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SÃO PAULO
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Antitrust in Brazil 2016

Report from Ibrac's 22nd International Seminar on
Competition Defense



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A stylized, handwritten signature in black ink, appearing to read 'Rob'.

Robert McLeod
Editor-in-Chief, MLex

Letter from the Editor-in-Chief

Brazil is living troubled political and economic times. Yet, antitrust officials in the country haven't allowed this instability to reflect on their work.

At a time when the government of Michel Temer is seeking to make the country more attractive to foreign investment, the message from The Administrative Council for Economic Defense, or CADE, is clear: It can and will continue to ensure markets remain competitive and open.

During the Ibrac conference this year, officials discussed the continued need to increase legal certainty for corporations and outlined measures to make rules clearer and fairer.

Investigators offered insight into how they may change rules governing cartel settlements, and issued warnings to companies who attempt to conceal wrongdoing or mislead merger reviews.

The authority has proved its maturity by weathering the political crisis that engulfed Brazil in recent years. Even without a permanent President heading the authority, CADE has kept up the pressure on cartels, and continued to deliver smooth reviews of deals.

But like most authorities worldwide, it has called for more generous budgets which will allow it to speed up investigations, improve merger analyses and ensure it is recruiting the best and brightest minds in the country. Loosening the state purse just a bit, could go a long way to restore global confidence in Brazil quickly.

I hope you find this selection of exclusive MLex stories from the annual Ibrac event insightful and useful to navigate the latest regulatory risk in Brazil.

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Contributors



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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.



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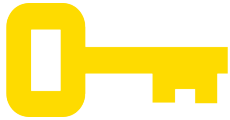
Carolina has worked as a journalist since 2006, writing about business and economic-related topics for a variety of publications. She received a bachelor's degree in journalism from Universidade Mackenzie and a post-graduation degree in international journalism from the Pontifícia Universidade Católica. 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 RITA REGO

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Ana Rita leads MLex's London office, overseeing reporters covering antitrust, financial services, bribery and other regulatory risks. She spent five years in Brussels writing about antitrust, state aid and legislative change in the EU and subsequently headed MLex's expansion into Latin America. Ana Rita holds a Master's degree from the Institut d'Etudes Politiques de Paris (Sciences Po) and studied journalism in London. She works in English, Portuguese, French and Spanish.



KEY INSIGHT

- Sets out the key challenges for CADE's next president.
- The interim president's mandate will expire in January.

More staff needed to face rise in 'complex' mergers, improve enforcement, Brazilian antitrust chief says

21 October 2016 | Carolina Guerra and Ana Paula Candil

Brazil's antitrust authority will need to boost staff numbers – in particular economists – to deal with a sharp increase in “complex” merger cases, the agency's interim president said.

A modest increase in the agency's annual budget of an extra 4 million reais would also go a long way to improve enforcement, Marcio de Oliveira Junior, who will leave the Administrative Council for Economic Defense, or CADE, in January, said today.

Complex merger cases demand a more detailed review including economic analysis, usually carried out by the regulator's economics department. Since CADE's lower-tier investigatory unit, the Superintendence, reviews most transactions, officials will need more help from specialist economists to deal with the increasing workload.

“As the Superintendence's [workload] has grown in terms of the number of cases, including complex cases, it's necessary to hire more people to help the Superintendence when it comes to economics analysis,” Oliveira Junior said.

Oliveira Junior's mandate as interim president will expire in January, but the government hasn't yet nominated a replacement. CADE has been without a permanent president since the end of May, when Vinicius Marques de Carvalho's mandate expired.

The successor will also need to continue efforts to increase the agency's budget, currently set at 27 million reais for 2017, Oliveira Junior said.

“If we had more budget, we could invest in more raids and increase our participation in international forums,” Oliveira Junior added.

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The government had promised to create a specific civil service career path for CADE, which would help the regulator hire and retain qualified staff members. But the government put the plans on ice.

“The next president will need to continue the effort to bring more people to CADE,” he said.

“If we had more budget, we could invest in more raids and increase our participation in international forums.”

Resolution will allow CADE to create new market definitions, Brazil's top antitrust investigator says

21 October 2016 | Ana Paula Candil and Carolina Guerra

The Brazilian competition agency will be able to create new market definitions that aren't included on its list of branches of business activities when a new resolution goes into effect, the country's top antitrust investigator said today.

The Administrative Council for Economic Defense, or CADE, is planning to make some changes in its resolution related to branches of business activities for fine enforcement purposes. The agency has given lawyers and companies until Nov. 1 to submit comments on the new text.

“The [current] list of sectors in the resolution ... doesn't fit the reality of most cases under analysis.”

“The [current] list of sectors in the resolution ... doesn't fit the reality of most cases under analysis,” Superintendent Eduardo Frade said at an event.

Frade said that the listed sectors in the resolution often don't correspond to the size of the target markets under investigation, and that doesn't allow the agency to really calculate how much the market was affected.

A fine can be too low or too high depending on the market definition, he said.

Turning a blind eye to cartels in distribution chains could lead to fines, senior Brazilian official says

21 October 2016 | Carolina Guerra

Manufacturers could face antitrust fines if they fail to report cartels in their distribution chains, a senior Brazilian antitrust official said today.

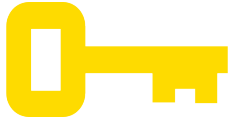
If officials suspect a company benefits from a cartel in a “related market,” it could come under scrutiny, Councilor Alexandre Macedo, of the the Administrative Council for Economic Defense, or CADE, said at a conference.

This situation could happen mainly in vertically integrated markets, Macedo told MLex on the sidelines of the event. For example, a drugmaker that is aware its distributors carve up the market but doesn’t report the wrongdoing could face antitrust enforcement, he said.

“It would be unlikely that such a company would face cartel charges, but it could face an antitrust investigation for unilateral conduct,” Macedo said.

“There are no convictions at CADE to date,” the councilor said.

“It would be unlikely that such a company would face cartel charges, but it could face an antitrust investigation for unilateral conduct.”



KEY INSIGHT

- Announces a change to Brazil's whistleblower policy
- Includes detail as to how the new policy could be shaped

Speedier cartel settlements are focus of policy revamp, Brazil's No. 1 investigator says

21 October 2016 | Ana Rita Rego, Ana Paula Candil and Carolina Guerra

Cartel settlement negotiations in Brazil could be sped up in the future, amid plans to “rationalize” the antitrust authority's policy, its top investigator said today.

“The policy has taken over a large part of our resources,” he said. “We are asking ourselves whether there is a less costly path for us and the parties,” Frade said. The regulator announced today its plans to revamp the way it negotiates settlements.

According to CADE, 47 percent of cases concluded by its lower-tier investigative unit are settlements.

How companies describe the illegal conduct in statements — especially the detail CADE requires of them to grant a settlement — could change in the future, the official said.

“We should think a bit outside the box,” Frade said. “Do we need five companies repeating exactly the same thing? Maybe not.”

“Would it be better to focus on the differences in accounts raised [by the cartel members],” he questioned.

It's still early days in the discussion, and CADE will first seek opinions from members of the legal bar before making changes to its settlement policy, Frade said.

“This is a real project for this year and will be deepened next year,” he said. “We need to rationalize the treatment of settlements.”



ENFORCEMENT TREND

- Brazilian police now more eager to take part in antitrust investigations.
- This means more probes have relied on phone taps rather than dawn raids.

Brazilian cartel probes relying more on phone taps than raids, top cartel investigator says

21 October 2016 | Ana Rita Rego, Ana Paula Candil and Carolina Guerra

Brazilian police are more eager to take part in antitrust investigations, meaning more probes have relied on phone taps rather than dawn raids, Brazil's top antitrust investigator said today.

"Federal police have shown much more interest in developing investigations with us," Eduardo Frade from the Administrative Council for Economic Defense, or CADE, said at an event in São Paulo state.*

The police's involvement means CADE can rely more on phone taps, and resort to less dawn raids at the premises of companies, Frade said. "What was supposed to be a search turned into telephone tapping," he said.

So far in 2016, CADE has only carried out two dawn raids to collect evidence in cartel cases. The number was particularly low because searches related to the wide-ranging probe into Petroleo Brasileiro, or Petrobras, were carried out by public prosecutors on behalf of CADE, the official said.

Agreements on the rise

The number of companies contacting the regulator to mark their interest in signing a whistleblower agreement has shot up 300 percent, Frade said. "A relevant part concerns the Lava Jato [Petrobras] probe. Others with the development of our leniency program," Frade said.

Requesting a marker doesn't necessarily mean a company will sign an agreement in the end. When a company requests a marker, it's given a limited amount of time to bring enough evidence of a cartel to the regulator, before it's granted immunity.

From January until early October 2016, CADE reached 10 leniency agreements. "It's possible we will pass this number this year. We are working towards that," Frade said.

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Antitrust in Brazil 2016

The number of settlements signed to close cartel probes has also increased substantially during 2016.

“The settlement policy has taken over our policy governing how investigations are run,” Frade said.

According to CADE, 47 percent of cases concluded by its investigative unit are settlements.

Frade said a partnership forged with federal public prosecutors in São Paulo has yielded fruit for companies and executives that came under scrutiny for cartel-like conduct. CADE has already signed settlements and helped secure collaboration agreements that led to lower criminal sanctions, or none at all with public prosecutors, Frade said.



ENFORCEMENT TREND

- Lawsuits by cartel victims aimed at recovering damages are not yet commonplace in Brazil.
- However, if future lawsuits jeopardize whistleblower agreements, CADE is likely to step in.

Intervention in damages actions ‘highly likely’ if whistleblower deals at risk, CADE attorney general says

21 October 2016 | Ana Rita Rego and Ana Paula Candil

Damages actions in Brazil that could jeopardize whistleblower agreements could see the national competition authority step in to protect its cartel-detection policy, the regulator’s attorney general said.

Lawsuits by cartel victims aimed at recovering damages have yet to become commonplace in Brazil. There are currently fewer than 20 pending cases in the courts, according to a report by the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade, or Ibrac.

But the Administrative Council for Economic Defense, or CADE, is often called to comment on the lawsuits that make it to the courts and are based on its decisions to fine companies.

“CADE’s legal team is always called to take part, but says it won’t ... because disputes involve private matters,” the regulator’s Attorney General Victor Rufino said at an event today.

Yet, cases that call into question CADE’s cartel whistleblower program — which permits the detection of secretive wrongdoing — could see its legal team step in.

“Damages actions are becoming very complex, and on certain issues, [CADE] can’t sit on the bench any longer,” Rufino said. “In cases involving leniency agreements, it’s highly likely that the legal team will intervene.”

CADE has been battling to protect agreements signed with cartelists that report wrongdoing, after the country’s second-highest court ruled in April that such documents must be disclosed once investigators issue an opinion to convict or acquit companies of cartel-like activity.

“I think it’s unlikely, given the increase in the number of disputes, that CADE won’t take part,” Rufino said.

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The regulator is unlikely to intervene in lawsuits that aren't based on its decisions, known as stand-alone actions, Rufino said. Participating in such cases could be "problematic" if CADE's lawyers are expected to take a stance on whether an infringement took place or not without investigating the matter.

"I don't know if CADE's involvement is the solution. There may be more efficient advocacy measures," Rufino said.

"I don't know if CADE's involvement is the solution."

Rufino said he is seeking to reallocate resources to increase the number of staff working on court disputes.

Specialized chambers needed

Antitrust disputes over CADE's decisions that end up in the courts have increased in complexity in recent years, and continue to take a long time to resolve, Rufino said.

"I don't mind the complexity factor. That's good. What is problematic, is the judicial process taking a long time," he said.

The official said he is in talks with the bodies governing the Brazilian courts to create specialized court chambers to deal with competition cases.

"Creating specialized chambers could be one of the answers," Rufino said. "We must put pressure for that to happen."

Rufino said he would be working to ensure courts routinely publish final decisions on cases classified as confidential. While business secrets should be kept out of the public eye, final decisions are important for authorities, lawyers and defendants to understand how courts rule, he said.

"It should be clear that decisions should be public. I'm inclined to promote measures for that to happen," he said.



BONUS INSIGHT

For more merger insight from Brazil, read this MLex article published during the conference:

Petrobras, White Martins negotiating with CADE over merger review of gas consortium.

20 October 2016

[> READ ONLINE NOW](#)

Proposing ‘efficiencies’ early on in merger reviews helpful, Brazilian antitrust official says

20 October 2016 | Ana Paula Candil

Companies with a lot of market clout should explain how a deal benefits consumers as soon as they notify the transaction to the Brazilian antitrust watchdog, a senior official said today.

Companies shouldn’t wait until a deal is considered “complex” because they may not have enough time to compile “robust” information, essential for the deal to go through, deputy Superintendent at the Administrative Council for Economic Defense, or CADE, Kenys Menezes Machado said.

Corporations often know their deal could raise competition concerns if they hold high market shares and there aren’t many rivals on the market, Machado said. They should therefore pre-empt these issues and show the regulator early on how the deal benefits consumers, that is, how it creates efficiencies, he said.

“If there are a lot of problems, the deal will require an analysis of efficiencies,” he said. “When we require efficiencies, we also seek robustness [in the figures].”

When a deal is considered complex, the regulator gives companies only 30 days to prove its worthiness. Machado said the window to submit efficiencies is “very short” and can’t be further extended because CADE must rule on a deal within 240 days.

Some companies “prefer to submit a remedy rather than submit efficiencies,” Machado said.

CADE’s interim president echoed the recommendation: “A few years ago, efficiencies could only be submitted by the parties after the relevant market was defined, but that [requirement] doesn’t exist anymore,” Márcio Oliveira Júnior said.

Attempts to mislead CADE to block mergers could trigger fines, senior official says

20 October 2016 | Carolina Guerra and Ana Rita Rego

Companies that try to mislead Brazil's antitrust regulator to block a merger they oppose could face fines, a senior antitrust official said today.

The Administrative Council for Economic Defense, or CADE, allows companies to provide information and comment on the impact of a deal on the market they operate in.

But companies that try to mislead the regulator to block a merger, or extract wide-sweeping concessions, could face sanctions, CADE decision-maker Gilvandro de Araújo said at an event in São Paulo state* today.

"If the agency finds proof of misleading information...I don't see an obstacle in launching an investigative procedure," which could lead to fines, Araújo said.

"A third party must demonstrate it's cooperating with the process," Araújo said. "It shouldn't stand in the way [of the review]."

Formally commenting on a deal as an "interested third party" shouldn't be an excuse to advance private interests, but rather to help the regulator protect competition on the market, the official said.

The agency has to carefully weigh which companies it gives a formal right to comment on a deal, because the status grants them powers to appeal a decision approving a transaction, Araújo said.

Deals that are approved by the regulator's upper-tier Tribunal can be completed, even if opponents file appeals, Araújo said.

"I don't see an obstacle in launching an investigative procedure."

Changing cartel fine calculations in ongoing cases not ‘best strategy’, Brazil’s antitrust chief says

20 October 2016 | Ana Rita Rego, Carolina Guerra and Ana Paula Candil

Brazil’s antitrust authority shouldn’t change the way it calculates cartel fines in ongoing cases because it could delay decisions and be unnecessary, the regulator’s interim president said today.

A change should only take effect after “testing” whether the current methodology isn’t working, Marcio Oliveira Junior, from the Administrative Council for Economic Defense, or CADE, said at an event.

“We can’t change CADE’s policy before testing our methodologies,” Oliveira said. “I don’t think it would be the best strategy.”

Decision-makers at CADE are divided over whether to calculate fines on the basis of how much a cartelist gained from its involvement in the illegal scheme. Some officials believe fines would be more accurate if this amount were taken into account, while others contend the opposite.

Oliveira said CADE should examine past cases to see whether fines were set at the right level to deter future wrongdoing, before making any changes.

“Let’s estimate and check whether we got it right or wrong in past cases,” Oliveira said. “If we got it right, we maintain the traditional methodology; if we got it wrong, we can change it.”

“Let’s estimate and check whether we got it right or wrong in past cases.”



BONUS INSIGHT

For more insight into cartels in Brazil, read this MLex article published during the conference:

More detailed cartel charge sheets needed to aid defenses, Brazilian bar members suggest.

20 October 2016

> [READ ONLINE NOW](#)

Cartel fines ‘chiefly’ based on gains made are ‘inaccurate,’ Brazil’s top antitrust investigator says

20 October 2016 | Ana Rita Rego, Ana Paula Candil and Carolina Guerra

Calculating fines based chiefly on how much a cartelist gained from the illegal conduct would be “costly,” and the end result would be “inaccurate,” Brazil’s top antitrust investigator said today.

Antitrust officials should also take into account fines levied by other authorities, in the country and abroad, to check whether fines are “adequate,” Eduardo Frade, from the Administrative Council for Economic Defense, or CADE, said at an event in Campos do Jordão, in São Paulo state today.

The debate on calculating fines based on how much cartelists earned from the conduct has gained traction in recent months, with some CADE decision-makers keen to estimate this amount to quantify penalties.

Brazilian antitrust law states only that the penalty shouldn’t be lower than the gain made from the illegal conduct, when it is possible to calculate this amount.

“Applying fines based chiefly on this element...would be very inaccurate, very costly,” Frade said. The regulator would be opening itself up for lengthy legal battles and risk seeing its fines overturned by the courts, he said.

Frade acknowledged that the authority should continue to perfect the way it calculates fines, and explore how it can take the gains made from a cartel into account. But this provision in the law should be seen as a “qualitative guide” to determine that fines are sufficiently high to deter executives and companies from entering a cartel again.

The authority already has other, more effective means to achieve this objective, Frade said. Reports about high penalties, dawn raids and prison sentences for executives work well at dissuading wrongdoing, he pointed out.

“If CADE wants to calculate the gain...I ask whether it isn’t dangerous...not to look at the whole apparatus,” Frade said.

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He suggested officials should also take into account “reputational costs,” “the cost of other penalties,” including damages actions by cartel victims to recover losses, and the loss of the right to sign contracts with public authorities.

“Shouldn’t we be looking at all of this when talking about gains made [from a cartel],” Frade said.

“I don’t want to seem too lenient. I am in favor of high fines and penalties,” but “let’s do it correctly.”

Frade also suggested the authority should carry out studies to review whether fines it levied were high enough or too high.

CADE’s interim President Marcio de Oliveira Junior said there were “limits” to calculating how much a cartel member gained from the wrongdoing and using that amount. Officials can’t go over the legal ceiling for fines, which is set at 20 percent of a company’s yearly gross sales in the market at issue.

Explaining the role each cartel member played in the illegal scheme would go further to encourage damages actions in Brazil than calculating how much companies gained from the conduct, Oliveira suggested.

“I don’t want to seem too lenient. I am in favor of high fines and penalties.”

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