

ANTITRUST IN BRAZIL 2017

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Contents

| | |
|---|---------|
| CADE isn't part of one-stop shop for leniency agreements, Barreto says | page 5 |
| Brazilian merger guidelines expected for first half of 2018, CADE president says | page 6 |
| CADE Superintendence to increase efforts on unilateral conduct cases, new top investigator says | page 7 |
| Arbitration can address competition concerns in vertical transactions, CADE councilor says | page 9 |
| CADE damages resolution won't change how agency deals with leniency documents, senior official says | page 11 |
| Argentina's bill creating leniency program expected to gain approval by early 2018, CNDC president says | page 13 |
| CADE should note how courts see cartel evidence, Tribunal's Araújo says | page 15 |



Contributors



ANA PAULA CANDIL

Correspondent

Ana Paula joined MLex in Brazil in 2014 writing about antitrust investigations and merger reviews. Prior to that, she worked for several trade publications and in TV. She lived in Washington DC, where she worked for Al Jazeera English in 2010. She studied journalism and holds a postgraduate diploma in International Business Management from the George Brown College in Toronto.



RODRIGO RUSSO

Correspondent

Rodrigo is based in São Paulo, where he covers antitrust, mergers and corruption investigations stemming out of Brazil. Rodrigo previously worked for the Brazilian daily broadsheet newspaper Folha de São Paulo, where he held several roles including Europe Correspondent and Assistant Editor on the Opinion Section. Rodrigo studied law at the University of São Paulo and holds an MSc in Political Sociology from the London School of Economics.



CADE isn't part of one-stop shop for leniency agreements, Barreto says

28 October 2017 | Rodrigo Russo and Ana Paula Candil

The Brazilian antitrust agency isn't part of a one-stop shop for ushering through leniency agreements, President Alexandre Barreto said today during a conference.

"We surely want more cooperation with other government agencies, and we also want more clarity on the duties of the various institutions," he said, "but we disagree with the idea of centralizing all discussions under a single desk."

A proposal that would address more multi-jurisdictional cooperation is backed by members of the legal community, but isn't part of the government's agenda, Barreto said.

"Each agency should remain within its expertise area, but working in a coordinated and effective way, therefore ensuring legal certainty for those willing to reach leniency agreements," Barreto said.

The Administrative Council for Economic Defense, or CADE, should be the only agency with the authority to sign leniency agreements for cartels involving public bidding processes, he said.

Barreto told the audience that the first meeting of the joint working group with members of CADE will occur in two weeks. The group includes the Court of Auditors, the Federal Prosecutors' Office, the Federal Attorney General's Office and the Ministry of Transparency.

These entities are legally entitled under Brazil's anticorruption law to sign leniency agreements with companies, but their actions seldom take place under the same umbrella.

Lawyers and company executives often mention this lack of government coordination as a major obstacle to increasing the number of settlements. They say that if authorities coordinated their actions, it would reduce companies' risk of signing flawed agreements and potentially suffering legal problems in the future.

➔ [*Read MLex's exclusive August 2017 interview with Alexandre Barreto here.*](#)



Brazilian merger guidelines expected for first half of 2018, CADE president says

27 October 2017 | Ana Paula Candil and Rodrigo Russo

Alexandre Barreto, the Brazilian antitrust authority's president, said today he expects to unveil guidelines on remedies that are imposed on anticompetitive deals by the first half of 2018.

The Administrative Council for Economic Defense, or CADE, has been working on establishing criteria for imposing restrictions on deals for quite some time, but the project has been delayed because of leadership changes. The agency recently appointed a new president and superintendent.

CADE's economics department, or DEE, is analyzing a draft of the guidelines.

Barreto said today at a conference in Campos do Jordão, Brazil, that he's in talks with other Tribunal members, the investigatory unit and agency economists. When the parties agree on a final version of the guidelines, it will be submitted for public comments before it's officially introduced.

CADE's economics department, or DEE, is analyzing a draft of the guidelines.



CADE Superintendence to increase efforts on unilateral conduct cases, new top investigator says

27 October 2017 | Ana Paula Candil and Rodrigo Russo

The new head of the Brazilian competition authority's Superintendence today said that he plans to increase the focus on unilateral conduct cases without cutting back on cartel investigations during his tenure with the agency's investigatory arm.

Superintendent Alexandre Cordeiro also said he plans to work on establishing a standard deadline for his unit of the Administrative Council for Economic Defense, or CADE, to send merger cases to the authority's Tribunal for a ruling.

Cordeiro took office as superintendent on Oct. 24. Before that, he was a Tribunal councilor.

There has always been debate about whether CADE should be more focused on investigations involving unilateral conduct. But, at the same time, there has been a consensus that CADE should prioritize investigating cartels, which in theory cause more harm to the market, given the agency's lack of staff and reduced budget.

But Cordeiro said today at a conference in Campos do Jordão, Brazil, that some unilateral conduct cases can cause more harm to the market than cartels.

“There are unilateral conduct cases involving huge companies, for example, that could cause more harm to the market than a small cartel,” he said.

“There are unilateral conduct cases involving huge companies, for example, that could cause more harm to the market than a small cartel,” he said.

The new superintendent also said that CADE has become a mature agency and now it is time to look at additional types of conduct. He acknowledged the agency's current staffing and budgetary difficulties but said that it is possible to make things happen when you have an agenda.

“We will include unilateral conduct cases among our priorities, but that doesn't mean that cartel cases will no longer be a priority,” he said.

Cordeiro said CADE's expanded focus is following the lead of regulators all around the world. Figuring out how antitrust agencies perceive cases involving unilateral conduct and which types of evidence should be used is very important, he said.

Continued Next Page



“This is a global trend and CADE shouldn’t stay out of this,” he said.

Asked by an audience member whether he intends to make staff changes at the Superintendence, Cordeiro said that he won’t be replacing anyone.

“Everyone that works for the Superintendence will stay, and I have a lot to learn with them.”

Merger review deadline

In addition to an increased focus on unilateral conduct cases, Cordeiro said he intends to standardize the amount of time the Superintendence will have to issue a recommendation on mergers and send the cases to the Tribunal for a ruling.

Speaking from his experience as a CADE councilor, he said having such a deadline would help the Tribunal to know exactly when it will be receiving a case for analysis. It would also be beneficial to the private sector, he said.

The Superintendence currently doesn’t have official deadlines for referring deals to the Tribunal. CADE has a formal 240-day deadline overall to review a transaction. The informal understanding is that the Superintendence has 120 days to analyze the case, leaving the other 120 days for the Tribunal to make a decision. In practice, however, the investigatory unit sometimes takes more time to issue a recommendation, especially in complex cases that involve highly concentrated markets.



Arbitration can address competition concerns in vertical transactions, CADE councilor says

27 October 2017 | Ana Paula Candil and Rodrigo Russo

Arbitration could be used as a mechanism to address certain competition concerns in transactions involving vertically-related markets that are highly concentrated, a Brazilian competition authority councilor said.

Speaking at a conference in Campos do Jordão, Maurício Bandeira Maia of the Administrative Council for Economic Defense, or CADE, said that the regulator should use arbitration in complex merger cases, as it did with the AT&T-Time Warner deal.

“Instead of blocking a transaction, we are trying to resolve competition problems and arbitration is a tool that can help in this ride,” Maia said.

CADE cleared the AT&T transaction this month with conditions that include the possibility of AT&T and Time Warner resolving disputes through arbitration. They committed to paying arbitration expenses of smaller players — those that have less than a 20 percent market share. The arbitration mechanism can be used if AT&T is seen as refusing to negotiate adequate agreements with rivals.

Other participants on the panel, however, criticized CADE’s use of that mechanism.

They objected to resolving problems in a “closed room” without the participation of the competition authority.

Panelists said CADE must look at the public interest as a whole, and not allow competition concerns to be resolved by the parties, who can come up with a solution that benefits them, but not the market.

Continued Next Page

ANTITRUST IN BRAZIL 2017



Maia, however, said the agency can revisit cases as necessary.

“We are trying to extract the best result possible from arbitration,” Maia said. “Arbitration isn’t replacing CADE. We are only making use of an instrument among all instruments we could use.”

Maia said the regulator is still analyzing whether arbitration can be useful in the antitrust sphere and how it can be applied. “The Chilean authority recently used arbitration in a decision, and the European Commission has also done the same thing in cases involving vertically related markets. This is happening especially because it isn’t always an easy task to find appropriate remedies,” he said.

He also said that the prospect of arbitration deters companies from behaving badly.

“Arbitration isn’t replacing CADE. We are only making use of an instrument among all instruments we could use.”



CADE damages resolution won't change how agency deals with leniency documents, senior official says

26 October 2017 | Ana Paula Candil

A pending draft resolution outlining which documents from leniency agreements can be disclosed to third parties seeking damages won't necessarily change how the Brazilian competition authority handles the confidentiality of such documents, a senior competition official said. Rather, it will formalize the existing unofficial practice of only publicizing certain documents after the competition authority rules on a case.

The Administrative Council for Economic Defense, or CADE, has been working since last year on a resolution allowing cartel victims in civil litigation partial access to documents related to whistleblowers, settlements and raids.

CADE councilor Paulo Burnier da Silveira said that through the resolution, the agency aims to formalize existing practices and clarify which leniency documents can be disclosed and at what time in the probe. "The resolution actually comes to increase legal certainty," he said today during a conference.

The resolution will state the principles for granting access to information related to CADE cases and determining the information that can be made public in each phase of a case.

Burnier said each phase of a cartel investigation has its own dynamics. The right time to provide confidential documents from a leniency agreement is after CADE's Tribunal rules, he said, because "there is no reason to keep documents confidential after the case came to an end."

However, he said CADE may not disclose at any time information from the "history of the conduct," a document produced by the agency for each whistleblower that reports a cartel. The document contains all the illicit practices reported by the whistleblower, as well as companies' sensitive commercial information.

"We know the history of the conduct is a key document, and so we need to protect it even after the case was ruled," he said. "Not leaving the beneficiaries of leniency agreements in a disadvantageous position in relation to others is important."

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Continued Next Page

ANTITRUST IN BRAZIL 2017



Burnier told MLex on the sidelines of the conference that the resolution will also allow CADE to reduce penalties levied against cartelists that reach agreements with victims during an antitrust investigation. He explained that if a company enters into an agreement with those harmed by its conduct before or while it's settling the case with CADE, the agency will be able to consider that when calculating potential fines.

He didn't say exactly when the resolution will come into force, but said that it will be "soon." CADE's Tribunal still has to approve it.

In September, CADE president Alexandro Barreto said he expects to enact the long-awaited resolution this month.



Argentina's bill creating leniency program expected to gain approval by early 2018, CNDC president says

26 October 2017 | Ana Paula Candil

The president of Argentina's antitrust authority said today that a draft bill proposing changes to the country's competition law is expected to be passed by Congress by early 2018.

Esteban Greco, president of the National Commission for the Defense of Competition, or CNDC, said the bill includes the creation of a pre-merger review system, as well as a leniency program aimed at helping the agency to enforce higher cartel fines and increase cartel detection in the country.

He said the bill is expected to gain federal lawmakers' approval either at the end of 2017 or early next year.

Greco, speaking at a conference in Campos do Jordão, Brazil, highlighted the importance of cooperation with other Latin American countries.

"It is very important for Argentina to promote convergence not only in the legal frame, but also in the enforcement," he said.

Greco said that the CNDC is interested in Brazil's past experiences. Argentina's competition law is like the old Brazilian competition law, he said, and the Brazilian Administrative Council for Economic Defense, or CADE, has not always had a successful leniency program. For example, Brazil's old competition law didn't include a pre-merger review system, and CADE analyzed transactions after the fact — and after the effects of that deal had already been felt.

"It is very important for Argentina to promote convergence not only in the legal frame, but also in the enforcement," he said.

Continued Next Page

ANTITRUST IN BRAZIL 2017



“Our law has incentives that go in the wrong way. We have lots of obstacles for firms to make deals because we have a bad review system, we review lots of cases that don’t even need to be reviewed,” Greco said.

He also said that the leniency program is key to increasing the probability of detecting cartels.

On the conduct side, the CNDC president said his agency is working on an updated version of its cartel penalty guidelines with the aims of increasing fines and using better tools to fight against cartels. He didn’t offer a timeframe for the release of the new guidelines.



CADE should note how courts see cartel evidence, Tribunal's Araújo says

25 October 2017 | Ana Paula Candil and Rodrigo Russo

A member of the Brazilian competition authority's Tribunal said today that the agency should keep in mind what courts are considering as sufficient evidence of cartel activity when it analyzes documents and information for leniency agreements.

Councilor Gilvandro Vasconcelos Coelho de Araújo said the Administrative Council for Economic Defense, or CADE, taking this step is necessary to enhance competition enforcement in the country.

"It is not worth it for CADE to have an autonomous system [regarding leniency agreements] in which there is no conversation with courts about what judges consider as sufficient evidence of the existence of a cartel," he said today during a conference in Campos do Jordão, Brazil.

"CADE has been conducting this very well," he said.

Araújo also highlighted the importance of CADE's investigatory unit, the Superintendence, and the deliberative Tribunal acting jointly when negotiating leniency agreements to reduce dissension when evaluating documents and information that prove violations and to bring more transparency to the regulator's leniency program.

Araújo said it is the Superintendence's role to collect evidence that proves the existence of illicit action, while it is the Tribunal's role to determine the parameters the Superintendence follows.

"CADE has been conducting this very well," he said.

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