

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Brazil****4 June 2019**

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<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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1. Introduction

1. In Brazil, competition enforcement relies on an administrative system implemented by the competition law enforcement authority – the Administrative Council for Economic Defense (CADE in its Portuguese acronym). Although CADE has administrative jurisdiction that cannot be modified within the executive branch of government, any decision issued by CADE can be challenged in the judiciary branch. This paper analyzes the legal framework and standard of review applied by judicial courts in competition cases, the courts' access to competition expertise, and the impact of judicial review on the competition authority and on the incentives of private parties to litigate.

2. Legal framework and standard of review

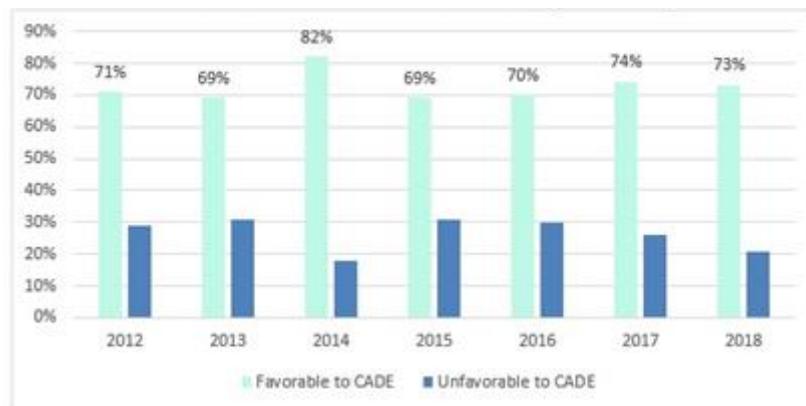
2. The judicial review of administrative decisions is based on the constitutional principle of separation of powers and the principle stated in article 5(XXXV) of the Brazilian Constitution, according to which “the law shall not exclude any injury or threat to a right from the consideration of the judiciary branch”. Therefore, all of CADE's decisions are subject to judicial review.

3. CADE is responsible for the investigation and for the first-instance decision making on competition matters over the whole national territory. Although CADE's headquarters is located in Brasilia, its decisions can be challenged by the parties or any interested party affected by the decision before a federal judge of any of the 27 federal states. Usually, CADE's decisions can be appealed to a federal court, whose decision can be appealed to a federal tribunal, whose decision can be further appealed to a High Court (the Superior Court of Justice, responsible for the harmonization of judiciary decisions, and/or the Federal Supreme Court, responsible for constitutional matters).

4. The judiciary branch can review any decision issued by CADE, irrespective whether it is a final decision, a charging document or a procedural act. Generally, procedural acts, such as search warrants, are frequently challenged in the judiciary since in Brazil a previous judiciary authorization is needed to conduct a dawn raid. In these cases, the judiciary warrant for a dawn raid is granted without hearing the target company, based only on the evidence of the conduct and of the target company's participation in it. After the execution of the dawn raid, the decision granting the warrant can be challenged, usually based on the alleged lack of sufficient evidence of a particular company's participation in the anti-competitive practice investigated.

5. Before discussing the standard of judicial review in competition cases in Brazil, it is important to highlight that CADE has a high confirmation rate of its decisions in the judiciary, as shown in the chart below. In 2018, 73% of the judiciary decisions were favorable to CADE.

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Figure 1. CADE's success rate in the judiciary

Source: CADE

6. The judicial review of competition cases in Brazil entails a review of legality as well as a full review of the merits of the decision. Therefore, the judiciary branch can either confirm CADE's decision or annul it, in full or in part. When it comes to annulment, the judiciary can either order CADE to make a new decision or replace CADE's decision with one of its own.

7. The standard of review varies depending on the authority responsible for the review. Usually, federal judges assess the procedural aspects of the decision and the correctness of the decision itself, while tribunals and higher courts assess only legal or constitutional matters. Additionally, there is a slight difference in the standard of review applied in decisions of different nature, like administrative or criminal ones. For instance, the review of judicial prison sentences is more rigorous than the review of the administrative decisions imposing fines because, among others, they are done by different branches of the judiciary with the application of different criteria. While CADE's administrative decisions are subject to review by federal civil courts, prison sentences are issued and reviewed by criminal courts, which take into account subjective aspects of the conduct, such as the intent to commit the crime.

2.1. Review of legality

8. The review of legality involves the lawfulness of the competition authority's decision, generally including the legality, reasonableness and procedural accuracy of CADE's decisions. When it comes to the examination of the legality, a relatively common circumstance that leads to the revision of CADE's decisions is the recognition, by the courts, of the interim statute of limitations.

9. A good example of this standard of review is the Nestlé/Garoto case in which the judiciary annulled CADE's ruling for lack of procedural accuracy.

Box 1. Nestlé/Garoto case*

In the Nestlé/Garoto case, the parties notified the merger in 2002 after the conclusion of the transaction. This case was assessed under the previous post-merger notification system.

In October 2004, after an in-depth analysis, the majority of CADE's tribunal blocked the merger.

The merging parties appealed to the judiciary, which in 2005 granted an injunction relief suspending CADE's decision. CADE appealed, but the injunction was upheld in 2007. In 2009, after a second appeal, the Federal Regional Tribunal of the 1st Region decided to annul CADE's ruling on the grounds that CADE's tribunal based its decision on the opinion of the Reporting Commissioner which was rooted in incorrect information. Consequently, the judiciary tribunal determined that CADE should render a new decision on the case observing the right procedure. Cade appealed and is waiting for a final decision.

Note: * Merger Review Process No 08012.001697/2002-89.

2.2. Full review of merits

10. The full review of the merits of competition decisions involves an assessment of the correctness of the administrative decision taken by CADE. It can encompass the review of elements of fact, elements of law, or both. In the example below, the judiciary branch overruled CADE's decision, replacing the administrative decision with its own assessment of whether the conduct under analysis can cause harm to competition.

Box 2. Adoption of a scale of a minimum fee¹

In 1996, the CADE tribunal has convicted Laboratório Bandeirante for influencing the adoption of uniform commercial behavior among competitors. The company appealed against CADE's decision that prohibited it to use the medical fee scale of the Brazilian Medical Association (AMB in its Portuguese acronym) or other similar documents that could result in the uniformity of prices for medical services. According to the company, there was no violation of the economic order.

In 2018, The Federal Regional Tribunal of the 1st Region reviewed CADE's decision and concluded that the use of the AMB medical minimum fee scale by the laboratory could not harm competition since the scale has no obligatory nature, serving as a simple orientation for the market players.²

Notes:

¹ Administrative Proceeding No 0169/1994.

² Lawsuit No 0016643-24.1998.4.01.3400 TRF1.

11. In other cases, in order to assess the correctness of CADE's decision, the judiciary branch needs to extend the collection of evidence presented.

Box 3. Marine hoses cartel case¹

In the Marine hoses cartel case, in 2015 CADE condemned three companies and an individual for participating in an international cartel in the marine hoses market. The practice occurred at least from 1985 to 2007. The fines imposed summed up to R\$ 13.5 million.

The parties appealed to the judiciary asking the suspension of CADE's ruling. The Federal Regional Tribunal of the 3rd Region recognized that the issue under discussion, participating in an international cartel, is complex and demands an in-depth analysis of the

subject under which the parties' right to defense must be guaranteed.² Therefore, the court could not conclude in a summary cognition that the administrative proceeding was illegal. Thus, the court suspended CADE's decision and confirmed the need for an extension of the collection of evidence.

Notes:

¹ Administrative Proceeding No 08012.010932/2007-18.

² Lawsuit No 0024614-25.2015.4.03.0000/SP.

12. Sometimes, instead of extending the collection of evidence, the judiciary branch assesses the evidence presented in a different manner, as shown in the review of CADE's decision in the generic drugs cartel case.

Box 4. Generic drugs cartel case*

In this case, CADE condemned several pharmaceutical companies for cartel formation. The decision was based on the minutes of a meeting between the sales managers of several pharmaceutical companies at the Getúlio Vargas Foundation. For the majority of the CADE Tribunal, the meeting was a clear evidence of collusion between the pharmaceutical companies that were planning anti-competitive strategies to prevent the entry of generic drugs into the Brazilian market.

However, the judiciary concluded that the evidence was insufficient to prove the conduct attributed to the companies by CADE. Both the 4th Federal Court of Brasília and the Federal Regional Tribunal of the 1st Region agreed about the non-existence of evidence for the imputation of the antitrust practices pointed out by CADE.

Note: * Administrative Proceeding No 08012009088/1999-48.

13. There are also those cases in which the judiciary assessed the correct application of the law to the facts, as shown by the judicial review of JBJ/Mataboi case.

Box 5. JBJ/Mataboi case¹

In 2017, CADE blocked the merger between JBJ and Mataboi and ordered the parties to undo the merger within 30 days since the merging parties had completed the transaction before obtaining the competition authority's approval (gun jumping).

According to CADE's Tribunal, the merger created significant risks to competition since the level of rivalry was low and the barriers to entry were high. Neither structural, nor behavioral remedies had been found capable of mitigating the competition concerns. The Reporting Commissioner stated that the transaction would result in a vertical integration of four markets and in horizontal overlaps in two stages of the chain.

However, the main argument used to block the merger was the kinship between JBJ owner José Baptista Júnior and the controllers of JBS, which is JBJ's main rival. Although there is no corporate relationship between JBS and JBJ, the kinship and the actions of the controllers of the two companies showed a potential coordinated action between them after the completion of the operation. For example, the appointment of José Batista Júnior as JBS president in the absence of the current controllers. Thus, the JBJ-Mataboi merger combined with the kinship between JBJ and JBS controllers would in effect hand almost complete control over the market to José Batista Júnior.

The merging parties presented an injunction to suspend the effects of CADE's ruling until the judiciary branch's decision. According to them, CADE's ruling was based on the presumption of bad faith regarding the use of the kinship between the directors of JBJ and JBS. Their argumentation was that a kinship is not foreseen in the current legislation as a ground for blocking a merger.

The first appeal court rejected the injunction request, but the Federal Regional Tribunal from the 1st Region suspended CADE's decision on the grounds that the plaintiff has the right to demonstrate judicially that his kinship relationship was not used to coordinate actions to the detriment of free competition.²

Notes:

1 Merger Review Process No 08700.007553/2016-83.

2 Lawsuit No 1011247-97.2017.4.01.0000 TRF1.

14. When applied well, the judicial review of the merits can help improve the accuracy, consistency and predictability of competition enforcement. However, when the judiciary branch issues conflicting decisions in the same case, as with the THC2 tariff, the review of the merits can be detrimental to competition policy.

Box 6. THC2 case¹

Since 1999, CADE has been pointing out that charging the THC2 tariff by port operators has unacceptable competitive impacts as it makes competition in the bonded warehouse market difficult or it may even restrain it completely.

Containers are unloaded from ships by port operators. After the containers are removed from the vessels, they have to be stored in warehouses. Customs warehouses are owned by third-parties and if the containers are stored in their warehouses, the port operators will charge them a so called THC2 tariff for transporting the unloaded containers to the warehouses. Naturally, the customs warehouses will transfer this expense to the ship operators. However, some port operators also have their own warehouses and if the ship owners choose to have the containers stored in the port operator's warehouses, no THC2 tariff is charged, making this second storage option cheaper. Given that only port operators are allowed to unload containers from vessels and transport them to storage facilities, the operators can use their privileged position to harm competition.

In Administrative Proceeding No. 08012.007443/99-17, CADE condemned four port operators from the city of Santos for charging customs warehouses the THC2 tariff, which was to the detriment of competition. The port operators appealed to the judiciary branch in different jurisdictions, São Paulo and Brasília, initiating a series of judicial proceedings that are still ongoing. These courts issued diametrically opposed decisions: the one in Brasília² upheld the appeal, while the one in São Paulo³ rejected it. The parties appealed to higher instance courts and the case is still pending.

Notes:

¹ CADE examined several cases concerning the charging of the THC2 tariff. The following Administrative Proceedings are waiting for a final judicial decision: Administrative Proceeding No 08012.007443/99-17, Administrative Proceeding No 08012.003824/2002-84; Administrative Proceeding No 08012.005422/2003-03, Administrative Proceeding No 08012.001518/2006-37 and Administrative Proceeding No 08700.008464/2014-92.

² Lawsuit No 0036938-38.2005.4.01.3400/DF.

³ Lawsuit No 0014995-56.2005.4.03.6100/SP.

3. Courts' access to competition expertise

15. In Brazil, the majority of judges possess insufficient expertise to adjudicate competition law and economic matters. Simple concepts such as relevant market or market power are constantly misinterpreted. Additionally, the judiciary sometimes requires CADE to include in its merger assessment the analysis of issues that have no relevance from a competition defense perspective. As an example, the judicial decision in a class action¹ ordered CADE to take environmental issues into consideration in the assessment of a merger in the mining market².

16. It is important to note that in Brazil judges have the prerogative to request the opinion of an expert when dealing with complex cases or matters in which they do not have expertise, such as competition cases. However, the opinion is often given by an expert judicial adviser. Generally, CADE cannot offer specialized advice to the judiciary, since it is almost always either a defendant or a plaintiff and has a direct interest in the case. When the subject under discussion is not a CADE decision, it can intervene in the process as a party assistant or *amicus curiae* (court friend) to offer its expertise in the matter. As an example, CADE has acted as *amicus curiae* in pleas against the constitutionality of legal devices filed against state laws that prohibited the operation of passenger transportation applications³.

17. To try to solve the lack of competition expertise in the judiciary, the Federal Justice Council approved Resolution 445, recommending the creation of non-exclusive specialized courts to adjudicate competition and international commerce cases.⁴ Despite the publication of the Resolution on June 7, 2017, until the present moment only two Specialized Federal Courts have been created in Rio de Janeiro.

4. The impact of judicial review on CADE and on the incentives of private parties to litigate

18. The judicial review system in Brazil is very slow compared to international standards⁵. A study conducted in 2016 concluded that the average time of the judicial review of competition cases in Brazil is 4 years and 6 months for simple cases and almost 10 years for complex ones⁶. Although there is no official later data available, this number

¹ Lawsuit No 1003592-88.2019.4.01.3400.

² Merger review No 08700.007101.2018-63.

³ Lawsuit No 449 Federal Supreme Court

⁴ For more information see Judicial perspectives on Competition Law – Contribution from Brazil, 7-8 December 2017. DAF/COMP/GF/WD(2017)3.

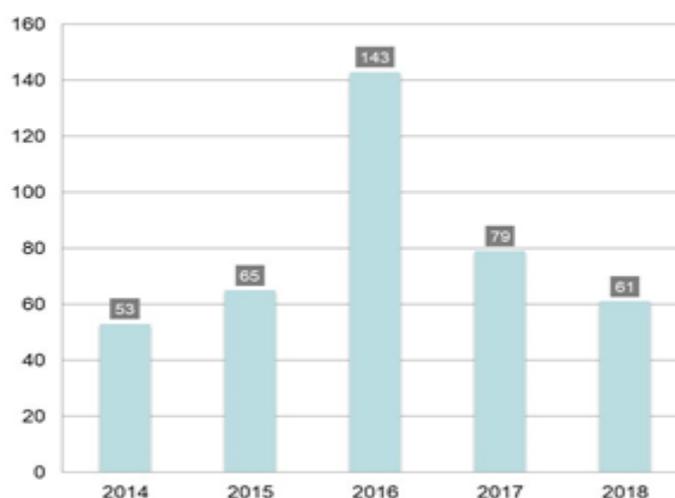
⁵ International Competition Network – ICN, *Competition and the judiciary: a report on a survey on the relationship between Competition Authorities and the judiciary*. April 2006. Available on: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf>>

⁶ Paulo Furquim de Azevedo, “Revisão judicial de decisões antitruste: incentivos para acordos?”. In: Mariana Mota Prado. (Org.). *O Judiciário e o Estado Regulador Brasileiro*. São Paulo: FGV Direito SP, 2016, v. 1, p. 81-102. 1ed.

has increased. The Nestlé/Garoto case, mentioned above, is a well-known example since it has been under review for 15 years and no final decision has been reached.

19. This same study stated that the number of cases brought to the judiciary was high during the first years of the previous competition law – Law No 8884/94 – (around 65%) and dropped after 2005 to 10% of the cases in 2012⁷. However, CADE has witnessed an increase in the number of its cases being appealed to the judiciary in the last 5 years as shown in the bar chart below.

Figure 2. Appeals against CADE in the last five years



Source: CADE

20. The high rate of challenges of CADE’s decisions in the first ten years of Law No 8884/94 had two important effects. First, CADE took important measures to improve its internal administrative rules and to guarantee the respect of the due process in its administrative proceedings in order to avoid future procedural errors in the decision-making process. These measures started in 2006, when CADE held public consultations to draft its Internal Regulation – RICADE. The idea was to mirror, in the administrative sphere, the due process-related judiciary procedures. It is important to note that despite the important achievements in this field, this is an ongoing process as CADE continues to publish guidelines and to put its internal rules and procedures to public consultation. In addition, CADE has recently joined the International Competition Network’s Competition Agency Procedures framework (ICN – CAP)⁸.

⁷ Paulo Furquim de Azevedo, “Revisão judicial de decisões antitruste: incentivos para acordos?”. In: Mariana Mota Prado. (Org.). *O Judiciário e o Estado Regulador Brasileiro*. São Paulo: FGV Direito SP, 2016, v. 1, p. 81-102. 1ed.

⁸ The framework combines substantive principles to the implementation of effective procedures by competition authorities around the world. CADE joined the ICN CAP on May 8th 2019. For more information see: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf

21. The second important effect was that in 2007, following international best practices and a public consultation process, CADE implemented its settlement policy. The idea was to present an alternative method to the judicial review in order to solve conflicts in a context where the parties are reluctant to pay the high expenses associated with a lengthy judicial process. It is important to note that the settlement policy is a significant complement to CADE's leniency program. Settlement decisions do not require prior review by the judiciary to become obligatory, but they need to be approved by CADE's Tribunal. A settlement decision can not be challenged by its parties since they waive their right to appeal. However, it can be challenged by third parties, but such lawsuits have been consistently dismissed by courts.

22. For some scholars, CADE's well-consolidated settlement policy, together with the slowness of the Brazilian judicial review system, has an "adverse selection" effect that distorts the role of the judicial review. Since the costs of a long judicial process are high, parties that seek the judiciary for legitimate reasons will prefer alternative methods of conflict resolution, while parties that seek the judiciary for the wrong reasons (i.e. to delay the final decision and consequently the sanction or payment of a fine) will prefer to challenge CADE's decision despite knowing that the judiciary will eventually rule against them.⁹

23. Recently, the judiciary branch has found a solution to mitigate this adverse selection effect. The Regional Federal Tribunal of the 1st Region decided to request the judicial deposit of fines or the offer of a suitable guarantee to suspend CADE's decision until the issuance of a final decision by courts. This simple measure decreases the company's incentive to delay a final decision, therefore favoring the effectiveness of competition policy.¹⁰

5. Conclusions

24. CADE acknowledges the benefits of an efficient judicial review of competition decisions. The review of legality of competition cases can provide important insights and feedback that allow the competition authority to improve its internal proceedings of conduct investigation as well as merger analysis. An efficient judicial review of legality can also discipline the authority's administrative acts, once it knows that any abuse of its powers may be sanctioned.

25. However, due to the current structure of the Brazilian judiciary system, some of the benefits of the judicial review may be hard to achieve in practice. This is because until today the judicial process has reached the final point beyond which there can be no further appeals in a very few number of cases and thus there are few decisions that could be used as feedback to improve the competition authority's internal proceedings and practices. Therefore, the only available domestic basis for improvement is intermediary decisions that

⁹ Paulo Furquim de Azevedo, "Revisão judicial de decisões antitruste: incentivos para acordos?". In: Mariana Mota Prado. (Org.). *O Judiciário e o Estado Regulador Brasileiro*. São Paulo: FGV Direito SP, 2016, v. 1, p. 81-102. 1ed.

¹⁰ For more information see: Judicial perspectives on Competition Law – Contribution from Brazil, 7-8 December 2017. DAF/COMP/GF/WD(2017)3.

are still subject to challenge in a higher court. Hence, the real improvements in procedures have been rooted in international best practices.

26. Additionally, the judicial review of the merits raises some concerns since the administrative proceedings within the Brazilian competition authority have the same procedural guarantees as the judicial ones. Moreover, the competition authority has expertise that is not yet matched in the judiciary despite the creation of specialized courts.

27. The effectiveness of judicial review and the usefulness of this control to improve CADE's decisions would improve with the establishment of simple and faster court procedures, the consolidation of the specialized courts in competition law with limited judicial power to review the merit of decisions issued by CADE, and the effective training of judges in competition law.