

Unclassified

English - Or. English

8 November 2023

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

Working Party No. 2 on Competition and Regulation

Competition and Professional Sports – Note by Brazil

4 December 2023

This document reproduces a written contribution from Brazil submitted for Item 4 of the 76th meeting of Working Party 2 on 4 December 2023.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/competition-and-professional-sports.htm.

Federica MAIORANO
Federica.Maiorano@oecd.org

JT03531188

Brazil¹

1. Introduction

1. Recent studies show that the market of sporting events represents a significant portion of the global economy, which is also true when we consider this economic sector for national economies, especially in Brazil². In this context, it is not surprising that the topic gives rise to considerations on the relationship between competition and antitrust agenda and the sporting sector.

2. This contribution will briefly present the organisation of the sporting sector in Brazil, focusing on the organisation of football championships and the applicability of the Brazilian Competition Law in the markets part of this sector. Finally, CADE'S case law related to the topic will be presented.

2. Brief Overview of the Organisation of the Sporting Sector in Brazil

3. The organisational structure of the sport disciplines in Brazil involves both public and private sectors, including different levels of implementation, operationalisation, and control. The structure complies with constitutional (Constitution of Brazil, Article 217) and legal provisions, such as the Pelé Law (Law 9615/1998), and the recently enacted General Sports Law (Law 14597/2023).

4. As provided for in Article 217 of the Brazilian Constitution, the sports organisations have autonomy to rule their own organisations and operations. They rely on the allocation of public resources to the main promotion of sports for educational purposes and, in specific cases, for high performance sports.

¹ This contribution was based on the Sports Media Rights contribution: Brief Considerations on the Market and CADE's Performance, submitted to the Latin American and Caribbean Competition Forum – LACCF in 2023. The document was updated and expanded by André Rothfeld Gratone, CADE's Advisor of the Office of the President, and Beatriz de Sousa e Silva Mueller, trainee of the Office of the President, and it was proofread by Lílian Santos Marques Severino, CADE's Chief Economist of the Department of Economic Studies. The English version of the present work was prepared by the in-house translators of the International Unit of CADE: it was translated into English by Karine Neumann Gonçalves and proofread by Nathália Oliveira Silva.

² MALAGON, Javier. Sports and Investment: allies with a promising future. Mapfre, 2022. Available at: <https://www.mapfre.com/en/insights/economy/sports-investment-allies-with-a-promising-future>

Mapfre, 2022. Available at: <https://www.mapfre.com/en/insights/economy/sports-investment-allies-with-a-promising-future/>. Retrieved: October, 2023.

Brazilian football clubs financials from 2020: Ernst Young Brazil. Available in Portuguese at: https://www.ey.com/pt_br/media-entertainment/levantamento-financeiro-dos-clubes-brasileiros-2020 Retrieved: October, 2023.

Brazil Market report, 2021. Available at: <https://media.sportbusiness.com/2021/02/free-brazil-market-report-2021> Retrieved: October, 2023.

5. In the public service, the General Sports Law establishes the Brazilian system for sports and leisure (SINESP), a decentralised cooperation mechanism among federal, state, and local governments for public policies related to sports.

6. We emphasise there is an explicit provision on sports autonomy in the law, ensuring there is no external interference that could jeopardise the uncertainty of results in sports competitions (Article 26, Paragraph 1).

7. On the other hand, the sports confederations and federations are private organisations, at national and state levels, that organise sport disciplines. They are responsible for carrying out championships and regulating sports. For instance, the Brazilian Football Confederation (CBF) is responsible for the football rules and for the organisation of Brazilian championships, while the state federations, such as the Football Federation of the State of Rio de Janeiro (FERJ) or the Football Federation of the State of São Paulo (FPF), are responsible for the championships of their own states.

8. In contrast, the clubs are private organisations that are traditionally organised as non-profit organisations, taking part in sports championships and their disciplines. Recently, the Brazilian Congress enacted the law on football corporations, *Law of Sociedades Anônimas de Futebol* (Law 14193/2021), allowing Brazilian football clubs to move from a model of non-profit organisation to a new model named *Sociedade Anônima de Futebol* (SAF), a special type of football club corporation³.

9. In order to promote competition advocacy, CADE organised a seminar to discuss the SAF model in 2022. The Brazilian competition agency gathered in-house experts, corporate and competition lawyers, as well as members of parliament, and other actors directly involved in the process of drafting and enacting the law⁴.

10. From the perspective of CADE, the corporate changes made by certain football clubs from association models to SAF models may result in notifiable mergers. Hence, the Brazilian competition authority must dwell on the competition aspects of these transactions, as it will be seen below.

11. Besides public policies and private operations of confederations, federations, and football clubs, there are other markets and economic agents operating to their core activities, such as media conglomerates, investment funds, advertising agencies, advertisers, among other stakeholders of the sporting sector. Some of these will be addressed in CADE's precedents below.

12. Therefore, the government bodies can implement public policies to foster sports, in addition to establishing the main principles of sporting activities. Such principles are regulated by the confederations and federations as private independent organisations that host championships, and by the football clubs that take part in these championships.

³ The supporters of the SAF model claim that the new corporation model can provide a new structure for Brazilian football clubs, allowing a greater capacity to pay debts by securing funds through the issuance of financial bonds. Another argument they often present is that it encourages the professional management of clubs with the participation of individuals, firms, and investment funds. In addition, it forecasts governance measures applicable to the clubs (or their football departments) that decide to use the new model.

⁴ Further information on the discussions of the event are available in Portuguese at: <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-promove-debate-sobre-lei-das-sociedades-anonimas-de-futebol-no-direito-concorrencial-brasileiro> Retrieved: 10 October, 2023.

3. Enforcement of the Brazilian Competition Law in the Sporting Sector and CADE's Most Recent Cases

13. The Brazilian Competition Law (Law 12529/2011) sets forth the prevention and suppression of antitrust violations, expressly indicating its imposition to practices performed on the Brazilian territory, in full or in part, or that produce or may produce effects thereon (head provision of Article 2). Moreover, the Article 31 addresses the general provisions on the antitrust violations punishment, illustrating the broad reach of the Brazilian Competition Law, including public and private agents⁵.

14. Having said that, as the Brazilian antitrust authority in the Brazilian Competition Defence System, CADE is responsible for conducting preventive and repressive control in any markets that may produce effects in Brazil, including the sporting sector. For instance, markets of publicity rights and sports broadcasting, sponsorship, and marketing of sporting events and professional sports, among other potential relevant markets.

15. As a rule, the main precedents of CADE related to the sporting sector are quite recent (after the enactment of the Brazilian Competition Defence System in 2012, under Law 12529/2011), and are related to professional football markets, as seen below.

3.1. Suppression of Antitrust Violations

16. The Administrative Proceeding no. 08012.003048/2001-31 was an emblematic case under the late Brazilian antitrust law (Law 8884/1994), launched by CADE after a complaint offered by *Associação NeoTV*, representative of pay TV operators. The representative accused *Globosat* (a company that programs and distributes pay TV channels) of anticompetitive and discriminatory practices when they refused to sell access to their channels to *Net's* competitors (another company that programs and distributes pay TV channels).

17. *Globosat* was a company controlled by *Globopar*, which used to control the *Globo* group. On the other hand, *Net* is a company that used to be partially controlled by the aforementioned economic group.

18. *Globosat* used a strategy to refuse selling its channels, especially the sports ones – *SporTV* and pay-per-view channels, to the operators of the market. The practice was reported as a vertical restriction because it closed the market, preventing the access of other competitors to sports channels and the broadcasting rights to several Brazilian football championships.

19. In January 2006, the former Secretariat of Economic Law (SDE)⁶ recommended *Globosat's* conviction to CADE. In the same year, CADE ratified a Cease and Desist agreement with the company. Therefore, *Globosat* committed to comply with a series of obligations in exchange for the suspension of the administrative proceeding.

⁵ Article 31. This Law applies to individuals and legal persons governed by public and private law, and to any associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, regardless of operating under a legal monopoly regime.

⁶ According to the former Brazilian Competition Defence System (SBDC), provided for in Law 8884/1994, the SBDC was formed by the Secretariat for Economic Monitoring (SEAE), the Secretariat of Economic Law (SDE), and CADE. The current model, provided for in Law 12.529/2011, merged CADE and SDE, creating a new antitrust authority.

20. The Cease and Desist Agreement was divided into two parts. First, *Globosat* should trade its channels in a non-discriminatory basis by the end of 2008. Second, from 2009 on, *Globosat* should not hinder the TV operator's access to the main sporting events and championships by using exclusivity agreements. The Cease and Desist Agreement was in force until the end of 2011.

21. We highlight that CADE is currently investigating other cases related to the market of sports media rights and other rights associated with sporting events.

3.1.1. Ongoing Investigations

22. In 2019, CADE established, ex-officio, a preliminary enquiry no. 08700.004453/2019-48 to analyse evidence of antitrust violations related to negotiations between economic agents (clubs and broadcasters) in the Brazilian market for media rights, regarding football broadcasting⁷.

23. During the discovery phase, and according to the technical opinion⁸ of the Office of the Superintendent General, which based on the conversion of the preliminary enquiry into administrative enquiry⁹, violations related to refusal to deal, hoarding, price discrimination, sham litigation, among other unilateral conducts, are under investigation. These violations are subject to sanctions, under the terms of Article 36, Paragraph 3 of Law 12529/11, and were allegedly committed by a Brazilian economic group in the market of football broadcasting in free-to-air and pay-TV medias.

24. It is important to emphasise that the ongoing investigations occur in the context of a recent change in the legislation. As stated in Law 14205/2021, which makes provisions on football broadcasting rights, the football club that hosts the match is granted exclusivity to negotiate the broadcasting rights of the football matches with radio and TV broadcasters.

25. The investigation on the alleged antitrust violations is in course at the Office of the Superintendent General of CADE. In case the enquiry is converted into an administrative proceeding, it will be analysed by the Tribunal of CADE.

⁷ CADE's investigation was confirmed later with a complaint of a football club in the first division of the Brazilian Championship, which claimed there was a discriminatory conduct of the broadcaster in the contract negotiation to grant broadcasting rights.

⁸ TECHNICAL OPINION NO. 1/2020/GAB-SG/SG/CADE. Available in Portuguese at the administrative enquiry no. 08700.004453/2019-48. Retrieved on: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOFT-6GFdjT9OZv1f6gYgfanJrJVBldHQTthI7j4Q_q_A1BZIIY72MKMLriNWn2VCEfr_K8ZIfmZDmp4DM5104TKQ

⁹ Mainly, CADE has three enquiries in course of analysis for antitrust violations. The preliminary enquiry aims to examine whether CADE has jurisdiction over the case, considering the indications available about alleged antitrust violations, and is extendable for 30 days, in case further investigation is needed. On the other hand, the administrative enquiry can be opened immediately, according to the available evidence on the case under analysis, or after further investigation on a preliminary enquiry. If needed, the administrative enquiry can be extended up to 180 days. The administrative proceeding occurs when there is strong evidence of violation. In addition since it is a formal accusation made by the investigative body of CADE, it ensures the right to full answer and defence to the parties under investigation. It is worth mentioning that the proceedings in the course of administrative proceedings must be submitted to the Tribunal, the adjudicatory body of CADE, responsible for the final decision of antitrust cases in the administrative field.

26. Another recent case involving the sporting sector was related to the negotiation of broadcasting rights. The administrative proceeding no. 08700.002012/2021-26 analyses an alleged antitrust violation in the international market of football championship media rights.

27. The practice, which happened from 2008 to 2017, consisted of (1) coordination of prices and moves, (2) market division through cover bids, competition abstentions, and joint-bid agreements, and (3) exchange of sensitive information, causing an impact in the international market of sports broadcasting rights, and rights associated with sporting events and granting of legal counsel services¹⁰. The investigation is in progress at the Office of the Superintendent General of CADE.

3.2. Prevention of Antitrust Violations

3.2.1. Gun Jumping Investigations

28. In 2022, CADE carried out an ex officio analysis of two transactions involving an alleged practice of gun jumping, in the context of transition from an associative model to a SAF model.

29. The first transaction was related to stock purchases of SAF Botafogo, a business that is responsible for managing the Department of Botafogo Football Club, by Eagle Holding. There was an investigation regarding an alleged conduct of gun jumping, due to a lack of notification of the business (Case no. 08700.003313/2022-58).

30. After asking the club's board of directors for information on the transaction and further analysis, CADE decided to dismiss the case. Although they understand that the acquisitions of SAF are up to notification, the lack of fulfilment of the turnover criteria on the case would not lead to a mandatory submission to CADE¹¹.

31. The second transaction was related to stock purchases of SAF Cruzeiro Esporte Clube, from the business group Tara Sports Brasil Participações Ltda (Case no. 08700.003312/2022-11).

32. CADE also dismissed the case due to the lack of fulfilment of the turnover criteria on the case, which is necessary for mandatory notification.

33. It is important to highlight that CADE may request the notification of non-mandatory mergers and acquisitions (Law 12529/2011, Article 88, Paragraph 7). In addition, the Office of the Superintendent General carried out an analysis on the case, suggesting there was an alleged vertical integration between the business group that bought

¹⁰In sum, the alleged conduct would have affected sports federations, sports clubs, and other right holders that posted bid invitations (1) for sports media rights and other related rights or (2) for the appointment of players, advisers, and consultants related to the sale of such rights.

¹¹ According to Article 88 of Law 12529/2011, the parties involved in the transaction must submit the mergers and acquisitions to CADE in cases which, cumulatively: 1. at least one of the parties involved in the transaction registered an amount equivalent or superior to BRL 750 million of annual gross sales or total turnover in the last balance sheet in Brazil, in the year prior to the transaction; and 2. at least another party involved in the transaction registered an amount equivalent or superior to BRL 75 million of annual gross sales or total turnover in the last balance sheet of Brazil, in the year prior to the transaction (Inter-ministerial Decree 944/2012). The values mentioned in items 1 and 2 of the head provision of this Article may be adequate, simultaneously or independently, on the indication of the Tribunal of CADE, by inter-ministerial decree of the Finance and Justice Ministries.

the media content distribution and the grant of broadcasting rights held by the SAF. They concluded there was no harm to the competitive environment that could justify the request for notification¹².

3.2.2. Merger analysis - SAF of Clube de Futebol Atlético Mineiro

34. Regarding the SAF phenomenon, CADE analysed the acquisition no. 08700.006273/2023-87 in 2023. The transaction concerns an acquisition by Galo Holding of the control of Atlético Mineiro SAF, which was owned by Atlético Mineiro.

35. The transaction scope involved sports rights related to Atlético Mineiro SAF, namely, management of agreements, the control of the club's stadium (Arena MRV), and the sports rights related to male, female, and youth academy teams of Clube Atlético Mineiro, in addition to broadcasting and intellectual property rights.

36. In general, there were some vertical relations between the market of professional football and the Brazilian market of advertising, sponsorship, and marketing sporting events.

37. In the advertising market analysis, they considered the representation of Clube Atlético Mineiro as the owner of the advertisement space, in terms of the amount spent with advertising, sponsorship, and marketing by the agents related to the buyer.

38. In the competition analysis of the professional football market, they considered the amount spent on player transfers, as a measure of market share.¹³ They came up with a result below 20%, the number considered dominant position by the Brazilian laws, considering both broader cases (international transfers) and restrict ones (national transfers). Later, the Tribunal of CADE examined the deal and decided to clear it unconditionally.

4. Final Considerations

39. The presentation of an overview of the functioning of Brazilian sporting activities, its agents, and ability to enforce the competition law (and CADE's performance, as well) illustrates the recent cases at the Brazilian antitrust authority regarding antitrust policies, either on prevention or suppression.

40. Among the topics CADE analysed, the most relevant ones are the potential antitrust violations in the markets of negotiation of broadcasting rights for sporting events, as well as the recent trend of mergers, due to the change from the Brazilian football clubs

¹² According to the technical opinion 13/2022 of the Office of the Superintendent General, it is possible to suggest that there is an alleged vertical relationship in the activities of Group R9. These activities involve the distribution of media content and the grant of broadcasting rights, made by SAF. As claimed by the defendants, Cruzeiro SAF is linked to the current contract on the broadcasting of several championships, where male professional teams are to take part. However, the defendants claimed that Beyond (the company of the buyer) would not be entitled to any current broadcasting rights. Third parties have the ownership of the rights of the clubs and federations when Beyond streams football matches, such as some Carioca Championships. Therefore, the transaction does not raise any competition concerns. Furthermore, other companies from the group provide services of sports marketing. However, these activities are oriented to sponsors, athletes, and sporting event organisers, and not for sports organisations, such as SAF".

¹³ The data obtained here is a result of the Global Transfer Report of the Fédération Internationale de Football Association - FIFA.

association model to the new corporation model, SAF. In conclusion, it is important to highlight that CADE remains alert to possible trends and their implications in the Brazilian competitive environment.