# THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

**Editor**
Aidan Synnott

THE LAWREVIEWS

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# THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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# PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny



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by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

**Aidan Synnott**
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019



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**Chapter 4**

# BRAZIL

*Mariana Villela, Leonardo Maniglia Duarte, Gabriela Reis Paiva Monteiro and Vinicius da Silva Cardoso*[1]

## I OVERVIEW

In 2018, the Administrative Council for Economic Defence (CADE), the Brazilian competition agency, maintained the efficiency presented in previous years and tried to boost the authorities' institutional strength. After six years of enforcement under Law No. 12,529/2011 (the Brazilian Competition Act),[2] which entered into force in May 2012 and introduced a new system that concentrated the roles of three competition bodies into one, both the pre-merger review system and the revised rules to create better incentives and provide more legal certainty to leniency agreements and cease-and-desist agreements (settlements or TCCs, to use its acronym in Portuguese) have enabled CADE to function at a higher level of efficiency and improve the quality in its investigations and decisions.

Under the previous system, the existence of three competition agencies, with overlapping responsibilities, used to cause delays in the processing of investigations for anticompetitive conduct and in the review and approval of mergers. Under the current institutional design, CADE is responsible for enforcing competition law issues at the administrative level, which is organised into three divisions or units: the Office of the Superintendent General (SG), the Administrative Tribunal (with seven commissioners) and the Department of Economic Studies (DEE).[3]

The current Competition Act also introduced a pre-merger review system, replacing the previous post-merger review system.[4] The new merger control model has exceeded expectations as to timing and efficiency, and CADE has been able to review and clear merger filings at a fast pace. In this regard, CADE continues to impress with its fast review of merger notifications, with an average review time for cases eligible for the fast-track procedure of 13.5 days in 2018. Transactions reviewed under the regular procedure are cleared within an average of 96.3 days.[5]

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1 Mariana Villela and Leonardo Maniglia Duarte are partners, Gabriela Reis Paiva Monteiro is an associate and Vinicius da Silva Cardoso is a junior lawyer at Veirano Advogados.

2 The new Brazilian Competition Act (Law No. 12,529/2011).

3 Broadly, the SG is in charge of investigating anticompetitive conduct and approving merger cases that do not raise competition concerns; the Administrative Tribunal is responsible for rendering decisions on all investigations of anticompetitive conduct and for deciding merger cases that may present competition concerns; and the Department of Economic Studies is responsible for issuing non-binding economic opinions and for carrying out economic studies in general.

4 See OECD, 'Competition Law and Policy in Brazil: a Peer Review, 2010', available at www.oecd.org/daf/competition/45154362.pdf.

5 Based on 'CADE em Números', available at www.cadenumeros.cade.gov.br, 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019, and CADE's 2019 Yearbook.



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According to CADE's estimates, 404 concentration acts were analysed in 2018, of which one case was rejected and six cases were approved with restrictions. CADE's Administrative Tribunal analysed 17 mergers in 2018 – six of them were appealed or called up after a decision by the SG. The SG declined to review a total of nine transactions, concluding that they did not require a merger filing because either they did not meet the legal turnover thresholds or they did not qualify as a concentration act as per the wording of the Brazilian Competition Act.[6]

CADE's Administrative Tribunal continued last year's trend, subjecting mergers to substantial scrutiny and opposition, and even effectively blocking high-profile mergers. In 2018, CADE blocked the acquisition of Liquigás by Ultragaz, and imposed heavy conditions to approve other notable mergers such as *Monsanto/Bayer* and *Arcelor Mittal/Votorantim Siderurgia*. In addition, Nadir Figueiredo also dropped the acquisition of Owens-Illinois after the SG recommended the blocking of the merger. This may be interpreted as an indication that CADE is continuously raising the bar of its approach to merger control in complex transactions. The competition analysis in merger control cases has become more complex and sophisticated as a result of CADE's accumulated experience and knowledge and of increasing challenges and contributions by third parties. CADE also issued a new guideline on remedies, indicating the authority's new approach will not diminish its historical efforts of increasing the transparency and quality of its decisions.

On the investigations front, 2018 was busier than 2017. The Administrative Tribunal tried 25 administrative proceedings, convicting the defendants (fully or partially) in 12 of them. CADE also executed 12 leniency agreements and 60 cease-and-desist agreements.[7] These agreements originated several new investigations, especially related to alleged cartels in public bids. In addition, CADE published a new ordinance on third parties' access to investigation documents.[8]

CADE was very active in terms of institutional progress and cooperation with foreign authorities throughout 2018. The authority took steps to improve international cooperation with other enforcers worldwide, executing memorandums of understanding with other antitrust authorities,[9] proceeding with its request to enter OECD's Competition Committee,[10] and signing cooperation agreements with other BRICS countries.[11]

Once again, CADE's performance in the past year was recognised by *Global Competition Review* (*GCR*), which rated the authority among the top 10 best antitrust authorities in the world.[12] Furthermore, during the 2018 ABA Antitrust Spring Meeting, the Brazilian antitrust

6 See 'CADE em Números', available at www.cadenumeros.cade.gov.br, and 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.

7 These figures consider the regular leniency agreements, the leniency plus agreements and amendments to these agreements. See CADE's 2019 Yearbook.

8 CADE's Ordinance # 21/2018 provides the legal framework to allow third parties access to documents used in administrative investigations.

9 See www.cade.gov.br/noticias/autoridades-antitruste-do-brasil-e-costa-rica-firmam-memorando-de-entendimentos (Costa Rica) and www.cade.gov.br/noticias/cade-e-autoridade-da-concorrencia-do-paraguai-firmam-memorando-de-entendimentos (Paraguay).

10 See www.cade.gov.br/noticias/cade-participa-de-reuniao-em-processo-de-adesao-ao-comite-de-concorrencia-da-ocde.

11 See http://en.cade.gov.br/press-releases/brics-improves-cooperation-on-competition.

12 See www.cade.gov.br/noticias/cade-se-mantem-entre-as-melhores-agencias-antitruste-do-mundo.



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authority received two awards: the Agency of the Year in the Americas by *GCR* and the 'Best Soft Law' by Concurrences.[13] Once again, CADE is a finalist for the Antitrust Writing Awards – promoted by Concurrences and George Washington University Law School Competition Law Centre – in the 'Best Soft Law' category for its Guidelines for Antitrust Remedies and in the 'Procedure' category for its Resolution on Discovery Policy.[14]

The year 2019 promises to be a game-changing year for CADE. The new government in Brazil will appoint four new commissioners to the Administrative Tribunal, a new Superintendent General, and a new Federal Attorney at CADE. All appointments must be previously approved by the Brazilian Federal Senate. In addition, the Brazilian press has published several articles revealing an unparalleled interest in CADE by the Ministers of Economy and of Justice appointed by the new Brazilian President, whose profiles indicate CADE will be allocated even more resources to tackle cartels, especially cartels in public biddings.

## II CARTELS

Since 2012, the SG, the CADE unit responsible for investigating anticompetitive conduct, has been trying to clear the backlog of cartel cases. In 2018, CADE's Administrative Tribunal decided twice the number of cartel cases decided in 2017.[15] In nine of them (45 per cent), CADE did not convict any defendants – against only three (30 per cent) in 2017.[16] The fines imposed by CADE in cartel convictions total 600 million reais. In addition, CADE also initiated 35 new cartel investigations and executed 49 TCCs related to cartel investigations – including cases originated from Operation Car Wash – that amounted to 1.26 billion reais in financial compensation being paid by the defendants.[17]

### i Significant cases

In 2018, CADE concluded various administrative proceedings concerning cartels.

In March, 18 companies, 39 individuals and three unions were condemned for cartel formation in the national sea salt market. According to CADE, the documents and pieces of evidence collected indicated that the defendants agreed to define prices, control the supply, and split the market. The conducts were supported by sectoral associations and trade unions. The SG also concluded that four companies organised a parallel collusion to obtain advantages in public bids held by Empresa Baiana de Alimentos S/A – EBAL. The fine applied by CADE was 289.5 million reais.[18]

13 See http://en.cade.gov.br/cade-is-awarded-the-agency-of-the-year-in-the-americas.

14 See https://awards.concurrences.com/en/awards/2019/soft-law/.

15 According to 'CADE em Números', CADE decided 20 cartel cases in 2018 and 10 cases in 2017. However, CADE's President states the authority decided 18 cartel cases in 2018 and eight in 2017. 'CADE em Números', available at www.cadenumeros.cade.gov.br, and 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.

16 'CADE em Números', available at www.cadenumeros.cade.gov.br.

17 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019, and CADE's 2018 Yearbook.

18 CADE Administrative Proceeding No. 08012.005882/2008-38. Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).



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In June, CADE's Administrative Tribunal approved three cease-and-desist agreements to settle a cartel probe in the foreign exchange market, involving the Brazilian real and offshore currencies.[19] The agreements were signed between CADE and the financial institutions Royal Bank of Canada and Morgan Stanley Bank. A total of 42.9 million reais was collected to the Fund for the Defence of Diffuse Rights.[20] According to CADE, there was strong evidence that the defendants agreed to fix the exchange rate spread, to coordinate the purchase and sale of currency and the price proposal for customers, as well as setting back the activity of other operators in the currency exchange market involving the Brazilian currency.

Another important case was the conviction, in August, of Toshiba Corporation and Mitsubishi Electric Corporation (Melco) owing to their involvement in the global gas-insulated switchgear (GIS) cartel.[21] From 1988 to 2004, the participating companies coordinated the concession of GIS projects, fixing prices and dividing geographic markets. The alleged deal would have affected all consumer countries, except the United States and Canada, since both countries were excluded from the discussions as a result of the strict antitrust laws adopted by both of them. Later China and Russia were also excluded from the discussions, due to the position gained by the ABB Group (another cartel participant) in these markets. Concerning the effects in Brazil, the investigations pointed out that the cartel affected the Brazilian electric system and companies that had acquired high-tension GIS separately, and medium and high-tension equipment for the composition of substations. CADE imposed fines of approximately 4.9 million reais on both companies.[22]

In the same month, CADE concluded that manufacturers of TV colour picture tubes (CPTs)[23] and PC colour display tubes (CDTs)[24] had colluded to accomplish anticompetitive practices. According to the Brazilian antitrust authority, the cartel would have been active between 1995 and 2007. The Administrative Tribunal followed the decision rendered by Commissioner Paulo Burnier and condemned the companies Toshiba Corporation and MT Picture Display for cartel activity in the international market of CPTs, imposing fines totalling 4.9 million reais.[25]

In December, the SG recommended the conviction by CADE's Administrative Tribunal of 16 companies and 52 individuals over allegations they were involved in a cartel to fix bids for public train contracts. According to the investigations carried out by the SG, the fraud occurred in at least 27 projects in the cities of São Paulo, Brasília, Porto Alegre and Belo Horizonte in Brazil. CADE concluded that Mitsu, Bombardier, Alstom, Balfour Beatty, Construccion y Auxiliar de Ferrocarriles (CAF), Hyundai-Rotem, and part of Hyundai Motor would have participated in the cartel. The investigation was initiated in 2013 after CADE executed a leniency agreement with Siemens, who voluntarily self-reported its alleged involvement in the price-fixing scheme to lessen its responsibility.[26]

19 See http://en.cade.gov.br/press-releases/cade-signs-three-agreements-regarding-a-cartel-investigation-in-the-foreign-exchange-market.

20 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).

21 See http://en.cade.gov.br/press-releases/cade-condemns-toshiba-and-mitsubishi-for-international-gas-insulated-switchgear-cartel.

22 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).

23 CADE, Administrative Proceeding No. 08012.002414/2009-92.

24 CADE, Administrative Proceeding No. 08012.010338/2009-99.

25 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).

26 See www.cade.gov.br/noticias/superintendencia-do-cade-recomenda-condenacao-do-cartel-de-trens-e-metros.



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The SG carried out at least three high-profile dawn raids in 2018, which were related to investigations regarding cartels in the following markets: (1) the Brazilian market of orthoses and prostheses;[27] (2) public bids held by federal agencies for the contracting of outsourced services;[28] and (3) public bids carried out by the state of Espírito Santo for the service contracting of asphalt paving.[29]

### ii Trends, developments and strategies

On 6 March 2013, CADE enacted Regulation No. 5/2013, which modified the rules regarding settlements. The purpose of this Regulation was to increase the incentives for companies to cooperate by adding more predictability and transparency regarding the amount of contribution to be paid. It contains guidelines on the levels of the settling sums to be paid by settling parties, which will vary depending on, *inter alia*, the level of cooperation and the moment of the investigation. Parties who are being investigated for cartel behaviour, however, need to acknowledge their participation in the violation in order to be able to settle. Since its enactment, over 249 TCCs have been executed under the new Regulation. In 2018, the Administrative Tribunal and the SG executed a total of 49 TCCs related to cartel investigations involving several markets, which amounted to 1.26 billion reais in financial compensation being paid by the defendants.[30] The aforementioned regulation on settlements has been proving to be a very effective tool to end investigations that otherwise could take years to be decided, releasing a significant amount of public resources that could be redirected to other investigations in Brazil.

### iii Outlook

An examination of the cases initiated and concluded in recent years suggests that the investigation of cartels continues to be an enforcement priority for CADE. In 2017, CADE executed an all-time high number of leniency agreements and settlement agreements, many of which were related to Operation Car Wash. In 2018, CADE continued to analyse and to execute agreements related to public biddings.

In the past few years, CADE has devoted a substantial amount of resources to the investigations and leniency agreements related to Operation Car Wash. Owing to the profiles of the new Ministers of Justice and of Economy – and the fact the government will appoint a new General Superintendent in 2019 – CADE is expected to allocate even more resources to tackling cartels, especially cartels in public biddings. This may have the side effects of delaying other investigations and of preventing CADE from pursuing new ones. This scenario highlights the importance of boosting CADE's human and financial resources as soon as possible, as CADE has historically been understaffed. Despite the agency's strong commitment to efficient enforcement and continuing developments in recent years, there is a risk that certain antitrust violations may go undetected and unpunished to the detriment of free competition and of Brazilian consumers due to a lack of sufficient personnel and resources.

27 See www.cade.gov.br/noticias/cade-realiza-busca-e-apreensao-em-investigacao-de-cartel-no-mercado-de-orteses-proteses-e-equipamentos-hospitalares.

28 See www.cade.gov.br/noticias/cade-e-pf-realizam-operacao-para-investigar-cartel-em-licitacoes.

29 See www.cade.gov.br/noticias/cade-realiza-busca-e-apreensao-em-investigacao-de-cartel-em-licitacoes.

30 See www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.



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## III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

### i Significant cases

In 2018, CADE's Administrative Tribunal analysed a total of seven cases related to unilateral conducts. Since 2017, the investigation of unilateral anticompetitive behaviour has been one of the priorities of CADE's current General Superintendent.[31]

In March 2018, CADE closed an administrative proceeding involving Volkswagen, Fiat and Ford, which concerned an investigation into auto parts.[32] The case was based on a complaint filed by the National Association of Auto Parts Manufacturers (ANFAPE) in 2007 in which it alleged that these companies were using their IP rights in an abusive manner. The SG argued that enforcing IP rights to prohibit independent manufacturers of automotive parts from selling their own auto parts on the aftermarket would constitute an abuse of the industrial property law. However, following the opinion issued by Commissioner Maurício Bandeira Maia, CADE's Administrative Tribunal decided that there was no evidence of anticompetitive conduct and dismissed the complaint.

In October 2018, CADE's Administrative Tribunal analysed the Terminal Handling Charge 2 (THC2) imposed by port operators to handle containers at the terminal before loading them into the vessel. According to Marimex, the company that requested the preventive measure granted by CADE' Administrative Tribunal's, BTC, in its capacity as port operator, was imposing charges as a condition to release the containers.[33] Commissioner Burnier concluded that BTC was a monopolist in the port terminal in which it was active and abused its dominant position to impose commercial conditions. The Commissioner also concluded that the unlawfulness of this charge is established by CADE's case law for more than 10 years. In August 2018, CADE imposed fines totalling 5.7 million reais[34] on Rodrimar and Rio Grande, operators of the port terminals of Port of Santos and Rio Grande, respectively, due to the same anticompetitive conducts.[35]

Also in October, CADE condemned Unilever to pay 29.4 million reais[36] for preventing competitors from having access to the market of ice cream for immediate consumption in the cities of São Paulo and Rio de Janeiro.[37] At least four exclusivity agreements were identified by the antitrust authority, involving (1) exclusivity of storage freezers; (2) minimal sales; (3) exclusivity of merchandising; and (4) exclusivity of sales. Initial investigations indicated that Nestlé was also involved in the anticompetitive conducts, especially in small shops, such as cafeterias and snack bars, but, for the lack of dominant position, CADE condemned Unilever only.

In 2018, CADE also executed 11 cease-and-desist agreements that totalled 70 million reais, which may be divided into three major groups:

*a* In March, in order to assure the contractual freedom in the real estate market, CADE executed a cease-and-desist agreement with the Brazilian Federal Council of Real Estate

31 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.

32 CADE, Administrative Proceeding No. 08012.002673/2007-51.

33 CADE, Administrative Proceeding No 08700.003006/2017-18. See www.cade.gov.br/noticias/cade-suspende-cobranca-de-taxa-adicional-por-operador-no-porto-de-santos.

34 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).

35 See http://en.cade.gov.br/press-releases/cade-condemns-port-operators-for-abuse-of-dominance.

36 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).

37 CADE, Administrative Proceeding No. 08012.007423/2006-27.



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Brokers (COFECI) and with the Regional Councils (CRECIS) to end the imposition of maximum and minimum prices for brokerage commission. The agreement also stipulated a pecuniary contribution of 75,000 reais.[38]

*b* Also in March 2018, Booking, Decolar and Expedia, all of them online travel agencies (OTAs), committed themselves to stop using their current price-parity clause policy and decided to renounce the conditions imposed on hotels that offer accommodation on their platforms. The administrative inquiry was started by the SG in 2016 after a complaint filed by the Brazilian Forum of Hotel Operators. The anticompetitive conduct aimed at guaranteeing more advantageous prices, room availability and other conditions at the OTAs' websites, in comparison to those offered by the hotel chains in their own sales channels (online and offline) or in competing platforms. CADE concluded that the imposition of broad parity clauses would limit the competition among travel agencies, regulating the final prices offered to consumers.[39]

*c* From July to September, CADE reached five cease-and-desist agreements with major banks after a lengthy investigation into anticompetitive practices in the electronic payment market.[40] CADE opened this investigation in 2016 to probe, among other things, the banks' exclusivity contracts with commercial establishments and the adoption of other anticompetitive practices that prevented small companies from accessing the market. As a pecuniary contribution, Itaú and Rede agreed to pay 21 million reais to the Fund for the Defence of Diffuse Rights. In addition, Banco do Brasil and Bradesco agreed to pay 1.9 million reais and 2.2 million reais in fines, respectively. Cielo SA, which is controlled by Banco do Brasil and Bradesco and is considered Brazil's largest credit and debit card operator, also payed 29.7 million reais.[41] This was the largest nominal contribution ever collected by CADE in a TCC involving unilateral conduct related to administrative inquiries.

### ii Trends, developments and strategies

As previously mentioned, since 2017, the current General Superintendent has been stating in public speeches that, after focusing on cartels and mergers for so long, it is now time for CADE to focus more attention on unilateral conducts, which can be very harmful to competition.[42] This statement was reinforced by CADE's President in his 2018 review.[43]

### iii Outlook

CADE's enforcement priorities were always clearly focused on fighting cartels, meaning that cases involving unilateral conduct represented a lower proportion of CADE's enforcement activities. Since 2017, public speeches by competition authorities have been indicating a

38 See www.cade.gov.br/noticias/acordo-revoga-tabela-de-honorarios-para-corretores-de-imoveis. Exchange rate as of December 31, 2018 (1 BRL = 0.2580778 USD)

39 See http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense.

40 CADE, Administrative Proceeding No. 08700.001860/2016-51.

41 See www.cade.gov.br/noticias/acordo-revoga-tabela-de-honorarios-para-corretores-de-imoveis. Exchange rate as of December 31, 2018 (1 BRL = 0.2580778 USD).

42 See https://globalcompetitionreview.com/article/1149505/cade-to-focus-on-unilateral-conduct.

43 'Balanço da atuação do Cade em 2018', available at www.jota.info/opiniao-e-analise/artigos/balanco-da-atuacao-do-cade-em-2018-20012019.



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possible shift on this policy and more enforcement in this area. Although there was a noticeable change in the level of enforcement against unilateral conducts, CADE still allocates much more resources to fighting cartels. It will be important to track closely how CADE's efforts related to unilateral conducts will unfold in 2019, especially considering the new authorities to be appointed by the new government.

## IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

### i Trends, developments and strategies

Even though the Brazilian Competition Act does not limit CADE's jurisdiction to enforce competition law in regulated sectors, certain aspects of its jurisdiction are still unclear and are being analysed by the Brazilian courts. After years of discussion regarding CADE's jurisdiction to enforce competition law over banking mergers and conducts, CADE and the Brazilian Central Bank (BACEN) have finally reached an agreement. As the Brazilian Competition Act does not limit CADE's jurisdiction to enforce competition law in regulated sectors, CADE understood that it had jurisdiction to enforce competition law in all sectors, including in the banking sector, although the Brazilian courts have so far sided with the argument sustained by BACEN, according to which BACEN should be solely responsible for enforcing competition law in the banking sector due to the sector's peculiarities. In 2017, CADE and BACEN established a working group to develop studies about competition defence in the Brazilian financial system. In 2018, these bodies signed a memorandum of understanding (MoU) to coordinate and give greater predictability to the assessment of mergers involving companies in the financial sector. This MoU states that BACEN and CADE will foster the exchange of information and that a consent from both bodies will be required for approval of mergers.[44]

In addition, CADE was also active in trying to influence public policy regarding regulated sectors. In May 2018, due to the truckers' strike initiated after a rise in diesel prices, CADE proposed several measures to reduce gas prices in Brazil. The government, however, decided to fix delivery prices. In June, CADE sent an opinion to the Brazilian Supreme Court (STF) arguing the government's policy harmed consumers, the market and the free competition. CADE opposed the policy, arguing it had effects similar to those of a cartel. The authority also initiated a preparatory procedure to probe any anticompetitive conducts.[45] The STF did not render a final decision on this matter.

In November, CADE held an open audience to debate the competitive impacts of the Brazilian financial sector's verticalisation. The panels counted on the speeches and contributions of several experts, public officers and companies' representatives, who debated the structure of this specific market and related competition concerns. CADE's President declared 'CADE understands the necessity to participate actively in discussions about possible solutions to enhance the competition environment in the financial sector'.[46]

44 See http://en.cade.gov.br/press-releases/cade-signs-memorandum-of-understanding-with-the-central-bank-of-brazil.

45 See http://en.cade.gov.br/press-releases/public-statement.

46 See http://en.cade.gov.br/press-releases/verticalisation-on-the-financial-sector-and-its-impacts-on-competition-is-the-theme-of-debate-at-cade.



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In December, CADE and the National Civil Aviation Agency of Brazil (ANAC) also held a joint seminar to discuss the competitive impacts of ANAC's regulations on the market.[47] The event discussed major questions in this market, such as: joint business agreements, slots competition, a ban on companies controlled by foreigners, competition between airports, and low-cost flights.

CADE's Department of Economic Studies also published two studies on regulated markets: health insurance and related markets (July 2018)[48] and maritime transport of containers (December 2018).[49] This is part of CADE's efforts to increase competition in regulated markets by influencing regulatory policies.

### ii Outlook

The increase in cooperation between CADE and various regulatory agencies, and the cases involving regulated markets that have been subject to CADE's scrutiny, suggest that CADE will continue to play an important role in shaping the regulatory framework of several industries in Brazil. CADE is expected to continue to enforce competition law in regulated sectors, particularly where sectoral regulation fails to prevent and repress practices that may be harmful to competition.

## V MERGER REVIEW

In 2018, 406 mergers were submitted to CADE's review. CADE continued to clear merger filings under a pre-merger review system quickly and efficiently, leaving far behind the anxieties and doubts that had been raised when the current Brazilian Competition Act entered into force in 2012. Simple cases eligible for the fast-track procedure have been cleared in less than 20 days on average, while more complex cases have taken, on average, no more than 100 days to be decided.[50]

### i Significant cases

#### *Blocks*

CADE blocked only one merger in 2018. In February 2018, the Administrative Tribunal blocked the acquisition of Liquigás Distribuidora S/A by Companhia Ultragaz S/A, the largest and second largest domestic market share of liquefied-petroleum gas (LPG). The Administrative Tribunal argued the purchase of Liquigás would increase the possibility for Ultragaz to exercise the abuse of market power in the LPG market. In a post-merger scenario, the new company would hold more than 40 per cent of sales in many states. The Reporting Commissioner also highlighted the existence of significant entry barriers and the lack of effective competition among the companies.[51]

47 See www.cade.gov.br/cade-e-anac-realizam-seminario-sobre-regulacao-e-concorrencia-no-setor-de-aviacao-civil.

48 See www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/cadernos-do-cade-atos-de-concentracao-nos-mercados-de-planos-de-saude-hospitais-e-medicina-diagnostica.pdf.

49 See www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/publicacoes-dee/caderno-mercado-de-transporte-maritimo-de-conteineres-versao-final.pdf.

50 See www.cadenumeros.cade.gov.br.

51 CADE, Concentration Act No. 08700.002155/2017-51. See http://en.cade.gov.br/press-releases/cade-blocks-liquigas2019-acquisition-by-ultragaz.



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In January 2018, the SG issued an opinion stating that the transaction involving the acquisition of Owens-Illinois Brazil's glass household items unit by Nadir Figueredo Indústria e Comércio SA should not be approved. According to the SG, the Brazilian market of glass household items presents a high concentration level that would be worsened by the transaction. The SG also indicated that competition from other domestic producers and the probability of new entrants to the market were low.[52] In June 2018, Nadir Figueredo dropped the acquisition of Owens-Illinois.

***Remedies***

CADE reviewed several high-profile merger cases in 2018, including transactions that were approved subject to sophisticated remedies packages (including structural and behavioural commitments). This is a positive effect of the merger control system enacted in 2012, which provides better incentives and a more suitable legal framework to encourage CADE and parties to seek negotiated solutions in merger cases.

In February 2018, CADE approved with restrictions the acquisition of TGM Indústria e Comércio de Turbinas e Transmissões Ltda by WEG Equipamentos Elétricos S/A, a transaction in the markets of equipment used in systems for triggering machines and for cogeneration of energy. CADE was especially concerned with the competition issues in tied selling of WEG and TGM products that integrate the energy generation system. For this reason, the Brazilian competition authority conditioned the approval of the merger to behavioural commitments. In the merger control agreement, the parties agreed to non-discriminatory conditions for the supply of the products to competitors providing third parties interested in acquiring the products with the individual prices for each components of the integrated energy generation system and guaranteeing that customers would be able to purchase each component separately or the integrated system at their own discretion.[53]

CADE also approved with restrictions Bayer's acquisition of Monsanto.[54] As this was a multi-jurisdictional merger, several remedies were coordinated with the jurisdictions involved. The main remedy consisted in the divestment of all of Bayer's assets that were related to the soybean seeds and cotton businesses, as well as the unit of non-selective herbicides based on ammonium glufosinate. Most of CADE's commissioners said those measures would be sufficient to address antitrust concerns, since the structural remedies solved all horizontal overlaps and the vertical integrations in the affected markets created by the merger in Brazil.

In March 2018, CADE also approved with restrictions a deal in the banking sector: Itaú-Unibanco S/A's acquisition of XP Investimentos S/A's stake. The transaction was approved conditioned to the parties' compliance with certain behavioural remedies aimed at ensuring the independence of the current XP controllers' management, maintaining the pre-merger incentives, and at mitigating the risks of market discrimination through the reinforcement of vertical integrations between XP and Itaú. As an example, XP is not allowed to require exclusivity clauses from autonomous investment agents and must ease the portability of its

52 CADE, Concentration Act No. 08700.005137/2017-21. See http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-concludes-opinion-about-transaction-between-owens-illinois-do-brasil-and-nadir-figueiredo.

53 CADE, Concentration Act No. 08700.008483/2016-81. See http:// http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-concludes-opinion-about-weg-and-tgm-transaction.

54 CADE, Concentration Act No. 08700.001097/2017-49. See http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto.



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consumers to competing investment platforms. XP also committed to maintain its zero rate or zero tariff policy for investment products related to fixed-income investments.[55] In August 2018, the Brazilian Central Bank also approved the transaction, but imposed more strict restrictions (e.g., BCB's decision prohibits Itaú from acquiring control of XP in the future).

Another noteworthy transaction that was cleared in 2018 subject to remedies was the acquisition of Votorantim Siderurgia S/A by its competitor ArcelorMittal Brasil S/A. The transaction consisted in the merger between two of the three main suppliers of common long steel in Brazil. The companies negotiated a merger control agreement with behavioural and structural remedies, including the obligation to divest two packages of assets: the first package was related to the production of drawn and ordinary long rolled steel, which must be sold to an individual acquirer, without any related partner participation, directly or indirectly to the applicants or its respective economic groups; the second package was related to the markets of wire drawing and steel wire rod machines. It must be offered to an individual acquirer, different from the buyer of the first package of assets. The acquirer of the second package cannot have partner participation linked to the applicants or to the economic groups they belong to.[56]

CADE's Administrative Tribunal also approved two other transactions subject to remedies in 2018. In February, the agency approved the acquisition of Companhia Petroquímica de Pernambuco and Companhia Integrada Têxtil de Pernambuco, owned by Petrobras, by the Petrotemex Group.[57] The companies agreed to set certain conditions (such as volume and price) to provide purified terephthalic acid to other companies for a limited time period. In June, CADE's Administrative Tribunal approved the merger of Praxair, Inc (White Martins) with Linde AG[58] in the industrial, special and medicinal gases market subject to structural and behavioural remedies. The merged parties agreed to divest several businesses and to provide calcium carbide gas without any discrimination.

***Compulsory notification***

On 5 September 2018, CADE's Administrative Tribunal requested the compulsory submission of the acquisition of All Chemistry do Brasil by SM Empreendimentos Farmacêuticos, a merger that did not meet the legal criteria for mandatory filing.[59] The authority based its decision on Article 88, Paragraph 7 of the Brazilian Competition Act, which allows CADE to request the submission of any transaction within one year from its performance.

Although CADE had already initiated several proceedings to assess whether a given transaction required compulsory submission to CADE despite not meeting the notification thresholds, this is only the second time that the body has effectively triggered this exceptional mechanism since the Brazilian Competition Act came into effect. The first case occurred in

55 CADE, Concentration Act No. 08700.004431/2017-16. See http://en.cade.gov.br/cade-approves-with-restrictions-itaus-acquisition-of-a-stake-in-xp-investimentos.

56 CADE, Concentration Act No. 08700.002165/2017-97. See http:// http://en.cade.gov.br/press-releases/arcelormittal2019s-purchase-of-votorantim-is-approved-with-restrictions.

57 CADE, Concentration Act No. 08700.004163/2017-32.

58 CADE, Concentration Act No. 08700.007777/2017-76.

59 CADE, Concentration Act No. 08700.005972/2018-42.



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2016, when CADE received a complaint regarding an international transaction with effects in Brazil, whereby Guerbet SA acquired the business of contrast for X-rays and computerised tomography and magnetic resonance from Mallinckrodt Group Sarl.[60]

### ii Trends, developments and strategies

The new trends in merger review in 2018 and 2019 are as follows:

*a* As CADE's merger review grows more sophisticated, the amount of merger challenges – and their relevance to the result of merger cases – is on the rise.

*b* In the past few years, CADE has toughened its assessments regarding mergers in general. Vertical integrations that, at another time, would be easily cleared under the fast-track procedure are now strictly scrutinised by CADE.[61] In addition, CADE also increased the number of mergers blocked.

*c* Based on the profile of the new government and on analyses carried out by the specialised press,[62] the several new authorities to be appointed by the new government in 2019 are expected to adopt a pro-business approach, reducing CADE's involvement in mergers and acquisitions.

### iii Outlook

CADE has proved capable of efficiently examining simple transactions under a pre-merger review system, overcoming the difficulties of a limited staff and a lack of experience of the new model. Nevertheless, there are aspects of the interpretation and implementation of the new Competition Act regarding merger control that are still unclear. The improvement of the Brazilian merger control system continues to be on CADE's agenda, as demonstrated by the new regulations and procedural matters enacted in 2018.

## VI CONCLUSIONS

### i Pending cases and legislation

In the area of anti-cartel enforcement, CADE's Administrative Tribunal is expected to decide various cases that were reviewed by the SG in 2018 and that have been under investigation for a few years. The decisions rendered in these cases and the approach the SG may take with respect to new investigations are issues that deserve the attention of the antitrust and business communities, as they may frame the enforcement environment for the next few years.

On the merger front, the Administrative Tribunal is also expected to decide high-profile mergers, including the acquisition of Rockfibras by Saint-Gobain.[63]

60 CADE, Concentration Act No. 08700.005959/2016-21.

61 E.g., see CADE, Concentration Act No. 08700.002276/2018-84, a RAN sharing agreement between Oi and Tim. Initially, SG-CADE decided the transaction did not meet the criteria of mandatory filing. However, CADE's Tribunal decided to call up the case and analyse it thoroughly.

62 See www.dci.com.br/legislacao/cade-deve-ser-mais-liberal-com-m-a-e-rigoroso-com-carteis-apos-renovac-o-1.759859; www.lexisnexis.com.br/lexis360/noticias/1831/troca-de-conselheiros-do-cade-deve-mudar-perfil-da/.

63 CADE, Concentration Act No. 08700.004162/2018-79.



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**ii Analysis**

Developments in recent years have shown Brazil to be a dynamic jurisdiction for competition law. The new competition law framework, which has been in place for almost six years, has been reasonably successful so far. However, it is natural that new challenges will appear as it develops. One significant concern is the risk that CADE may be over-influenced by and pressured from a political perspective, given that several cartel investigations that derived from the Car Wash Operation affect several Brazilian high-level authorities and politicians. Therefore, the risk of political appointments to key positions within CADE may increase, and this deserves attention.

This will be especially relevant in 2019. This year, the new Brazilian government will appoint four new commissioners to the Administrative Tribunal, a new Superintendent General, and a new Federal Attorney at CADE. According to the Brazilian press, the Ministers of Economy and of Justice showed an unparallel interest in CADE. Their backgrounds could give some hints about CADE's role in the new government: the Minister of Economy holds a PhD degree from University of Chicago and has a pro-business background, while the Minister of Justice is known for his role as a federal judge of criminal cases related to Operation Car Wash. Tradition states the Ministers of Economy and Justice take turns to appoint CADE's authorities.

In any case, CADE has already developed solid institutional foundations inspired by the best international practices in competition law enforcement and has continuously improved. Therefore, CADE is well positioned to successfully deal with all these challenges adequately, given the difficulties that it has already overcome and considering the overall evolution of competition law and policy in Brazil. CADE has also been able to convince Brazilian Congress to increase its annual budget, which is expected to translate in more resources to increase competition enforcement in the country.



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**Appendix 1**

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