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CONTRIBUTORS



CAROLINA GUERRA
Correspondent, Brazil

Carolina has worked as a journalist since 2006, writing about business and economic-related topics for a variety of publications. She received a bachelor's degree in journalism from Universidade Mackenzie and a post-graduation degree in international journalism from the Pontifícia Universidade Católica. Carolina can speak English, Portuguese, Spanish and German. Since April 2014, she has been reporting on antitrust in Brazil and Latin America for MLex..



ANA PAULA CANDIL
Reporter

Ana Paula graduated in journalism in 2011. She lived in Washington DC, where she worked for Al Jazeera English in 2010, and later in Toronto, where she holds a postgraduate diploma in International Business Management. She also worked for a number of trade publications and TV before joining MLex in October 2014.



Lead investigative role should belong to agency that moves first, CADE president says

The president of Brazil's antitrust authority said today that when more than one public body is investigating a case, the lead role should be taken by the agency that moves first.

“It is very much possible in a cooperation environment to recognize that when there is an overlap of competences one must recognize a kind of leading role in the conduct of the investigation strategy, which belongs to who made the first move,” Vinicius Marques de Carvalho said. “From that moment on, the strategy of investigation as a whole will be ... a general strategy.”

Carvalho said, for example, that when an investigation is begun by the Administrative Council for Economic Defense, or CADE, entities such as the public prosecutor's office or the general comptroller's office should coordinate with the antitrust regulator, which would conduct the investigation.

“The opposite is also true,” said Carvalho, referring to investigations started by other agencies. He said he believes other agencies share his view.

— Compliance —

Carvalho said that, regarding companies seeking fine reductions, the regulator may examine the willingness to cooperate apart from the existence of a compliance program.

“The existence of a robust compliance program and the same company taking part in a cartel is something a bit contradictory,” he said. “How can a company say that its executives did not know about the cartel and still say there was an effective program?”

Carvalho said, however, that if a company decides to adopt a compliance program after investigations are launched, that could be seen as evidence of good faith.



Uber, other innovators should be regulated, not prohibited, CADE's top lawyer says

Brazil's antitrust authority has no intention of prohibiting Uber, but regulators must find a way to integrate the ride-share service and similar companies into the competitive landscape of Brazil's market, the agency's top lawyer said.

"The main effect of market competition is the technology innovation it brings," Victor Rufino said. "Market competition is socially desirable, and regardless of what will be decided in the future, we need to know which path we are following."

In early September, the economics unit of the Administrative Council for Economic Defense, or CADE, said in a report that companies such as Uber shouldn't be banned. Ride-share apps provide alternative services to traditional taxis and may substitute for the use of private cars, the report said.

Antitrust officials are reviewing two conflicting complaints related to Uber: one against the company launched by a São Paulo-based taxi association, and another by university students accusing taxi syndicates in São Paulo and Brasilia of trying to block the rideshare app with frivolous court cases.

Rufino said less regulation would benefit competition. "Shouldn't we deregulate taxi services more than regulating Uber?"

Citing the different views of consumers and taxi drivers, Rufino acknowledged that the process of accommodating new technologies creates problems.

"This process is not easy. It has friction, which is normal because you have players that already operate in the market, entrants wishing to integrate the market, and consumers who are feeling themselves violated by an economic activity or a lack of competition," he said.

"The good part about competition is that it brings better things to the market — those that you needed but you never realized you needed them," Rufino added. "We can't be a reactionary country in a new world that is approaching every day."



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Ana Pellegrini, Uber's legal counsel in Brazil, said the company understands the need for regulation.

"Uber doesn't refuse to be regulated," she said. "On the contrary, we are already regulated in several countries around the world."

There are several actions against Uber in Brazilian courts, and violence has been directed against its drivers, she said.

"CADE's report was very important and showed that the entrance of new players in the market of individual transportation can be something positive," Pellegrini added.

She also said that the markets in which Uber drivers and taxi drivers operate coincide, but said Uber is "very different" from a taxi service.

"For a user to have access to an Uber driver, he or she needs to have a credit card, a smartphone and a profile that will be analyzed by the driver," she said. "The Uber driver also needs to fulfill the Uber requirements. Beyond that, Uber drivers don't have taxi stands."



Federal prosecutor Araujo says investigative agencies need to coordinate better in corruption, cartel cases

Federal prosecutor Marcio Araujo said today that investigative agencies need to improve coordination in the investigation of cartel and corruption cases.

Legislators, jurists and administrators have different experiences with the enforcement of the law and it is not always easy to coordinate, he said.


“Differences exist, but that does not absolve each agency from seeking to ensure the confidence that is the basis of detection of cartels,” the prosecutor said during a panel discussion at an event in São Paulo.

He also said that corruption in Brazil is sometimes used by companies to seek competitive advantages.

“Apart from the need to recognize this particular characteristic of the Brazilian system, the country today faces a lot of difficulties with the coordination of the interaction between public bodies,” Araujo said.

An official from the Brazilian General Controller’s Office, or CGU, Marcelo Pontes Viana, who also took part in the panel discussion, said that suspects shouldn’t be subject to a multiple “attacks” from several public bodies.

“We should be seeking for more coordinated, effective and uniform methods of seeking information,” said Araujo.



CADE meets higher standard before investigating individuals, official says

Antitrust official Paulo Burnier said today that compared to its probes of companies, the antitrust agency must meet a higher standard before investigating individuals suspected of violating antitrust laws.

Burnier said several factors are taken into consideration for individuals, including the number of times that person was mentioned in documents connected to the probe, the person's position in the organization and the level of participation in the cartel.

Burnier said today at an event in São Paulo that his agency, the Administrative Council for Economic Defense, or CADE, will take into account “whether the suspect was an intern or a vice president” when it considers initiating a probe.

“If it is a high executive who is copied in a suspect e-mail, it is likely that he will be included in the probe,” said Burnier, a councilor on CADE's Tribunal. “The criteria is the capacity for interrupting wrongdoing.”


CADE is cautious about investigating individuals, he said.

The Tribunal has the last word on whether a suspect is convicted, he said. “The criteria to include someone in a case are not the same as the ones to convict someone,” he said.

The councilor also commented on a recent decision by the CADE Tribunal regarding an alleged cartel among graphite electrode producers. In that case the regulator recognized there was a procedural mistake because an antitrust official took part both in the complaint and investigation phases of the probe.

One company, Hydro Aluminium Deutschland, agreed to pay 253,346 reais (about \$84,000) to settle the case. Burnier said that was unfortunate, given that the case was ultimately dropped.

“Still, in general, settlements are seen in a very positive manner and contribute to shorten the length of a case”, he said.



CADE councilor says agency should be able to choose among methodologies in market investigations

Antitrust official Marcio de Oliveira Junior said today that the agency should have freedom to choose the best methodology for each investigation into market concentration even at the expense reduced predictability for companies involved.


“It is important not to concentrate on only one methodology when investigating a market. There are several indicators that can show the [market] power of a certain company and the ideal is to choose according to the case,” said Oliveira.

“The idea of being able to choose a methodology that best fits each market reduces the probability of making mistakes,” he said. “It is best to offer a bit less predictability to investigated companies, but offer a better chance of not making a mistake.”

Oliveira cited several factors that should be considered, such as the market structure, market share and recent changes, barriers to entry, market power of buyers and the company’s financial attributes.

He also said that economic indexes such as Herfindahl-Hirschman or Lerner should not be used without further market study because they can lead to incorrect conclusions about market power.

“A change in the number of players in a certain market can affect an index when in fact an increase in competition might have happened,” he said. “One must be careful when interpreting such indexes, as they can lead to wrong conclusions about a market.”



Remedies negotiated before notification of deal work only in specific merger cases, CADE deputy superintendent says

Kenys Menezes Machado, the deputy superintendent of the Brazilian competition authority, said that negotiating remedies before a planned merger has been reported to the antitrust agency isn't the best route to take in most cases.

“Many companies want to present proposals for remedies before the notification of the deal, but that depends on the situation and complexity of the transaction,” Machado.

He said that “proposing remedies before the notification of a complex deal is complicated, but possible.” However, Machado said it only works in mergers that involve companies, market shares, products and geographic scope that the Administrative Council for Economic Defense, or CADE, already knows well. He offered the recent deal involving cement makers Holcim and Lafarge as an example.

“In the Holcim-Lafarge deal, CADE was faster than other jurisdictions to issue a final decision. But usually that is not possible,” Machado said.

The competition authority cleared Holcim's merger with Lafarge last December with the proposed divestitures of cement and concrete assets in Rio de Janeiro and Minas Gerais. The agency approved the final divestitures this week.

Machado said, however, that in most of the cases — those in which the markets and geographic scope affected are not “very clear” — antitrust officials are not able to negotiate remedies in advance because there is a need for more research.

The ideal time to negotiate remedies with the CADE, the deputy superintendent said, is right after the deal is declared “complex.”

A deal is declared complex when CADE needs to make a more in-depth analysis of the case because of the competition concerns created by the transaction. But the declaration that a deal is complex doesn't necessarily mean that CADE's lower-tier, the Superintendence, will recommend that the Tribunal reject it, he said.




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“There’s no rule for that,” Machado said.

The CADE official urged companies to negotiate remedies with the Superintendence as soon as investigators find out that the deal will generate concerns.

“Don’t let the 120-day deadline expire to start negotiating,” Machado said, referring to the generally accepted period for a deal to undergo review by the Superintendence.

According to Brazilian law, CADE’s Superintendence and Tribunal have a combined 240 days to review a transaction, and the period can be further extended by 90 days. There is no formal rule on how much time each division within CADE gets.



Better balance on number of behavioral remedies imposed needed, CADE chief-economist says

The chief economist of Brazil's competition authority said today that because of the cost of monitoring deals once they are completed, the agency needs to be careful in considering whether to propose behavioral remedies.

Luis Alberto Esteves also said that imposing structural remedies instead should be considered.

“There is the possibility of replacing at some level, but not much, behavioral remedies that require monitoring with structural remedies,” Esteves said.

Antitrust officials have been studying ways to impose more effective remedies on deals that generate certain competition concerns.


In February, the Administrative Council for Economic Defense, or CADE, started to discuss merger remedy guidelines aimed at helping officials make more consistent decisions and at helping anticipate problems that could arise after remedies are imposed. The guidance is intended for companies that submit mergers for approval, but also to train CADE's staff.

“Even after doing a lot of research, we still have to discuss what are the costs of imposing behavioral remedies,” Esteves said.

Kenys Menezes Machado, CADE's deputy superintendent, said that it is always recommended that the companies present structural remedies, “but, of course, it depends on the case, because remedies have to be proportional.”

It's easier to get approval from CADE's Superintendence and, if necessary, its Tribunal, when the companies propose structural remedies, or both structural and behavioral remedies, he said.

“Behavioral remedies sometimes can allay competition concerns,” Machado said. “Most remedies proposed and approved are behavioral. ... The Superintendence is always open to negotiate as long as remedies are clear,” he added.



CADE councilor says agency should examine calculations of damages

Brazil's competition authority should review its methods for calculating damages in antitrust cases with an eye toward increasing penalties where necessary, a top agency official said.

"We have to take the calculation of damages to another level," Alkmin said. "Companies must get the message that the possibility of being caught in a cartel is high. And when they're caught, the sanction must be higher than the damage caused."

Alkmin said the Administrative Council for Economic Defense, or CADE, should take a leading role in the calculation of damages, and should also support prosecutors' actions to seek damages.


"CADE, the public prosecutor's office, and other agents should have a complementary role," she said. "It would be interesting to see increased cooperation in the future."

She also said it would have been interesting to see what would have happened if alleged cartels among cement producers and medical gas producers had been handled as criminal matters by prosecutors.

"These were cases that meant less oxygen for medical treatments and, in the cement cases, houses may have gotten more expensive," she said. "These practices affected a whole chain."

Alkmin said damages should be calculated in order to create a deterrent effect.

"We should be able to create incentives so that executives realize that it is not worth it to create a cartel ... [and] sanctions should have more of a deterrent role, which would lead to fewer cartels in the future," she said.



As term winds down, CADE president reflects on importance of communication among regulators

The president of Brazil's antitrust authority, making his valedictory appearance at a national conference of competition lawyers, had some advice about communication for his successor and a lament about the lack of communication between his agency and financial regulators.

“My advice is not to muddle,” said Vinicius Marques de Carvalho, the president of the Administrative Council for Economic Defense, or CADE. “CADE is only little hierarchical and leadership has to be built by dialogue and consensus. This is where strength comes from.”

Carvalho, whose term expires next May and whose successor hasn't been chosen, was making his final appearance before the annual conference of the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade, or Ibrac. In his speech, he reviewed the agency's progress in recent decades, particularly since the country's competition law was changed in 2012.

“There are still several issues to be discussed and improved,” said Carvalho, a CADE veteran who took over as president in May 2012. “However, as a whole, the transition to the country's new competition law was made in a smooth way. The policy evolved in a very careful manner ... which brought international recognition.”

Carvalho also said the agency could increase its role in advocacy regarding competition law and policy if the staff existed for that work.

“It is a mistake to think that only the antitrust authority should deal with competition issues,” he said. “Other public bodies should include the theme in their agendas.”

On the other hand, he said, discussions with the central bank on competition issues in the financial sector have been less productive lately.



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“The dialogue between the central bank and CADE has decreased,” he said.

Carvalho said the central bank lays claim to responsibilities that have traditionally belonged to CADE. “They won’t cede something that they never had,” he

The agency’s president said a proposal for a decree by the government that would remove CADE’s responsibility to regulate the financial sector is “very serious.” That decree must be passed by the country’s parliament to take effect.

“If the bill is approved as it is, there will be an intense discussion,” he said. “This is a field in which we must act.”

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