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Competition Enforcement and Regulatory Alternatives – Note by Brazil

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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Brazil[1]

1. Legal framework and background

1. The functions of the Brazilian government as to the economy and antitrust are set forth in the Brazilian Constitution from Article 170 onwards. Article 170 provides that the economy is "founded on the appreciation of the value of human work and on free enterprise", aiming to "ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles": (i) national sovereignty; (ii) private property; (iii) the social function of property; (iv) free competition; (v) consumer protection; (vi) environment protection; (vii) reduction of regional and social differences; (viii) pursuit of full employment; and (ix) preferential treatment for small businesses.[2]

2. Against this backdrop, the Constitution establishes that "as the normative and regulating agent of the economic activity, the State shall, in the manner set forth by law, perform the functions of control, incentive and planning" (head provision of Article 174).

3. As from the 1990s, with the Brazilian Privatization Programme[3], the Brazilian government initiated a process of transferring, totally or partially, the activities of some economic sectors to the private sector. Thus, the government took on the role of regulating and controlling the sectors through newly established regulatory agencies.[4]

4. The Administrative Council for Economic Defense (CADE), for its part, was created by Law 12529/2011, which structures the Brazilian Competition Defense System (SBDC). This statute confers the Council – an adjudicative federal agency linked to the

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[2] Amongst other important provisions, we highlight Article 173(4): "The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits."

[3] The Brazilian Privatization Programme, established by Law 8031/1990 (repealed by Law 9491/1997 and later amends), had the core goals of (i) restructuring the strategic position of the government as to the economy, transferring to the private sector activities unduly developed by the public sector; (ii) working to restructure the public sector, especially by increasing the country's credit score and reducing national debt; (iii) allowing investment on the businesses and activities transferred to the private sector; (iv) assisting the private sector in its economic restructuring, especially to modernise the national infrastructure and industrial park, increasing competitiveness and strengthening the business capacity of several economic sectors, including through credit granting; (v) allowing the government to focus on the nation's main priorities; and (vi) contributing towards a stronger capital market by increasing the offer of securities and encourage participating companies' IPOs.

[4] At the time this document was prepared, there were 11 regulatory agencies in Brazil, each governed by a specific law. For information purposes, they are the following regulatory agencies: the Electricity Agency (ANEEL), the Petroleum Agency (ANP), the Telecommunications Agency (ANATEL), the Health Regulatory Agency (ANVISA), the Private Health Insurance Agency (ANS), the Water Agency (ANA), the Waterway Transportation Agency (ANTAQ), the Land Transport Agency (ANTT), the Film Agency (ANCINE), the Civil Aviation Agency (ANAC), and the Mining Agency (ANM).

Ministry of Justice – power to prevent and fight antitrust violations according to the cited constitutional principles, in both regulated and unregulated markets.

5. The regulatory agencies, in addition to regulating and controlling the activities of each sector, implement and promote free competition between market players, which also entail methods to fight anticompetitive practices. In this regard, for instance, the Brazilian Electricity Agency (ANEEL), according to Article 3 of Law 9427/1996, "aims at promoting effective competition between players and preventing economic concentration in services and activities related to electricity". Therefore, it is tasked with introducing into businesses, business groups, and shareholders "restraints, thresholds, or conditions related to obtaining and transferring franchises, permits, and authorisations; to corporate concentration; and to businesses conducted between each other". The law also mentions ANEEL should "monitor compliance with competition law and oversee the market behaviour of players of the electricity sector". Similarly, Law 9472/1997 establishes the Brazilian Telecommunications Regulatory Agency (ANATEL) is responsible for "exercising its competent jurisdiction to control, prevent, and repress antitrust violations related to telecommunications, except for those under CADE's jurisdiction", in addition to promoting free, fair, and unfettered competition amongst the sector's players and correcting market failures.

6. It is also important to mention the Central Bank of Brazil (BACEN) and some regulatory agencies are also responsible for clearing transactions involving players in their sectors[5]. However, we emphasise this is done according to these bodies own review methods and criteria, which are not combined to, nor conditioned by, CADE; each body has its own jurisdiction and autonomy.

7. Thus, from a normative perspective, CADE and the regulatory agencies have separate, complementary jurisdiction. Such absence of conflict of jurisdiction is reinforced by Law 13848/2019 (the Brazilian General Regulatory Agencies Law). The law confirms the antitrust authority is to review mergers, and initiate and conduct proceedings to investigate antitrust violations in regulated sectors. In any case, sectoral agencies, acting as regulatory bodies and having deep knowledge about their respective sectors, are also responsible for promoting free competition and are important in the enforcement competition laws in the country.

2. Importance of regulatory agencies to competition enforcement

8. Regulatory agencies and the antitrust authority in Brazil have been interacting increasingly in recent years. This institutional relationship is contributing to the regulation of Brazilian economy and the effectiveness of antitrust policies, in addition to granting greater legal certainty to regulated parties.

9. Law 13848/2019 (the Brazilian General Regulatory Agencies Law) establishes the interaction between the antitrust authority and regulatory agencies, based on cooperation and information sharing. According to it, the regulatory agencies should monitor their

[5] Amongst other competition-related matters, Article 10(X) of Law 4595/1997 confers the Central Bank the jurisdiction to "give provision for financial institutions to be ... transformed, merged, acquired, or consolidated; ... and to transfer controlling interest in any way." Likewise, Law 9961/2000 establishes the duties of the Private Health Insurance Agency "to authorise the registration and operation of health insurance companies, as well as their spin-off, merger, acquisition, change, or transfer of controlling interest, without prejudice to the provision of Law 8884 of 11 June 1994 (today's Law 12529/2011, the Competition Law).

respective markets, so as to assist CADE, and report any practices that may constitute an antitrust violation under the terms of Law 12529/2011. Furthermore, Law 13848/2019 mentions CADE may require information and technical opinions from regulatory agencies so as to conduct administrative procedures pending at the antitrust authority – something also prescribed by Law 12529/2011 that has occurred in numerous cases and will be later discussed in this paper. Moreover, the same law sets forth the antitrust authority should report to the respective regulatory agency on its decisions related to merger review and proceedings to punish antitrust violations.

10. It is important to highlight that, even before Law 13848/2019, regulatory agencies were already important to competition enforcement. In the context of merger control (preventive role), Article 65(I) of Law 12529/2011 provides regulatory agencies can lodge appeals against the decisions of the Office of the Superintendent General on this regard. With regard to fight against anticompetitive practices (punitive role), the law differentiates and characterises the several kinds of complaints regulatory agencies can file. Such complaints waive preliminary enquiries and allow CADE to immediately launch administrative enquiries or administrative proceedings, granting CADE the jurisdiction to investigate or even punish investigated parties.

11. Furthermore, the competition authority entered into more than 40 Technical Cooperation Agreements and Memorandums of Understanding with regulatory and control agencies, by which they have committed to share information and mutually support their activities. To illustrate, the Joint Administrative Rule signed on 10 December 2018 between CADE and the Central Bank[6] provided the merger reviews of financial institutions conducted by both bodies with more predictability. It also made it easier to align the bodies' efforts to stimulate competition in the sectors under their jurisdiction, preventing conflicts of jurisdiction between them.[7]

12. Another example of cooperation between CADE and other agencies is the establishment of joint working groups to evaluate and discuss possible changes in sectoral regulation. For instance, through Joint Ordinance 4/2018, CADE and the Brazilian Petroleum Agency (ANP) established a working group to (i) review the fuel market structure; (ii) evaluate the execution of the measures proposed in the study "Repensando o setor de combustíveis: medidas pró-concorrência" (Rethinking the fuel sector: pro-competition measures), developed by CADE's Department of Economic Studies and its

[6] Available at: <https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yMAjhgvmOhUiRhWzcnKCgfsd1eF3HkduhvLuNbKNK64YtjaTA9iVhwqez6F_Zd1Ihb1cFtF9vrt5Hj0YZC-NVz8>.

[7] Other examples: Agreement 03/2020, signed with the Electricity Agency (ANATEL) on 7 May 2020; Agreement 28/2019, signed with the Private Health Insurance Agency (ANS) on 4 Jan. 2019; Agreement 30/2018, signed with the Land Transport Agency (ANTT) on 03 Jan. 2019; and Agreement 06/2013, signed with the Petroleum Agency (ANP) on 3 Apr. 2013; and Memorandum 07/2019, signed with the Waterway Transport Agency (ANTAQ) on 4 June 2019. All the agreements were intended for technical cooperation. Through them, the bodies share experiences, information, and technology and apply them to different types of HR training, institutional development, and public management. As a result, several joint, mutually supported, common interest actions have been developed towards increasing and protecting competition in regulated sectors.

Office of the Superintendent General; and (iii) evaluate the possibility of adopting the exceptional regulatory measures imposed in the 2018 fuel supply crisis.[8]

13. Finally, it is worth mentioning the antitrust cooperation in regulated sectors is not restricted to CADE's relationship with regulatory agencies; it also encompasses initiatives held alongside the Legislative branch[9], control agencies[10], and the Organisation for Economic Co-operation and Development (OECD). An example would be the recent cooperation project with the OECD, which aims to identify unnecessary restrictions to competition and propose alternative policies to foster competition in the Brazilian markets of port and civil aviation.[11]

14. In this regard, the Brazilian Council for Consumer Protection (CNDC), coordinated by the Brazilian Consumer Protection Secretariat (Senacon), was established in 2020[12] as a forum for consumer protection in which several regulatory authorities, agencies, and governmental bodies gather to discuss and coordinate public policies. The forum can become a starting point for future policies connecting consumer protection, data protection, and competition.[13]

3. CADE's activity in regulated sectors

15. Considering the coexisting jurisdiction of regulatory and competition bodies, CADE has reviewed several cases involving players of regulated sectors (both within administrative proceedings to punish anticompetitive practices and within merger reviews) and has addressed competition concerns in some sectors, as detailed below.

[8] Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/contribuicoes-do-cade/repensando-setor-combustiveis-medidas-pro-concorrencia-cade.pdf>.

[9] CADE, at the request of legislative bodies, comments on several pending bills, such as through Official Letter 411/2021/AFEPAR/MJ, concerning Bill 6514 of 2019, which amends Law 13874/2019 (Law of the Declaration of Rights of Economic Freedom); Official Letter 2282/2020/AFEPAR/MJ, concerning Bill 4199/2020, which established the Programme for Cabotage Promotion, also known as BR do Mar (Sea Road). Additionally, CADE participated in discussions of the Committee on Public and Private Transport of the Brazilian lower chamber on Bill 448 of 2019 (concerning the maximum price charged by private passenger transport companies).

[10] Technical Cooperation Agreement 02/2020, signed with the Prosecution Services at the Court of Accounts of the Federal District on 23 Apr. 2020; Technical Cooperation Agreement 19/2019 signed with the Court of Accounts of the State of Mato Grosso do Sul on 3 Dec. 2019; and Technical Cooperation Agreement 17/2019, signed with the Office of the Comptroller General of the State of Santa Catarina on 1 Dec. 2019.

[11] For further information, access: <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-e-ocde-lancam-projeto-de-avaliacao-concorrencial-nos-setores-de-portos-e-aviacao-civil>.

[12] See Executive Order 10417/2020.

[13] BRASIL. Governo Federal cria Conselho Nacional de Defesa do Consumidor. 2020. Available at: <https://www.gov.br/secretariageral/pt-br/noticias/2020/julho/governo-federal-cria-conselho-nacional-de-defesa-do-consumidor>.

3.1. CADE's case law

3.1.1. Port infrastructure and services

16. Concerning mergers and acquisitions, the ports industry was subject to antitrust scrutiny several times, especially regarding private investment in the sector made through leasing and the exploration of private terminals.[14]

17. For instance, CADE reviewed and cleared Merger 08700.005868/2017-77, which consisted of a partnership agreement between terminals Multi-Rio and TIL for joint commercial exploitation of part of TECON 2 Rio, a terminal used for handling and storing containerised load at the Port of Rio de Janeiro. In its opinion, the Office of the Superintendent General adopted a position that relevant markets should be defined according to the port's supply chain. The office concluded that in examining port activities of handling and storing containerised load, CADE should take into account each port's functioning. Thus, these activities can be understood either as separate markets or as a single market.

18. CADE has also analysed markets related and vertically integrated to the ports industry, such as the market of maritime transport. In Merger 08700.006750/2017-66, for instance, the Office of the Superintendent General reviewed and cleared a Vessel Sharing Agreement signed between the firms Mercosul Line and Log-In for a joint operation of cabotage involving ports in Brazil and East Coast South America.

19. Additionally, CADE investigated and reviewed several anticompetitive practices by players of the sector. As an example, there were controversies related to charges that port operators (those responsible for cargo handling in ports) levied on independent bonded warehouses (firms that store imported and exported goods), such as charges related to container handling and delivery (known as SSE).

20. The most recent final decision CADE made on the SSE was within Administrative Proceedings 08700.005499/2015-51 (applicants: Atlântico Terminais S.A. and Suata Serviço Unificado de Armazenagem e Terminal Alfandegado S.A.; defendant: Tecon Suape S.A.). The Tribunal of CADE reviewed the case on 3 February 2021 and, at the occasion, the rapporteur of the case included in his vote a history of CADE's case law on port service charges, mentioning the existence of at least 12 administrative procedures with the same topic. Furthermore, the rapporteur carefully analysed the whole functioning of the market and the role of its every player.

21. The Tribunal of CADE determined that, although not illegal *per se* from the regulatory or competition perspectives, the SSE charge imposed by port operator Tecon Suape S.A. in the port of Suape (in the Brazilian state of Pernambuco) was an anticompetitive practice in this case under the terms of Law 12529/2011. The Tribunal concluded the defendant abused its dominant position in the upstream market to artificially raise costs for its rivals in the downstream market. According to the decision, the port operator unduly charged for its services through (i) double billing and (ii) price discrimination, with (iii) no reasonable economic grounds. Due to these anticompetitive factors, CADE considered the practice anticompetitive, irrespective of the charge's price. The Brazilian Waterway Transport Agency (ANTAQ) was notified of the case and made

[14] A study conducted by CADE in 2017 about the Brazilian ports sector showed the antitrust authority reviewed 81 transactions connected to the markets of supply of ports services. The majority of the cases were unconditionally cleared, whilst some were cleared subject to remedies. For further information, see: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/mercado-de-servicos-portuarios-2017.pdf>.

statements in the case record providing information on the player's interaction in the affected relevant markets and comparing prices charged by the respondent with port operators around the country.

22. The Tribunal, taking into account that CADE and regulatory agencies have different but complementary jurisdiction, highlighted that although charging for the SSE is considered lawful from a regulatory perspective, the charge can still constitute an anticompetitive practice under Law 12529/2011. Moreover, antitrust immunity conferred by doctrines such as regulated conduct defence, state action, and pervasive power were all discarded in this case, following the OECD-recommended criteria.[15]

23. Administrative Proceedings 08700.005326/2013-70 is another example of an antitrust violation committed by agents of the ports sector and was adjudicated by the Tribunal on 9 December 2015. ANTAQ's complaint against the Labour Management Body of Porto Alegre (OGMO-POA) was subject to an antitrust investigation. In the complaint, ANTAQ claimed the OGMO (i.e. the body responsible for managing port labour supplied to port operators) imposed a compulsory charge levied on new port operators that intended to operate in the public part of the port, thus restricting competition between operators, since OGMO members are old port operators and do not pay the charge.

24. In analysing it, the Tribunal observed the charge could represent an economic efficiency, as it prevented new port operators from having positive external effects. However, examining the price charged by the OGMO-POA, CADE determined it constituted an anticompetitive practice, since it levied more than the necessary to prevent a free-rider problem, thus representing a potential entry barrier in the port operations market.

25. Notwithstanding, the Tribunal of CADE has once again the opportunity to assess OGMO's charges, as new proceedings involving the OGMO of the ports of Rio Grande (state of Rio Grande do Sul), Belém, and Vila do Conde (both in the state of Pará) are now under review (administrative proceedings 08700.008897/2015-29 and 08700.008751/2015-83, respectively).

3.1.2. Telecommunications

26. Telecommunications services are extensively regulated in the country, both by Law 9472/1997, that established ANATEL as the sector's regulatory body, and by specific regulation of the services of this sector. The regulations demand an entrant satisfy some criteria related to technical aspects, *inter alia*, using certified equipment, adopting base broadband prices, undertaking certain commitments, and following competition-promoting rules. Moreover, ANATEL, using its complimentary jurisdiction over antitrust in the telecommunications market, has recently adopted asymmetrical obligations to reduce market concentration and prevent the exercise of dominant position in the retail communications market.[16]

[15] See: OECD. Policy roundtables: regulated conduct defence. Paris, 2011.

[16] As reported by ANATEL, its project to create competition goals (General Plan for Competition Goals, or PGMC) aims at "promoting free, fair, and extensive competition between telecommunications service providers towards more diverse, quality services, at reasonable prices". The plan categorises markets, setting four different types of municipalities according to their competition level: competitive, potentially competitive, fairly uncompetitive, and uncompetitive. Moreover, the plan establishes methodological principles to typify wholesale relevant markets and groups with significant market power.

27. The telecommunications sector is many-sided, whether due to its high demand for technological renewal, which is linked to the need for interoperability in service provision and to the physical and economic limitations that further increase market concentration. Thus, considering the sector's complexity, CADE–with the technical support provided by ANATEL–conducted administrative enquiries into alleged anticompetitive practices and reviewed M&A activity in the sector, such as acquisitions of equity interest and operational partnerships between telecommunications companies.

28. As an example, in Administrative Enquiry 08700.004314/2016-71, CADE examined a complaint brought by the Federal Prosecution Services about a potential anticompetitive practice committed by companies Claro S.A. ("Claro"), Oi Móvel S.A. ("Oi"), TIM S.A. ("TIM"), and Telefônica Brasil S.A. ("Telefônica-Vivo"). The complaint stated the companies engaged in zero-rating conduct, through which mobile internet providers offered free mobile broadband for certain applications (or type of applications). According to the lawsuit, the practice could potentially distort the competition dynamics of the applications market, favouring some players over others, which could hamper the growth of competing firms and market entry (under Article 36(3)(IV) of Law 12529/2011). Moreover, it alleged a zero-rating policy would discourage innovation and raise the prices paid by end consumers for mobile broadband as way to offset the costs incurred by the raised volume of internet traffic.

29. Nonetheless, CADE's Office of the Superintendent General concluded CADE had no jurisdiction to examine whether the principle of net neutrality[17] had been violated due to the zero-rating policy. Furthermore, there was no evidence the practice represented an antitrust offence under the terms of the Brazilian Competition Law (Law 12529/2011). Thus, the office determined the case should be dismissed. In any event, it is worth mentioning the competition authority consulted ANATEL and the Ministry of Science, Technology, Innovations, and Communications on the matter. The two bodies made statements in the case record that helped CADE to better understand the relevant markets affected. They also indicated there was no explicit legal prohibition on zero-rating as to net neutrality. This, along with the high degree of competition of the investigated markets (mobile telecommunication services, applications, and content provision) and the absence of exclusivity clauses (through which applications would negotiate a zero-rating policy only to specific mobile internet providers), gave CADE the reasons for its decision.

30. As far as merger control goes, Merger 08700.002013/2019-56, unconditionally cleared by the authority, addressed Claro's acquisition of shares of Nextel Telecomunicações Ltda. The case looked into the market of mobile services provision and included extensive market testing. Competitors TIM, Oi, and Telefônica-Vivo claimed the transaction increased Claro's market power and raised competition concerns that could threaten end consumers.

31. To understand the technical matters involved the market's competitive dynamics, such as frequency allocation and its own barriers to entry, CADE requested ANATEL to produce a statement in the case record with its contributions. In the end, CADE concluded the competition concerns were not valid, as the conditions of the market and the regulations on the matter would mitigate the chances of foreclosure in the upstream market.

32. Still within the scope of M&A activity, CADE has reviewed numerous operational and network sharing agreements (e.g. ran-sharing agreements) between telecommunication service providers. As some examples, we can mention Merger 08700.002276/2018-84

[17] The concept of net neutrality is founded on the principle that all information on the internet should receive the same treatment and broadband speed, as well as free access to every user.

(applicants: Tim and Oi), unconditionally cleared on 7 November 2018; and Merger 08700.006163/2019-39 (applicants: TIM and Telefônica-Vivo), unconditionally cleared on 3 June 2020. Regarding the latter, CADE analysed Claro's appeal and decided to turn it down. The appellant alleged the transaction would raise concerns because of (i) reduced incentives to competition between the applicants; (ii) reduced incentives to improvements in the network quality and capacity; (iii) exchange of sensitive information; and (iv) incentives to refuse access to infrastructure, in addition to leading to market foreclosure.

3.1.3. Aviation

33. CADE reviewed the new alliances formed by national and international airlines, intended for infrastructure sharing, air route expansion (e.g. codeshare agreements and other operational partnerships), and the acquisition and control of companies, encouraged, above all, by the legislative changes that allowed foreign investment in Brazilian airlines.[18]

34. For instance, CADE's Tribunal cleared Merger 08700.003258/2020-34 without remedies on 3 March 20201, a joint venture between Delta Airlines, Inc. and Latam Airlines Group S/A in the scope of a strategic alliance for transport services for freight and travelling passengers in air routes connecting Canada, the United States, and South American countries. As a transaction that caused a concentration in the structure of the aviation market, it demanded a thorough analysis of its effects on concentration. In reviewing the joint venture, the Tribunal had the support of representatives of the Brazilian Aviation Agency (ANAC) to better understand airport infrastructure and the dynamics of this market.

35. After verifying a significant increase in consumers in three routes connecting Brazil and the US, the Tribunal decided to clear the transaction without conditions, based on the fact a joint venture should create pro-competitive efficiencies for consumers above all. Moreover, CADE understood some factors mitigated the probability of an exercise of market power: (i) the absence of significant regulatory barriers or infrastructure preventing entrants to operate the routes; (ii) the presence of idle capacity; and (iii) the effective rivalry of the routes.

36. As far as antitrust violations go, it is worth mentioning Administrative Enquiry 08700.002069/2019-19, launched to assess the effects of alleged price-fixing and market allocation arrangements involving Gol Linhas Aéreas Inteligentes ("Gol"), Latam Airlines Brasil ("Latam"), Elliott Associates, L.P., Elliott International, L.P., and Manchester Securities Corp. The practices targeted an auction to sell Avianca's assets (Oceanair Linhas Aéreas S.A. e AVB Holding S.A.), an airline that is currently under administration.

37. The claims proved to be well founded, and CADE's Department of Economic Studies[19] verified competition concerns arising from an alleged allocation of Avianca's slots[20] to incumbent companies (Gol and Latam). Based on that, the Office of the

[18] For a long time, under Law 7565/1986 (the Brazilian Aeronautical Code), franchises to exploit public aviation services were only granted to legal entities in which Brazilian citizens held at least four-fifths of the voting shares. As provisional orders 714/2016 and 863/2018 were voted into laws 13319/2016 and 13842/2019, the Brazilian Aeronautical Code was amended, and this limitation on foreign capital, removed.

[19] Technical Opinion 4/2019/Department of Economic Studies/CADE, issued within the scope of Analysis 08700.001834/2019-75; and Technical Opinion 23/2019/Department of Economic Studies/CADE, issued within the scope of Thematic Analysis 08700.003081/2019-32.

[20] ANAC defines an airport slot as the "time set for a fix's overflight, landing, or take-off. In practical terms, it is understood as a time window – for instance, a period that ranges from 5 minutes before

Superintendent General decided to launch an investigation. The concerns regarded these companies' high market shares in Avianca's main routes; consequently, the slot purchase would further increase the already high concentration in the Brazilian market of passenger air transport. The investigation is currently in progress.

38. Furthermore, the Council made some recommendations to ANAC based on the Department of Economic Studies' research, intending to mitigate the concentration ratio of the Congonhas airport and reduce future anticompetitive effects. These are "(i) loosening the rules to reallocate airport slots as to new entrants, (ii) redesigning slot allocation so as to change the number of remaining slots allocated to new entrants, and (iii) encouraging Azul to create an air transport network complementary to Avianca's if new entrants become interested in Avianca's slots."

39. CADE's suggestions were submitted to ANAC during the process of temporary slot allocation. With it, the slots Avianca operated were allocated to entrants in Congonhas, thus reducing market concentration. Administrative Enquiry 08700.002069/2019-19 is still under way at CADE's Office of the Superintendent General.

40. Another case in motion is Administrative Proceedings 08700.001831/2014-27, which looks into alleged anticompetitive practices to limit access to the market of aviation fuel carried out by companies Air BP Brasil Ltda., Petrobras Distribuidora S.A., Raízen Combustíveis S.A., and Concessionária do Aeroporto Internacional de Guarulhos S.A. A complaint brought by Gran Petro Distribuidora de Combustíveis Ltda. claimed the companies (i) had non-solicitation clauses and refused access to the primary distribution of aviation kerosene (QAV) and (ii) raised entry barriers and restricted access to essential facilities needed to operate in the QAV market of the Guarulhos airport. The proceedings are pending in the Tribunal, and the Department of Economic Studies was requested to prepare a study to analyse the matter.

3.1.4. Oil & Gas

41. The Brazilian fuel sector is one of the major regulated markets in the country due to its strategic role and relevance to the country's production. In the late 1990s, the government created a regulatory agency for the sector, the ANP, and developed opportunities for national and international private businesses to explore oil. Thus, the private sector could explore, produce, refine, and transport oil – activities previously carried out by the government through a legal monopoly. Nevertheless, the structure of some links of the fuel production chain remained highly concentrated due to the former monopoly, requiring a steady collaboration between regulatory and competition bodies. Hence, they worked together to promote competitive rules and prevent abuse of dominant position, such as non-solicitation clauses, entry barriers, obstacles to rivals' expansion, and predatory pricing.

42. Another major instance of collaboration in the sector was the Cease and Desist Agreement entered by CADE and company Petrobras in the scope of Administrative Enquiry 08700.006955/2018-22. The enquiry was launched based on competition concerns raised by the Department of Economic Studies in Technical Opinion 37/2018. The opinion, regarding the oil refining market, resulted from discussions of a working group formed by the two authorities.

43. According to the document, the national refining market constitutes a *de facto* monopoly, as Petrobras holds 98% market share, creating the potential for abuse of

to 10 minutes the set time". Available at: <https://www2.anac.gov.br/anacpedia/por-ing/tr4433.htm>.

dominant position and negative effects on society. Questioned about its monopoly and commercial practices, the company proposed a Cease and Desist Agreement, undertaking to fully divest from 8 of its 13 refineries and their respective logistical infrastructure.

44. On 10 June 2019, CADE's Tribunal approved the agreement and suspended the investigation into the refining market. Hence, according to the Department of Economic Studies, Petrobras divestiture will reduce market concentration, consequently representing a potential increase in competition and benefits to consumers.

45. On a different note, an important topic consists of the many cartel investigations involving the retail fuel market, for which CADE already has a consolidated case law.

46. By way of example, Administrative Proceedings 08700.010769/2014-64, adjudicated on 10 April 2019, was an enquiry into a cartel in the distribution and retail trade of fuel in municipalities of the Belo Horizonte metro area, state of Minas Gerais. The cartel included filling stations, distributors, and Minaspetro – a union of oil derivative retailers of Minas Gerais. According to the Tribunal of CADE, the participating companies created a complex structure. The union, comprised of the principal filling stations in Belo Horizonte (i) arranged meetings between representatives of the union, distributors, and retailers; (ii) promoted the sharing of commercially sensitive information between competing stations; (iii) communicated with the cartel participants to coordinate and enforce their price-fixing agreements; and (iv) made regular contact to opposing filling stations to try to persuade or compel them to be part of the arrangements. The distributors, for their part, allegedly (i) encouraged coordinated behaviour, (ii) fixed resale prices, and (iii) made agreements between other distributors.

47. In March 2007, ANP detected an uncommon behaviour in petrol prices, which later lead to the conviction of more than 40 investigated parties for engaging in coordinate behaviour or encouraging it. The parties, who included both individuals and legal entities, were fined a total of BRL 156.9 million.

48. Administrative Proceedings 08012.008859/2009-86, brought in 2012, is an investigation of alleged cartel activity in the fuel resale market in the Federal District. Together, CADE, the Prosecution Services of the Federal District, and the Federal Police seized documents that are now pending analysis at CADE's Office of the Superintendent General. The authorities will use the documents to scrutinise the allegations of price-fixing, market allocation, and barriers to entry, adopting mechanisms for monitoring the commercially sensitive information shared amongst fuel distributors. The ongoing antitrust investigation aims to detect evidence of anticompetitive practices in the market of motor fuel resale and is aided by the ANP, which has been supporting CADE in technical matters related to the prices charged in the Federal District. In 2017, CADE entered into a Cease and Desist Agreement with Cascol, one of the major local filling station chains. Through the agreement, the company undertook to admit its participation in the violation, stop the illegal activity, and pay a financial contribution of BRL 90,436,672.83.

49. In the matter of the *ex-ante* merger control discharged by the authority, we can mention Merger 08700.006444/2016-49, blocked on 2 August 2017, on Ipiranga's full acquisition of Alesat. In summary, the transaction involved companies of the liquid fuel distribution market operating in several Brazilian states. Due to their operations and high market shares in the fuel distribution market, CADE's Tribunal considered the acquisition had the potential to increase the merging firms' exercise of coordinated power, negatively impacting other links of the fuel supply chain.

50. In reviewing the companies' proposed remedies, the Tribunal determined the remedies were not sufficient to eliminate the high risk of market power exercise. Hence, the Tribunal suggested they divested all Alesat's relevant assets related to distribution in

twelve Brazilian states. The companies disagreed on the remedies and CADE blocked the transaction.

51. Moreover, the ANP was informed of the decision and provided, in the case record, information on how it defined the relevant market in the merger review and on the weighted mean prices charged by companies of the motor fuel distribution market.

52. Another significant case to exemplify CADE's *ex-ante* control is Merger 08700.000827/2020-90, cleared subject to remedies on 18 November 2020. The transaction involved the national market for LP gas distribution, with the full acquisition of Liquigás (a subsidiary of Petrobás) by companies (i) Copagaz and Itaúsa, (ii) Nacional Gás, and (iii) Fogás. CADE's Tribunal understood the conditions of the LP gas distribution sector, such as its high concentration and regulatory and infrastructural barriers, raised competition concerns, as they potentialise the chances of coordinated behaviour between the acquiring companies (Copagaz and Itaúsa, Nacional Gás and Fogás).

53. However, the Tribunal concluded these concerns could be mitigated by a structural remedy. Thus, intending to ensure the transaction's clearance, the parties entered into a Merger Control Agreement with CADE, undertaking to, amongst others, (i) divest several assets; (ii) minimise the risks of sharing sensitive information during restructuring; and (iii) hiring a trustee to monitor the implementation of the agreement.

54. When signing the agreement and clearing the transaction, the Tribunal mentioned the proposed remedies not only eliminated the identified concerns but also strengthened a new competitor in the major regions of the country.

3.2. CADE’s advocacy role

55. In addition to performing preventive and punitive roles as to concrete cases, CADE often contributes through its advocacy role, providing technical opinions to regulatory agencies on the potential adoption, change or elimination of certain regulations in order to address competition concerns on regulated markets. Moreover, CADE comments on legislative bills with the intention to promote free competition and grant markets more efficiency. In this regard, it is worth mentioning the work carried out by CADE’s Department of Economic Studies.

56. In the ports sector, CADE's case law regarding the Terminal Handling Charge 2 led ANTAQ to issue its Resolution 2389/2012 and, later, Resolution 34/2019, which together address this matter from a regulatory perspective. The documents clarify, amongst other issues, which services provided by port operators are covered by the THC (Terminal Handling Charge), box rate and SSE, and can be imposed on other supply chain links.

57. Furthermore, CADE was recently involved in discussions around Bill 4199/2020[21] (also known as BR do Mar, or Sea Road), which establishes the Programme for Cabotage Promotion. At the occasion, the Department of Economic Studies issued a number of technical opinions with recommendations and remarks about the potential competitive effects of the bill and rules proposed (e.g. ANTAQ Resolution 01/2015, that modified the procedures and criteria for chartering vessels used in cabotage).

[21] The project is a federal government initiative to enhance the structure of waterway transport and increase the participation of cabotage in Brazilian logistics chains. It aims at granting private investors regulatory certainty and ensuring transport service users have regularity, stability, and predictable prices to commercialise their cargo. The bill is pending at the Brazilian Congress. Available at: <https://www.ppi.gov.br/politica-de-estimulo-a-cabotagem-denominada-br-do-mar>.

58. As for the civil aviation sector, CADE also provided its input on the competitive effects of slot allocation and air ticket price caps, aiming to increase competition in the sector.[22]

59. In addition, the Department of Economic Studies assisted in bills that culminated in Law 13640/2018, concerning private passenger transport services, such as those offered by ride-hailing applications. After carrying an in-depth empirical study on the market, the Department concluded entrants (applications such as Uber, Cabify) boosted competition in the market and cut prices paid by consumers (including prices charged by incumbents, i.e. taxi drives). Hence, the Department suggested the transport sector was gradually deregulated, so as to reduce barriers to entry and increase competition.

60. More recently, the advocacy activity performed by CADE and its interaction with regulations and legislation has become relevant in light of the Covid-19 pandemic. Against this background, the Department of Economic Studies has prepared a number of technical opinions against bills that introduced price controls on medication[23], essential Covid-19 related products[24], educational services[25], and LP gas[26], amongst others. The department concluded the controls would negatively impact the supply of these products and services to society, raising consumer prices in the medium and long terms.

4. Conclusions and future perspectives

61. The Brazilian perspective on the regulatory and competition jurisdictions is grounded on the principle of coexistence and complementarity of institutions, as CADE's decisions demonstrate. Furthermore, the relationship between sectoral regulatory agencies and the competition authority is founded on a collaboration that exceeds mere coexistence and the MoUs and cooperation agreements entailed, ranging from CADE's recommendations for regulated markets to the technical support CADE provides by analysing these markets.

62. In this respect, in 2019, the Brazilian Congress passed a law to promote the interaction between antitrust and government regulation. Law 13848/2019 (the Brazilian General Regulatory Agencies Law) describes regulatory agencies' jurisdiction over competition and the role of the antitrust body as to regulated markets, setting forth a close cooperation between regulatory and competition bodies to foster competitiveness in these markets.

63. Hence, we expect the increased interaction between these two activities will potentially benefit the Brazilian competition environment, since closer collaboration between the institutions will help enforce competition in the regulated sectors, whilst granting market players greater legal certainty.

[22] See the Department of Economic Studies' Technical Opinions 12/2019 and 23/2019.

[23] See the Department of Economic Studies' Technical Opinion 15/2020.

[24] See the Department of Economic Studies' Technical Opinion 16/2020.

[25] See the Department of Economic Studies' Technical Opinion 17/2020.

[26] See the Department of Economic Studies' Technical Opinion 19/2020.