

Unclassified

English - Or. English

20 May 2022

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

Integrating Consumer Behaviour Insights in Competition Enforcement – Note by Brazil

24 June 2022

This document reproduces a written contribution from Brazil submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm>

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03495758

*Brazil*¹

1. Introduction

1. In spite of what classic economic literature says, economic agents (including consumers) do not necessarily act rationally and in their best interest. That is, they do not always choose the product or service that better meets their necessities in terms of price, quality, applications, and usefulness; in fact, based on cognitive biases², they sometimes take decisions against their true preferences, as explains Kahnemann (2011)³.

2. Against this backdrop, as the OECD mentioned in its call for contributions, in recent years, the international antitrust community has increasingly discussed the need for better understanding consumer behaviour and its effects on free competition, leading antitrust authorities to ponder on how, when, and where they should intervene.⁴ For example, the Stigler Center Report notes consumer behaviour can affect variables important for the competitive dynamics of a market – and, especially, digital markets, which are characterised by dynamism, network effects, and possible lock-ins.⁵

3. Hence, as detailed below, CADE heeds this behaviour in the analysis of mergers and anticompetitive conduct, especially in defining the affected relevant markets, examining entry barriers, and assessing rivalry.

2. Defining the relevant market

4. According to CADE's Guide for Horizontal Merger Review⁶, "defining the relevant market involves identifying the set of economic agents (consumers and producers) that actually respond to and limit decisions of the merged firm regarding strategies such as price, quality and quantity, amongst others".

¹ This document has been prepared by Luiz Augusto Azevedo de Almeida Hoffmann, Commissioner of the Tribunal of CADE; Rafael Rossini Parisi, Commissioner Hoffmann's Chief of Staff; and Ingrid Cristina Soares Silva and Júlia Yanis Fidanza Araujo, trainees of the referred Commissioner's Office.

² The term, coined by Amos Tversky and Daniel Kahnemann in the 1970s, regards a systematic behaviour pattern an individual adopts that deviates from what is deemed rational. In his work, Kahnemann (2011) mentions several types of cognitive biases, such as: confirmation bias, conjunction fallacy, endowment effect, fundamental attribution error, gambler's fallacy, halo effect, hindsight bias, hot-hand fallacy, illusory correlation, in-group bias, and mere exposure effect.

³ KAHNEMANN, Daniel. *Thinking, Fast and Slow*, 2011, Farrar, Straus and Giroux.

⁴ See FLETCHER, Amelia. *The EU Google Decisions: Extreme Enforcement or the Tip of the Behavioral Iceberg?* Available at: <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Fletcher.pdf>.

⁵ Available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/policy-brief--digital-platforms---stigler-center.pdf?la=en&hash=AC961B3E1410CF08F90E904616ACF3A3398603BF>.

⁶ English version available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf>.

5. As to the investigation of antitrust practices, CADE has already expressed that "the analysis of relevant market in its fight against anticompetitive conduct only works as a mechanism to assess if it is suitable, practical, and reasonable to detach or split the area of economic activity where law will be enforced"⁷, considering "sometimes the relevant market definition itself is ignored in light of a business behaviour that clearly restrains free competition and free enterprise"⁸.

6. In this regard, the goal of defining the relevant market is essentially to identify the products and geographical area affected by the transaction or practice. By setting the boundaries of competition between companies and employing the hypothetical monopolist test, the antitrust authority can determine whether the exercise of market power and negative effects on competition are likely to exist in a market.

7. CADE's Guide also explains that the methodology to define the relevant market considers how substitutable a product is from the perspective of supply and demand. Supply substitutability is the probability of other companies starting to supply a given product and/or service in one same region within a short time frame if there is a "small but significant and non-transitory increase in price" (SSNIP). Demand substitutability means the relevant market should include the products and/or services consumers consider substitutable because of their applications, prices, etc. Therefore, in case a company is able to impose a SSNIP, consumers can divert the demand by choosing substitute products.

8. Analysing consumer behaviour is paramount to identify which products and geographic regions compete between themselves and which alternative products are available for consumers. This allows gauging the competitive pressure faced by merging parties or by companies investigated for anticompetitive conduct.

9. Against this backdrop, CADE tries to examine consumer behaviour empirically, looking into how consumers choose products in a market, which product features they most desire, amongst other relevant aspects to understand the competitive dynamics of a market, as the following precedents show.

2.1. Atacadão/Grupo BIG (Merger Case no. 08700.003654/2021-42, pending before the Tribunal of CADE)

10. A recent instance is Grupo Carrefour's attempt to purchase hundreds of shops of Grupo BIG through its subsidiary Atacadão – a case that involves the self-service retail industry. CADE's Office of the Superintendent General (SG) has started the investigation and issued its decision, and CADE's Tribunal is now probing the case and will issue CADE's final decision afterwards.

11. In defining the relevant product market, SG concluded it could not simultaneously include supermarkets (small-size shops with fewer checkouts), hypermarkets (large shops with more checkouts than supermarkets), and *atacarejos* (large shops that sell wholesale

⁷ See CADE's Office of the Superintendent General Opinion no. 241/2014, concerning Administrative Proceeding no. 08012.011508/2007-91 (Claimant: Associação Brasileira das Indústrias de Medicamentos Genéricos – Pró Genéricos; Defendants: Eli Lilly do Brasil Ltda. and Eli Lilly and Company).

⁸ See Commissioner Roberto Augusto Castellanos Pfeiffer vote on the Administrative Proceeding no. 08012.008024/1998-49 (Claimant: Secretaria de Direito Econômico (SDE); Defendants: Microsoft Informática Ltda. and TBA Informática Ltda.).

and retail and have more checkouts than supermarkets). Note that the number of checkouts⁹ is the parameter that differentiates these shops.

12. As consumer behaviour interfered in the dynamics of competition, the SG adopted an analytical stance, noting every type of shop exerts competitive pressure differently: hypermarkets and *atacarejos* always put competitive pressure on supermarkets, but the opposite is only true for supermarkets with a similar capacity. From a consumer point of view, these different kinds of shop are not interchangeable, meaning consumers use them for distinct purposes (e.g. buying in small or large quantities, buying repeatedly or occasionally). Along these same lines, all a consumer finds in a small-size shop can be found in larger shops; however, not everything to be found in a larger shop is found in a smaller shop.

13. For this reason, based on consumer behaviour in the self-service retail market, the SG decided supermarkets of "similar capacity" are those that either have the same number of checkouts, have the same revenue of the shop that is being acquired or that has a higher number of check-out than the average of the shops of the merging parties in that specific relevant geographic market.

14. As for the relevant geographic market, the SG once again took into account consumer behavioural patterns to delimit competition between products or services supplied in distinct places, seeking to understand how far consumers are willing to move to have a product or service.

15. By analysing the size of towns, the SG concluded those under 200,000 inhabitants should be considered as a relevant market, since consumers often move across the whole city in order to shop. On the other hand, for the cities with over 200,000 inhabitants, each targeted shop had a different area of influence as consumers hardly move far away to shop.

16. Founded on CADE's case law, the SG adopted a methodology developed by Juracy Parente and Heitor Takashi Kato¹⁰ (2001), which uses a town's population density and a shop's number of checkouts to delimit the areas where supermarkets, hypermarkets, and *atacarejos* competed, from a consumer point of view. Based on these empirical criteria, the SG arrived at an "influence curve" with some predetermined radiuses given by the intersection between population density and the gap between checkouts.

17. However, the merging parties alleged the methodology for estimating the area of influence was highly restrictive, not truly representing the market dynamics. This is because the parties considered many of the analysed shops were located in busy areas or important highways, and hence were regularly frequented by consumers who did not live nearby. The parties argued this consumer behaviour extends the influence area of a shop and consequently widens the relevant geographic market.

18. Thus, they collected consumer data, such as information their establishments had on customers about their postal codes, in addition to credit card data from customers that shopped at least once in the last 15 months and had cards issued by Carrefour or Grupo BIG. Based on this information, the parties proposed expanding the area of influence to

⁹ According to data from ABRAS, the Brazilian association of supermarkets, and CADE's case law, Brazilian supermarkets have an average of 3 checkouts, whilst hypermarkets have an average of 23 checkouts, and *atacarejos* 12 checkouts.

¹⁰ PARENTE, Juracy; KATO, Heitor Takashi. Área de influência: um estudo no varejo de supermercados. Revista de Administração de Empresas, v. 41, n. 2, pp. 46-53, São Paulo, Apr.-Jun. 2001.

cover the place of residence encompassing 75% of the customers who lived closest to the analysed shop.

19. Recognising the limitations of its methodology, the SG decided to adopt both methodologies: the Parente-Kato and the one proposed by the parties.

20. Thus, to define the relevant market, the SG studied the behaviour of consumers for both the product dimension (e.g. consumer perception about the substitutability of different types of shops) and the geographic dimension (e.g. the distance consumers cover to shop). As of now, the case is still under analysis, pending before the authority's Tribunal.

2.2. Athena/SBS (Merger Case no. 08700.002346/2019-85; Rapporteur Luiz Augusto Azevedo de Almeida Hoffmann)

21. A merger review of the healthcare sector in the Brazilian state of Espírito Santo also detailed consumers' perception of product substitutability. The case concerned the acquisition by Athena Saúde Espírito Santo S.A. (owner of private health insurance company SAMP) of seven companies that corresponded to the Grupo São Bernardo (SBS).

22. In line with CADE's case law on the sector, the SG defined the relevant markets affected by the deal as (i) individual/family health insurance plans; (ii) group health insurance plans; and (iii) corporate health insurance plans. The chosen geographic dimension considered the cluster of towns around a given city where 75% of consumers who made use of the services lived. CADE employed the Elzinga-Hogarty method, which locates the origin (place of residence) and destination (place of purchase and/or consumption) of consumers' consumption patterns.

23. The merging parties, however, claimed the market of corporate plans should be split according to their coverage: those that cover inpatient stays, among other services (premium plans), and those that cover only outpatient care (that is, that do not include stays).

24. Pondering on this matter, the Tribunal concluded the differences in coverage were not enough to make up two separate relevant markets. As both plans have the same purpose for their beneficiaries and target the same consumers (i.e. company employees), who can even choose to switch to the other type of plans at their will, the plans were considered substitutable, and therefore part of a same relevant market.

25. Additionally, the antitrust probe looked into rivalry. As further detailed below, examining proximity between merger applicants – that is, whether they have close substitutes from the consumer perspective – is important to establish if they can exercise market power after the transaction.

26. Contrary to the parties' allegations, the Tribunal concluded that SAMP and SBS were indeed close competitors, due to a number of reasons. Firstly, the firm Unimed and the merging parties had been responsible for most of the sales in the market in the last five years, and other rivals only exerted limited competitive pressure on these three companies. Secondly, the merging parties charged similar prices. Thirdly, CADE's Department of Economic Studies collected churn data from beneficiaries' ID information offered by the merging parties and their competitors and found out many SAMP's beneficiaries had recently migrated to SBS (and vice versa). In light of these facts, CADE established SAMP and SBS exerted high competitive pressure on one another. Therefore, the authority's analysis objectively assessed whether consumers considered the merging parties' products as substitutes, using data from beneficiaries of both companies over time, and the analysis pointed out consumers often switched from one of the merging parties to the other.

27. Hence, the Tribunal of CADE found the merger raised competition concerns as it eliminated the competitive pressure SBS exerted on SAMP in many of the assessed relevant markets. And, if unconditionally cleared, it would increase the likelihood of having price rises and lesser products for consumers.

28. In June 2020, the Tribunal of CADE cleared the transaction contingent on a merger control agreement through which the merging parties assumed behavioural and structural obligations such as selling part of their customer portfolio of business plans to a third party capable to become a significant rival to them.

29. For these reasons, the Athena/SBS case is a precedent for which rivalry assessment, based mainly on consumer behaviour to find substitutability between the merging parties, played a crucial role in CADE's decision.

2.3. GSHMED/Unimed Leste Fluminense (Merger Case no. 08700.004940/2020-44; Rapporteur Luiz Augusto Azevedo de Almeida Hoffmann)

30. The transaction involved companies GSHMED Hemoterapia S.A. (GSHMED) and Unimed São Gonçalo-Niterói Sociedade Cooperativa de Serviços Médicos e Hospitalares Ltda. (Unimed). It consisted of GSHMED's acquisition of 85% of Unimed's stake in a special purpose entity yet to be created. In defining the relevant markets affected by the acquisition, an interesting discussion emerged around consumers' part in choosing and hiring hemotherapy services.

31. Considering the several links in the supply chain, their respective players, and the provision of hemotherapy services, the Tribunal examined whether all activities connected to the service (acquisition, screening, processing, storage, distribution, transfusion, and blood products, according to Law 10205/2011), should integrate a single relevant market or be split into the markets of (i) private companies' provision of hemotherapy to private hospitals and (ii) hospitals' direct provision of hemotherapy to their patients.

32. After initial scrutiny, the Tribunal of CADE focused on understanding the relationship of the involved players, namely (i) hemotherapy service providers; (ii) hospitals; (iii) health insurance plan companies; and (iv) consumers; and concluded that although the consumer was the final user, it was not the patient but the hospital that decided on the service provider. Also, the antitrust authority acknowledged that this decision not always considered whether the hemotherapy service provider is part of the health insurance company's network of providers since the hospital bears the costs in these dynamics.

33. Hence, CADE's Tribunal ruled that the patient only picks the hospital basing the choice on how close the hospital is to their place of residence or work, the hospital's reputation, and whether it is in the insurance plan's network or not, amongst others.

34. CADE concluded, therefore, that hemotherapy service providers never competed for hospital patients but exclusively for hospitals, which effectively hire their services. For this reason, the authority determined the relevant product market comprised the provision of hemotherapy services, including all private companies' activities in the supply chain.

35. To delimit the geographic dimension of the affected relevant market, the authority also considered how hemotherapy services are hired: consumers select the hospital where they want the services and head to it. Although the merging parties claimed to be in a municipal market, by analysing the behaviour of consumers and the characteristics of the region affected by the transaction (e.g. conurbations, with a steady flow of people), CADE delimited the relevant geographic market of hemotherapy services as the metropolitan area of Rio de Janeiro, encompassing 22 cities.

36. Thus, similar to the position adopted in the Atacadão/BIG case, the SG defined the relevant market considering the distance consumers were willing to cover to be treated.

37. In April 2021, the Tribunal of CADE unconditionally cleared the acquisition.

3. Likelihood of exercising market power

38. In merger reviews, once the antitrust authority defines the relevant market affected, it assesses the likelihood of firms exercising market power in a post-merger scenario. For this purpose, the authority analyses market structure (e.g. market shares), entry barriers, and rivalry (e.g. whether competitors can restrain the merging firms' market power, whether customers have bargaining power).

39. In regard to conduct cases, the analysis of defendants' market power is in line with the assessment of whether the investigated practice generated adverse effects on free competition in the affected market or had the potential for it.

3.1. Entry analysis

40. According to CADE's Guide for Horizontal Merger Review, barriers to entry may be defined as "any existing element in a market that puts a potential competitor at a disadvantage vis-à-vis other established players". There are different types of barriers to entry, which relate to legal/regulatory issues, economies of scale, supply chain verticalisation level, brand reputation, consumers' loyalty to established brands, amongst others.¹¹

41. Thus, it is relevant to analyse the criteria customers prioritise during decision-making to find if they are loyal to a brand and if earning a reputation is essential to entrants to the point it hinders market entry. These considerations affect switching costs in particular (costs customers pay to switch from one supplier to another), which, one should note, are not necessarily financial costs but also transaction costs (e.g. time). Besides, we should mention the high switching costs caused by the impossibility of multi-homing and the lock-in effect, which are very common in markets related to the digital economy.

42. The following are some cases CADE analysed in which customers' behaviour was an important factor in assessing the relevance of barriers to entry and/or to operation in a given market.

3.1.1. Google AdWords (Administrative Proceeding no. 08700.005694/2013-19; Rapporteur Mauricio Oscar Bandeira Maia)

43. The case consisted of a complaint filed by Microsoft Corporation ("Microsoft"), owner of the search engine Bing and the advertising platform Bing Ads, against Google Inc. and Google Brasil Internet Ltda. (here referred together as "Google"). According to Microsoft, Google carried out an anticompetitive practice in the search engine market through its Google Search and Google AdWords platforms.

44. According to the claimant, the terms imposed by AdWords' Application Programming Interface (API) on agreements with advertising companies hampered multi-

¹¹ CADE. Guide for Horizontal Merger Review. July 2016. Conselho Administrativo de Defesa Econômica, p. 27.

homing and the interoperability with competing platforms. As advertisers could not publish their ads on different platforms, Google would be abusing its dominant position.

45. As CADE stressed, advertisers can make their advertisements with Google AdWords or Bing Ads directly, through means offered by the companies, or by hiring specialised companies, such as advertising agencies. If advertisers intend to put the same advertisement on different platforms, they (or the outsourced agency hired) need to licence the Google AdWords API to develop software that communicate with the Google platform.

46. Therefore, CADE's investigation analysed the advertisers' and software developer's relationship with Google to obtain the API licence and to enable communication with software created not only with Google but also with competing platforms, social media, and websites that run ads in general.

47. After investigating more than one hundred economic agents (such as advertising companies and agencies), CADE observed companies usually advertise with one platform at a time – even though there is no legally binding obligation. This is because they wish to increase the performance and range of advertisements through network effects.

48. Considering consumers' behaviour (search engine users), CADE noted the greater the number of users on a platform, the more attractive it is for advertisers, as their earnings increase. This creates a cycle in which the platform with the highest financial return keeps innovating and, consequently, holds its dominant position by offering advertisers increasingly accurate, customised, and attractive search results (directed to their elected target audience).

49. Thus, the advertiser can analyse the cost-benefit of its advertising campaign by measuring its reach and user engagement (for instance, looking at the number of purchases after users click on their advertisements published on AdWords). Conversely, advertiser clients would not often have sufficient income to choose between different search engines, thus favouring major platforms such as Google AdWords (market leader in terms of number of users at the time of the investigation). In this regard, advertisers heeded their target audience, the available budget, and customers' browsing habits in choosing a search engine.

50. The Tribunal of CADE found Google's agreements did not present anticompetitive clauses but only clauses common to licensing agreements. Besides, since multihoming is possible on the advertiser side, the authority noted there was no causal link between GoogleAds' API terms and adverse effects on competition.

51. Hence, the case was dismissed in June 2019.

52. In sum, CADE investigated customers' responses to the different advertising channels, assessing whether multi-homing was difficult and directed customers to Google Adwords over rivals.

3.1.2. Google Shopping (Administrative Proceeding no. 08012.010483/2011-94; Rapporteur Mauricio Oscar Bandeira Maia)

53. Upon a complaint brought by E-Commerce Media Group Informação e Tecnologia Ltda. (owner of the price comparison websites Buscapé and Bondfaro), CADE analysed whether Google would have abused its dominant position to favour its price comparison website (Google Shopping) over rivals (Buscape, Bondfaro, etc.), a practice known as self-preferencing. According to the claimant, the conduct hindered free competition amongst price comparison platforms, causing harm to the consumer, who as a result would have fewer available options and would pay higher prices.

54. CADE pondered whether Google was directing customers to use its platform through page layout, placing Google Shopping and thus influencing and biasing consumer choice through choice architecture. Thus, the case concerned aspects related to behavioural economics. The authority considered customers could choose Google not because they actually preferred it but due to Google's nudge, making them prone to cognitive biases.¹²

55. In June 2019, the Tribunal of CADE dismissed the case by the majority of votes, understanding the conduct should not be considered illegal per se but rather based on the fact its anticompetitive effects outweighed its pro-competitive effects (efficiencies). The authority observed the economic rationality of the conduct and, most importantly, found no evidence of competitive harm to the market.

56. It is noteworthy the majority opinion in the Tribunal referred to similar investigations carried out by the Federal Trade Commission (FTC) and the E.U. Directorate-General for Competition (DGComp) and mentioned their challenges in defining effective remedies for the competition concerns. CADE observed that, since the market under analysis was highly dynamic, an intervention could be complex and soon become outdated and innocuous. In addition, CADE could commit a false-positive error, penalising a potentially procompetitive practice and, as a result, hindering and discouraging innovation in the market. Furthermore, had the authority intervened in the face of questioning about harmful effects on competition and the risk of discouraging innovation, it would assume the player's role in making decisions on platform layout and algorithm development, resulting in second guesses that could harm social welfare.

57. Thus, CADE considered the influence Google Shopping's choice architecture had on customers and assessed whether Google was directing and favouring its platform so customers would not use competing ones.

3.2. Rivalry analysis

58. Actual rivalry can mitigate market power in the affected relevant market since the merging parties might face competitive pressure after the transaction.

59. According to CADE's Guide for Horizontal Merger Review, the following are common features in markets with high degrees of rivalry: (i) low market concentration; (ii) players with high market share variance; (iii) competitors with access to inputs and to distribution and logistics services in the same or higher degree than the merger applicants; (iv) competitors' with the same or higher degree of vertical integration; (v) competitors with wide and/or similar product portfolios; (vi) assets that are not exclusive to a few market players; and (vii) competitors offering close substitutes, from a consumer perspective.

3.2.1. *Bunge/Seara (Merger Case no. 08700.001134/2020-14; Rapporteur Sérgio Costa Ravagnani)*

60. The case concerned Seara's acquisition of tangible and intangible assets of Bunge's mayonnaise and margarine operations. CADE carried out an in-depth analysis of

¹² The term, coined by Richard Thaler and Cass Sunstein in the book "Nudge: Improving Decisions about Health, Wealth, and Happiness" (2008), regards the different ways in which choices can be presented to decision makers. Depending on the manner choices are designed (e.g. by companies, by the government) and presented to decision makers (e.g. consumers), the results (choices) can change drastically.

customers' criteria for choosing the product of the relevant market affected to assess the substitutability and proximity levels between merger applicants and their competitors.

61. In assessing the likelihood of exercising market power, CADE observed the margarine market should be further analysed, considering the merging parties combined market share exceeded 20% and that the post-merger HHI delta was above 200 points. The mayonnaise market, in contrast, did not raise competition concerns as the transaction consisted of a mere substitution of a player, with no verticalisation between the involved business groups.

62. Therefore, the authority analysed market entry and rivalry in the margarine industry and concluded the product is heterogeneous. In this regard, the investigation proved loyalty to a brand plays a great part in consumers' decision-making process, and preferences vary depending on the intended use, purchasing power, amongst others. Marketing and advertising investment also showed to be important for gaining brand reputation and winning customers' loyalty.

63. Finally, CADE ascertained there was rivalry in the margarine industry and that the merging firms were not as close as it seemed, since several players supplied products that could substitute Seara's. As consumers choose the product based on their needs and preferences, no competition concerns were found as to the merging firms' potential exercise of market power. Hence, the factors consumers take into account to buy margarine from a given supplier were taken into account and played a relevant role in CADE's rivalry assessment.

64. In November 2020, the Tribunal of CADE unconditionally cleared the case.

3.2.2. Unilever & Nestlé ice cream case (Administrative Proceeding no. 08012.007423/2006-27; Rapporteur João Paulo de Resende)

65. Based on a complaint brought by the firm Della Vita, claiming it was facing difficulties to expand in the market of impulse-bought ice cream in the cities of Rio de Janeiro and São Paulo, CADE investigated exclusivity agreements signed by the firms Unilever (owner of the brand Kibon) and Nestlé with ice cream retail establishments.

66. At first, to define the relevant market affected, the authority considered the relevant market of impulse ice cream (i.e. ice cream for immediate consumption) differs from that of other types of ice cream, such as ice cream in larger packages, ice cream not intended for immediate consumption, and take-home ice cream.

67. In this matter, in examining consumer's behaviour, CADE noted impulse ice cream in fact did not compete directly with other types of ice cream. According to the authority, they were not direct rivals from a consumer perspective as consumers use the products differently and as their market dynamics are also distinct. For instance, CADE concluded that customers do not head to a shop to buy impulse ice cream but pick it when they come across the product (as a result of marketing and advertising investment and strategic placement in shops).

68. The Tribunal of CADE concluded Unilever and Nestlé imposed obligations resulting in an exclusive relationship on many points of sale. Some of the obligations were (i) privileged position of merchandising material; (ii) exclusive use of their freezers for ice cream storage; (iii) reaching the minimum sales volume; and (iv) impositions on the duration of the agreements. In fact, the investigation found the points of sale considered the firms as "must-have brands".

69. Consequently, according to the authority, the impulse ice cream market's exclusivity clauses for merchandising had nearly the same effects as sales exclusivity

clauses; hence, in practice, it was difficult to find customers who consumed ice cream offered by a player other than Unilever or Nestlé. Besides, as there were clauses for minimum sales volume, the authority understood that the points of sale had clear incentives to favour Kibon and Nestlé over other ice cream manufacturers, under the risk of not achieving the goal set in the agreement, which demonstrates the existence of lock-in in the market.

70. In October 2018, the Tribunal of CADE convicted the firm Unilever and ordered the case was dismissed in regard to Nestlé as the Tribunal found the company did not hold a dominant position in the market.

71. As mentioned, consumer behaviour (in this case, buying by impulse) was a key factor for differentiating the products offered by the points of sale and, thus, for defining the affected relevant market. Similarly, product placement at a shop and its influence on customer choice was relevant to understand the market effects of the conduct.

4. Conclusion

72. We can observe CADE is attentive to consumer behaviour and – in line with aspects of behavioural economics – to how it can affect competition.

73. CADE believes examining consumer behaviour at different stages of its reviews of mergers and conduct cases is an important supplementary asset to traditional economics assessment methodologies.

74. For instance, looking into consumer behaviour provided CADE with information to define the relevant market affected (product and geographic dimensions), to analyse the likelihood of market power, to examine the barriers to entry and rivalry degree, and to discuss the possible applicable remedies (as in the Google Shopping case).

75. Nevertheless, although highly innovative and dynamic markets (e.g. digital markets) are usually the ones seen as detached from the *homo economicus* and rational behaviour, CADE's experience shows consumer behaviour assessment can also be useful in reviewing cases involving brick-and-mortar markets.

76. Furthermore, the Brazilian antitrust authority seeks to adopt several measures to understand the competitive dynamic of markets, analysing the decision-making and purchasing process of consumers. Hence, it often takes advantage of enquiries directed to market players as a way to collect information about consumers' criteria for choosing a product (e.g. Seara/Bunge case), product substitutability (e.g. Atacadão/BIG and Athena/SBS cases), and switching costs (e.g. Google AdWords case). Additionally, there were cases in which the authority reviewed consumer behaviour over time to assess how a transaction could change a market's competitive pressure (e.g. Athena/SBS case) and how one practice affected only a few types of products in a market (e.g. Unilever/Nestlé case).

77. Finally, the Brazilian antitrust authority keeps a close relationship with other national governmental agencies to share information and address relevant matters regarding consumer behaviour. For instance, CADE tackles data protection issues with the country's Data Protection Agency (ANPD) and consumer protection matters with the Secretariat for Consumer Protection (Senacon) and the Council for Consumer Protection (CNDIC) – the latter two managed by the Ministry of Justice.