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Interim Measures in Antitrust Investigations – Note by Brazil

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This document reproduces a written contribution from Brazil submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Article 84 of the Brazilian Competition Law (Law 12529/2011) sets forth how interim measures should be used for antitrust investigations: the claim must be plausible (*fumus boni iuris*) and there must be serious and irreparable harm (*periculum in mora*). Interim measures aim to preserve competition, protect consumers, and cease the anticompetitive conduct.²

2. To illustrate, we present below two recent cases adjudicated by CADE in which the authority imposed interim measures, namely the iFood, and Facebook-Cielo cases.

1. iFood – Administrative Enquiry no. 08700.004588/2020-47

3. In March 2021, CADE granted an interim measure against iFood, a digital food ordering and delivery platform.

4. The measure was founded on claims brought by Abrasel, a Brazilian association for bars and restaurants, and Rappi Brazil, a competitor that employs digital technology to sell products and services of partner companies (supermarkets, restaurants, shops, etc.) in a marketplace.

5. Rappi claimed iFood had a dominant position in the market of online food ordering and that it took advantage of its position to adopt vertically restrictive practices through the massive execution of exclusivity agreements with partner restaurants. By favouring restaurants with exclusivity agreements, iFood powerfully influenced restaurants to adhere to its more restrictive business model.

6. Abrasel, for its part, alleged iFood was the leader of this market, holding an 86% market share, and that the firm was abusing its market power by creating barriers to competitors and extending its dominance to adjacent markets.

7. CADE identified that iFood's market share exceeded the 20% threshold for assuming dominance established in the Brazilian Competition Law. The authority also

¹ This document has been written by Patricia Alessandra Morita Sakowski, Deputy General Superintendent, Alden Caribé de Sousa, General-Coordinator for Antitrust Analysis, and Priscilla Craveiro da Costa Campos, Advisor, all of them at CADE. The information gathered in this contribution was based on Technical Reports issued during the administrative proceedings and written by Alexandre Cordeiro Macedo, Ana Paula Aparecida Guimarães de Paula, Carolina Helena Coelho Antunes Fontes, Ednei Nascimento da Silva, Edson Junio Dias de Sousa, Helenilka Pereira Barboza da Luz and Patricia Alessandra Morita Sakowski. Additionally, Arianne Mesquita and Ariel Menezes, Translators at CADE's International Unit, have translated it from Portuguese.

² Law 12529/2011: Article 84. In any stage of administrative enquiries or administrative proceedings to impose sanctions for antitrust violations, the Rapporteur of the case or the Superintendent General – sua sponte or upon application of CADE's Attorney General – may adopt interim measures if there is any evidence or a reasonable concern that the respondent's actions, directly or indirectly, have caused, or might cause, harm to the market that is irreparable, difficult to repair, or that renders the final result of the proceeding ineffective.

The Rapporteur of the case or the Superintendent General are to order the practice is ceased and, whenever practicable, the situation is reverted, through a interim measure, establishing a daily fine as per Article 39 of this Law.

considered that iFood had the first-mover advantage and that the affected market raised competition concerns related to tipping effects.

8. A successful online food delivery platform crucially depends on having a critical mass of partner restaurants. This is because, although a delivery website or application can have a wide user base, it may meet relevant growth issues if unable to partner with a sufficient number of restaurants on the other end. Thus, the antitrust authority concluded exclusivity clauses could hinder the supply chain by actually or potentially preventing competitors from reaching the volume of restaurants required to effectively operate in this market.

9. CADE's investigation suggested restaurants enjoy individual benefits from exclusivity agreements with iFood, possibly gaining competitive advantage. In addition, by having exclusive dealings with strategic restaurants, iFood could make other platforms' restaurant portfolios less attractive to customers, hindering their development.

10. The exclusivity clauses also increase the switching costs of restaurants that intend to leave iFood for its competitors; these competitors, in turn, would have to make a sufficiently attractive proposal to offset the restaurants' losses from breaking agreements with iFood. Besides, exclusivity clauses impede multi-homing by restaurants, that is, that restaurants take part in multiple platforms.

11. Considering digital markets are very dynamic and, especially, that the COVID-19 pandemic has driven the food delivery industry forward, retaining well-known restaurants with exclusivity clauses could raise high barriers to entry, obstructing competitors' growth or even making them leave the market.

12. Hence, CADE concluded if iFood continued to sign exclusivity agreements, this would increase market concentration and obstruct new entrants, extant companies, and rivals' ability to compete with iFood, since the main condition to attract clients is to have access to commercially attractive restaurants.

13. Based on the reasons above and determining as met the criteria for granting an interim measure, in March 2021, CADE demanded that, until a final decision, iFood:

- iFood should refrain from closing exclusivity agreements with restaurants, which were part of iFood's marketplace without exclusivity clauses;
- iFood could keep exclusivity agreements with restaurants, which were part of its marketplace with exclusivity clauses. Nevertheless, at the end of the agreements' term, renewals could only include exclusivity clauses if agreed by the parties. Renewals, however, should be restricted to one-year terms, although unlimitedly renewable;
- agreements with restaurants that were new to iFood's marketplace could not include exclusivity clauses;
- for those restaurants already part of its marketplace with exclusivity clauses, whose contracts were renewed without exclusivity clauses whilst the interim measure was still in force, iFood should not include exclusivity clauses in subsequent renewals.

14. Moreover, until a final decision on the case was announced, CADE imposed a daily fine of BRL 150,000 for breaching the interim measures. The investigation is ongoing.

2. Facebook (currently Meta) – Cielo – Administrative procedure for investigating mergers and acquisitions no. 08700002871/2020-34

15. On 23 June 2020, CADE granted an interim measure ordering the halt of the transaction between Facebook (currently Meta) and Cielo, an acquirer company. The transaction aimed at enabling commercial establishments accredited by Cielo to accept a new WhatsApp Business' payment system.

16. The transaction was highly publicised by the press on 15 June 2020, which led CADE to investigate it through an administrative procedure. As mentioned before, to grant an interim measure, CADE first evaluates whether two conditions are met: the *fumus boni iuris*, i.e. the plausibility of the claim; and the *periculum in mora*, i.e. danger in delay.

17. The authority determined the transaction affected, amongst other markets, the acquiring market, in which Cielo operates. According to a precedent³ and a study⁴ conducted by CADE, Cielo held over 40% of the national acquiring and payment channel market, based on the number of payment terminals. The company was the market leader in 2017 and held unquestionable market power. Moreover, the antitrust authority was conducting other investigations into Cielo at the time of this analysis that seemed to indicate the firm was using its position to hamper competition in the acquiring market.

18. The authority's preliminary assessment suggested competitors were not likely to create or replicate a similar payment system, even more so if Facebook and Cielo signed an exclusivity agreement. It was clear that, depending on the agreement's design, WhatsApp's user base (120 million people at the time) would give Cielo the possibility to process innumerable transactions without facing competition.

19. Hence, there was a great risk of incurring exclusivity, whether de facto or granted by an agreement, possibly excluding competitors from the new payment method and reducing consumer's options.

20. Another identified risk was that large banks were stakeholders at this transaction. In addition to being credit card issuing banks, the Brazilian banks Banco do Brasil and Bradesco were Cielo's shareholders. If the new payment method was only available for users that had cards issued by these two banks, the transaction could cause distortions in the bank market and have a negative effect on the competition environment.

21. The authority's decision to grant the interim measure also considered there was no indication or evidence the transaction would be notified to CADE to undergo merger review. In fact, announcements made by the press and Banco do Brasil showed the firms were already implementing their agreement.

22. Thus, the antitrust authority concluded that, due to the transaction's potential risks, the transaction could immediately affect the market, hindering competitors' operations or even relevantly diverting their demand; furthermore, the weakened competitiveness would rebound on consumers.

23. Therefore, on 23 June 2020, CADE ordered that the transaction be completely stopped in Brazil, prohibiting, at that time, the agreement between Facebook (currently

³ See Merger no. 08700.006345/2018-29 (Itaú Unibanco S.A. and Ticket Serviços).

⁴ Cadernos do CADE: Mercado de Instrumentos de Pagamento (Portuguese only). Available at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/publicacoes-dee/Cadernodeinstrumentosdepagamento_27nov2019.pdf

Meta) and Cielo and their new WhatsApp payment solution. The authority imposed a daily fine of BRL 500,000 in case of non-compliance with the order.

24. On 30 June 2020, as the parties clarified details of the operation and that they did not pursue a relationship of exclusivity, the measure was lifted.

25. Although *interim measures* are not limited to digital markets, this contribution focused on two Brazilian cases in these markets to illustrate the challenges posed by them. Either intervening or abstaining from intervening can be harmful to the market environment. The context of the high-speed development of innovative business models and of highly dynamic markets only increases the pressure on the antitrust authority to seek timely and suitable solutions. Late or unqualified solutions would equally be mistakes. In the two examples highlighted in this text, CADE decided in favour of the interim intervention in the market aiming to be timely and accurate. In one situation the measure was sustained during the investigation, while in the other the agency opted to lift it one week later after accessing new elements regarding the transaction.