

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

**Advantages and Disadvantages of Competition Welfare Standards – Note by Brazil**

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<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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### 1. The objectives of antitrust in Brazil

1. The Brazilian Competition Defense System, structured by Law 12529/2011, includes the Administrative Council for Economic Defense (CADE), a body aimed to ensure free competition in the market and prevent a company or group of companies from causing damages to **consumer welfare**. Thus, consumer welfare drives antitrust policy in Brazil.

2. In a seminal work, Bork (1965) argues that some contradictions in antitrust analyses may bring about some crisis of policy. It is important to note that competition provides society with the maximum output because there is no other rearrangement of resources that can result in a 'better situation for consumers. The goal of antitrust is to protect competition, not competitors.

3. In order to evaluate the welfare standards employed in CADE's recent precedents, we have to consider first that there are some different standards. In this regard, Robert Bork's commonly cited view is far from driving today's antitrust guidelines. On the one hand, Bork refers to consumer welfare in a broad sense, which includes both producer surplus and consumer surplus (in terms of microeconomic theory). On the other hand, current guidelines equate consumer welfare to consumer surplus.<sup>2</sup> These two views are grounded in economic theory and therefore tend to focus the analysis on prices and market quantities, which are objectively measurable aspects.

4. Alternatively, there are other possible welfare standards not limited to economic welfare, that is, low prices and high production. They may include other product or market variables, such as product quality, and the impact of a transaction on common resources, such as the environment. The broader the spectrum of variables included in the welfare standard, the more likely the scope of action of the antitrust authority will overlap with that of other authorities (e.g. environmental protection authorities). Besides, a broad standard may impose responsibilities on antitrust agencies that go beyond their operational and technical capacities. For these and other reasons, the movement known as Neo-Brandeis is still controversial.

5. Consequently, 'CADE first defines the relevant market to evaluate consumer welfare. Defining a relevant market is not a simple task since it involves considering quantitative and qualitative information, which the Brazilian authority assesses mainly through market tests. Thus, the analysis of market power includes, for instance, information about dominant market players and their characteristics (rivalry analysis), costs and profitability, the role of imports, barriers to entry, diversion ratios, brand relevance and customer perception of the market.

6. Since markets are becoming more complex, CADE avoids narrowly delimiting the geographic or product dimension in its analysis, taking into account different scenarios.

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<sup>1</sup> This document was written by Lílian Santos Marques Severino, Head of the Advisory Unit of the Office of the President, and Leonardo Enrico Marchioro Mendes, Advisor to the Office of the President. It was revised and edited in English by Arianne Mesquita, Ariel Menezes e Bruna Assunção, in-house translators at the International Unit of CADE.

<sup>2</sup> Hovenkamp, Herbert J., "On the Meaning of Antitrust's Consumer Welfare Principle" (2020). Faculty Scholarship at Penn Law. 2152.

Moreover, the authority created a digital questionnaire platform to collect data for its assessments. When requested information, parties can, for instance, download the questionnaire on the platform, ask for a time extension, and receive a response receipt. In addition, as the case may be, it distinguishes public from restricted data. These initiatives and CADE's cooperation with other government bodies have produced excellent results for society.

## 2. Consumer welfare and alternative concepts: case examples

7. Although CADE addressed issues usually related to alternative views on welfare in recent cases, a close reading of them reveals that the decisions' rationale is still based on the economic aspects of consumer welfare, i.e. the likelihood of price increases or supply restrictions. Below we present four recent cases to illustrate CADE's view.

### 2.1. Microsoft-Activision Blizzard<sup>3</sup>

8. In 2022, Microsoft's acquisition of Activision Blizzard was notified to CADE and other jurisdictions. In Brazil, the transaction involved horizontal overlaps in the markets of (1) game development and publishing, (2) game distribution, (3) online advertising, and (4) merchandising. In addition, it created a vertical integration in the industries of game publishing (upstream) and game distribution (downstream) since Microsoft operates in both markets. The authority considered, in its analysis, the complimentary relationships between the markets of game advertising, game hardware and online advertising.

9. CADE first assessed the market share of the merging firms in different scenarios of relevant markets. Results showed that the merging firms would have less than 20% of market share in all markets or an HHI variation lower than 200, ruling out dominance concerns. As to vertical integration, the transaction would have a share larger than 30% only in the game distribution market. However, the analysis did not find economic incentives for market foreclosure by Microsoft in the downstream market (development and publishing of games) since the company lacked a dominant position and, if certain games were not available in Microsoft's online stores, consumers would likely switch to other providers.

10. In the upstream market (game distribution), the concern regarded the availability of Activision-Blizzard's games on the consoles of Microsoft's rivals. However, as a substantial part of Activision-Blizzard's current revenue derives from competitors' consoles, there would be no incentives to discontinue game distribution with competitors.

11. The most notorious aspect of this case was the issue of the cloud gaming market. The market test carried out in Brazil indicated that, despite being a trend, cloud gaming is still nationally incipient, thus not needing a different market definition. Hence, cloud gaming was regarded part of the digital distribution market. Moreover, third parties indicated the series Call of Duty (COD) as an essential game; therefore, if exclusive to Microsoft, there would be strong negative effects on the markets. However, information revealed the relevant markets did not need differentiation by game types and Call of Duty was not necessarily essential. This is due to Call of Duty and other games from Activision Blizzard not being as popular and relevant in Brazil as they are in the United States and other countries. Besides, there are close substitutes in the market, that is, games of the same

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<sup>3</sup> Case no. 08700.003361/2022-46 unconditionally cleared in October 2022. Parties: Microsoft Corporation and Activision Blizzard, Inc.

genre, available on the same platform, targeted at the same type of player, and developed with similar production values and technical specifications.

12. Based on these findings, CADE cleared the merger unconditionally in 2022. Although the competition authority took into account further analysis in its assessment, examining the quality and popularity of a specific product in the market, they were not that different from usual methods that focus on the likelihood of price increases or market foreclosure.

## 2.2. WhatsApp' privacy policy

13. Another recent example is a probe into the privacy policy of WhatsApp in Brazil, which shows that competition and data protection policies may overlap sometimes but can also work towards similar aims and outcomes. To this end, authorities should limit themselves to their competences and cooperate wherever necessary, which is not something new to competition enforcement in Brazil: CADE has cooperated with regulatory agencies in a number of occasions.

14. WhatsApp has over 120 million users in Brazil, and its privacy policy has been a controversial topic since the app announced changes in it in 2021. At the time, CADE, the Brazilian Data Protection Agency (ANPD), the Federal Prosecution Services (MPF), and the Brazilian Secretariat for Consumer Protection (Senacon) jointly assessed the case to ensure that the changes complied with Brazilian legal standards and followed the principles of data protection, competition, transparency, and security.

15. The joint assessment proved to be relevant as it covered risks related to privacy and the economy: data protection regulations addressed privacy risks to individuals and the antitrust enforcement focused on the issue of consumer surplus or total surplus.<sup>4</sup> In this sense, data protection and competition policies may converge.

16. One should note the possibility of privacy representing an economic cost connected to zero-price digital services. In this regard, consumers could be harmed by excessive data charges, the transfer of which would not be adequately compensated by platforms that exercise market power. In addition, privacy may be a quality component of competition. Thus, a decrease in the competitive pressure caused by an increase in market concentration can deteriorate the levels of privacy practiced by the dominant agents.<sup>5</sup>

17. Considering that arriving at a consensus was a complex and continuous process that involved several stakeholders (the government, industry, academia and civil society), CADE and the Brazilian Data Protection Agency decided on the case based on their respective competences, after evaluating the policy changes and reviewing public input. In terms of competition, the antitrust authority understood it did not need to adopt any measures for penalizing anticompetitive conduct at the time as the case lacked signs of competition harm.

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<sup>4</sup> Maureen K. Ohlhausen & Alexander P. Okuliar, Competition, Consumer Protection, and the Right [approach] to Privacy, 80 ANTITRUST LAW J. 121–156, 154–155 (2015).

<sup>5</sup> Fernandes, V. Restrições à privacidade: um problema antitruste? 2a Edição. (No prelo) Tratado de Proteção de Dados Pessoais. Rio de Janeiro: Forense, 2021.

### 2.3. SER-FAEL<sup>6</sup>

18. We can also mention FAEL's acquisition of the SER economic group: two higher education institutions focused on distance learning whose merger CADE reviewed in 2021. The authority defined the relevant markets according to course/area of knowledge, with horizontal overlaps occurring only in 13 undergraduate courses and 2 graduate areas of knowledge. The assessment considered markets nationally and locally. The case did not raise concerns regarding vertical integration (undergraduate and graduate markets).

19. CADE's analysis did not identify risks to competition in the national undergraduate and graduate markets, as the resulting firm's market share would not exceed 20% in any of the markets. Only certain local undergraduate markets, in which the applicants had high market shares, required further scrutiny. The Brazilian authority concluded that market power was not likely to occur because these markets were very small, had the presence of at least one other higher education institution, and had a history of competitor entry and exit movements.

20. The impact of the transaction on the quality of Brazilian higher education stood out as one of the decisive factors for this case. On the one hand, the relevant market is limited to private education institutions due to their lower quality, compared to public institutions, and different student profiles. On the other hand, competing firms argue that increased concentration in the distance higher education market would lead to a decrease in quality. Even though these points were raised, CADE understood that the Ministry of Education (MEC) regulates the education, so there was no necessity to delve into the quality level of the courses offered by the applicants given that both already had prior authorization to function. Hence, CADE decided to keep its analyses within the limits of the competition aspects of market shares and cleared the merger without restrictions.

### 2.4. Serasa-Claro<sup>7</sup>

21. This transaction concerned a service agreement between Serasa, a credit bureau, and Claro, a telecommunications company. In it, Claro agreed to provide customer data in exchange for Serasa's solutions to protect credit cycle and prevent fraud. Both companies have committed not to share the data (with Serasa's competitors) and the solutions (with Claro's competitors). Therefore, this is a case involving not only competition concerns, but also issues related to the privacy of users' personal data.

22. The authority first analyzed the credit information market, in which credit bureaus function as platforms that collect data from multiple sources and offer information services to client institutions. There was a slight horizontal overlap resulting from this transaction, as Claro was beginning to offer credit protection services based on the data it already had. This overlap seemed insignificant due to Claro's negligible market share. The main potential concern was that the companies could foreclose the market, limiting other credit bureaus' access to data. A negative feedback loop could occur if Claro's data had relevance for the survival of competing bureaus.

23. CADE's conclusion was that the data mentioned in the contract was not exclusive to Claro as other market players provide them as well. Moreover, no one was using such

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<sup>6</sup> Case no. 08700.003774/2021-40 unconditionally cleared in November 2021. Parties: 3L Tecnologias Educacionais Digitais S.A. and Sociedade Técnica Educacional da Lapa S.A.

<sup>7</sup> Case no. 08700.000167/2021-28 unconditionally cleared in July 2021. Parties: Serasa S.A. and Claro S.A.

data, meaning it would not affect competing bureaus directly in any way. Consequently, the authority unconditionally cleared the case.

24. It is also worth mentioning the decision highlights that the contract could also raise concerns regarding user privacy. However, it also stressed the authority with powers in this regard is the Brazilian Data Protection Authority (ANPD) not CADE, whose duty is to focus on competition issues. Hence, CADE cleared the case without restrictions and submitted all documents relating to it to ANPD and the telecommunications regulatory agency (Anatel).

### 3. Final considerations

25. This contribution seeks to provide a general overview of the Brazilian antitrust policy as to consumer welfare and alternative welfare concepts.

26. Although there are recent precedent decisions in which CADE has addressed issues typically associated with alternative views of welfare like data protection and quality, a close reading of such cases reveals that the rationale of CADE's decisions still focuses in the economic aspects of consumer welfare such as the likelihood of price increases or of firms restricting supply.

27. In other words, CADE's latest decisions do not expand antitrust analysis beyond typical economic variables as an alternative welfare standard', even in cases where such variables are mentioned. On the contrary, typically, the Brazilian antitrust policy focuses on providing society with the maximum output. Its main objective is protect competition, not competitors, and even if other concerns are raised—environmental, data privacy, or others—the body understands they should be evaluated and addressed by specialized authorities.