

STOCHE FORBES RADAR

Antitrust

Special Issue – 2019 First Semester

STOCHE FORBES RADAR's issue of July 2019 - presents a brief analysis of recent developments in Brazilian competition law and policy during 2019's first semester and early July.

Until now, the Brazilian antitrust authority, CADE (Administrative Council for Economic Defense) reviewed 213 transactions and completed 18 antitrust investigations – out of which 8 ended in convictions for antitrust violations with fines totaling USD 201 million¹. Moreover, the antitrust authority executed 8 Cease and Desist Agreements (known as TCCs), totaling USD 13 million² in pecuniary contributions.

Furthermore, as will be seen below, the Organization for Economic Co-operation and Development (OECD) has recently admitted Brazil as an associate

member at its Competition Committee, highlighting the alignment of the country's antitrust policy with international best practices.

For the next half year, CADE's General Superintendence (SG) and its Tribunal are expected to have a new composition. Indeed, the current General Superintendent's 2-year term will end in October; his mandate can be renewed or a new name may be nominated by Brazil's President. In addition, four out of seven chairs at CADE's Tribunal will be empty in the coming weeks, and two names appointed by Brazil's President. are already pending before the Senate for approval

The main highlights from the first half of 2019 will be presented below.

Brazil is admitted as a member of the OECD's Competition Committee

On February 22nd, 2019, the Brazilian government announced that the country was admitted as an associate member of the OECD's Competition Committee, in which Brazil will be represented by CADE.

In order to be accepted, Brazil underwent a detailed peer review process, which focused on the extent to which the laws, institutions, policies and enforcement practices in the country were in line with OECD recommendations.³

In summary, OECD's Competition Committee concluded that CADE is equipped with strong powers and enforcement tools, but also pointed out some areas where the country could improve, such as: (i) better segregation between investigation and decision-making at the competition agency; (ii) clarification of the criteria to calculate fines; (iii) improvement of the scope and application of CADE's settlement policy; (iv) increased enforcement against potential abuses of dominance; and (v) faster investigations, among others.

¹ Considering Brazilian Central Bank conversion rate of June 27th, 2019 (1 USD = 3,86 BRL).

² Please see above.

³ The report produced in the peer review process is available at <https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf>

Brazil's President appoints two names for CADE's Tribunal

On May 20th, 2019, Brazil's President – Jair Bolsonaro – appointed two names for holding a position as Commissioners at CADE's Tribunal. In the coming weeks, the mandates of four out of seven commissioners at CADE's Tribunal will end.

The names appointed by the President are Leonardo Bandeira Rezende, an economist holding a Ph.D. in Economics from Stanford University, and Vinicius Klein, a Ph.D. in Law from the State University of Rio de Janeiro and associate professor of Law and Economics at the Federal University of Paraná. Their names have to be confirmed by the Federal Senate after a formal hearing, what has not taken place up to now. Moreover, there is still no estimate as to when such voting will happen.

According to media reports, the delay in the approval may impact antitrust investigations and merger review proceedings pending before CADE's Tribunal. If no empty position at the Tribunal is replaced by next July 14th, there will be no sufficient quorum for the Tribunal to reach a final decision on antitrust practices and complex mergers. Under the Brazilian antitrust legislation, a judgement session requires the presence of at least 4 Commissioners.

If approved, Rezende and Klein will have a four-year mandate, with no possibility for reappointment.

General Law of Regulatory Agencies is enacted with some provisions relating to CADE

On June 26th, 2019, Law No. 13,848 (General Law of Regulatory Agencies) was enacted by the President, which (amongst other issues) brings common standards for the administration and management of independent regulatory agencies.

Although not qualified as a regulatory agency, some provisions of such General Law are applicable to CADE, including the requirement for risk management practices, internal controls and an integrity policy to prevent, detect, punish and repair damages caused by fraud and corrupt acts. Such statute also reinforces CADE's independence and autonomy in operational, financial and administrative

matters, as well as in its decision-making process. In this regard, the General Law of Regulatory Agencies provides further stability of those holding a decision-making position inside CADE and in regulatory agencies.

Finally, the General Law of Regulatory Agencies reinforces the interaction between CADE and sectoral regulatory agencies, providing that the antitrust authority shall notify the competent agency about decisions taken within the context of an antitrust investigation or a merger review proceeding that refers to a practice or a transaction in a regulated sector.

Petrobras agrees to sell refinery plants and gas pipelines

The state-owned oil company Petróleo Brasileiro S.A. (Petrobras), which currently controls most up- and midstream segments of the industry in Brazil, agreed to sell refinery plants and gas pipelines by means of Cease and Desist Agreements (TCCs) with the antitrust authority, and as part of a broader policy of the current federal administration.

In this regard, Brazil's National Council for Energy Policy (known as CNPE) has recently approved two regulations about the sale of those assets by Petrobras. The first one was issued on May 14th, setting forth parameters for the divestment of oil refinery plants – taking into consideration a market study issued by CADE's Economic Studies Department on December 12th, 2018. The other one was issued on June 24th, 2019, providing guidelines for the sale of shareholding in gas pipeline companies, in order to increase competition in the market.

These guidelines were important to support Petrobras in the execution of settlement agreements

with the antitrust authority, within the context of some investigations of alleged anticompetitive conducts. Indeed, on June 11th, CADE's Tribunal approved a Cease and Desist Agreement (TCC) negotiated between the SG and Petrobras, under which an administrative inquiry opened against the company in 2018 to investigate an alleged abuse of dominant position was suspended conditioned to the sale of 8 oil refinery plants, which correspond to approximately 50% of Petrobras' refining capacity in the country.

Moreover, on July 8th, CADE's Tribunal approved another TCC proposed by Petrobras, this time to suspend two administrative inquiries and one administrative proceeding opened against the company to investigate alleged abuses of dominant position in the gas sector. Petrobras has committed itself to sell its shareholding on three gas pipeline companies (Nova Transportadora do Sudeste S.A. – NTS, Transportadora de Gasoduto Brasil Bolívia S.A. – TBG; and Transportadora Associada de Gás S.A. – TAG) as well as its shareholding on several local gas distribution companies.

Within this context, Petrobras recently sold a 90% interest in TAG – the largest natural gas pipeline network in Brazil – to a consortium formed by French energy group Engie and Canadian pension

fund Caisse de Dépôt et Placement du Québec (CDPQ)⁴. The buyers paid Petrobras US\$ 8.6 billion, with such transaction being considered the largest divestiture under Petrobras' assets sale program.

Four complex transactions were reviewed and approved under conditions by CADE

In the first half of 2019, CADE's Tribunal reviewed and approved four transactions subject to conditions, including two global transactions: the acquisition of controlling shareholding in Twenty-First Century Fox by The Walt Disney Company (Fox/Disney case); and the creation of a healthcare joint-venture between GlaxoSmithKline PLC. and Pfizer Inc. (GSK/Pfizer case)⁵.

The Fox/Disney case was reviewed by CADE on February 27th. The approval of this transaction in Brazil was conditioned to: (i) the sale and transfer of several assets to third-parties, including Fox Sports' transmission rights of sports events, all contracts with cable TV operators, key employees, real state and transmission equipment; (ii) the commitment by the parties of not entering into any agreement with sports leagues currently transmitted by Fox Sports, and (iii) the free license of Fox's brands to the purchaser of the assets mentioned above.

The GSK/Pfizer case, in turn, was analyzed by CADE's Tribunal on June 17th. It was approved under the condition of divestment of all the assets related to a Pfizer's antacid product.

Besides such cases that were actually reviewed by the Tribunal, three transactions filed with CADE were withdrawn by the parties close to their final evaluation by such body. One of them was the merger between Siemens and Alstom's mobility businesses (Siemens/Alstom case), right after it was blocked by the European Commission. The other two cases involved companies producing thermal and acoustic isolation products: one was the proposed acquisition of DànicaZipco by Kingspan, and the other was the acquisition of Rockfibras do Brasil by Saint-Gobain.

Three investigations against Google were dismissed by CADE

In June, CADE's Tribunal dismissed three administrative proceedings against search engine company Google, based on a dismissal recommendation by the General Superintendence.

One of them was opened to investigate the alleged scraping by Google of content from price comparison websites and the use of such information on its own price comparison platform – Google Shopping.

The second one was opened to evaluate an alleged abuse of market power by creating disincentives for clients advertising in platforms competing with Google Adwords, like Bing Ads from Microsoft.

Finally, the third case investigated an accusation of abuse of dominant position by Google when

displaying its service Google Shopping in a more favorable position than competing comparison shopping platforms.

The first two cases were dismissed on June 19th by a unanimous decision of CADE's Tribunal, based on the lack of evidence of scraping or of any antitrust effect derived from contractual terms and conditions for advertisement through Google Adwords. However, during the same judgement session, the Tribunal requested the General Superintendence to initiate an investigation about a potential abuse in the market for search engines and for news websites.

The third case was dismissed on June 26th, when CADE's Tribunal, by majority, decided to close the proceeding based on the lack of evidence of an anticompetitive practice in Brazil.

⁴ The buyers were represented by Stocche Forbes Advogados in the merger review proceeding before CADE, cleared on May 6th, 2019.

⁵ The other two transactions had a local scope: the acquisition of controlling shareholding in Mediplan Assistencial Ltda., Hospital Samaritano Ltda. and Hospital e Maternidade Samaritano Ltda. by Notre Dame Intermédica Saúde S.A.; and the acquisition of All Chemistry do Brasil Ltda. by SM Empreendimentos Farmacêuticos Ltda.

CADE imposes a BRL 535 million fine on 11 companies for alleged bid rigging in the provision of subway rolling stock, equipment and maintenance services

On July 8th, CADE's Tribunal fined 11 companies and 42 people for participating in an alleged bid rigging scheme that affected 26 public procurement proceedings related to the development of subway, trains and auxiliary systems projects between 1998 and 2013 in several Brazilian states.

The investigation was initiated in 2013, following a Leniency Agreement signed by Siemens, CADE's General Superintendent, the Federal Prosecutor's Office and São Paulo State Prosecutor's Office (MP/SP). Some months later, based on the evidence

provided by Siemens, CADE carried out dawn raids in the headquarters of 13 investigated companies.

CADE's Tribunal imposed fines⁶ of approximately USD 133 million to companies and USD 5 million to individuals. Besides that, CADE prohibited the participation of the alleged leader of the scheme in public bids for 5 years and, for three companies (including such leader), the authority will recommend to other public agencies not to grant tax benefits for 5 years.

CADE's Tribunal approves an amendment to the authority's By-laws

On June 26th, CADE's Tribunal approved Rule No. 22/2019, which amends CADE's By-Laws. Such rule brings relevant procedural changes and will enter into force after 90 days.

The main changes by Rule No. 22/2019 are: (i) the deadline for presenting a defense submission will be

automatically extended to all the defendants in an antitrust proceeding, in case a request made by any one of them is approved by CADE; and (ii) differently to current practice, procedural deadlines will no longer be double-counted in case the parties to an antitrust proceeding are assisted by different attorneys.

⁶ Considering Brazilian Central Bank conversion rate of June 27, 2019 (1 USD = 3,86 BRL).

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