliminary injunction issued in the scope of the first class action suit, requiring CADE to expedite its merger review.

30. As the merger review was almost complete at the time of the disaster, CADE's Office of the Superintendent General unconditionally cleared the transaction, meeting the time limits for review and for announcing a decision. A third party to the case, however, lodged an administrative appeal before the Tribunal of CADE, challenging not the merger review but the fact CADE did not tackle the environmental concerns brought by the class action suit.

31. The Tribunal found for the defendant, as the rapporteur of the case, Commissioner Maurício Bandeira Maia, dismissed the environmental claims. The rapporteur contended that observing antitrust regulations does not exempt merger applicants from other legal obligations; nevertheless, from an antitrust perspective, the transaction could be consummated. In his words, *"By restricting itself to market competition, without addressing matters that regard other government regulators, CADE is also fulfilling its duties. The authority has no expertise on these topics nor power over them; taking them into account would only weaken decisions that address these concerns. Hence, CADE's analysis is limited to its jurisdiction, that is, the competition aspects of the transaction. It does NOT exempt applicants from fulfilling possible obligations related to the environment, taxes, or others, which should be imposed, monitored, and enforced by the competent authorities"*.³

32. As far as the second class action suit is concerned, it claimed CADE had carried out a faulty review, as environmental considerations were not taken into account. In the end, although critical of CADE's review, the judiciary found the consummation of the deal depended on VALE's environmental compliance.

33. This case shows the link between environmental aspects and antitrust enforcement can be hard to handle and result in conflicting decisions or undesired external effects on the antitrust decision-making process. The tragedy and its economic impacts surpass the

³ Vote in Case no. 08700.007101/2018-63.

environmental aspect, directly influencing the economy, employment, and supply in the affected municipalities. However, as the disaster had no causal link with the transaction, we could even consider that the deal's prompt clearance and consummation would be more important than blocking it, as one of the applicant (VALE) was involved in the environmental tragedy. Furthermore, although CADE avoided expanding its antitrust analysis beyond its jurisdiction, any antitrust decision was likely to have little to no capacity to mitigate the environmental disaster or prevent new ones.

Sand mining cartel case in the State of Paraná⁴

34. Due to the need for environmental protection, the parties to this case executed a consent decree with the Prosecution Services of the State of Paraná, committing to comply with the environmental requirements. To this end, and to reduce environmental costs, the parties associated with one another and adopted joint measures.

35. However, the joint coordination required to mitigate the environmental issues led them to exchange competitively sensitive information and standardise commercial strategies. This made the Office of the Superintendent General of CADE recommend the CADE Tribunal held the parties guilty of cartel conduct. At the Tribunal, the rapporteur of the case suggested Cease and Desist Agreements (TCC) were signed, taking into consideration the practice was "instigated" by a governmental body.

36. In its analysis, the Tribunal of CADE took account of the environmental issue, as the signatories had executed a consent decree with the Prosecution Services of the State of Paraná that established environmental obligations that connected to the illegal conduct investigated by the antitrust authority. The competitors shared competitively sensitive information, and the association lessened competition. As mentioned in a release at the CADE website, "the analysis of the case considered [...] the consent decree signed between the Prosecution Services of the State of Paraná and some of the investigated companies. The agreement aimed at environmental protection and the recovery of areas along the Paraná River bank."

37. For the TCC and the consent decree to be valid simultaneously, and the environmental and antitrust objectives attainable, CADE made practical adjustments to the practices and procedures it imposed on the companies and their association. In his vote, the rapporteur stressed the TCC included commitments related to the environmental concerns pointed out by the Prosecution Services of the State of Paraná and the competition concerns observed by CADE. In this regard, the authority had the "invaluable collaboration of the representative of the Federal Prosecution Services at CADE". Furthermore, the rapporteur said that, for these reasons, the agreements were deemed timely and suitable.

38. The TCC had a caveat about the possible expansion of a terminal mentioned in its text, stating the terminal was only requirable if there were no environmental reservations about the project. Therefore, CADE had to address the environmental concerns to issue a decision on the case, adopting measures that concurred with the environmental measures established by the Prosecution Services.

39. It should be noted the environmental issue directly affected not only CADE's decision-making and ruling but also the parties' anticompetitive behaviour itself. It was due to it that competing market players came together and ended up violating antitrust law. The

⁴ Case no. 08012.004430/2002-43, regarding firms Porto de Areia Cristo Rei Ltda; Porto de Areia São José; Porto de Areia Pioneiro; Porto de Areia Dom Camilo; Mineração Porto Rico - JM LADA e CIA Ltda; Mineração Nova Londrina Ltda; Porto de Areia Pontal; Mineração Unidos Ltda; and Porto Paraná.

fact that CADE found the Prosecution Services "instigated" coordination was deemed a mitigating factor that led the authority to consider it was timely and suitable to negotiate a TCC. Finally, as antitrust compliance had to concur with the environmental requirements in place, the authority considered environmental issues in its TCC.

40. This is a clear example of how a more effective competition advocacy could prevent companies and associations' initiatives aiming to provide sustainable and environmental improvements from violating antitrust law.

3. Conclusion

41. Although there is no consent about the risks and benefits of incorporating sustainable matters into antitrust review, we can no longer conceive an economy isolated from considerations on sustainability. As for the environment, it has a direct economic impact on climate and sanitary issues, and even on human survival. Therefore, sustainability is essential to the economic development and, consequently, to different economic policies.

42. Nonetheless, approaching such discussions within antitrust law is more complex and conflicting. Despite the undeniable need to connect competition and environmental issues to the economic policy, it is not that easy to unite these topics with antitrust enforcement. Against this backdrop, although CADE references environmental concerns in adjudicating some cases, those are not taken as relevant in the Brazilian antitrust authority's decision-making.

43. As provided in the Constitution of Brazil, both free competition and environmental protection are principles of the economic regime and, hence, must be enforced and secured by the government, which does so through several bodies, laws, and regulations. Thus, even though it is clear that the government must harmonise these principles, it harmonises them through the same policy.

44. Notwithstanding, in analysing mergers and exercise of economic power (abusive or not), it seems clear to us that CADE cannot and should not shut its eyes to the self-evident economic consequences of environmental issues. In certain cases, these issues may directly affect elements of antitrust reviews (for instance relevant market, barriers to entry, and rivalry). However, this does not mean we should use environmental issues as evidence of anticompetitive conduct, nor that we should grant antitrust exemption in face of situations that demand that competitors coordinate or generate environmental efficiencies. Similarly, it does not mean that deeming a practice anticompetitive is sufficient to preclude an economic activity that promotes sustainability from happening. Nonetheless, governments have other mechanisms to integrate both values in the enforcement of their public policies – mechanisms much more suitable than antitrust enforcement.

45. Regarding the role of antitrust authorities, the following ways of operating seem to be more suitable and to provide better outcomes, including as to sustainability. Firstly, ensuring competition in the markets according to the authorities' traditional duties and analyses, which encourages the development of free enterprise, innovation, and the compliance required for sustainable development. In this sense, environmental aspects will always be analysed, provided they are part of the elements economically relevant to antitrust review (i.e. efficiencies, rivalry, entry barriers, etc.) and are in the scope of antitrust law (and not environmental law). The second way of operating is through advocacy, through which antitrust authorities can disseminate values and a culture of competition in the formulation of public policies for sustainability and can instruct private players to consider competition in joint or individual environmental initiatives. Otherwise,

as evidenced by the examples above, environmental concerns are likely to be regarded as an obstruction, as something irrelevant, or worse – if antitrust analyses are no longer technical and are completely subject to external decisions, resulting in legal uncertainty and unpredictable decisions.